



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, OPC, MNR, MNDC, MNSD, FF
GNE, CNC, CNR, FF

Introduction

This hearing was convened by way of conference call concerning applications made by the landlord and by the tenant. The landlord's amended application seeks an Order of Possession and a monetary order for unpaid rent or utilities; for an Order of Possession for cause; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of the application. The tenant has applied for an order cancelling a notice to end tenancy for landlord's use of property, for an order cancelling a notice to end tenancy for unpaid rent or utilities, and to recover the filing fee from the landlord.

The parties both attended the hearing and the landlord was accompanied by a person who was in attendance only for the purpose of morale support to the landlord and did not testify. The tenant did not object. The parties each gave affirmed testimony and provided evidentiary material in advance of the hearing to the Residential Tenancy Branch and to each other. The parties were given the opportunity to cross examine each other on the evidence and testimony provided.

Preliminary Issues

Exchange of Evidence

During the course of the hearing the landlord advised that the tenant provided the landlord with 27 pages of evidence 3 days prior to the hearing, not 42 pages as received by the Residential Tenancy Branch or any photographs.

The tenant advised that only one of the 2 packages of evidence provided by the landlord was received by the tenant, and that all that the tenant has received are the

gas bills. The landlord advised that the 2 evidence packages were sent by Registered mail on October 24, 2014 and November 7, 2014. The second package was not picked up by the tenant.

The Residential Tenancy Branch has received the following from the tenant:

- 2 pages of text messages, received on November 19, 2014;
- 4 photographs, received on November 13, 2014;
- 12 photographs, received on November 12, 2014;
- 8 pages including 5 pages of a 6-page tenancy agreement, received on November 10, 2014;
- 42 pages, received on November 7, 2014;
- A 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, received on November 5, 2014 (both pages of the 2-page form);
- A 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, received on October 23, 2014 (only page 1 of the 2-page form), along with another document entitled "Appendix B – NOTICE TO END A RESIDENTIAL TENANCY"

The following evidence has been provided by the landlord:

- 15 pages including Canada Post receipt dated November 7, 2014 for registered mail to the tenant and a Canada Post receipt dated October 24, 2014 for registered mail to the tenant and 2 notices to end the tenancy, received on November 7, 2014;
- 32 pages including a copy of a 6-page tenancy agreement, received October 22, 2014.

In the circumstances, I am satisfied that the tenant has been provided with the evidence of the landlord as required by the Residential Tenancy Branch Rules of Procedure. However, I am not satisfied that the tenant has provided the landlord with all of the tenant's evidence. The landlord advised that 27 pages were received, but did not indicate exactly what was received, other than no photographs. I also find that some of the documents provided by the parties have been duplicated by the other party, such as natural gas bills and notices issued by the landlord. I am not convinced that the landlord has received the 2 pages of text messages or the photographs provided by the tenant and I decline to consider any of them. With respect to the 8 pages which include 5 pages of a 6-page tenancy agreement, received on November 10, 2014, and the 42-page evidence package, I am unable to determine which portions the landlord has received, and therefore, I decline to consider any of that evidence.

Amendment

The tenant has applied for an order cancelling a notice to end tenancy for landlord's use of property and the parties agree that the landlord did not issue a notice to end tenancy for landlord's use of property. The parties agree that notices issued by the landlord were for unpaid rent or utilities and for cause. Therefore, I find that the tenant has simply checked the incorrect box in the application and I amend the application to show that the tenant has applied for an order cancelling a notice to end tenancy for unpaid rent or utilities; for an order cancelling a notice to end tenancy for cause; and to recover the filing fee from the landlord.

Issue(s) to be Decided

- Is the landlord entitled under the *Residential Tenancy Act* to an Order of Possession for unpaid rent or utilities?
- Should the notice to end tenancy given by the landlord be cancelled?
- Is the landlord entitled under the *Residential Tenancy Act* to an Order of Possession for cause?
- Should the notice to end tenancy given by the landlord be cancelled?
- Has the landlord established a monetary claim as against the tenant for unpaid rent or utilities?
- Has the landlord established a monetary claim as against the tenant for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for items purchased as part of an agreement?
- Should the landlord be permitted to keep all or part of the security deposit in full or partial satisfaction of the claim?

Background and Evidence

The landlord testified that this fixed-term tenancy began on December 1, 2013 and expires in April, 2015; the tenant still resides in the rental unit. Rent in the amount of \$1,350.00 per month is payable in advance on the 1st day of each month. Prior to the commencement of the tenancy the landlord collected a security deposit from the tenant in the amount of \$675.00 which is still held in trust by the landlord, and no pet damage deposit was collected.

