



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, MNR, MNSD, FF

Introduction

This hearing dealt with cross applications. The tenants had applied to cancel a Notice to End Tenancy for Unpaid Rent. The landlord had applied for an Order of Possession and Monetary Order for unpaid rent and authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

At the beginning of the hearing I determined that both parties had failed to prove service of their evidence upon each other in a manner that complies with the Act or Rules of Procedure. The landlord had served his evidence late upon the tenants. The tenant claims to have attached the tenants' evidence to the landlord's gate which the landlord denied receiving. Accordingly, I excluded the evidence of both parties and proceeded on verbal testimony only.

As both applications involved a 10 Day Notice to End Tenancy I asked the tenant to verbally describe the content of the Notice, which she did, and the accuracy was confirmed with the landlord.

During the hearing the tenant frequently interrupted me and the landlord. The tenant was given a final warning by me that further interruptions would not be tolerated and that I would exclude her from the proceeding if she interrupted again. The tenant indicated she understood me; however, the tenant did interrupt the proceedings again. At that point I ceased to accept any further testimony from the parties and rendered my verbal decision.

Issue(s) to be Decided

1. What is the monthly rent payable by the tenants?
2. Should the 10 Day Notice to End Tenancy be upheld or cancelled?
3. Is the landlord entitled to an Order of Possession?
4. Is the landlord entitled to a Monetary Order for unpaid rent or loss of rent for November 2011 through March 2012?
5. Is the landlord authorized to retain the security deposit?

Background and Evidence

The parties provided very different and opposing submissions during the hearing. Below I have summarized the parties' respective positions.

Landlord's submissions

The tenancy commenced in 2005 and the tenants paid a \$1,250.00 security deposit. The tenants had paid rent by way of monthly cheques in the amount of \$2,500.00 up until October 2011, with the exception of the month of August 2011 where the cheque was \$4,375.00. The landlord explained the payment in August 2011 represented rent of \$2,500.00 and the remainder was for Ford truck parts sold to the tenant(s).

The tenants have not paid any rent for November 2011, December 2011, January 2012 or February 2012 and on February 23, 2012 the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent indicating the tenants owed \$10,000.00 in rent as of February 1, 2012 (the Notice). The Notice was sent via registered mail on February 23, 2012. The landlord provided the registered mail tracking number for service of the Notice, which the tenant acknowledged receiving. A search of the tracking number revealed it was received by the tenants on February 28, 2012.

In January 2012 the landlord had issued a 10 Day Notice to End Tenancy (the previous Notice) and erroneously inserted the monthly rent of \$2,500.00 in the space that provides for the amount of outstanding rent and indicated the rent for October 2011 was outstanding. The landlord filed an application seeking to recover unpaid rent for four months starting October 2011 (under file no.787101).

The residential property rented to the tenants is a house of approximately 4,000.00 sq ft and a detached shop. The landlord has never given the tenants cash to offset rent cheques given to him.

Overall, the landlord gave clear, organized and reasonable submissions and responses to my enquiries.

Tenant's submissions

The tenants gave the landlord monthly cheques in the amount of \$2,500.00 prior to November 2011; but, prior to depositing the cheques the landlord would meet the tenant(s) and give the tenant(s) \$1,250.00 in cash. The tenants gave the landlord \$1,250.00 rent for November 2011 after selling their dirt bikes. In early December 2011 the tenants gave the landlord cash of \$1,250.00, also from the sale proceeds of their dirt bikes. In early January 2012 cash in the amount of \$1,250.00 was given to the landlord. Finally, on February 2 or 3, 2012 the tenants gave the landlord \$1,250.00 in cash. The tenants did not receive receipts for the cash payments.

In filing the tenants' application the tenants submitted that they have in fact pre-paid rent until June 15, 2012. The tenant explained that she was confused when she completed the application but she initially was of the position she had paid rent up to February 2012 and then she added 3.5 months to February to account for the "pre-paid rent" of \$4,375.00 made in August 2011.

The tenant further submitted that the cheque for \$4,375.00 is exactly 3.5 months of rent and is further evidence that the monthly rent is only \$1,250.00. She claimed that the pre-payment was made so that the landlord would delay selling the house until after the winter. The tenant claimed she has requested a copy of the cancelled cheque for \$4,375.00 from the bank but it has not yet arrived.

The tenant submitted that the house is in poor condition and the market rent is nowhere near \$2,500 per month. Nor, can the tenants afford to pay \$2,500.00 per month in rent.

Despite cautioning the tenant to present relevant submissions in a clear and organized fashion, overall, the tenant's submissions were confusing, unorganized and often unresponsive to the questions asked of her. The tenant submitted that she was confused and her family has undergone several illnesses and much stress.

