



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes: OPR

This application was brought by the landlord seeking an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid rent dated May 12, 2009 and effective May 23, 2009 which was served in person to the tenant on May 12, 2009 at 11:45 a.m.

The landlord applicant and the tenant respondent both appeared.

Issue(s) to be Decided

The landlord was seeking an Order of Possession and the issue to be determined based on the testimony and the evidence are:

Whether or not the landlord is entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent. This determination requires answers to the following questions:

- Did the tenant receive a valid 10-Day Notice to end Tenancy for Unpaid Rent?
- Were rental arrears validly owed by the tenant?
- Did the tenant have a valid reason under the Act to deduct the rent or any portion thereof?
- Did the tenant pay the rental arrears in full within five days of receiving the Notice?

- Did the tenant make an application to dispute the Notice within five days of receiving the Notice?
- Was the tenancy subsequently re-instated by the parties?

Preliminary Issue

Some evidence was submitted by the tenant and it was established that this evidence was not served on the respondent. The tenant stated that he misunderstood the process and had mistakenly only submitted the evidence to the Dispute Resolution file and not to the other party.

The Residential Tenancy Rules of Procedure, Rule 4.1, requires that if the respondent intends to dispute an Application for Dispute Resolution, copies of all evidence that the respondent intends to rely upon at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding. In situation where the date of the dispute resolution proceeding does not allow the five (5) day requirement in to be met, then all of the respondent's evidence must be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

I also note that the Landlord and Tenant Fact Sheet contained in the hearing package makes it clear that "*copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by Residential Tenancy Branch as soon as possible.*"

Being that the respondent tenant's evidence was not served on the applicant landlord, it was determined that the tenant would only be permitted to present verbal testimony on the evidence in question.

Background and Evidence

The landlord submitted into evidence a copy of proof of service of the Notice of Hearing, a copy of the 10-Day Notice to End Tenancy for Unpaid Rent dated May 12, 2009 with effective date of May 23, 2009, proof of service of the Ten-Day Notice, a copy of the tenancy agreement, a copy of a Notice of Rent Increase dated October 22, 2008 increasing the rent from \$561.00 to \$602.00 effective February 1, 2009, a copy of the tenant's rental ledger from January 1, 2008 until May 1, 2009 showing an outstanding balance of \$98.00 owed by the tenant and a copy of a receipt for payment of \$100.00 "For Use and Occupancy Only" dated May 20, 2009.

Also submitted into evidence was a copy of an account statement addressed to the tenant dated February 12, 2009 showing payments and debits from February 1, 2008 until February 3, 2009. The statement showed accumulated arrears of \$1.00 per month from April 1, 2008 until January 1, 2009 totaling \$10.00 and an additional shortfall of \$21.00 which had occurred on February 1, 2009. The total arrears at that time were \$32.00. The landlord testified that this statement was sent to the tenant on February 12, 2009 by mail. A notation on the document states, "*Rent has been increased starting February 1, 2009 for \$602.00 per month. From April 1, 2008 to January 2009, every month short-paid \$1.00. Total arrears \$32.00*".

The landlord testified that the \$1.00-per-month shortfall began in January 2008 after the rent was increased by \$21.00 from \$560.00 to \$581.00 and the tenant only increased his payments to \$580.00 per month.

The landlord testified that, after the February 12, 2009 reminder statement was sent to the tenant, the tenant still continued to pay \$580.00 per month instead of the increased rate of \$602.00 as required. Therefore on May 12, 2009, the landlord issued a Ten-Day Notice to End the Tenancy for Unpaid Rent showing arrears of \$98.00. The landlord testified that the tenant did not pay the outstanding arrears within 5 days. The landlord

testified that the tenant did not pay the arrears until May 20, 2009 by giving cash directly to the building manager on that date.

The building manager testified that he had personally served the tenant with the Notice of Rent Increase on October 22, 2008. The building manager also confirmed that he had personally served the Ten-Day Notice to End Tenancy for Unpaid Rent on May 12, 2009. The building manager testified that although he had received a phone call from the tenant on May 15, 2009, he was not available to immediately go to the site to collect the \$98.00 outstanding rental arrears when the tenant called him. The building manager testified that, however, he was usually on the premises every day and was available to be contacted by residents. The building manager testified that, in fact, he had seen the tenant on the premises several times after the Ten-Day Notice was served. The building manager testified that the tenant finally paid the arrears directly to him on Wednesday May 20, 2009 in cash and a receipt was then issued for "*use and occupancy only*".

