



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNSDM MNR, CNR, FF

Introduction

This hearing dealt with two related applications. One was the landlords' application for an order of possession, a monetary order, and an order permitting retention of the security deposit in partial satisfaction of the claim. The other was the tenants' application for an order setting aside a 10 Day Notice to End Tenancy for Non-Payment of Rent. As the parties and circumstances are the same on both applications one decision will be rendered for both.

All parties appeared and had an opportunity to be heard. All parties acknowledged receipt of the Application for Dispute Resolution filed by the other side and their evidence.

The hearing commenced at 10:30 am. The tenant NR, who was in tears and very distraught, advised that she had just received news that her mother had passed away that morning. The landlords were most insistent that the hearing proceed. Just then the tenant took a call from her brother. While I was in the process of obtaining some procedural information from the landlords and the tenant was attempting to compose herself my connection to the conference call was broken. It was over ten minutes before I was able to rejoin the call. Fortunately, all the parties were still there.

I asked NR to try to carry on with the hearing I explained that I would try to keep the hearing as short as possible and as calm as possible. She agreed to try.

All of the parties were able to give their evidence in full. NR gave her testimony in a clear and organized manner.

There was a great deal of emotion from both sides of this dispute, which lengthened the proceedings considerably. Although I heard everything the parties had to say only the evidence that is relevant to the decision will be referenced.

Issue(s) to be Decided

The landlords entitled to an order of possession and, if so, on what terms?
Are the landlords entitled to a monetary order and, if so, in what amount?

Background and Evidence

The tenancy between the male tenant, WK, and the landlord commenced September 20, 2012. The rental unit is one of several located in a house. The monthly rent of \$740.00 is due on the first day of the month. Included in the rent is furniture, utilities, cable and Internet. The landlord collected a security deposit of \$370.00. There is a written tenancy agreement.

In February of 2013 WK allowed his friend NR to move into the rental unit with him. WK did not ask the landlords' permission before making this change nor did he advise the landlord that NR had moved in. It was not until later that spring that the landlord found out that NR was living in the rental unit. The landlord did not take any action against WK for the unauthorized roommate and allowed NR to stay in the unit. However, a new tenancy agreement was not signed and NR was never added to the existing agreement.

When NR moved into the rental unit she had no income because of injuries sustained in an accident. In July of 2013 she began to receive social assistance because of her continued disability. The landlord's son signed the Shelter Information Form. The form stated that the rent was \$760.00 and NR's share was \$380.00. The form very clearly states that it does not constitute a tenancy agreement under the *Residential Tenancy Act*.

WR says that he moved out of the rental unit in August of 2013 because he did not want to live with NR. He says he has only returned to the unit twice since then to pick up some personal possessions. However, he continued to pay the rent in full until April of 2014. WK never told the landlord that he was not living at the rental unit or that he had moved out until the spring of 2014.

NR says that in August of 2013 WK told her he was going to be in another community building a house but that he still wanted to have a place in the city. She says that between September 2013 and July 2014 WK spent a few days every month at the rental unit. She also says that WK still has personal possessions at the unit including a motor vehicle and tools.

WF and NR both filed letters accusing the other of bad behaviour.

NR says that during this time she gave WK her half of the monthly rent in cash and he paid the landlord. She never received a receipt for her contributions. WK says she never contributed anything.

The landlord testified that at the end of March 2014 WK came to her house, told her he was moving out at the end of April, and paid the April rent in full. He did not give a written notice to end tenancy.

On May 1 WK paid the landlord \$500.00. WK says he gave the landlord written notice to end tenancy at that time; the landlord says she does not recall receiving anything in writing. No document was filed in evidence.

In one of these conversations the landlord asked WK to take NR with him as she did not want NR as a tenant. Throughout the hearing the landlord made it very clear that she did not want NR as a tenant.

The landlord testified that at the end of May she called both WK and NR. WK said he was not living at the unit; JR said he was.

On June 14 the landlord served NR with a 10 Day Notice to End Tenancy for Non-Payment of Rent. The notice was addressed to NR only. NR says this was the first time she heard that WK had not paid the rent in full. NR was expecting payment for some work she had done and promised to pay the arrears.