Analysis

Where a 10 Day Notice to End Tenancy for Unpaid Rent comes under dispute, the landlord has the burden to establish that a valid notice was issued and the amount of outstanding rent payable. The tenant has the burden to prove rent was paid or that the tenant had an legal right to withhold rent otherwise payable. The burden of proof is based on the balance of probabilities.

Upon hearing from the parties as to the content of the Notice issued to the tenants by the landlord I am satisfied the landlord issued an otherwise valid Notice on approved form. Thus, I proceed to consider whether the amount of monthly rent payable by the tenants and the amount of rent actually paid by the tenants for the months of November 2011 through February 2012, if any.

It is undisputed that the tenants have given the landlord monthly cheques in the amount of \$2,500.00 up until October 2011 with the exception of \$4,275.00 paid in August 2011. However, I was presented with disputed verbal testimony that the landlord would give the tenants \$1,250.00 in cash every month to bring the net monthly rent payment to \$1,250.00. I find it unlikely, improbable and uncorroborated that the landlord would meet the tenant(s) every month for the past several years in order to give the tenants cash in the amount of \$1,250.00 and then deposit a cheque from the tenants in the amount of \$2,500.00, as alleged by the tenant.

The tenant submitted that the \$4,375.00 payment made in August 2011 was for 3.5 months of "pre-paid rent" that she had to borrow in order to reach an agreement that the landlord would not sell the property in the winter months. I find that it does not make sense to me that the tenant would pay "pre-paid rent" of 3.5 months and then continue to pay rent for September 2011 through February 2012, as she alleged, which are the winter months. Nor was there a reasonable explanation from the tenant why the payment included a partial month and when the tenants were to re-coup the "pre-paid rent". Therefore, I found the tenant's explanation for the \$4,375.00 payment unlikely and, in contrast, I found the landlord's explanation that the payment included the sale of truck parts to be fathomable.

Considering the above factors, and the overall presentations made to me during the hearing, I found the landlord's testimony to be more credible than that of the tenant. That being said, I reject the tenant's submission that \$1,250.00 was paid to the tenants monthly by the landlord and I accept the landlord's submissions that the monthly rent is \$2,500.00 as supported by the cheques written to him by the tenants. Therefore, I find the landlord has established the tenants are required to pay rent of \$2,500.00 per month.

I was presented with disputed testimony that the tenant gave the landlord four cash payments of \$1,250.00 in the months of November 2011 through February 2012. As I found the tenant's testimony to be less credible than that of the landlord, and considering the tenant has the burden to prove the tenants made payments as alleged, I find the disputed verbal testimony to be insufficient to meet the tenant's burden of proof.

Therefore, I reject the tenant's submission that the tenants made four payments of \$1,250.00 in the months of November 2011 through February 2012.

Based on all of the above, I find the landlord has established that as of February 1, 2012 the tenants were in arrears \$10,000.00 calculated as \$2,500.00 per month for the months of November 2011 through February 2012. Therefore, I find no basis to grant the tenants' request to cancel the Notice and I will uphold it.

Since the Notice was received by the tenants on February 28, 2012 the effective date of the Notice automatically changes to read March 9, 2012 in accordance with section 53 of the Act. Therefore, I find the tenancy legally ended March 9, 2012 and since the tenants continue to occupy the rent rental unit the landlord is entitled to an Order of Possession. Provided to the landlord with this decision is an Order of Possession effective two (2) days after service upon the tenants.

I grant the landlord's request to recover unpaid rent of \$10,000.00 from the tenants and I award the landlord an additional \$2,500.00 for loss of rent for the month of March 2012 since the tenants have continued to occupy the rental unit. I further award the filing fee to the landlord and I authorize the landlord to retain the tenants' security deposit in partial satisfaction of the rent owed to the landlord. Accordingly, the landlord is provided a Monetary Order calculated as follows:

Unpaid rent – November 2011 through February 2012	\$10,000.00
Loss of rent – March 2012	2,500.00
Filing fee	100.00
Less: security deposit	<u>(1,250.00)</u>
Monetary Order	\$11,350.00

To enforce the Monetary Order it must be served upon the tenants and may be filed in Provincial Court (Small Claims) to enforce as an Order of the court.

Conclusion

The tenants' application to cancel the Notice to End Tenancy was dismissed. The landlord's application was successful and the landlord has been provided an Order of Possession effective two (2) days after service upon the tenants. The landlord has also been authorized to retain the tenants' security deposit and has been provided a Monetary Order for the balance of \$11,350.00 to serve upon the tenants.

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 22, 2012.

Residential Tenancy Branch