



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, OPC, MNSD, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord for an order of possession, a monetary order for unpaid rent, an order to retain the security deposit in partial satisfaction of the claim and to recover the filing fee for the Application.

The landlord filed a large volume of evidence, but failed to serve all the evidence submitted for this hearing on the tenant. Therefore, I am only relying on the relevant documents that were served on the tenant.

Both parties appeared and gave affirmed testimony and were provided the opportunity to present evidence orally and in written and documentary form, and make submissions to me.

Issue(s) to be Decided

Is the Landlord entitled to an order of possession?
Is the Landlord entitled to a monetary order for unpaid rent?

Background and Evidence

The tenancy began on September 1, 2009. Rent in the amount of \$900.00 is payable on the first of each month. The tenant paid a security deposit of \$450.00 on August 29, 2009.

The parties agreed that on September 11, 2011, the landlord served the tenant with a two month notice to end tenancy for landlord's use of the property, with an effective date in the notice as November 11, 2011. The landlord failed to include this document in her evidence package and was provided by the tenant.

The parties agree that later on September 11, 2011, the landlord served the tenant with a ten day notice to end tenancy for unpaid rent for September 2011. The tenant testified that his rent was paid prior to the notice being issued. The landlord testified that the tenant did pay his rent prior to the notice, but he was still late. The landlord's evidence

shows the tenants rent was deposited in her account on September 5, 2011, prior to the notice being issued.

The parties agreed that on September 30, 2011, the landlord served the tenant with a ten day notice to end tenancy for unpaid rent. The parties further agree that the notice was for October rent, which was not due until midnight October 1, 2011.

On September 30, 2011, the landlord served the tenant with a one month notice to end tenancy for cause, with an effective date of November 1, 2011. The tenant testified that the one month notice to end tenancy for cause is not valid as he has already accepted that the tenancy will end based on the two month notice.

The landlord testified that the two month notice to end tenancy is not valid, as she mistakenly gave the tenant the wrong notice. The landlord never planned to use the property for landlord use. The landlord testified she issued this document to be nice to the tenant and give him two months to move out, instead of one month and she needs to be paid for November rent.

The tenant testified the landlord has told him that her nephew was going to move in to the rental unit and she has also told him that she intends to use the rental unit for her office. The tenant states that he believes the only reason why the landlord wanted him to move from the rental unit was to increase the rent and alleges the only reason the landlord issue the subsequent notices is to avoid having to compensate him for one month rent.

The tenant testified that he accepted the two month notice to end tenancy and is relying on that notice, and he has arranged to move into another rental unit on December 1, 2011. The tenant testified that he has already provided the landlord with his forwarding address in writing.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

The 10 day notice to end tenancy that was served on September 11, 2011, was not served in accordance with Section 46 of the Act, as the tenant had paid September rent on September 5, 2011. I find the notice was not valid and must be dismissed.

The 10 day notice to end tenancy that was served on September 30, 2011, was not served in accordance with the Section 46 of the Act. The tenant was not required to pay

rent for October until October 1, 2011. Section 46(1) of the Act states, the landlord may end a tenancy if rent is unpaid on any day after the day it is due, the earliest possible date the notice could have been given would have been October 2, 2011. I find the notice was not valid and must be dismissed.

As I have determined that both of the ten day notices issued for unpaid are not valid, I must consider the validity of the one month notice to end tenancy and the two month notice to end tenancy.

The two month notice to end tenancy was served on September 11, 2011, with an effective date of November 11, 2011. Section 53 of the Act stipulates that if the effective date stated in a notice is earlier than the earliest date permitted under the legislation, the effective date is deemed to be the earliest date that complies with the legislation. Therefore, I find that the corrected effective date of this notice to end tenancy is November 30, 2011.

The Landlord indicates that she is proceeding with the one month notice to end tenancy for cause that was served on September 30, 2011, with an effective date of November 1, 2011, rather than the two month notice to end tenancy for landlord's use of property that was served on September 11, 2011. She indicated that she had no intentions of using the property for landlord's use, which makes the two month notice invalid. The landlord did not file in her evidence package page two of the one month notice.

The Act and Policy Guideline do not allow a landlord to withdraw a notice unless the tenant consents.

The Residential Tenancy Policy Guideline 11, Amendment and Withdrawal of Notices, states:

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

I find that the two month notice was the first notice served on the tenant, and it is a valid notice. The tenant did not apply for dispute resolution of the notice within the timeframe required by the Act. The tenant accepted the notice and made alternative rental arrangements. The tenant did not consent to the landlord cancelling the notice. Therefore, I find the one month notice to end tenancy was not valid and must be dismissed. I find the only valid notice is the two month notice to end tenancy.

As the two month notice is in effect, the tenant must move out on the corrected effective date.

The landlord is claiming unpaid rent for November 2011.

Section 51(1) of the Act states:

A tenant who received a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

Section 51(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50(2) that amount is deemed to have been paid by the landlord.

As a result, there is no money to be paid by the tenant to the landlord for November rent and the landlord's request for a monetary order for unpaid rent is dismissed.

As the landlord was not successful with their application, I am not granting the recovery of the filing fee from the tenant.

The landlord has been provided with the tenant's forwarding address and must comply with section 38(1) of the Act, regarding return of the security deposit.

Conclusion

I dismiss the landlord's application to end tenancy based on the notices that were served on September 30, 2011, and the landlord is not entitled to recover the filing fee from the tenant. The tenancy is ending under the two month notice.

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 29, 2011.

Residential Tenancy Branch