



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MT, CNR, MNDC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- more time to make an application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 66;
- cancellation of the landlord's 10 Day Notice pursuant to section 46; and
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord testified that she posted the 10 Day Notice on the tenant's door on October 12, 2011. The tenant said that he received the landlord's 10 Day Notice on October 13, 2011, although he maintained that it was placed under his door. Based on this evidence, I am satisfied that the tenant received service of the landlord's 10 Day Notice on October 13, 2011.

The tenant testified that he handed the original version of his dispute resolution hearing package to one of the landlord's representatives in the landlord's office on October 21, 2011. The landlord confirmed receiving this original hearing package, including the tenant's original application for dispute resolution on October 21, 2011. The tenant testified that he handed the landlord a copy of his revised hearing package, in which he added the claim for a monetary award, on November 4, 2011. This was the same date that he amended his application at the offices of the Residential Tenancy Branch. The landlord's representatives denied having received this amended application for dispute resolution and were unaware until this hearing that the tenant was seeking a monetary Order for \$1,200.00.

I am satisfied that the tenant served a copy of his original dispute resolution hearing package to the landlord in accordance with the *Act*. However, as discussed at the hearing, there is conflicting evidence regarding the service of the tenant's amended dispute resolution hearing package, which included the tenant's claim for a monetary Order. At the hearing, the tenant said that his principal concern related to the landlord's 10 Day Notice and that he was prepared to pay any outstanding rent that he owed. The

amounts identified in the tenant's application essentially requested a reinstatement of an earlier April 1, 2011 decision of a Dispute Resolution Officer (DRO), one that was superseded with respect to monetary issues in a more recent September 30, 2011 decision of a DRO. As the tenant agreed that there seemed little merit to his claim for a monetary Order on the basis of the most recent DRO decision, he withdrew his current claim for a monetary Order against the landlord. The tenant's claim for a monetary Order identified in his amended application for dispute resolution is withdrawn.

At the hearing, Landlord's Representative MM (the landlord) made an oral request for an end to this tenancy on the basis of the 10 Day Notice and an Order of Possession if the tenant's application to cancel the 10 Day Notice were dismissed.

Issues(s) to be Decided

Is the tenant entitled to an extension of time to file his application to cancel the 10 Day Notice? If not, has the landlord issued a valid 10 Day Notice to end this tenancy and is the landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to the relevant documentary evidence, including photographs, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's application and my findings around each are set out below.

This one-year fixed term tenancy commencing on November 15, 2010 was scheduled to end on December 1, 2011, at which time the landlord said it was possible that the tenancy could continue as a periodic tenancy. Monthly rent was set at \$1,100.00 less a \$92.00 discount for agreeing to a fixed term tenancy. The scheduled monthly rent was thus set at \$1,008.00, payable in advance on the first of each month.

An April 1, 2011 decision and Order of a DRO allowed the tenant to reduce his monthly rent by \$300.00 until such time as the pest control company retained by the landlord had completed the pest extermination process and verified that the rental unit was free of rodents. The September 30, 2011 decision determined that the rodent issue was resolved in May 2011 and, as such, the landlord was entitled to a monetary order for the tenant's failure to pay \$300.00 for each of June and July 2011. As a result of the September 30, 2011 decision, the \$300.00 reduction in monthly rent order in the April 1, 2011 ended as of June 1, 2011.

The landlord issued a 10 Day Notice on the basis of alleged unpaid rent of \$854.00 that the landlord maintained was owing as of October 12, 2011. The tenant disputed the

amount owing, maintaining that he discovered in November 2011 that the landlord had received double payment for rent in August 2011. The landlord denied having received a double payment for August 2011, noting that the tenant had stopped payment on any direct deposit payments on one of his bank accounts, a fact confirmed at the hearing by the tenant. The landlord testified that the only payment the landlord received for August 2011 was a \$1,008.00 bank draft received by the landlord on August 5, 2011.

Analysis – Tenant's Application for an Extension of Time to File his Application for Dispute Resolution

Section 46 of the *Act* reads in part as follows:

- 46** (1) *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...*
- (4) *Within 5 days after receiving a notice under this section, the tenant may*
- (a) pay the overdue rent, in which case the notice has no effect, or*
 - (b) dispute the notice by making an application for dispute resolution.*
- (5) *If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant*
- (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and*
 - (b) must vacate the rental unit to which the notice relates by that date...*

The landlord's 10 Day Notice clearly states that a tenant may be evicted if the tenant does not within five days of receiving the 10 Day Notice either pay the rent or utilities identified as owing in the landlord's 10 Day Notice or make an application for dispute resolution. In accordance with section 46(5) of the *Act*, a tenant's failure to take either of these actions within five days may lead to the end of a tenancy on the effective date of the notice.

In this case, the tenant did not submit his application for dispute resolution until the 8th day after he received the landlord's 10 Day Notice. At the hearing, I asked the tenant why he was unable to file his application within five days of receiving the 10 Day Notice. He first said that he had much work to do to file his application. He then stated that he

had made a mistake in misreading the 10 Day Notice and understood that he had 10 days to file his application for dispute resolution.

