



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

This hearing was scheduled to deal with cross applications. Nearly one hour of hearing time was spent dealing with preliminary matters, service issues, and the landlord's application. Prior to hearing the tenant's application, the landlord requested the hearing be adjourned. The tenants did not object to the landlord's request for adjournment. As the issues under dispute were unrelated, I severed and adjourned the tenant's application. Accordingly, this decision deals with the landlord's Application for Dispute Resolution only and a separate decision shall be issued for the tenant's Application for Dispute Resolution pending conclusion of that hearing.

The landlord's application dealt with a request for an Order of Possession and Monetary Order for unpaid rent; and, and authorization to retain part of the tenants' security deposit.

Although the landlord provided evidence from Canada Post that the landlord's Application for Dispute Resolution was sent to each of the tenants via registered mail, the male tenant claimed he was not served. Upon hearing from the tenants and their advocate I was satisfied the male tenant was privy to the landlord's hearing documents as the male tenant had provided copies of the landlord's documents to the advocate and the advocate had prepared a detailed response to the landlord's claim. Therefore, I deemed both tenants sufficiently served with the landlord's Application for Dispute Resolution and evidence pursuant to the authority afforded to me under the Act.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession and monetary compensation for unpaid rent for January 2012? Has the issue of unpaid rent for January 2012 already been heard and decided upon?

Background and Evidence

The tenancy commenced in June 2009 and the tenants are required to pay rent of \$1,248.00 on the 1st day of every month.

In filing this Application for Dispute Resolution the landlord seeks to enforce a 10 Day Notice to End Tenancy for Unpaid Rent issued January 5, 2012 for unpaid rent of \$416.00 (herein referred to as the Notice). The landlord provided conflicting evidence as to service of the Notice. The landlord verbally testified that it was given to the female tenant in person. Included in the documentary evidence was a signed Proof of Service indicating that the Notice was given personally to the male tenant in the presence of a witness.

The landlord explained that the Notice dated January 5, 2012 was not pursued by filing an Application for Dispute Resolution sooner because the landlord was already in possession of an Order of Possession from a prior hearing and the landlord was interested in working with the tenants.

The tenant's advocate argued that the tenants paid the rental arrears and there was no outstanding rent as of March 22, 2012 as evidence by a letter signed by the landlord's agent on March 22, 2012. Secondly, the issue of unpaid rent for January 2012 was *res judicata* as the amount was included in the 10 Day Notice issued February 6, 2013 which was the subject of the dispute heard and decided upon on March 8, 2013.

This issue of unpaid rent has been the subject of two previous dispute resolution proceedings with the most recent hearing held on March 8, 2013. In decision issued March 8, 2013 the Arbitrator provided the landlord with a Monetary Order for unpaid rent of \$375.00 of the \$2,151.00 requested by the landlord. The Arbitrator found that the 10 Day Notice issued February 6, 2013 for \$2,151.00 in unpaid rent included amounts from the start of the tenancy and that the landlord had already been provided a Monetary Order in a prior hearing for those amounts; except for \$375.00 related to a cheque for August 2012.

During the hearing before me, both parties indicated the findings of the Arbitrator on March 8, 2013 were inaccurate. The landlord was of the position that not all amounts of unpaid rent were previously awarded to the landlord. The tenants were of the position the award of \$375.00 for August 2012 was erroneously attributed to their tenancy. I informed the parties that decisions of an Arbitrator are final and binding and that I do not have the authority to change or alter a decision already issued.

The landlord submitted that the landlord's claims for unpaid rent were dismissed with leave to reapply by the Arbitrator on March 8, 2013. The tenant's advocate disagreed. Both referred me to the decision written March 8, 2013.

Analysis

As the parties were informed during the hearing, a decision or order of an Arbitrator is final and binding, subject only to the review provisions contained in the Act or Judicial Review. I do not have the authority to change or alter a decision or order previously issued and filing a new Application for Dispute Resolution is not a means to change or alter a previously issued decision or order.

The landlord's Application for Dispute Resolution that was heard on March 8, 2013 dealt with the landlord's request to recover unpaid rent of \$2,151.00 for the period of June 2009 through February 2013. Upon review of the decision issued March 8, 2013 I find the landlord's request for \$2,151.00 was heard and decided upon. I find no indication that any part of the landlord's Application for Dispute Resolution was dismissed with leave to reapply. Therefore, I find the matter of unpaid rent up to and including the month February 2013 is *res judicata*.

Res judicata is a rule in law that a final decision, determined by an Officer with proper jurisdiction and made on the merits of the claim, is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent Application involving the same claim.

With respect to *res judicata*, the courts have found that:

"...the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

Although I have significant reservations that the 10 Day Notice dated January 5, 2012 was served upon the tenants given the landlord's conflicting submissions concerning service if, in fact, the 10 Day Notice was served I find the parties conducted themselves in a manner consistent with waiver or withdrawal of the Notice as evidence by the continued acceptance of rent for more than a year after the Notice was issued.

In light of the above, I find the Notice issued January 2012 is no longer enforceable and I deny the landlord's request for an Order of Possession based upon that Notice. I have also declined to make a decision as to whether rent is owed for January 2012 under the principle of *res judicata*.

Conclusion

The 10 Day Notice dated January 5, 2012 is no longer enforceable. The landlord's monetary claim for unpaid for January 2012 is *res judicata*. Therefore, the landlord's request for an Order of Possession and Monetary Order for unpaid rent related to January 2012 is dismissed.

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: April 10, 2013

Residential Tenancy Branch