



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNSD MNDC O FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order or Possession for unpaid rent and a Monetary Order for unpaid rent, for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, to keep all or part of the security deposit, for other reasons, and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, sent via registered mail on January 24, 2012. Mail receipt numbers were provided in the Landlord's evidence. Based on the Landlord's submission I find the Tenant was sufficiently served with notice of today's proceeding.

The Landlords appeared at the teleconference hearing, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form. No one appeared on behalf of the Tenant, despite her being served notice of today's hearing in accordance with section 89 of the *Residential Tenancy Act*.

Issue(s) to be Decided

1. Has a valid 10 Day Notice to end tenancy (the Notice) been issued and served upon the Tenant in accordance with sections 52 and 46 of the *Residential Tenancy Act* (the Act)?
2. Has the rent been paid since the Notice has been issued?
3. If so, has the Notice been waived by actions taken by the Landlord?

Background and Evidence

The Landlords confirmed they entered into a fixed term tenancy agreement with the Tenant that began on May 1, 2011 and is set to end on April 30, 2012. Rent is payable on the first of each month in the amount of \$945.00 and on March 31, 2009 the Tenant paid \$467.50 as the security deposit.

The Landlord affirmed she posted the 10 Day Notice to the Tenant's door on February 2, 2012 and since that date the Tenant has made payments towards the rent. The Tenant paid the following which has brought the payments of rent current: \$500.00 on February 13, 2012; \$470.00 on February 22, 2012, and \$945.00 on March 9, 2012. The Landlord issued receipts for each payment for use and occupancy only.

The Landlord advised she did not explain to the Tenant what the words "for use and occupancy only" meant and when she received the March 9, 2012 rent payment the Tenant asked what the hearing will be for now. The Landlord stated that she told the Tenant the hearing was only for the Landlord to get their rent to which the Tenant responded that she would not be attending then. The Landlord confirmed she did not discuss whether the Landlord would be continuing with their request for an Order of Possession.

The Agent advised they are still seeking an Order of Possession and a monetary order for the late payment fees of \$25.00 per month for February and March 2012 plus the \$50.00 filing fee.

Analysis

I have carefully considered the aforementioned and the documentary evidence which included, among other things, a copy of the 10 Day Notice dated February 2, 2012, a tenant ledger, and a copy of the tenancy agreement.

A Notice to End Tenancy can be waived and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when a landlord has accepted rent from a tenant after the Notice to End Tenancy has been served. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End Tenancy, no question of "waiver" can arise as the landlord is entitled to that rent.

In these circumstances the Notice was posted to the Tenant's door on February 2, 2012, which is deemed to have been received by the Tenant on February 5, 2012, three days after it was posted in accordance with section 90 of the Act. Accordingly the effective date of the Notice was February 15, 2012. Therefore, the Landlord was able to accept rent for the period up to February 15, 2012 without waiving the 10 Day Notice to End Tenancy.

If the Landlord accepts rent for the period after the effective date of the Notice to End Tenancy, the intention of the parties will be in issue. In these circumstances the Landlord had accepted rent of \$25.00 for January 2012 arrears, \$945.00 for February 2012 and \$945.00 for March 2012, which exceeds the amount that was due by February 15, 2012.

After careful consideration of the facts in this case, specifically that the Landlord did not explain to the Tenant what “use and occupancy only” meant which was written on the payment receipts and that the Landlord told the Tenant today’s hearing was “only for the Landlord to get the rent money”; I find these to be misleading to the Tenant. Furthermore, I find that on a balance of probabilities the Tenant was of the belief that her tenancy had been reinstated and the Notice waived when she paid the full balance due for rent by March 9, 2012 which may be why she chose not to attend today’s hearing.

Based on the aforementioned, I find the 10 Day Notice to have been waived and I dismiss the Landlord’s request for an Order of Possession.

Section 7 of the *Residential Tenancy Regulation* provides that a Landlord may charge a non-refundable late payment fee if the tenancy agreement provides for such a fee. In this case the tenancy agreement section 10 provides for a late payment charge of \$25.00 for each month in which rent is paid after the first of the month.

Based on the aforementioned I find the Landlord has met the burden of proof for late payment fees and I award them fees for February and March 2012 in the amount of **\$50.00** (2 x \$25.00).

The Landlord has primarily been successful with their application; therefore I award them recovery of the **\$50.00** filing fee.

Conclusion

The 10 Day Notice to End Tenancy issued February 2, 2012, is hereby cancelled and is of no force or effect.

The Landlord’s decision will be accompanied by a Monetary Order in the amount of **\$100.00** (2 x \$50.00).

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: March 13, 2012.

Residential Tenancy Branch