



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, MNSD, FF, O

Introduction

This hearing was convened by way of conference call in response to an application made by the landlords for an Order of Possession for unpaid rent or utilities; for a monetary order for unpaid rent or utilities; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlords to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of this application.

An agent for the landlords attended the conference call hearing, provided evidence in advance of the hearing, and gave affirmed testimony. The landlords' agent also called two witnesses, who also gave affirmed testimony.

The tenant called into the conference call hearing but did not remain in attendance for the entire hearing and did not testify. An agent for the tenant attended and gave affirmed testimony. The parties were also given the opportunity to cross examine each other and the witnesses on the evidence and testimony provided, all of which has been reviewed and is considered in this Decision.

During the course of the hearing, the landlords' agent testified that the landlords did not collect a security deposit from the tenant, which was not disputed by the tenant's agent. Therefore, the landlords' application to keep all or part of the pet damage deposit or security deposit is dismissed without leave to reapply.

Issue(s) to be Decided

The issues remaining to be decided are:

- Are the landlords entitled to an Order of Possession for unpaid rent or utilities?
- Are the landlords entitled to a monetary order for unpaid rent or utilities?
- Are the landlords entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Background and Evidence

The landlords' agent testified that this month-to-month tenancy began on January 1, 2012 and the tenant still resides in the rental unit. Rent in the amount of \$800.00 per month is payable on the 1st day of each month, and no pet damage deposit or security deposit was collected. No written tenancy agreement exists between the landlords and the tenant.

The landlords' agent further testified that the tenant failed to pay rent when it was due for the month of January, 2012. The landlords collected \$250.00 from the tenant on January 4, 2012 and another \$50.00 on January 6, 2012, leaving a balance outstanding of \$500.00. The tenant was served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on February 1, 2012 personally. A copy of a Proof of Service of the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities was provided for this hearing, which states that the person who served the notice served it personally on the tenant on February 1, 2012 at 5:15 p.m. A copy of the notice was also provided in advance of the hearing, and it states that the tenant failed to pay rent in the amount of \$500.00 that was due on January 1, 2012 but contains no expected date of vacancy. Also, only 1 page of the 2-page form has been provided. The landlords' agent testified that both pages were served, however it was not the agent who served the notice on the tenant. The landlords' agent also stated that the *Residential Tenancy Act* provides that incorrect dates on a notice to end a tenancy are automatically changed to the earliest date that complies with the *Act*.

The landlords' first witness testified to serving the notice to end tenancy on the tenant on February 1, 2012 in the early evening by handing it directly to the tenant. The witness stated that the parties identified themselves, and the witness provided the tenant with identification, and another person was there. The parties had a lengthy conversation about the notice to end tenancy and the witness stated that the tenant asked about other roommates. The witness responded that it was unknown what will happen to the roommates but the witness told the tenant what the rights of a tenant were with respect to such a notice.

The witness also testified that during a meeting with an RCMP officer later about another matter, this tenant came up in conversation, and the descriptions of the tenant stated by the officer and the witness were identical.

The witness also testified that both pages of the 2-page notice to end tenancy were handed to the tenant, and that the effective date of vacancy was not filled in on the form which was an oversight by the witness.

Another witness for the landlords testified to being the owner of the rental unit and that the tenant was an occupant in 2011, having moved in with other tenants who had a written tenancy agreement with the landlord. The tenants had told the witness that a relative was moving in, but the occupant was not a relative. That occupant is the tenant named in this dispute resolution proceeding. The tenants had also told the owner that they had no plans to move out. However, the tenants moved out in December, 2011 without giving proper notice to the landlord and left the occupant in the rental unit. The witness had a conversation with the occupant who advised that no notice was given to the occupant either, and the occupant wanted the witness to serve a 30 day notice to end tenancy effective the end of January, 2012 to allow the occupant time to find a new place to live. The occupant also gave the witness a note promising to vacate by January 31, 2012. A copy of that note was provided for this hearing. It is dated January 2, 2012 and states that the occupant will be vacating the rental unit on January 31, 2012 at 1:00 p.m. The witness testified to serving the one month notice to end tenancy, but a copy was not provided for this hearing. The witness also testified to receiving rent from the occupant in the amount of \$300.00 during January, 2012. The witness also stated that the Ministry had paid \$450.00 in December, 2011 for January's rent for the previous tenant. The witness still holds that money.

The tenant's agent testified that upon speaking to the owner on January 31, 2012, the owner stated that the rent for January was paid. The first that the tenant's agent saw of the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities was when the evidence package and notice of hearing documents were received with the Landlord's Application for Dispute Resolution. Further, when the server arrived at the rental unit, no paperwork was presented at all.

