



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FF

Introduction

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

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) issued on December 2, 2011, (pursuant to section 46); and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. I am satisfied that the landlord served the 10 Day Notice by handing it to the tenant on December 2, 2011. The landlord's representative EM (the landlord) confirmed that she received a copy of the tenant's dispute resolution hearing package sent by the tenant by a registered Canada Post mail service on December 8, 2011. I am satisfied that the tenant's hearing and written evidence packages were served to the landlord in accordance with the *Act*.

Issues(s) to be Decided

Should the landlord's 10 Day Notice issued in December 2011 be cancelled? If not, has the landlord made a valid oral request to end this tenancy on the basis of the December 2011 Notice? Is the landlord entitled to an Order of Possession based on the 10 Day Notice issued in December 2011? Is the tenant entitled to recover her filing fee for this application from the landlord?

Background and Evidence

This one-year fixed term tenancy commenced on July 1, 2011. Monthly rent is set at \$1,250.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$625.00 security deposit.

The tenant provided the only written evidence for this hearing. She provided copies of the tenancy agreement, her bank money orders for rent payments, the landlord's monthly rent receipts, her summary of her payments, a 10 Day Notice issued in September 2011, the 10 Day Notice issued on December 2, 2011, and a number of other documents. She clarified that the 10 Day Notice she was disputing was the most

recent one issued on December 2, 2011 which identified \$1,536.00 as owing as of December 1, 2011.

At the commencement of the hearing, landlord's representative, Ellen Martini (the landlord), testified that the landlord was not seeking an end to this tenancy on the basis of the 10 Day Notice issued in December 2011. She said that one of the landlord's previous managers who was not fully familiar with his responsibilities had mistakenly issued the 10 Day Notice for unpaid rent owing on December 1, 2011, when the landlord had already obtained an end to this tenancy and an Order of Possession based on a September 2011 10 Day Notice. The landlord said that there was no need to obtain an Order of Possession from the 10 Day Notice of December 2011 because the landlord already had a valid Order of Possession for the rental unit stemming from the decision and order of a previous Dispute Resolution Officer (DRO). Although the landlord had not provided any written evidence, she referred to Residential Tenancy Branch (RTB) File No. 780623. For these reasons, the landlord said that she was not disputing the tenant's current application.

The tenant confirmed that a previous DRO had issued a decision and Order of Possession. However, since that decision was issued on October 20, 2011, she had made four payments to the landlord for a total of \$2,464.00. She maintained that the landlord's acceptance of these payments continued her tenancy and that the landlord's subsequent issuance of the 10 Day Notice in December 2011 confirmed that she still had a valid tenancy.

I asked the parties to stay connected with the telephone conference to provide me with an opportunity to retrieve a copy of the October 20, 2011 decision and Order issued by the previous DRO. After reviewing that decision and Order and taking oral testimony from the parties, I once again asked the landlord if the landlord was seeking any outcome with respect to the tenant's application to cancel the December 2011 Notice to End Tenancy, the only issue before me. She reiterated that the landlord did not require any action with respect to the 10 Day Notice of December 2, 2011 because she believed she already had a decision ending this tenancy and an Order of Possession.

Analysis

After hearing evidence from the parties and checking with them to ensure that they had no further evidence to give, I commenced issuing my oral decision with respect to this matter. I advised the parties that I considered the landlord's actions subsequent to the issuance of the October 20, 2011 decision continued this tenancy. The landlord accepted four payments in November 2011 from the tenant. The November 22, 2011 receipt for one of these cheques noted that the landlord had accepted this bank money

order for “use and occupancy only.” However, I heard oral and written evidence that receipts issued to the tenant on November 24, 2011 for receipt of a \$700.00 bank money order, November 24, 2011 for a \$500.00 bank money order, and November 28, 2011 for a \$300.00 bank money order were received for “arrear owing.” By accepting the first of these November payments for use and occupancy only but failing to note this reason for accepting subsequent payments, I find that the tenant reasonably expected that the landlord had decided to restore her tenancy. The tenant gave oral and written testimony that she believed that some of her payments were being applied to her December 2011 rent. The expectation that her tenancy was continuing was further reinforced by the landlord’s representatives when she received the landlord’s 10 Day Notice issued on December 2, 2011. If the landlord believed that the tenancy no longer existed, there would have been no reason to issue a new 10 Day Notice to the tenant.

