



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant's Application: CNC, CNR, ERP, RR, O
Landlord's Application: OPR, MNR, MNSD, FF

Introduction

This hearing was scheduled to deal with cross applications. A tenant's application was filed by LM to cancel a Notice to End Tenancy for cause and for unpaid rent; Orders for emergency repairs; authorization to reduce rent, and "other" issues. The landlord applied for an Order of Possession for unpaid rent and a Monetary Order for unpaid rent; and, authorization to retain the security deposit.

All parties named on the applications appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

The tenant has primarily dealt with the landlord's agent during this tenancy and in this decision I refer to both the landlord and landlord's agent collectively as "the landlord".

LM indicated in the details of dispute that issues to be determined are the existence of two separate rental units and establishment of a tenancy agreement with LM that is separate from the tenancy for tenant LSP. I have explored these issues and have made a determination of such in this decision. As the standing of LM as a tenant, co-tenant, or occupant was identified as an issue to be resolved I referred to the occupants by their initials.

This hearing was plagued with several disruptions, including the LSP calling into the hearing late and disconnecting and then LM reconnecting to the teleconference call; as well as inappropriate conduct such as shouting by LM and interruptions by other

participants. All of the parties were cautioned multiple times about not disrupting the proceedings or interrupting the other party or me.

Although LM filed to dispute a Notice to End Tenancy for Cause, I was not presented any such Notice and neither party referred to one in their submissions. Accordingly, I have made no findings as to a Notice to End Tenancy for Cause.

LM also applied for an Order for emergency repairs but did not provide any specifics with his Application for Dispute Resolution. The Act requires an applicant to provide sufficient particulars in filing their application so that the other party is put on notice as to the matters that are to be dealt with at the hearing. I find the LM did not clearly indicate the nature of the emergency repairs he is seeking and I did not give any further consideration to this request.

Issue(s) to be Decided

1. Are there one or two rental units on this property?
2. Do LM and LSP have separate tenancy agreements with the landlord?
3. Should the 10 Day Notice to End Tenancy be upheld or cancelled?
4. Is the landlord entitled to a Monetary Order for unpaid rent?

Background and Evidence

On February 5, 2014 the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) indicating rent of \$1,300.00 was outstanding as of February 1, 2014. The Notice indicates the tenants are LSP and LM. The Notice was posted on the doors of the house and has a stated vacancy date of February 15, 2014. The landlord is seeking to enforce the Notice whereas LM filed to dispute this Notice.

When the landlord purchased the property on November 11, 2013 LSP was already living on the property. LSP had been living on the property for several years as the care-aid to the former owner, who died prior to the landlord purchasing the property.

All parties provided consistent testimony that a tenancy formed between LSP and the landlord in November 2013 and that as part of that agreement she was permitted to allow other occupants or sub-tenants to move into the house to help her meet her obligation to pay rent. It was agreed that LSP would be responsible for collecting monies from those occupying the property and remitting the monthly rent to the landlord. The landlord initially indicated to LSP that rent would be \$1,400.00 per month but after further negotiations, rent was set at \$1,300.00 per month.

LSP approached DM about moving to the property in exchange for \$700.00 per month (based upon one-half of \$1,400.00). DM and her husband LM accepted the offer and moved in at the end of November 2013 and paid LSP \$700.00 for the month of December 2013.

With respect to the residential property (a house), I heard LSP primarily uses the basement area and LM and DM primarily use the upper floor. The basement area has a microwave and electric frying pan that LSP uses primarily for cooking but LSP has access to and has used the kitchen on the upper floor for cooking. I heard that the basement bathroom used by LSP includes a toilet and sink only and that, on occasion, LSP showers in the upper bathroom. There is an entry door in the basement that LSP usually uses to come and go but that LSP also answers the main entry door. I heard that the upper unit and the basement do not have a physical barrier between them; however, the occupants are constructing a door way on the landing by the front entrance.

LM took the position that the residential property has two separate living units (an upper suite and a separate basement suite) with LSP living in the separate basement unit and LM and his wife living in the upper unit. LM further submitted that in late January 2014 he formed a separate tenancy agreement with the landlord for rental of the upper unit in the amount of \$650.00. The landlord disputed LM's position and I have summarized their testimony below.

It was undisputed that LM met with the landlord on two occasions in late January 2014. LM testified that during the meetings with the landlord he requested a separate tenancy agreement with the landlord for rent of the upper unit only at the rate of \$650.00 per month. LM claims this was agreed to by the landlord. LM paid the landlord \$600.00 toward outstanding rent for January 2014 and received a receipt in his name. LM did not produce a copy of the receipt as evidence for this proceeding.

