



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DIRECT REQUEST DECISION

Dispute Codes

OPR, MNR, MNSD, FF

Introduction

The Hearing proceeded by way of Direct Request Proceeding, pursuant to section 55(4) of the Act, and dealt with an Application for Dispute Resolution by the landlord for an Order of Possession and a monetary order.

The landlord submitted a signed Proof of Service of the Notice of Direct Request Proceeding which declares that on August 17, 2009, the landlord served the tenant with the Notice of Direct Request Proceeding. The applicant provided a receipt to confirm service by registered mail. Section 90 of the Residential Tenancy Act determines that a document is deemed to have been served in 5 days when sent by registered mail.

Based on the written submissions of the landlord, I find the tenant has been duly served with the Dispute Resolution Direct Request Proceeding documents.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an Order of Possession for unpaid rent; to a monetary Order for rental arrears, to retain the security deposit from the tenant and reimbursement for the cost of the Application for Dispute Resolution, pursuant to sections 38, 55, 67, and 72 of the *Residential Tenancy Act (the Act)*. I have reviewed all documentary evidence.

Proof of Service of 10 Day Notice to End Tenancy

The landlord submitted a copy of the Application for Dispute Resolution and a "Proof of Service" form stating that the Ten-Day Notice to End Tenancy, was served by posting it on the door on August 5, 2009 to the tenant at 15:34.

The purpose of serving documents under the *Act* is to notify the person being served of their failure to comply with the Act and of their rights under the *Act* in response. The landlord, seeking to end the tenancy due to this breach has the burden of proving that the tenant was served with the 10 day Notice to End Tenancy and I find that the landlord has met this burden.

Analysis

Submitted into evidence was a copy of the Ten-Day Notice and proof of service, a copy of an "agreement of understanding" showing rent set at \$300.00 per month from July 1, 2007 until December 2007 with an automatic increase to \$400.00 per month as of January 2008, another automatic increase to \$500.00 per month as of January 2009 and anticipated increase starting January 2010 to \$600.00 per month. Also in evidence was a Two-Month Notice to End Tenancy for Landlord Use dated July 7, 2009, several written communications from the landlord to the tenant and a written "History of Rental" composed by the landlord.

The landlord did not submit a tenancy agreement nor copy of the tenant's rent account ledger. However, the application stated that the landlord is claiming rental arrears of \$500.00 for the month of August 2009 and requesting an Order of Possession based on the Ten-Day Notice.

Analysis

This was an application to proceed by way of Direct Request Proceeding, pursuant to section 74(2)(b) of the Act. The Fact Sheet containing directions and

the requirements to apply for a resolution under this section states that the following mandatory documentation must accompany the Application:

- Copy of the Tenancy Agreement

I find that this application did not include a copy of a valid tenancy agreement pursuant to section 13 of the Act which sets out mandatory terms that must be contained in a tenancy agreement.

In addition, I find that some of the terms contained in the “*Agreement of Understanding*” submitted into evidence by the landlord, may also be in breach of some provisions under the Act. When this occurs, Section 5 of the Act states that landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect and section 6(3) states that a term of a tenancy agreement is not enforceable if the term is inconsistent with the Act or the regulations. In regards to the specific term in the agreement, I find that the landlord has imposed yearly increases in the rental rate that exceed the allowable amount under section 22(2) of the Regulation. That being said, however, I find that section 43(1)(c) of the Act does permit a rent increase that exceeds the amount specified in the regulation, provided it is mutually agreed upon by the parties in writing. But the landlord is still required under the Act to issue a formal Three-Month Notice on the official form notifying the tenant three months in advance of imposing each increase. The landlord is not exempted from following section 42(2) and 42(3) of the Act and the Regulations in relation to the format and timing. I find that the “Agreement of Understanding” would not suffice to support the increasing rental rate pursuant to the Act and Regulations.

The Residential Tenancy Policy Guidelines discusses this matter and provides that:

“If the tenant agrees in writing to the proposed increase, the landlord is not required to apply to a dispute resolution officer for approval of that rent increase. The landlord must still follow requirements regarding the timing

and notice of rent increases. The tenant's written agreement to a proposed rent increase must clearly set out the agreed rent increase (for example, the percentage increase and the amount in dollars), and the tenant's agreement to that increase. It is recommended the landlord attach a copy of the agreement to each Notice of Rent Increase given to the tenant. Payment of a rent increase in an amount more than the allowed annual increase does not constitute a written agreement to a rent increase in that amount."

This raises the question of whether or not the past rent increases were issued in compliance with the Act. Section 43 5) of the Act states that if a landlord collects a rent increase that does not comply with the Act, the tenant may deduct the increase from rent or otherwise recover the increase. Therefore, I find that the quantum or even the existence of the claimed rental arrears may possibly be impacted by the determination of this preliminary matter and the validity of the Ten-Day Notice would be at issue.

For this reason, I find that the application seeking to end the tenancy for unpaid rent may not proceed by Direct Request and must be dismissed.

Conclusion

I hereby dismiss the application without leave to reapply.

August 2009

Date of Decision

Dispute Resolution Officer