For these reasons, I advised the parties that I considered the landlord’s actions in accepting repeated payments from the tenant in November 2011 for “arrear owing” has reinstated this tenancy. I confirmed that I could not overturn the existing decision or Orders. I said that the only issue before me is the tenant’s application to cancel the landlord’s 10 Day Notice issued on December 2, 2011. Based on the landlord’s repeated statements that the landlord had no intention of pursuing the 10 Day Notice issued on December 2, 2011, I advised the parties that I was cancelling the landlord’s 10 Day Notice issued on December 2, 2011. I also advised the parties that I would be including in my decision my finding that the landlord’s actions subsequent to the issuance of that decision has in fact reinstated this tenancy.

Only at this point did the landlord state that she was now interested in pursuing an end to this tenancy on the basis of the landlord’s 10 Day Notice issued on December 2, 2011. She attempted at this point to have the sufficiency of the December 2, 2011 Notice considered and have the tenant’s payment or non-payment of rent owing as of December 1, 2011 established as the basis for ending this tenancy. At this point, she also asked for the issuance of an Order of Possession based on the 10 Day Notice of December 2, 2011.

I advised the landlord that even if at this extremely late stage of the proceedings I were to consider the substantive evidence regarding the amounts paid and owing as of December 1, 2011, the only written evidence provided had been produced by the landlord. She asked if the tenant was claiming that she had paid her December 2011 rent, separate from \$286.00 that the landlord claimed had been owing prior to December 1, 2011. As this was a reasonable question to consider, I asked the tenant to respond to the landlord’s question regarding her payment of rent for December 2011. Initially, the tenant said that she had not paid her December 2011 rent. However, she

clarified this by testifying, as she had set out in her written evidence, that the payments she had made over the course of her tenancy exceeded the amount of rent owing during her tenancy. She maintained that her four payments issued in November 2011 overpaid her rent for December 2011.

Based on the timing of the landlord's request to consider the merits of the 10 Day Notice of December 2, 2011, I am reluctant to make a ruling on whether there was indeed rent owing as of December 1, 2011. However, on a balance of probabilities, I find that the tenant's written evidence including copies of her money orders and the landlord's receipts dating back to the beginning of her tenancy has more credibility than the landlord's oral assertions that the tenant has not paid all of her rent. The landlord is already in possession of a monetary Order resulting from the October 21, 2011 decision and it is unclear to me whether portions of the tenant's rent payments have been applied to fulfill that monetary Order. The tenant testified that she has been attempting to obtain a clear record of the amounts the landlord claims are owing for some time and that the landlord has failed to produce suitable records to her.

The landlord's lack of preparedness for this hearing contrasts with a detailed and extensive written body of evidence provided by the tenant. The landlord chose to provide no written evidence in support of the 10 Day Notice of December 2, 2011 because the landlord had an existing decision and Order of Possession (the latter of which has not been acted upon by the landlord). Until this hearing commenced, the landlord provided no indication to the Residential Tenancy Branch that there was an earlier decision and Orders that the landlord claimed would have an effect on the tenant's current application. The landlord provided explanations that the landlord's previous manager was ill-informed as to his duties, had made mistakes, and the landlord's representative who was supposed to handle this matter for this hearing fell ill the day before this hearing. An illness the day before this hearing would not have had any impact on the landlord's failure to provide any written evidence whatsoever to support an end to this tenancy and the issuance of an Order of Possession on the basis of the 10 Day Notice of December 2, 2011. I find that the landlord has not provided sufficient evidence to demonstrate that the landlord has grounds to end this tenancy on the basis of the 10 Day Notice issued on December 2, 2011. I note the landlord stated early in her testimony that the 10 Day Notice was issued to the tenant as a result of a mistake by the landlord's previous manager. I also note that the landlord only raised concerns about the tenant's application to cancel the 10 Day Notice of December 2, 2011 when it became apparent to the landlord that I was finding that this tenancy continues because of the landlord's actions following the issuance of the previous decision.

Since the tenant has been successful in her application, I allow her to recover her \$50.00 filing fee from the landlord. To enable her to recover this amount, I allow the tenant to reduce her next scheduled monthly rent payment or any other funds owed to the landlord by \$50.00.

Conclusion

I allow the tenant's application to cancel the 10 Day Notice issued on December 2, 2011. I find that the landlord's actions, including the landlord's repeated acceptance of rent during November 2011 and issuance of a 10 Day Notice on December 2, 2011, reinstated this tenancy that commenced on July 1, 2010. The effect of this decision is that the tenancy continues.

As the tenant has been successful in this application, I allow the tenant to recover her \$50.00 filing fee by reducing her next scheduled monthly rent payment or any other funds owed to the landlord by that amount.

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: December 22, 2011

Residential Tenancy Branch