The tenant's agent further testified to being a roommate of the tenant. The tenant and the tenant's agent have subleased the rental unit from the previous tenants, but no written tenancy agreement exists.

The tenant's agent further testified that the rental unit is half of a duplex and the property manager lives in the other rental unit of the duplex. Payments were made directly to the property manager in the amount of \$250.00 on January 2, 2012. The tenant's portion was \$350.00, and the tenant paid the other \$100.00 on January 4, 2012. During the month of December, 2011, the tenant paid \$350.00 to the previous tenants. The Ministry sent the landlord a cheque on behalf of the previous tenant, but would not issue another for this tenant because the landlord had already received rent for that month.

The tenant has a mental illness, and was in hospital during January, 2012. The tenant was released on January 31, 2012 and then went into a Stable Living House on February 1, 2012 and then was re-admitted in to hospital on February 2, 2012. The tenant's agent stated that the notice to end tenancy could not have been served on the tenant personally on February 1, 2012.

Analysis

Firstly, I find that the tenant is a tenant of the landlords within the definition of a tenant in the *Residential Tenancy Act* by virtue of the payment of rent during the month of January, 2012.

With respect to the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, the *Residential Tenancy Act* states that:

46 (2) If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

The landlord's agent takes the position that the effective date of vacancy on notice to end tenancy should be automatically changed to the earliest date that complies with the *Act*, as provided in Section 46 (2). I disagree with the interpretation of the landlord's agent because no effective date is contained in the notice. The *Act* does not say that the effective date automatically changes if it's left blank in the notice; it states that if the date is earlier than permitted, the effective date is deemed to be the earliest date that complies with the section. Further, the *Act* states that if a tenant does not dispute a notice to end tenancy or pay the rent within 5 days of receiving the notice, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice. If the effective date does not exist on the notice, the tenant cannot conclusively presume that the tenancy ends on any specific date. Therefore, I cannot uphold the notice to end tenancy given by the landlord.

The tenant, however, gave notice to the landlord on January 2, 2012 to vacate the rental unit on January 31, 2012 at 1:00 p.m. I refer to Residential Tenancy Policy Guideline 11 – Amendment and Withdrawl of Notices, which states as follows:

“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.”

In this case, I find that the tenant did give a notice to end tenancy to the landlord with an effective date of January 31, 2012. There is no evidence before me that discussions even took place between the parties with respect to cancelling the tenant’s notice. Therefore, I find that the tenancy ended on January 31, 2012, and the tenant has not moved from the rental unit. The landlord is entitled to an Order of Possession.

With respect to the landlord’s application for a monetary order, the landlords’ agent testified that the tenant paid rent in the amount of \$250.00 on January 4, 2012 and another \$50.00 on January 6, 2012. The witness, who is the owner of the rental unit, testified that the tenant paid \$300.00 in January, which is consistent with the testimony of the landlords’ agent. The owner also testified to receiving \$450.00 for January’s rent from the Ministry for the previous tenant, and the landlords’ agent testified that that money has to be returned to the Ministry, but the owner did not provide any such testimony. The tenant’s agent testified that no more money could be issued by the Ministry because the landlord had already been paid.

The landlords’ agent took the position that a tenancy was created by the tenant named in this dispute by virtue of paying rent during the month of January, 2012, and I accept that, however the tenant’s agent testified that the tenant’s portion was \$350.00. It is clear in the circumstances that the landlord is owed rent, but I do not agree that the landlord has established that this tenancy was for the amount of \$800.00. There is nothing before me as evidence that the tenant ever agreed to \$800.00 per month or that the tenant and the landlord ever discussed the amount of rent. The landlord may have a claim as against the tenants who gave no notice and vacated the rental unit leaving the occupant there, but I do not find that the landlords’ claim for a monetary order as against this tenant has been established.

Since the landlords have been partially successful with the application, I find that the landlords are entitled to recovery of the \$50.00 filing fee for the cost of this application.

Conclusion

For the reasons set out above, the landlords’ application to keep all or part of the pet damage deposit or security deposit is hereby dismissed without leave to reapply.

I hereby grant an Order of Possession in favour of the landlord on 2 days notice to the tenant.

The landlords' application for a monetary order for unpaid rent or utilities is hereby dismissed without leave to reapply.

I hereby grant a monetary order in favour of the landlords for recovery of the \$50.00 filing fee, pursuant to Sections 67 and 72 of the *Residential Tenancy Act*.

These orders are final and binding on the parties and may be enforced.

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: February 23, 2012.

Residential Tenancy Branch