The landlord denied that he agreed to enter into a separate agreement with LM. Rather, the landlord stated that LM requested that he be added to the tenancy agreement with LSP, to which the landlord agreed. The landlord accepted the \$600.00 payment from LM as a co-tenant and issued a receipt. The landlord also prepared a written tenancy agreement identifying both LSP and LM as co-tenants. The landlord sent the tenancy agreement to LSP via email for her to review, print and sign but he did not receive a response from LSP.

LSP acknowledged that she did receive an email from the landlord but she was unable to open the attachment in the email. LSP testified that the landlord did not discuss changes to their agreement or adding LM as a tenant with her and that she only heard of a new arrangement when LM told her he had a separate agreement.

With respect to payment of rent for February 2014, LSP testified that she withheld rent for February 2014 since the landlord had not compensated her for her labour to paint the upper floor of the house. LSP acknowledged that no agreement was reached with the landlord as to how much her labour was worth for the painting or that she could deduct a specific amount from rent for her labour. The landlord responded by stating that he paid for the materials for painting and that the monthly rent had been reduced to \$1,300.00 per month in exchange for LSP providing labour for "small jobs".

Although LM was of the position he formed a tenancy with the landlord at the end of January 2014, he acknowledged withholding rent that would have been payable by him if a tenancy did commence. LM testified that they have an infestation of bugs that have stingers and capable of biting. Upon further enquiry, LM identified the bugs as "flying ants".

All of the parties provided consistent testimony that no monies have been paid to the landlord for the month of March 2014.

In addition to an Order of Possession, the landlord is seeking to recover unpaid rent for February and March 2014 in the total sum of \$2,600.00.

I noted that an unsigned tenancy agreement was provided as evidence by the landlord. The tenancy agreement indicates both LSP and LM are co-tenants and that the tenancy commenced on November 15, 2013 requiring the tenants to pay rent of \$1,300.00 on the 1st day of every month. It also reflects payment of a security deposit of \$1,300.00.

LSP confirmed that she paid a \$1,300.00 security deposit, along with \$2,600 for two months of rent. LSP stated that the landlord required a security deposit of \$650.00 for LSP and \$650.00 for LM, which she paid. The landlord responded by stating \$650.00 was for a security deposit and \$650.00 was for a pet damage deposit since there are multiple pets residing at the property. It was undisputed that the tenants have pets.

Analysis

The Act requires that a landlord must prepare and give to the tenant a written tenancy agreement, reflecting the terms agreed upon, for every tenancy entered into. However,

by definition, the Act recognizes a tenancy agreement that is oral, express or implied. This recognition ensures that parties cannot avoid their legal obligations by failing to prepare or execute a written tenancy agreement. The difficulty with agreements that are not written is that corroborating evidence as to what was agreed upon is lacking and an Arbitrator is often left with disputed verbal testimony to make a decision.

In this case, I was provided with an unsigned tenancy agreement as evidence which the tenant was unable to view electronically. Neither party appeared to make any attempt to present or obtain a written agreement in another way despite living very close to one another. Therefore, I am left with verbal testimony to determine the terms of tenancy, and any changes to that agreement.

I find the testimony of all the parties clearly establishes that an oral tenancy formed between LSP and the landlord in November 2013 for the payment of rent of \$1,300.00 per month.

In order to change a tenancy agreement the Act requires that both the landlord and the tenant must agree to that change in order for the change to be binding. In this case, LM met with the landlord without LSP present and, although LM and the landlord have a different version of what was agreed to during their meetings, I find LSP was not privy to any new agreement, whatever it may have been. Both of the versions of the agreement presented by LM and the landlord affect the rights and obligations of LSP under her existing tenancy agreement. Therefore, LSP would have to have agreed with the changes and I conclude that LSP's consent was not obtained based on the testimony of all parties.

In light of the above, I reject LM's position that a new tenancy formed with him and the landlord in late January 2014 as the landlord could not make such an agreement without the consent of LSP. As such, I find that the agreement reached by LSP and the landlord remained in effect as it could not have been changed without her agreement. Therefore, I find LM has no standing as a tenant or a co-tenant under the Act and I dismiss his Application for Dispute Resolution entirely.

As I have found LM to have no standing as a tenant, the Orders provided with this decision identify the tenant as being LSP only.

