



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Introduction

This application was brought by the landlord seeking an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid rent dated November 6, 2013. The landlord also sought a Monetary Order for the unpaid rent and filing fee for this proceeding.

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 affirmed testimony and relevant evidence that was properly served.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent?

Is the landlord is entitled to monetary compensation for rental arrears owed?

Preliminary Matters

Service of Respondent's Late Evidence

Documentary evidence was received from the respondent tenant on January 6, 2013.

Rule 3 of the Residential Tenancy Rules of Procedure, requires that all evidence must be served by an applicant on the respondent and I find that the applicant landlord filed their Application on November 15, 2013 and served it, along with the documentary evidence on the tenant.

Rule 4 states that, if the respondent intends to dispute an Application for Dispute Resolution, copies of all available documents or other evidence the respondent intends to rely upon must be received by the Residential Tenancy Branch and

served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding but if the date of the dispute resolution proceeding does not allow the five (5) day requirement in a) to be met, then all of the respondent's evidence must be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

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, and if served on a business, it must be served on the previous business day. Weekends or holidays are excluded in the calculation of days for evidence being served on the Residential Tenancy Branch.

I find that, the tenant's evidence arrived on January 6, 2013 for a hearing scheduled for January 8, 2013 and this did not meet the requirement of "*at least five days*" prior to the hearing. It also fails to comply with the "at least two days" deadline applicable to cases where the date of the dispute resolution proceeding does not allow the five (5) day requirement to be met.

The tenant testified that he was repeatedly hospitalized since the 10-Day Notice to End Tenancy was received. The tenant testified that that this had affected his ability to respond to the landlord's 10-Day Notice and the application within the statutory deadlines. However, the tenant did not provide any evidentiary proof to confirm the alleged periods of hospitalization.

In any case, I find that the landlord did not have an opportunity to see and respond to the tenant's documents prior to the hearing and therefore accepting the evidence would unfairly prejudice the applicant.

Therefore, the tenant's documentary evidence will not be considered. However, the tenant is permitted to give verbal testimony about the content of the documents and the testimony will be considered. The landlord will be given the opportunity to verbally respond and this will also be considered.

Improper Service of 10-Day Notice to End Tenancy

The tenant testified that the 10-Day Notice to End Tenancy for Unpaid Rent was served in person to his minor daughter. The tenant testified that he did not receive the 10-Day Notice to End Tenancy for Unpaid Rent until four days later than the date shown on the Notice, November 6, 2013.

The landlord indicated in the application that the Notice was served on November 6, 2013:

“ON THE DOOR (DAUGHTER WAS IN SO SHE TOOK IT)”

Section 88 of the Act requires that all documents, other than those referred to in section 89 [*special rules for certain documents*], must be given or served in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
- (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
- (f) by leaving a copy in a mail box or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
- (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
- (h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
- (i) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
- (j) by any other means of service prescribed in the regulations.

Given the above, I accept the tenant's testimony that the 10-Day Notice to End Tenancy for Unpaid Rent was not served in accordance with the Act. I also accept the tenant's testimony that the tenant did not actually receive this Notice until November 10, 2013.

Therefore I find that the service date for the Notice is November 10, 2013.

Section 46 (1) states that landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

I find that the effective date of November 16, 2013, shown on the 10-Day Notice does not comply with section 46 of the Act in that the stated effective date is less than 10 days after the Notice was served on the tenant.

Section 53 (1) of the Act states that, if a landlord or tenant gives notice to end a tenancy effective on a date that does not comply, the notice is deemed to be changed in accordance with subsection (2) or (3), as applicable. Subsection (2) provides that, if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

In the case before me, I find that the effective date of the Ten Day Notice to End Tenancy for Unpaid Rent must be changed to November 20, 2013, which is 10 days after the Notice was served.

Section 46(4) states that:

“Within 5 days after receiving a notice under this section, the tenant may
(a) pay the overdue rent, in which case the notice has no effect, or
(b) dispute the notice by making an application for dispute
resolution.”

In this instance, I find that the tenant had 5 days from November 10, 2013 to either dispute the Notice or pay the arrears and therefore the deadline to pay or dispute the Notice did not expire until November 15, 2013.

Recording Proceedings

During the hearing, the tenant advised that the hearing was being recorded. I advised the tenant that Residential Tenancy Rules of Procedure, (Rule 9.1) actually prohibit recording of the hearing and specifically states:

“Private audio, photographic, video or digital recording of the dispute resolution proceeding is not permitted.”

Rule 9.2 contains provisions for arranging official recording as excerpted below:

“a party requesting an official recording by a court reporter must provide written notice stating the reasons for the request, to the other party and to

the Residential Tenancy Branch at least two (2) business days in advance of the dispute resolution proceeding. A Dispute Resolution Officer will determine whether to grant the request and will provide written reasons, if requested. If permission is granted for an official recording of the dispute resolution proceeding by a court reporter, the party making the request must:

- (a) make all necessary arrangements for attendance by a court reporter and court reporter's necessary equipment;*
- (b) pay the cost of the court reporter's attendance at the dispute resolution proceeding, and the recording; and*
- (c) must provide all parties with copies of the recording, transcript, or both, as ordered by the Dispute Resolution Officer. “*

The tenant did not commit to ceasing his recording of these proceedings. Notwithstanding this participant's violation of the Rules of Procedure, the hearing continued.

