



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute codes

CNR MNDC

Introduction

This hearing was convened in response to an application by the tenant to cancel or set aside a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the Notice to End) dated September 05, 2010. The landlord orally requested an Order of Possession should I dismiss the tenant's application or uphold the landlord's notice. The tenant also claims unspecified compensation for damage or loss.

Both parties attended the conference call hearing and participated with submissions and sworn testimony. The parties were also permitted to discuss their dispute with a view to its resolve.

Issue(s) to be decided

Did the landlord serve the tenant with a valid 10 Day Notice to End?

Should the Notice to End be set aside?

Is the landlord entitled to an Order of Possession?

Is the tenant entitled to the monetary amount claimed?

Should the landlord be ordered to comply with the tenancy agreement?

Evidence and Background

The relevant evidence before me is as follows. The tenancy began August 01, 2009. As stipulated in the tenancy agreement - rent in the amount of \$739 and parking in the amount of \$50 per month were payable in advance on the first of each month. Regardless, the landlord did not insist on the payment of \$50 per month for parking as this amount, although not stipulated in the tenancy agreement, was waived from being payable, and categorized as a 'rental incentive' which should have been reflected in the tenancy agreement. On April 01, 2010 the parties entered into a 'revised' tenancy agreement with a change in one of the tenants, and a change in the amount payable for

parking – now set at \$0.00 – and the ‘rental incentive’ now stipulated as ‘free parking’ (8/1/2009 to 7/1/2010). The landlord testified that the revised agreement now reflects how the original agreement *should have been created* - the rental incentive having been inadvertently left out of the original tenancy agreement.

The landlord claims that the tenant did not pay the rent for August 2010, and that by September 05, 2010 (date of Notice to End) the rent arrears reflected as the tenant owing \$445.

The tenant argues that at the outset of the tenancy in 2009 the rental agent of the day verbally stated that the ‘rental incentive’ was to be the “13th month free of rental obligation” – which the landlord disputes. The agent of the day called into the conference call hearing and under affirmation explained that the landlord was offering the 13th month rental incentive on certain suites in 2009 and that he “possibly” may have told the tenants that the 13th month free of rent was the rental incentive –although the tenancy agreement did not reflect the nature of the rental incentive.

Analysis

On the preponderance of all the evidence before me, **I find** that neither party has paid attention to their *written* Tenancy Agreement. Regardless, as the Tenancy Agreement is ultimately an instrument of the landlord I find that any ambiguity within the terms of the agreement falls in the favour of the tenant. I find it the responsibility of the landlord to either have operated within the confines of the original tenancy agreement and demanded the parking fee of \$50 per month, or taken steps to clarify the tenancy agreement to reflect that the amount of parking was being waived as the ‘rental incentive’. In the absence of neither it is not surprising that this matter is in dispute. The tenant, however, cannot claim to be entitled to both, free parking at \$50 per month and free rent for August 2010 (13th month). The tenant clearly has benefitted from free parking since the outset of the tenancy and this value must be factored into any amount actually owed by the tenant.

As the result of all the above, I find, on the balance of probabilities, that I prefer the tenant’s version of the nature of the ‘rental incentive’ for the tenancy agreement. I find that the originally contracted ‘rental incentive’ was the *13th month free of rent*. On this basis, the landlord’s Notice to End Tenancy for Unpaid Rent has not been properly calculated and is therefore null and of no effect. The landlord’s Notice to End **is set aside** and the tenancy continues. The landlord is not entitled to an Order of Possession. The tenant’s claim for compensation was not dealt with, and **is dismissed**, with leave to reapply.

The landlord is **Ordered** to Comply with the terms of the original tenancy agreement – *that the 13th month is free of rent and that parking is \$50 per month from the outset of the tenancy.* The landlord is at liberty to recalculate the tenant's account. If necessary, the landlord is at liberty to issue a **new** valid 10 Day Notice to End Tenancy for Unpaid Rent.

Conclusion

The landlord's Notice to End for Unpaid Rent dated September 05, 2010 is **set aside** and the tenancy continues.

I Order the landlord to Comply with the terms of the original tenancy agreement – *that the 13th month is free of rent and that parking is \$50 per month from the outset of the tenancy.*

The balance of the tenant's claim is **dismissed** with leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.