On June 27 NR made a payment of \$500.00. The landlord gave her a receipt with the notation "For use and occupancy only. It doesn't form a tenancy agreement."

NR made another payment of \$500.00 on July 27. The landlord gave her a receipt that said "For use and occupancy only does not reinstate tenancy".

The payment NR was expecting did not materialize. She also quit receiving assistance in July. No payment was made towards rent in August.

On August 19, 2014 the landlord again served NR with a 10 Day Notice to End Tenancy. That notice was addressed only to NR. NR filed this application disputing the notice on August 22.

NR paid \$380.00 on September 1, 2014 and \$500.00 on October 1, 2014. She received a receipt for each payment that said "for use and occupancy only does not reinstate tenancy".

NR testified that sometimes WK will say he is going to move out and other times he will say he is not going to. In their most recent conversation she told him she wanted to move out and he said that if she moved out he would move back in. She was very clear that WK was only prepared to move in if she was moving out.

Analysis

The end of April 2014 the legal situation of the parties is very clear. WK is the sole tenant pursuant to the tenancy agreement and is solely responsible for the rent. NR was merely an occupant of the rental unit, not the tenant. Her arrangement was with WK and was not subject to the *Residential Tenancy Act*.

Section 44(1) of the *Act* sets out the circumstances in which a tenancy ends. Those relevant to this application are:

- The landlord and tenant agree in writing to end the tenancy.
- The tenant gives written notice to end tenancy.

- The tenant vacates or abandons the rental unit.
- The landlord gives the tenant a 10 Day Notice to End Tenancy for Non-Payment of Rent.

The tenant says he gave written notice to end tenancy on May 1. If that is the case the effective date of the notice would be June 30. However, the onus is on WK to prove that he did provide the landlord with written notice to end tenancy. The only evidence on this point is the contradictory oral testimony of the landlord and WK. (For example the landlord said WK told her he was moving out and she accepted his oral notice because she trusted him. But if she accepted that he was moving out why did she call him the following month looking for the rent?) WK has not established on a balance of probabilities that he gave written notice to end tenancy.

Between the nature of the rental unit (fully furnished) and the contradictory evidence of the witnesses it is impossible to conclude whether WK has vacated or abandoned the rental unit and has no intention of returning to it, or is just waiting for NR to move out so he can move back in.

WK has not established that he has ended his tenancy through any action of his own.

When NR made a payment in June the landlord was very clear that she was not entering into a tenancy agreement with NR. That payment, and all other payments made by NR, was for use and occupancy only. NR's legal status remains a mere occupant, not a tenant.

Section 46 allows a landlord to end a tenancy if rent is unpaid on any day after the day it is due by giving a notice to the tenant in the prescribed form. The evidence is clear that the rent is in arrears. However, the notice to end tenancy was addressed to the occupant of the unit, not the tenant. Accordingly, the 10 Day Notice to End Tenancy for Non-Payment of Rent dated August 19, 2014 is invalid.

A monetary order for arrears of rent cannot be made until the tenancy has ended.

Accordingly the landlords' application for an order of possession and a monetary order must be dismissed.

Although the tenants were successful on their application to set aside the notice to end tenancy they did not pay any fee to file their application. No further order regarding the filing fee is necessary.

Conclusion

- a. The application by the landlords is dismissed.
- b. WK's tenancy has not been ended by any action he has taken. Until it is, he remains the tenant and remains responsible for the rent.

- c. NR does not have a tenancy agreement with the landlord. She is not a tenant, merely an occupant, and the *Residential Tenancy Act* does not apply to her living arrangement.
- d. The 10 Day Notice to End Tenancy for Non-Payment of Rent dated August 19, 2014 is invalid and is of no force or effect. WK's tenancy continues until ended in accordance with the legislation.
- e. As of October 31, 2014 the arrears of rent are \$2060.00.
- f. Any issue between WK and NR regarding payment of past rent and/or arrears of rent is outside the jurisdiction of the Residential Tenancy Branch. That dispute must be heard and decided in the Small Claims Court.

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: November 05, 2014

Residential Tenancy Branch

