



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 31, 2009, at 4:10 p.m., the landlord served the tenant in person with the Notice of Direct Request Proceeding.

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 Ten-Day Notice to End Tenancy for Unpaid Rent and a "Proof of Service" form stating that the Ten-Day Notice, was served to the tenant by posting it on the door at 5:00 p.m. on August 15, 2009. A posted notice is deemed served in three days.

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

No copy of the tenant's rent account ledger was submitted. However the copy of the Ten-Day Notice to End Tenancy for Unpaid Rent showed Rental Arrears of \$1,150.00. I find that this contradicts the claim on the application indicating that that the tenant was in arrears of \$360.00 for "*last months rent*" and \$1,150.00 unpaid rent for "*this month*".

Submitted into evidence was the tenancy agreement signed on May 12, 2005 showing rent that rent was set at \$1,000.00 per month and security deposit of \$500.00 per month. An addendum to the tenancy agreement also signed on May 12, 2008 contained a term that stated, "*the rent will increase to the amount of \$1,150.00 per month*". I find that the term contained in the addendum of the tenancy agreement imposing an automatic rent increase effective June 1, 2009, to contravene sections 41, 42, and 43 of the Act which deal with rent increases.

Section 5 of the Act states that landlords and tenants may not avoid or contract out of the Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect. 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 included as a term in the agreement that a 15% increase in the rental rate will take effect in the future and that this has been agreed to by the tenant as indicated by the tenant's signature. I find that, although the rent increase exceeds the amount allowed in section 22(1) of the Residential Tenancy Regulation, the parties are at liberty under section 43 (1) (c) of the Act to mutually agree to an increase that is more than that allowed under the legislation, provided that the tenant agrees to this in writing.

However, the Act and Regulation still requires the landlord to issue a formal Three-Month Notice on the approved form officially notifying the tenant three months in advance of imposing the rent increase. The written consent does not exempt a landlord from following sections 42(2) and 42(3) of the Act and the Regulations in relation to the form and the timing of a Notice of Increase.

I find that merely including this term in the tenancy agreement, does not suffice to fulfill the mandatory requirements in the Act and Regulation to establish an increase of the rental rate effective June 1, 2009. For a rent increase to take effect on June 1, 2009, the landlord was obliged to give the tenant legal notice of the increase on the Three-Month Notice of Rent Increase form or before February 28, 2009.

As the landlord did not include any evidence of the Notice of Rent Increase form served on the tenant on or before February 28, 2009 I find that there was no valid or enforceable rent increase from the original rate of \$1,000.00 per month. I find that, under the Act, no increase of rent can occur in this tenancy until a compliant Notice is issued on the approved form at least three months in advance.

The above factors impact the amount of arrears genuinely owed, because 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 it. I also find that this fact serves to invalidate the Ten-Day Notice dated August 15, 2009 issued by the landlord. The amount of arrears was based in part on funds owed pursuant to the noncompliant rent increase.

Conclusion

Given the above, I hereby dismiss this application without leave to reapply.

September 2009

Date of Decision

Dispute Resolution Officer