After hearing the parties describe the residential property that LSP rented I am unsatisfied that there are two rental units at the property. Rather, I find the landlord rented the entire house to LSP. The tenant's attempt to construct a physical barrier

between areas of the house does not satisfy me that two units have come into existence.

With respect to the landlord's application, I find the landlord entitled to an Order of Possession for the reasons provided below.

Under the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement even if the landlord has violated the Act, regulations or tenancy agreement; unless, the tenant has a legal right to withhold rent. The Act provides for very limited circumstances when a tenant may withhold rent.

The Act does not apply to contracts for services (such as painting a property for the landlord) meaning a tenant is not entitled to deduct monies from rent for a service the tenant has performed for the landlord; unless, the landlord has given the tenant consent to deduct an amount from rent or the tenant has been provided authorization from an Arbitrator. In this case, it was undisputed that the landlord did not give LSP consent to deduct monies from the rent for her painting labour and the tenant did not have the prior authorization of an Arbitrator to do so. Therefore, LSP did not have a legal right to withhold rent from the landlord for painting labour. If in fact the tenant and landlord had a contract for painting services the tenant's remedy in the appropriate forum (Small Claims division of Provincial Court).

Having repair issues and/or bug infestations are not a basis for a tenant to withhold rent unless the tenant has the prior authorization from the landlord or an Arbitrator to deduct amounts from rent. The only exception to this is where all of the criteria for "emergency repairs" as provided under section 33 of the Act have been met. In this case, I was not presented evidence to suggest emergency repairs were made by the tenant.

I am satisfied that the tenant did overpay the security deposit as security deposits are limited to one-half of the monthly rent which would be \$650.00 in this case. I reject the landlord's position that \$650.00 was collected as a pet damage deposit as this is not reflected in the written tenancy agreement he prepared and sent to the tenant for signature. The fact that pets reside in the rental unit is not evidence in itself that payment of a pet damage deposit was agreed to by both parties. Since the Act does permit a tenant to deduct the overpaid portion of a security deposit from rent, I find the tenant was entitled to withhold \$650.00 of the rent due for February 2014. Therefore, I find \$650.00 remains outstanding for February 2014.

Where a tenant does not pay all of the rent that is due, the landlord is at liberty to issue a 10 Day Notice to End Tenancy for Unpaid Rent. Upon receipt of a 10 Day Notice, the tenant has five days to pay the outstanding rent or file an Application for Dispute Resolution to dispute it and present a basis for cancellation of the Notice.

In this case, LM filed to dispute the 10 Day Notice; however, that application has been dismissed. Nor did LSP present a legal basis for withholding the remainder of the rent owed for February 2014. Therefore, I find this tenancy has ended for unpaid rent. Accordingly, I provide the landlord with an Order of Possession as requested. Provided to the landlord is an Order of Possession that is effective two (2) days after service upon the tenant.

For certainty and clarity, the Order of Possession applies to the entire residential property and requires LSP and all other occupants, which includes LM and DM, to provide vacant possession of the property to the landlord.

With respect to monetary compensation, I find the landlord entitled to recover unpaid rent of \$650.00 for the month of February 2014 and since the rental unit is still occupied I further award the landlord loss of rent for the month of March 2014 in the amount of \$1,300.00. I also award the landlord recovery of the \$50.00 filing fee paid for the landlord's application.

I have not authorized the landlord to retain the security deposit of \$650.00 as the landlord indicated there may be a possibility the landlord and tenant may be able to re-instate the tenancy if outstanding rent is paid and the property is cleaned up. As such, the security deposit of \$650.00 remains in trust for the tenant, to be administered in accordance with requirements of section 38 of the Act.

In light of the above, the landlord is provided a Monetary Order calculated as follows:

Unpaid Rent: February 2014	\$ 650.00
Loss of Rent: March 2014	1,300.00
Filing fee	<u>50.00</u>
Monetary Order	\$2,000.00

To enforce the Monetary Order it must be served upon the tenant and may be filed in Provincial Court (Small Claims) as necessary.

Conclusion

I have found that LM has no standing as a tenant and his application is dismissed. I have found that LSP is the only tenant at this property and all orders issued with this decision name her as the tenant.

I have provided the landlord an Order of Possession effective two (2) days after service and a Monetary Order in the amount of \$2,000.00. The security deposit of \$650.00 remains in trust for the tenant to be administered in accordance with section 38 of the Act.

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 12, 2014

Residential Tenancy Branch

