



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

OPR, MNR, CNR,

Introduction

This hearing dealt with applications by the landlord and the tenant, under to the *Residential Tenancy Act*. The landlord applied for an order of possession pursuant to Section 55 and a monetary order for rent owed, pursuant to Section 67 of the Act. The tenant applied for an order to cancel the notice to end tenancy for rent, pursuant to Section 46 of the Act.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Matter

The tenant claimed to have sent in evidence to the Residential Tenancy Branch by fax on January 31, 2013 and stated that this same evidence was re-faxed again to RTB on February 4, 2013. The tenant testified that she provided a copy of this evidence to an agent of the landlord, in person.

The landlord's representative who attended the hearing stated that she had no knowledge of whether this evidence from the tenant was served on the agent identified by the tenant.

Rule 4.1 of the Residential Tenancy Proceedings Rules of Procedure states that if the Respondent intends to dispute an application, the evidence upon which the Respondent intends to rely must be received as soon as possible and at least 5 days before the dispute resolution hearing or if that is not possible, the evidence must be filed with the Residential Tenancy Branch and received by the Respondent at least 2 days prior to the hearing. (my emphasis)

The “*Definitions*” portion of the Rules of Procedure states that when the number of days is qualified by the term “*at least*” then the first and last days must be excluded. Evidence served on a business, must be served on the previous business day. In addition, weekends or holidays are excluded in the calculation of days for evidence being served on the Residential Tenancy Branch.

In this instance I found that any evidence submitted by the tenant and served on the landlord on January 31, 2013, if this occurred, could validly be considered as it was submitted on time. However, the evidence package apparently sent on Thursday, January 31, 2013, was not located.

According to the tenant, the same evidence package was apparently re-faxed to RTB on February 4, 2013. This particular evidence package was finally located, despite the fact that it was not physically placed in the file, nor had it been uploaded in the system under the tenant’s file number. It had, however, been found in the system uploaded only under the landlord’s cross-application file number.

Giving the benefit of doubt to the tenant, based on the possibility that the evidence in question was submitted on Thursday January 31, 2013, I allowed the tenant’s evidence and it was taken into consideration in the determination of this dispute.

All of the landlord’s evidence was accepted as properly served and was considered in the determination.

Issues to be Decided

- Is the landlord entitled to an order of possession for unpaid rent?
- Has the Landlord established monetary entitlement to compensation for rent still outstanding?
- Has the tenant proven that the Notice to End Tenancy for Unpaid Rent should be cancelled?

Background and Evidence

Based on the testimony of both parties, I find that the tenancy started in June 2012. The current rent is \$1,015.00, and the tenant paid a security deposit of \$507.50.

The landlord’s evidence package consisted of:

- a copy of a Ten Day Notice to End Tenancy for Unpaid Rent dated January 8, 2013 showing \$1,015.00 unpaid rent for November 2012, December 2012 and January 2013 were outstanding,

- copies of communications,
- copies of receipts for rent payments made by the tenant for \$1,015.00 on November 6, 2012 and \$646.00 on November 14, 2012 ,
- copies of Notices for unpaid Electricity from the Utility company,
- a copy of the tenancy agreement and
- a copy of a rental arrears repayment plan.

The landlord testified that the tenants failed to pay all of the rent owed in June 2012 and a payment plan was agreed-upon. No current rental account ledger for the tenant was submitted into evidence. However, according to the landlord, the tenant defaulted on the payment plan to pay for June 2012 arrears. The landlord testified that rent payments made by the tenant for November 2012, December 2012 and January 2013 were returned NSF. No bank records were presented by the landlord to verify the defaulted payments. The landlord conceded that the \$1,015.00 shown on the Ten Day Notice as being arrears for November 2012, was actually related to outstanding arrears from the past, owing since June 2012.

The landlord is seeking an Order of Possession based on the 10-Day Notice and a monetary order for all of the arrears accrued, including rent owed for February 2013.

The tenant testified that in June 2012 they had fallen into arrears due to a problem with a lost money order that has never been located nor reimbursed, despite a record of its existence.

The tenant testified that their banking records submitted into evidence confirmed all withdrawals from their account from October 1, 2012 up to January 31, 2013. The tenant testified that the evidence clearly shows funds of \$1,015.00 had been withdrawn on October 1, 2012, November 1, 2012, December 3, 2012 and January 3, 2013. The tenant also pointed out that additional funds were withdrawn for money orders on October 22, 2012 in the amount of \$507.50 to pay the landlord \$500.00 and on November 13, 2012, in the amount of \$653.50, and these amounts were to pay the landlord the remaining arrears owed for June 2012.

The landlord argued that, although the withdrawals of the tenant's funds appear on the tenant's record of bank *debits*, these financial records neglect to track all banking activity on the account. The landlord testified that, when the rent was due, the tenant's account was overdrawn and the landlord was notified by the bank that a stop-payment had apparently been placed, by the tenant, on the rent payments to the landlord. The landlord testified that they did not actually receive the payment that was shown shown on the tenant's records as having been withdrawn. The landlord testified that, after the automatic debits were rejected, the tenant then submitted additional funds to replace

the defaulted payments by money order later in the month. The landlord testified that the replacement payments were accepted by the landlord for use and occupancy only and that the tenant remains in arrears for three month's rent still owed..

Analysis

Based on the evidence, I accept that the landlord served the tenant a Ten Day Notice to End Tenancy for Unpaid Rent seeking rental arrears for November 2012, December 2012 and January 2013.

I find that the landlord had submitted some evidence of payments made, including a receipt issued by the landlord for a payment of \$1,015.00 on November 6, 2012 and another payment of \$646.00 received on November 14, 2012. It is not clear what these payments represented. I find that the landlord's Ten Day Notice to End Tenancy for Unpaid Rent, issued on January 8, 2013, indicated rental arrears were still owed for November 2012 and makes no mention of arrears owed from June 2012.. I find that the landlord failed to submit a current tenant ledger that would confirm and clarify the specific discrepancies in the tenant's rental account.

In addition to the above, I find that the tenant had submitted incomplete banking records that only showed debits that were made from the tenant's account. I find that these records were not sufficiently complete to track payments made to the landlord, including reports that some payments were returned NSF or stopped..

Based on the conflicting testimony and evidence of both parties, I find am not able to determine the merits of the landlord's monetary claim. I also find that, based on the contradictory evidence, I cannot grant the landlord an Order of Possession to enforce the Ten Day Notice to End Tenancy for Unpaid Rent.

Given the evidence before me, I grant the tenant's application to cancel the Ten Day Notice to End Tenancy for Unpaid Rent dated January 8, 2013, and dismiss the landlord's application for an Order of Possession based on that Notice.

In regard to the monetary claim of the landlord, I make no findings with respect to the current amount of rental arrears that may be owed by this tenant and I make no findings with respect to the merits of the landlord's monetary claim. Accordingly, I hereby dismiss the portion of the landlord's application relating to the monetary claim with leave to reapply.

Conclusion

The tenant is successful in their application to cancel the 10-Day Notice to End Tenancy for Unpaid Rent and the portion of the landlords application seeking an Order of Possession is dismissed.

The landlord's application seeking monetary compensation for rental arrears is dismissed with 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: February 07, 2013

Residential Tenancy Branch