The tenant testified that the rent was always paid directly to the landlord by the Ministry. The tenant testified that the normal method of paying rent to the landlord otherwise was to either pay the building manager directly when he appeared, or to place the rent payment in an envelope on the door or under the mat. The tenant testified that the building manager could also be contacted to come and retrieve the rent, or would merely take the rent payment from the door or from under the mat. The tenant testified that other residents routinely paid rent by that method and it was sanctioned by the landlord. The tenant testified that, however, under normal circumstances, the tenant did not need to remit his rent payments to the landlord because of the direct payment arrangement through the ministry. The tenant stated that the Notice of Rent Increase dated October 22, 2008 was never received by the tenant and was not personally served as claimed by the building manager. The tenant testified that he had no knowledge that a rent increase had been imposed and that this was the reason that the tenant did not pay the additional \$21.00 rent beginning on February 1, 2009. The tenant

testified that, had he received this notice, he would have notified the Ministry. The tenant testified that for all of the years he had been a tenant, since February 2005, the rent was always paid promptly and in fact was received by the landlord in advance.

The tenant testified that he also did not receive the subsequent communication from the landlord dated February 12, 2009 alerting the tenant that his rent had been short-paid by \$1.00 each month and reminding him that he had failed to pay the recent rent increase of an additional \$21.00 per month. The tenant attributed his failure to receive this communication to ongoing problems with the common mailbox in the complex, which he alleged was not secure. The tenant testified that the occupants of the complex had previously brought concerns about the apparent theft of mail to the landlord and the landlord has not addressed this problem. The tenant testified that some of his mail had been taken in the past, including his tax refund. In regards to the \$1.00-per-month shortfall, the tenant testified that, as far as he knew, the rent had originally only been increased by \$20.00 per month for 2008. According to the tenant, the monthly rental rate for 2008 was \$580.00 per month and that was the amount paid each month in advance by the ministry. He was not aware that the rent from January 2008 until February 1, 2009 was \$581.00, not \$580.00. The tenant testified that the first he knew about both the accumulated shortfall of \$1.00 per month and the new rental rate increase of \$21.00 effective February 1, 2009 was when he was served in person with the Ten-Day Notice on May 12, 2009. The tenant testified that he was shocked by this information and the fact that he was then required to pay the outstanding \$98.00 within 5 days. The tenant testified that he had been forced to replace a nonfunctioning refrigerator that the landlord had not addressed and was therefore short of funds. The tenant testified that he met this challenge by borrowing the money to pay the arrears on May 15, 2009 after which he phoned the building manager several times to come and pick up the funds. The tenant testified that he has phone records that confirm his efforts and pointed out that during the proceedings the testimony of the building manager confirmed that the tenant had called for the building manager to pick up the payment. The tenant testified that he then placed the cash for the rental arrears under the mat

and assumed that these funds would be picked up by the building manager. The tenant testified that he had copies of signed testimony from witnesses who loaned him the money and who were witness to the fact that the funds were placed under the mat for payment or collection on May 15, 2009. The tenant testified that May 15, 2009 fell on a Friday and there was no reason to expect that the payment would not be picked up. The tenant testified that the five days expired on May 17, which was a Sunday and that the following day, Monday, May 18, 2009, was a statutory holiday. When asked why the tenant did not make arrangements to pay the arrears on Tuesday May 19, 2009, despite it being beyond the five-day deadline, the tenant stated that the building manager knew that the payment was available and should have come to collect it but continually failed to do so. When asked why he did not deliver the outstanding payment directly to the person identified as the landlord on the Ten-Day Notice and directly to the address specifically indicated on the Ten-Day Notice, the tenant stated that it was not a normal practice to go to the office of the property management company to pay the property manager directly. The tenant stated that rent was never paid that way and this could be verified by other tenants in the complex. The tenant stated that he had no way of even knowing whether the landlord would be there to receive the payment or even whether the landlord would accept the payment. The tenant testified that as soon as the building manager finally arrived on site, the debt was immediately paid. This did not occur until May 20, 2009 and the tenant was of the opinion that this delay was the landlord's fault. The tenant testified that the landlord had intentionally impeded his payment in order to evict him in reprisal for complaints made by the tenant in the past. The tenant's position was that, although rent may have been owed, he had paid the arrears within the five days by virtue of the fact that he duly contacted the building manager to collect the funds and had placed the payment in the usual place for it to be collected.