Background and Evidence

The landlord testified that the tenancy began in August 2013 with rent of \$500.00 and a security deposit of \$250.00 was paid.

The landlord submitted into evidence a copy of the 10-Day Notice to End Tenancy for Unpaid Rent dated November 6, 2013, deemed to be served on the tenant on November 10, 2013.

The landlord testified that the tenant failed to pay \$500.00 rent for October 2013 and \$500.00 rent for November 2013. The landlord testified that a 10-Day Notice to End Tenancy for Unpaid Rent was issued and served on the tenant. The landlord testified that the tenant did not pay the arrears, did not vacate the unit and did not dispute the Notice.

The landlord testified that the tenant also failed to pay \$500.00 rent owed for each of the months of December 2013 January 2014.

The landlord seeks an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent and a monetary order for 4 months rental arrears totaling \$2,000.00.

The tenant testified that the rents owed for October and November 2013 were paid in full. The tenant made reference to his bank statements that he contends show

withdrawals of \$500.00 around the time that his rent was due. The tenant testified that he paid the rent in cash, but the landlord refused to issue receipts in violation of the Act.

The landlord pointed out that receipts were not issued because the rent was not paid. The landlord testified that the tenant's withdrawals records from the tenant's bank account do not serve to prove that these funds were then paid to the landlord.

The tenant testified that his attempts to pay rent for December 2013 and January 2014 were not successful as the landlord refused to accept payment.

The landlord disputed this allegation and stated that she would not have refused payment, but would naturally accept money owed for rent and then would issue a receipt that stated "*for use and occupancy only*".

In regard to the fact that the tenant had not made an application to dispute the 10-Day Notice to End Tenancy for Unpaid Rent, the tenant acknowledged that no application was made, but stated this was due to health issues that prevented him from disputing the Notice.

Analysis

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement. Through testimony from the landlord and evidence in the form of an undisputed Ten Day Notice to End Tenancy for Unpaid Rent, I find that the tenant did not pay the rents for October and November 2013 when they were due.

When a tenant fails to comply with section 26, then section 46 of the Act permits the landlord to end the tenancy through a Ten-Day Notice effective 10 days after the date the tenant receives it. I find that the tenant was served with the 10-Day Notice on November 10, 2013.

This section of the Act also provides that, within 5 days after receiving a notice, the tenant may either pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution.

I find that the tenant had until November 15, 2013 to either pay the rent owed or to dispute the Notice if he disagreed with the amount being claimed as unpaid rent.

I find that the tenant did not dispute the 10-Day Notice within the required 5 days or at any time thereafter.

In regard to the tenant's claim that rent was not in arrears, I find that the tenant has not provided sufficient proof of payment. Even if I accept that funds of \$500.00 were withdrawn around the time rent was due in September, October and November 2013, this does not adequately prove that the withdrawn funds were then paid to the landlord in cash.

With respect to the tenant's claim that their attempts to pay the rents for December 2013 and January 2014 in cash were rebuffed by the landlord, I find that, given the fact that the landlord made an application seeking compensation, it is unlikely that the landlord would refuse to accept payment of rent. I find that the landlord would have no motive to decline payment for December and January, as the landlord already had sufficient reason, based on the defaults for October and November 2013, to enforce the 10-Day Notice to End Tenancy for Unpaid Rent. I find that, the tenancy could be ended, with or without additional arrears, because the five-day deadline to cancel the Notice by paying the arrears had already expired in November 2013.

In this instance I find that the tenant was in arrears at the time the 10-Day Notice was served on November 10, 2013 and the tenant did not pay the arrears. I find that the tenant, in fact, continued to withhold the rent for December 2013 and January 2014.

Section 46(5) of the Act provides that if a tenant does not pay the rent or make an application for dispute resolution in accordance with the above, then the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.

Given the above, I find that the landlord is entitled to an Order of Possession.

I further find that the landlord has established total monetary entitlement for \$2,050.000, comprised of \$500.00 rent for October 2013, \$500.00 rent for November 2013, \$500.00 rent for December 2013, \$500.00 rent for January 2014 and the \$50.00 cost of the application.

I order that the landlord retain the tenant's \$250.00 security deposit in partial satisfaction of the claim, leaving a balance of \$1,800.00 in favour of the landlord.

I hereby issue an Order of Possession in favour of the landlord effective two days on service. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I hereby grant the landlord a monetary order under section 67 for \$1,800.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The landlord is successful in the application and is granted an Order of Possession and a monetary order.

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: January 08, 2014

Residential Tenancy Branch