The tenant did not provide any written evidence with his October 21, 2011 application for dispute resolution or with his amended application of November 4, 2011. Although he provided a detailed binder of material, including 3 CDs and 2 DVDs, none of this was submitted into evidence until November 9, 2011. I find little reason to extend the five-day time frame established in the *Act* on the basis of the tenant's claim that he had much work to do to initiate an application for dispute resolution after he received the 10 Day Notice. I also note that the tenant is familiar with the dispute resolution process, having applied to cancel the landlord's previous application to end this tenancy on the basis of rent withheld in the summer of 2011. The tenant's claim that he misread the time frame set out in the 10 Day Notice also provides little reason to extend the five-day time statutory time limit established under the *Act* for filing an application for dispute resolution.

At the hearing, I advised the parties that I found no reason to grant the tenant an extension of time for his application for dispute resolution. As such, I told the parties that I found the tenant's application to cancel the 10 Day Notice was initiated after the statutory time frame for doing so, as outlined in section 46(4) of the *Act*. At the hearing, I told the parties that I was dismissing the tenant's application for more time to make his application and his application to cancel the landlord's 10 Day Notice.

Landlord's Oral Request for an End to this Tenancy and an Order of Possession

Section 55(1) of the *Act* reads as follows:

55 (1) *If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,*

(a) the landlord makes an oral request for an order of possession, and

(b) the director dismisses the tenant's application or upholds the landlord's notice.

Based on my decision to dismiss the tenant's application without leave to reapply, the landlord would be entitled to obtain an end to this tenancy and an Order of Possession if the landlord could demonstrate that the 10 Day Notice was issued in accordance with the *Act* and there were no other reasons to continue this tenancy.

Although the tenant maintained that the landlord had received two rent payments from the tenant for August, I am not satisfied that the tenant has provided sufficient evidence to demonstrate that this is so.

Based on the oral and written evidence, I am satisfied on a balance of probabilities that rent for this tenancy was owing as of October 12, 2011, the date that the landlord issued the 10 Day Notice. I am also satisfied that the tenant did not pay any portion of the rent identified as owing on that date within five days of receiving that Notice. As such, the landlord would be entitled to end this tenancy when the tenant neither paid all of the amount identified as owing in the 10 Day Notice nor applied for dispute resolution within five days of receiving that Notice.

The parties agreed that the tenant paid and the landlord received a \$1,008.00 payment on November 4, 2011. The landlord stated that she understood that this payment was accepted for "use and occupancy only" and that the landlord's acceptance of this payment was not intended to continue this tenancy. She said that this payment was applied to the amounts outstanding from October 2011.

The tenant testified that he understood that the payment was accepted by the landlord for his November rent payment and that by doing so the landlord had agreed to continue this tenancy. The tenant and his co-habitant noted at the hearing that they have a receipt issued by the landlord for the November 4, 2011 payment which clearly stated that this payment was for "rent" and that there was no mention of it having been accepted for use and occupancy only.

At this point, the landlord revised her earlier testimony to state that she was not actually certain as to the exact wording of the receipt issued to the tenant, but the usual practice of the landlord is to issue a receipt for use and occupancy only when a tenant does not dispute a 10 Day Notice or apply for dispute resolution within the five-day time limit established under the *Act*. When the tenant read the exact and full contents of the landlord's receipt into oral evidence, the landlord did not dispute the accuracy of the tenant's claim that the payment was received for rent.

At the hearing, I advised the parties that if the tenant were correct in his claim that the November 4, 2011 payment was received for rent, I would find that the landlord's acceptance of a rent payment after issuing the 10 Day Notice set aside the 10 Day Notice and continued this tenancy. Since this would be the sole basis for denying the landlord's oral request to end this tenancy and issue an Order of Possession, I advised the parties that I would give the parties until 4:00 p.m. that day to fax me a copy of the receipt for the tenant's November 4, 2011 payment of \$1,008.00. I said that I needed a

copy of that receipt to consider whether the landlord had waived the right to end this tenancy by accepting the tenant's payment for rent.

Before 2:00 p.m. that afternoon, I received a fax from the tenant in which he provided a copy of the landlord's November 4, 2011 receipt. This receipt clearly identified that this payment was received for rent and made no mention of it being accepted for use and occupancy only. I received no fax from the landlord that afternoon. I assume that the landlord agrees that the November 4, 2011 payment was received for rent owing.

For these reasons, I find that the landlord's acceptance of a full one month rent payment from the tenant on November 4, 2011 continued this tenancy and ended the landlord's attempt to end this tenancy. I dismiss the landlord's oral request to end this tenancy on the basis of the 10 Day Notice of October 12, 2011. I deny the landlord's oral request for an Order of Possession.

Conclusion

The tenant's application for a monetary Order of \$1,200.00 was withdrawn at the hearing. I dismiss the tenant's application for an extension of time to apply for a cancellation of the landlord's 10 Day Notice without leave to reapply. Based on this decision, I also dismiss without leave to reapply the tenant's application to cancel the landlord's 10 Day Notice.

I dismiss the landlord's oral request to end this tenancy and obtain an Order of Possession.

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*.

Dated: November 17, 2011

Residential Tenancy Branch