



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, CNR, FF, O

Introduction

This hearing was conducted concerning applications made by the landlord and by one of the named tenants. The landlord has applied 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 tenants for the cost of the application. One of the tenants named in the landlord's application has applied for an order cancelling a notice to end tenancy for unpaid rent or utilities and to recover the filing fee from the landlord for the cost of the application. The other tenant has not made any application.

The landlord and the tenant who made the application attended the hearing in person, and each gave affirmed testimony. The landlord also called one witness who gave affirmed testimony. The parties also provided evidentiary material prior to the commencement of the hearing, however some of the evidence provided by the tenant was not received within the time required under the Residential Tenancy Branch Rules of Procedure, and that evidence is not considered in this Decision.

During the course of the hearing it was determined and agreed by the parties that the second named tenant was not a tenant of the landlord, and the landlord's application as against that tenant is hereby dismissed without leave to reapply.

No further issues with respect to service or delivery of documents or evidence were raised, and all evidence and testimony with the exception of the evidence of the tenant that was provided late, has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent or utilities?
Has the landlord established a monetary order as against the tenant for unpaid rent or utilities?

Is the tenant entitled to an order cancelling the notice to end tenancy for unpaid rent or utilities?

Background and Evidence

The landlord testified that this fixed term tenancy began on March 19, 2010 and expired on March 31, 2011, and the tenant still resides in the rental unit. Rent in the amount of \$1,950.00 per month was originally payable under the tenancy agreement, however the agreement also states that at the end of the fixed length of time the tenancy may continue for another fixed length of time, and refers to section (c) which states, "other periodic tenancy indicated below" and has been completed as, "12 Month Fixed Terms with \$300/Annual Increases." Rent is payable on the 1st day of each month and the landlord testified that a pro-rated amount of rent was collected for the first month of the tenancy. Also, at the outset of the tenancy, the landlord collected a security deposit from the tenant in the amount of \$975.00 which is still held in trust by the landlord.

The parties had also entered into a purchase agreement, which is separate from the tenancy agreement, and although not provided for this hearing, the landlord testified that the purchase agreement is also in writing. The amount of monthly payments for the purchase agreement is in addition to the monthly rent payable, and the tenant has defaulted on both agreements.

The landlord further testified that the tenant is in arrears of rent for the months of January, February and March, 2013. The tenancy agreement provides that each year of the tenancy rent increases by \$300, or \$25.00 per month. Therefore, for the first year the tenant paid \$1,950.00 per month, the second year \$1,975.00 per month, and this year \$2,000.00 per month.

The landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities and provided a copy for this hearing. The notice is dated February 3, 2013 and contains an expected date of vacancy of February 13, 2013. The notice also states that the tenant failed to pay rent in the amount of \$4,000.00 that was due on February 1, 2013. The landlord testified that the notice was served by personally handing it to the tenant on February 13, 2013.

The landlord's application claims \$5,000.00 and was filed on February 13, 2013, at which time the tenant was in arrears \$2,000.00 for each of January and February, 2013 and the \$5,000.00 claim takes into account half a month for March, 2013 knowing that this hearing was scheduled for March 5, 2013.

The landlord's witness testified to being the spouse of the landlord and that the tenant was phoned every month requesting that rent be paid. The landlord was open to extending the contract and wanted to help the tenant purchase the rental unit, but at no time was the tenant ever told that rent didn't have to be paid.

The tenant testified that rent has been paid right up until the landlord told the tenant not to worry about paying rent, but to purchase the rental unit. Since June 8, 2012 the mortgage rules changed and the tenant now requires a larger down payment in order to qualify for a mortgage. When the parties signed the agreements, the tenant asked the Realtor and the landlord about the worst case scenario, and the tenant was told that the dates could be extended. The landlord kept encouraging the tenant to purchase and to concentrate on the purchase, but not to worry about the rent.

Analysis

Firstly, with respect to the purchase agreement, I have no jurisdiction to make any orders with respect to any agreement other than under the *Residential Tenancy Act* or the regulations, or the *Manufactured Home Park Tenancy Act* or the regulations.

I have reviewed the tenancy agreement and the notice to end tenancy. The *Residential Tenancy Act* states that a tenant must pay rent when it is due, and if the tenant fails to do so, the landlord may issue a notice to end tenancy. The tenant has 5 days to pay the rent in full or dispute the notice, or the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice. In this case, I find that the notice is in the approved form and contains information consistent with the testimony provided for this hearing. The tenant disputed the notice within the 5 days required, but has not provided any evidence that rent has been or should not be paid, and therefore, I find that the landlord is entitled to an Order of Possession and the tenant's application for an order cancelling the notice to end tenancy is hereby dismissed.

With respect to the amount of rent payable to the landlord, I find that the tenancy agreement contains a clause that is inconsistent with the *Act*, in that it provides for annual rent increases that are not calculated in accordance with the regulations, or provided to the tenant in the approved form. The *Act* also states that any attempt to avoid or contract outside the *Act* is of no effect, and I find that the rent increases were not lawful. Therefore, I find that the amount of rent payable to the landlord ought to be reduced accordingly. The tenancy agreement provides for a monthly rental of \$1,950.00 and the landlord testified that for the period April 1, 2011 to March 31, 2012

the tenant paid an additional \$300.00; and from April 1, 2012 to March 31, 2013 the amount is another \$300.00. I find that the landlord is entitled to rent in the amount of \$1,950.00 for each of January, February and March, 2013, or \$5,850.00, less \$600.00, for a total of \$5,250.00 in unpaid rent.

The landlord has not applied to keep the security deposit in partial satisfaction of the claim and I leave it to the parties to deal with it in accordance with the *Residential Tenancy Act*.

Since the landlord has been successful with the application, the landlord is entitled to recovery of the \$50.00 filing fee for the cost of the application.

Conclusion

For the reasons set out above, I hereby grant an Order of Possession in favour of the landlord on 2 day notice to the tenant.

The landlord's application for a monetary order as against the second named tenant is hereby dismissed without leave to reapply.

The tenant's application is hereby dismissed in its entirety without leave to reapply.

I hereby grant a monetary order in favour of the landlord in the amount of \$5,300.00.

I order the parties to deal with the security deposit in accordance with the *Residential Tenancy Act*.

This order is final and binding on the parties and may be enforced.

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 08, 2013

Residential Tenancy Branch

