



Dispute Resolution Services

Page: 1

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 tenant for the cost of this application.

The named landlord and the tenant attended the conference call hearing; both gave affirmed testimony and were given the opportunity to cross examine each other. The landlord also provided an evidence package to the tenant and to the Residential Tenancy Branch. All evidence and the testimony provided have been reviewed and are considered in this Decision.

During the course of the hearing the named landlord agreed that the dates on the Landlord's Application for Dispute Resolution are incorrect, as pointed out by the tenant. The date the application was signed and the date the notice to end tenancy was issued shows 2011 and both dates should read 2012. The landlord applied to amend the dates on the application. The tenant did not oppose the application, and I ordered that the dates be amended accordingly.

Further, the tenant pointed out that the spelling of the tenant's name is incorrect on the Landlord's Application for Dispute Resolution. The tenant opposed an amendment to the spelling of the tenant's name, and the landlord was unsure of the appropriate spelling.

Also, during the course of the hearing it was determined that documents issued by the landlord are not issued by either of the landlords named in the Landlord's Application for Dispute Resolution. The landlord who attended the hearing is the same landlord named in the Landlord's Application for Dispute Resolution, and the said landlord did not apply to amend the application accordingly.

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 testified to being an agent and manager of the apartment complex which houses the rental unit in this case. That person is referred to in this Decision as the landlord's agent.

The landlord's agent testified that upon becoming property manager for the rental unit, no copies of tenancy agreements were on file for some of the 37 rental units in the apartment building, which includes this rental unit. Therefore, the landlord's agent is not certain when this tenancy began, however the tenant still resides in the rental unit. Rent in the amount of \$588.00 per month, plus \$8.00 per month for parking, are payable in advance on the 1st day of each month. The landlord's agent does not know whether or not the tenant paid a security deposit or a pet damage deposit or how much those deposits may have been or when they may have been paid.

The landlord's agent further testified that the tenant has been repeatedly late paying rent. In April, 2012 the tenant paid the landlord \$300.00 on April 4, 2012 and another \$296.00 on April 25, 2012. The tenant still owes \$30.00 for late fees, and the landlord's agent stated that a late fee in the amount of \$30.00 is provided for in the tenancy agreement. The tenant has a copy of the tenancy agreement, but the landlord's agent does not.

For the month of May, 2012 the tenant paid \$250.00 on May 1, 2012 leaving a balance outstanding of \$406.00 including late fees in the amount of \$30.00 for each of the months of April and May, 2012. The landlord caused a 10 Day Notice to End Tenancy to be served upon the tenant, and provided a copy for this hearing. The notice is dated May 1, 2012 and contains an expected date of vacancy of May 12, 2012, and states that the tenant has failed to pay rent in the amount of \$596.00 that was due on May 1, 2012. The name of the landlord on the notice to end tenancy is not the same landlord named in the Landlord's Application for Dispute Resolution and the landlord's agent testified that the agent's name and the name of the apartment building are named in the Landlord's Application for Dispute Resolution, and the landlord is the landlord named in the notice to end tenancy. The landlord's agent also testified that the spouse of the landlord's agent served the document personally on the tenant on May 2, 2012. On May 8, 2012 the tenant paid the landlord \$406.00 by way of cheque, but the landlord's agent is not yet certain if the cheque has cleared the bank. There are no arrears at this

point, but the landlord's agent stated that the tenant did not pay the outstanding rent within the 5 days provided for in the *Residential Tenancy Act*. The landlord did not issue a receipt or any other documentation stating that the money was being received "For Use and Occupancy Only."

The landlord's agent requests an Order of Possession for unpaid rent due to the tenant's failure to pay the rent within 5 days of receipt of the notice to end tenancy. The publications on the Residential Tenancy Branch website is where the landlord's agent received information about ending the tenancy, wherein the landlord's agent read that rent is due by the end of the business day.

The tenant testified that the landlord's agent's spouse did not serve the tenant personally on May 1, 2012; the landlord's agent personally served the tenant with the notice on May 2, 2012 at 8:30 or 8:35 p.m.

Analysis

Firstly, I refer to the Landlord and Tenant Fact Sheet #RTB-129 which states: "The landlord can give a 10-day notice for non-payment of rent on any day *after* rent is due."

In this case, I find that a landlord issued a notice to end tenancy, but I am not satisfied that the landlord who applied for dispute resolution is entitled to any order. It may be that the landlord is the landlord named in the notice to end tenancy, or it may be that the landlord is the person named on the application for dispute resolution, however, I am not satisfied who exactly the landlord is. Further, neither a landlord nor the landlord's agent have issued any notice to the tenant that any money accepted by the landlord as paid by the tenant after the date the notice was issued, was being received as use and occupancy only and did not serve to reinstate the tenancy. During the course of the hearing, I referred the parties to the Residential Tenancy Branch Fact Sheet #RTB-124 which states:

"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 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.”

It is clear in the testimony provided by the landlord’s agent that nothing was given to the tenant to advise or make it clear to the tenant that the payment made on May 8, 2012 was accepted for use and occupation only and not to reinstate the tenancy, and therefore, I find that the landlord in this case has reinstated the tenancy. Therefore, the landlord’s application for an Order of Possession cannot succeed.

With respect to the landlord’s application for a monetary order for unpaid rent or utilities, the landlord’s agent first testified that the tenant still owes late fees for the month of April, 2012, and then testified that the tenant has paid all rental arrears, as well as all late fees. However, the regulations state that a landlord may not charge more than \$25.00 for late fees, and may only make that claim if it’s provided for in the tenancy agreement. The landlord’s agent testified that no tenancy agreement can be found. Since no money is currently owed by the tenant to any landlord, the landlord’s application for a monetary order cannot succeed.

Since the landlord has not been successful with the application, the landlord is not entitled to recover the filing fee from the tenant 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 *Residential Tenancy Act*.

Dated: May 15, 2012.

Residential Tenancy Branch