The landlord rebutted the tenant's claim that the approved method of paying was to place cash payments on the door or under the mat and also disputed the tenant's claim that the tenant did not make it a practice to go directly to the property management company office. The landlord stated that the tenant had actually been there on many

occasions. The landlord stated that payment offered by the tenant would never be refused. The landlord stated that, even if the days during the weekend and statutory holiday on Monday May 18 were discounted, the tenant had still failed to pay until May 20, 2009 which was a full eight days after the Notice was served. The landlord refuted the accusation that it had acted in reprisal for complaints made by the tenant in the past. The landlord's position was that the tenant simply failed to pay the outstanding arrears within the required five days under the Act. The landlord stated that, in any case, there is no provision in the Act exempting weekends or statutory holidays from the five-day deadline in which to cancel a notice by paying the rental arrears. The landlord stated that the arrears were owed, a Notice was issued giving the tenant five days to pay and the tenant neglected to make the payment within the time frame. Therefore the landlord was confident that, under the Act, there was no other option but to grant an Order of Possession in favour of the landlord.

Analysis

Section 26 (1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. The reasons for the tenant's failure to do so would not be a material consideration in whether or not an Order of Possession was warranted pursuant to a Ten-Day Notice to End Tenancy for Unpaid Rent, except when the tenant has a right to withhold rent under the Act.

In this instance, the tenant had fallen into arrears by failing to pay the rent when it was due. Section 46 of the Act states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice. However, a notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under the Act to deduct from rent. The Act provides that, within 5 days after receiving a notice under this section, the tenant may either pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an

application for dispute resolution. If a tenant who has received a Ten-Day Notice to End Tenancy for Unpaid Rent does not pay the rent or make an application for dispute resolution then the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.

That the Notice was served on May 12, 2009 was not disputed and I find as a fact that the tenant was served with a Ten-Day Notice to End Tenancy for Unpaid Rent. I find that the tenant therefore had until May 17, 2009 to pay the rental arrears or to dispute the notice. I find as a fact that the tenant did not make an application to dispute the notice.

In regards to whether the tenant paid the arrears within the five-day deadline, I accept the tenant's testimony that he had contacted the building manager by telephone on May 15, 2009 to advise that the payment was available. However, the tenant's position was that by placing the payment for arrears under the mat on May 15, 2009 and informing the building manager, to whom the rent would normally be paid, that the funds were now available, constitutes payment effective on May 15, 2009. I do not accept that these actions would be considered as payment having been accomplished. I find as a fact that the tenant received a Ten-Day Notice which clearly indicated a valid service address for the landlord. I find that the funds demanded were never delivered to the address stated on the Notice form. I acknowledge that the tenant may have had a good reason for not making the payment to the landlord within the five days required to cancel the notice. I accept the testimony that the tenant made, what he considered to be, a logical presumption that the building manager would come to the complex to pick up the payment on May 15, 2009 in response to the tenant's call. However, I find as a fact that the payment was not actually received by the landlord until May 20, 2009, at the precise moment when the tenant personally gave the cash payment to the building manager and was issued a receipt. I find as a fact that the payment was made after the five-day deadline.

Residential Tenancy Guidelines state that a Dispute Resolution Officer has no jurisdiction to extend the time within which a tenant may pay overdue rent unless; a) The landlord specifically consents to the extension of time being considered and granted, or, b) The tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under dispute resolution officer's order.

A landlord has no legal obligation to agree to extend the time to pay the rent and any such agreement must be voluntary. In this instance, I find as a fact that the landlord did not specifically consent to an extension of time being granted to pay the arrears.

I also find as a fact that the tenant did not have a valid reason under the Act nor through an order allowing the tenant to deduct any portion of the rent.

Based on the evidence and the testimony of both parties, I find that the tenant was served with a Notice to End Tenancy for Unpaid Rent. The tenant failed to pay all of the outstanding rent and did not make application to dispute the Notice within five days of receiving the Notice. Under section 46(5) of the Act, the tenant is therefore conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice, which in this instance was May 23, 2009. Based on the above facts I find that the landlord is entitled to an Order of Possession under the Act.

Conclusion

I hereby issue an Order of Possession in favour of the landlord effective at 1:00 p.m. on Sunday, August 1, 2009. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

July 2009

Date of Decision

Dispute Resolution Officer