



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, RP, OPR, MNR, FF

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- an order to the landlord to make repairs to the rental unit pursuant to section 33.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another.

Landlord Representative TS (TS) testified that he handed the 10 Day Notice to the tenant on November 8, 2012, in the late morning. The tenant and her roommate, MR, testified that TS gave the tenant's roommate the 10 Day Notice on November 11, 2012, at approximately 11:30 a.m. The tenant's witness MR testified that he gave the tenant the 10 Day Notice later that day, upon her return to the rental unit.

In accordance with section 88(e) of the *Act*, a landlord may serve a notice to end tenancy to an adult who apparently resides with a tenant. In this case, on a balance of probabilities I find that the sworn testimonies of the tenant and the tenant's witness were more specific and clear than that provided by TS who served the 10 Day Notice without the presence of a witness. At the hearing, I advised the parties of my finding that the 10 Day Notice was served to the tenant on November 11, 2012. As such, I find that the tenant's November 16, 2012 application to cancel the 10 Day Notice was received by the Residential Tenancy Branch (the RTB) within the 5-day period for doing so.

At the hearing, both parties acknowledged having received one another's dispute resolution hearing packages. The landlord's representatives also confirmed having

received the tenant's written evidence. I am satisfied that the above documents were served by the parties to one another in time to enable them to prepare for this hearing.

At the commencement of the hearing, Landlord's representative PD (PD) testified that the landlord had accepted a full payment of \$1,200.00 for use and occupancy only from the tenant on November 23, 2012 for the period from December 1, 2012 until December 31, 2012.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Is the landlord entitled to an Order of Possession for unpaid rent? Should an order be issued against the landlord to conduct repairs to the rental unit? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The tenant testified that she moved into this rental unit on or about August 26, 2010. She entered into written evidence an undisputed copy of a Residential Tenancy Agreement (the Agreement) she and the previous landlord signed for a periodic tenancy for both levels of this two level rental unit commencing on September 1, 2012. Monthly rent for both levels is set at \$1,200.00, payable in advance on the first of each month. The tenant testified that she paid a \$450.00 security deposit for this tenancy on or about August 26, 2010. The landlord's representatives observed that they have little information about this rental property because they only took over management of the property during the second half of October 2012.

The principal issue in dispute is the tenant's claim that she paid her November 2012 rent early, as has been her practice throughout her tenancy, on October 29, 2012. She entered into written evidence a copy of a receipt for \$1,200.00 for a rental payment made that day to the person she had been paying her rent to in the past and who had signed the September 2012 Agreement as the landlord. Although the landlord did not dispute the tenant's claim that she paid this amount to the previous landlord, PD maintained that the tenant had been advised in mid-October 2012 that rent payments due for November 2012 were to be paid to the landlord's new representative, TS.

The landlord's application for a monetary award of \$1,200.00 was for unpaid rent owing for November 2012. The landlord also sought an Order of Possession for that amount of unpaid rent owing for November 2012, and recovery of the filing fee.

The tenant applied to cancel the 10 Day Notice, as she maintained that she had provided evidence that she had paid her November 2012 rent on October 29, 2012.

She also applied for an Order requiring the landlord to undertake a number of repairs to the rental unit.

TS testified initially that he visited the rental property at some time between October 16, and 18, 2012, at which time he handed the tenant an October 16, 2012 Notice to all Tenants. This document, entered into written evidence, read as follows:

As of October 15th, ABC Real Estate Services will be managing this property. All rent checks must be sent to the above address. If you need help with this, Please call the building management assistant below...

The tenant confirmed that TS visited her rental unit after taking over management of the rental property. She testified that TS spoke with her about the monthly rent for this property and expressed his opinion that the market rent should be much higher for this two-level rental property. She testified that she was not handed the October 16 Notice to all Tenants by TS or anyone else from the landlord until November 1, 2012 when TS handed her this Notice. She said that her male friend, CN, was with her at the rental unit at that time and that he was available to act as her witness in this regard if necessary. The tenant's witness CN gave sworn testimony at the hearing that he was present when TS handed the tenant the October 16, 2012 Notice to all Tenants on November 1, 2012 at approximately 2:00 or 2:30 p.m.

PD testified that the landlord is a licensed property manager and took proper precautions to ensure that tenants were fully aware that they should be paying their November 2012 rent to the new agents for this building (i.e., the landlord in these applications). He reiterated that the landlord did not have much information from the previous person who had been managing this property. He observed that no else affected by the landlord's assumption of management of this property claimed to have paid their rent to the previous agent for the owner.

After hearing the testimony from the tenant and her male friend, TS testified that he had a distinct recollection of knocking on the tenant's door and finding only her male friend, CN, in attendance. Shortly thereafter, he said that the tenant returned home and in the accompaniment of both the tenant and CN, he left the October 16, 2012 notice on her kitchen table. He maintained that the tenant was fully aware that she was supposed to have paid her November 2012 rent to him.

