



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, FF

Introduction

This hearing was convened by way of conference call in response to an application made by the landlord for an Order of Possession for unpaid rent or utilities, for a monetary order for unpaid rent or utilities, and to recover the filing fee from the tenants for the cost of this application.

An agent for the landlord attended the conference call hearing, gave affirmed testimony, and provided evidence in advance of the hearing to the Residential Tenancy Branch and to the tenants. One of the tenants attended the conference call hearing and provided affirmed testimony. The landlord provided evidence of having served both tenants by registered mail on January 5, 2012. All evidence and testimony provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent or utilities?

Is the landlord entitled to a monetary order for unpaid rent or utilities?

Background and Evidence

The landlord provided a copy of a tenancy agreement which is signed by one of the tenants on November 13, 2006, and states that the tenancy is a month-to-month tenancy beginning on December 1, 2004. Rent in the amount of \$218.00 per month was originally payable at the outset of the tenancy however the landlord testified that as a result of rental increases, rent in the amount of \$244.00 per month is currently payable in advance on the 1st day of each month.

The landlord further testified that the tenants have been late with the rent on numerous occasions, and at the time that the Landlord's Application for Dispute Resolution was filed, the tenants were in arrears \$1,051.00 which includes \$75.00 for 3 cheques returned by the financial institution for insufficient funds. The landlord stated that the Residential Tenancy Branch website states that a landlord is entitled to charge such

fees. The landlord stated that an addendum to the tenancy agreement exists and is signed by the parties which provides for N.S.F. fees in the amount of \$20.00, but was not provided for this hearing. The tenancy agreement states that there is no addendum.

The landlord served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities by registered mail on January 5, 2012, a copy of which was provided for this hearing. The notice is dated January 2, 2012 and states that the tenants failed to pay rent in the amount of \$1,051.00 that was due on January 15, 2012 and contains an expected date of vacancy of January 15, 2012. Both pages of the 2-page form have been provided.

Since the issuance of the notice, the tenants made a payment of \$244.00 on January 9, 2012 and another on February 8, 2012 in the amount of \$244.00. The landlord did not issue a receipt or any other documentation to the tenants to provide the tenants with notice that the money was being received for use and occupancy only.

The landlord claims a monetary order in the amount of \$807.00, being \$732.00 in unpaid rent and \$75.00 for N.S.F. fees.

The tenant testified to moving into the manufactured home park in 2003.

The tenant also testified that previous rent cheques have been returned N.S.F. and the landlord was paid N.S.F. fees, and specifically recalls paying the landlord \$33.00 as a service charge for one of those cheques. The tenant also stated that other fees were charged by the landlord for late fees or fees for cheques that have not cleared the financial institution, but was not able to state how much or when.

Analysis

Firstly, with respect to the landlord's application for an Order of Possession, I refer to Residential Tenancy Landlord and Tenant Fact Sheet RTB-124 which states that:

"A landlord and tenant can agree to reinstate the tenancy if the tenant pays all or some of the rent after the five day period has passed but before the tenant is required to vacate.

"When a landlord does not want the tenancy to continue, the landlord must:

1. Clearly tell the tenant that the payment of rent outside the 5 day period, or payment of some of the rent within the five 5 day period, does not cancel the Notice;

2. Specifically tell the tenant that the rental payment is being accepted for the use and occupancy only and does not reinstate the tenancy; and
3. Tell the tenant of one of the following options:
 - The tenant must vacate in accordance with the Notice to End Tenancy, or
 - The tenant must vacate at the end of the month.

“If a dispute arises, the landlord must prove the payment was accepted for use and occupation only and not to reinstate the tenancy. Therefore, the landlord should advise the tenant, in writing, that the tenancy is not being reinstated and the tenant must vacate.”

In this case, the landlord accepted 2 cheques from the tenants after the issuance of the notice to end tenancy (one before the effective date and one after the effective date), but did not advise the tenants that the payments were accepted for use and occupancy only, and I must find that by failing to do so, the landlord has in effect reinstated the tenancy, and the landlord’s application for an Order of Possession cannot succeed.

With respect to the landlord’s application for a monetary order, the onus is on the landlord to prove the amounts owing. In this case, the landlord stated that the amount of \$1,051.00 was due at the time that the application was filed which includes \$75.00 in N.S.F. fees for 3 returned cheques. The landlord then advised that an addendum to the tenancy agreement exists that was not provided for the hearing, and states that the tenants are required to pay \$20.00 for returned cheques. The tenant testified that the landlord recently accepted a cheque in the amount of \$277.00 which included a \$33.00 N.S.F. fee. The tenancy agreement provided for this hearing clearly states that there is no addendum.

With respect to the landlord’s statement that the Residential Tenancy Branch website provides for N.S.F. fees to be charged against a tenant for returned cheques, I refer to the Manufactured Home Park Tenancy Regulations which state that a landlord may charge an administration fee of not more than \$25.00 for the return of a tenant’s cheque by a financial institution or for late payment of rent, but the landlord must not charge that fee unless the tenancy agreement provides for that fee. The regulations also state that the landlord may charge a service fee charged by a financial institution to the landlord for the return of a tenant’s cheque, but the landlord has not provided any evidence of what fee the landlord may have been charged by the landlord’s financial institution. The landlord has not provided an addendum to prove the agreement for such fees, and has in fact provided a tenancy agreement that states there is no addendum.

I am not satisfied in the circumstances that the landlord has established what amount of rent is owed to the landlord.

Since the landlord has not been successful with the application before me, I decline to order that the landlord recover the filing fee from the tenants for the cost of this application.

Conclusion

For the reasons set out above, the landlord's application is hereby dismissed in its entirety without 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 *Manufactured Home Park Tenancy Act*.

Dated: February 13, 2012.

Residential Tenancy Branch