Although the tenant listed a number of repairs that she would like undertaken to the rental unit and provided some photographs, she did not provide evidence of having made written requests to the current landlord to undertake these repairs. Many of these

repairs appeared to be relatively minor in nature and would have been known to the tenant when she signed her Agreement that took effect on September 1, 2012.

Analysis – Notice to End Tenancy and Landlord's Application for Unpaid Rent

The key issue in dispute in this hearing is whether there is unpaid rent owing for November 2012. The tenant provided undisputed evidence that she paid \$1,200.00 on October 29, 2012 to the person identified as her landlord on her Agreement. She also gave undisputed sworn testimony that it has long been her practice to pay her monthly rent in advance of the due date as a precautionary measure. The landlord confirmed that the tenant paid \$1,200.00 to be applied towards the amount owed to the landlord for December 2012 on November 23, 2012. The landlord also confirmed that no 10 Day Notice was issued for October 2012. Thus, any payment made to the previous landlord on October 29, 2012 would not have been for outstanding rent owing prior to November 1, 2012. I find that the above evidence supports the tenant's claim that it is her normal practice to pay her rent in advance of the due date and that no rent was owing prior to November 1, 2012.

I find that the primary issue in dispute narrows to whether the landlord provided sufficient notice to the tenant prior to her October 29, 2012 payment to the previous landlord that all monthly payments made for November 2012 were to be paid to TS, the new agent for this rental property.

While I have given the landlords' testimony careful consideration, I find on a balance of probabilities that it is more likely than not that the tenant paid her November 2012 rent to the landlord listed on her Agreement. There is conflicting evidence as to whether TS provided the October 16, 2012 Notice to all Tenants to the tenant in advance of the tenant's payment of her November 2012 rent to the former landlord. I find that the landlord as the server of the October 16, 2012 bears a higher burden of proof to establish that TS did in fact hand the tenant this Notice prior to October 29, 2012, if the landlord is attempting to rely on this service to demonstrate a failure to comply with the terms of this Agreement. The primary evidence supplied by the landlord that this Notice was in fact served by the landlord to the tenant, a notice which called for a significant variation in the provisions of her Agreement, was the sworn testimony of TS. I find the recollection of important details of the service of this document by TS varied somewhat during the course of this hearing, especially with respect to his initial estimate that this service happened somewhere between October 16 and October 18, 2012.

By contrast, I find that the tenant's evidence with respect to the service of the October 16, 2012 Notice and that of her male friend, CN, were much more precise and exact. I also find it difficult to understand what motive a tenant would have to purposefully pay someone other than the landlord her rent had she been provided the October 16, 2012

Notice prior to her October 29, 2012 payment. To do otherwise would purposefully expose a tenant to a monetary claim from the new landlord and could potentially end the tenancy.

For these reasons, I allow the tenant's application to cancel the 10 Day Notice, as I find that the landlord has not demonstrated that the tenant has failed to comply with the terms of her Agreement. I dismiss the landlord's application to end this tenancy on the basis of the 10 Day Notice, with the effect that this tenancy continues.

I also dismiss the landlord's application for a monetary Order as I do not find sufficient evidence to demonstrate that the tenant has failed to meet her contractual rent obligations as determined in her Agreement. In making this determination, I would suggest that the landlord look to remedies outside the *Act* to obtain any monetary award that the landlord believes is due with respect to the previous landlord's alleged retention of rent paid by the tenant for November 2012. As the landlord has been unsuccessful in this application, I dismiss the landlord's application to recover the filing fee from the tenant.

Analysis- Tenant's Application for Repairs to the Rental Unit

I have also considered the tenant's application for an order requiring the landlord to undertake a range of repairs to the rental unit. As the landlord has only recently taken over management of this property, PD testified that the landlord needed some time to consider the tenant's requests and to undertake those repairs that bring the rental unit up to the standard required by the *Act* and their Agreement. Although the tenant provided an extensive list of items requiring repair, I do not find that the tenant has demonstrated at this time sufficient evidence to warrant an order requiring the landlord to undertake the repairs requested. Landlord's representative PD expressed a willingness to consider the tenant's request for repairs.

For the above reasons, I dismiss the tenant's application for an order requiring the landlord to undertake repairs as I find that the tenant's request to this landlord is premature. I direct the tenant to clearly identify any requested repairs in a letter to the landlord. I also direct the landlord to implement the commitment made by landlord's representative PD at the hearing to undertake those repairs that are necessary under the *Act* and the Agreement. Should the tenant disagree with the landlord's attendance to the requested repairs after having given the landlord a two-month period to undertake these repairs, the tenant is at liberty to reapply for an order requiring such repairs.

Conclusion

I allow the tenant's application to cancel the landlord's 10 Day Notice with the effect that this tenancy continues.

I dismiss the landlord's application without leave to reapply.

I dismiss the tenant's application for an order requiring repairs to the rental unit with leave to reapply as outlined above.

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: December 24, 2012

Residential Tenancy Branch