The landlord has provided a copy of the tenancy agreement, and testified that it was changed during the tenancy; the parties had agreed that the tenant would pay for the gas bills of the rental unit and \$200.00 per month for hydro for all 3 rental units within the rental complex. The tenancy agreement was changed to reflect that after the tenant

signed it. The copy provided by the landlord shows: "The tenant will pay rent of \$1350 + utilities each month to the landlord on the first day of the rental period which falls on the 1st day of each month subject to rent increases given in accordance with the RTA." The paragraph marked b) shows that stove and oven, dishwasher, window coverings, laundry (free), storage, garbage collection and parking are included in the rent and, "Additional Information" shows "\$200 Electric – all Fortis Gas." An initial which appears to be that of the tenant appears beside the amount of rent payable. The landlord also testified that the tenancy agreement provides that all of the gas bills for 3 rental units in the complex are the responsibility of the tenant, but the tenant has only paid \$100.00 during the tenancy. Copies of gas bills have been provided.

The landlord further testified that the parties had a conversation wherein the tenant asked the landlord to let the tenant out of the lease, and if the landlord would find another tenant and rent it out for the summer because the tenant could not afford the rent. The tenant was also working out of town. The landlord replied that a suitable tenant could be found and the parties agreed that the tenant would provide certain amenities to prospective summer tenants, such as a bed, linens, towels and basic necessities. The parties agreed that the landlord would pay to the tenant the sum of \$6,400.00 for July 6 to September 11, 2014 rentals. The tenant didn't comply with the agreement, and the landlord had to purchase the amenities amounting to about \$550.00, so in July, 2014, the landlord purchased them and charged them against the \$6,400.00 owed to the tenant. No receipts for the items have been provided.

The tenant has not paid any rent since June, 2014, and the landlord expected that during the summer months, the tenant would continue to pay rent even though rent was being accepted from other tenants on a weekly basis. The landlord was not able to provide complete testimony with respect to the amount of money the landlord collected for rent from other tenants during the weeks between July 6 and September 11, 2014 when the tenant moved back in. The landlord was able to determine that for one of those weeks, the landlord collected \$1,000.00 and for 3 other weeks \$800.00 per week was collected. The landlord has not given the tenant any of the money but has applied the \$6,400.00 to the \$1,350.00 per month for rent due from the tenant and other expenses. The landlord has provided several documents showing calculations.

The landlord further testified that on October 8, 2014 the tenant was personally served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and the tenant did not respond so the landlord applied for an Order of Possession through the Direct Request process. The landlord did not have a witness to the service of the notice, so the landlord served another with a witness present. The landlord served the tenant with a 10 Day Notice to End Tenancy on November 2, 2014 by posting it to the door of the

rental unit. A copy of the notice has been provided and it is dated November 1, 2013 and contains an expected date of vacancy of November 12, 2014 for unpaid rent in the amount of \$1,350.00 that was due on November 1, 2014. (My emphasis added).

The landlord also served the tenant personally on October 8, 2014 with a 1 Month Notice to End Tenancy for Cause for repeated late rent, but used an out-dated form. The landlord served another on November 1, 2014. The tenant filed the application for dispute resolution disputing a notice to end tenancy for unpaid rent or utilities on October 10, 2014, but the November 1, 2014 notice had not been issued by then and has not been disputed, therefore the landlord requests an Order of Possession. The landlord has not provided copies of either notice dated October 8, 2014 or a 1 Month Notice to End Tenancy dated November 1, 2014.

The landlord further testified that the tenant was served with a 1 Month Notice to End Tenancy on October 24, 2014 by posting it to the door of the rental unit. A copy of the notice has been provided. It is not dated by the landlord, and contains an expected date of vacancy of November 30, 2014.

The landlord has also provided a Monetary Order Worksheet showing a monetary claim for past due rent, utilities, anticipated utilities, cost of registered mail and recovery of the filing fee for a total claim of \$4,216.93.

The tenant testified that the parties had initially agreed to rent out the rental unit for the summer together. The parties agreed that the tenant would get \$6,400.00 but the tenant does not know what the landlord charged or collected from other tenants during the summer.

The tenant also disputes the amount of utilities charged by the landlord. At the outset of the tenancy the landlord said that it would be about \$160.00 on average, and the tenant told the landlord that it couldn't be more because the utilities were shared with other tenants. The tenant had no access to the thermostat, so the rental unit in the upper level used the gas and the tenant now discovers that the landlord is charging \$200.00 per month in addition to a charge for gas. The tenant was not shown how to light the pilot light and the thermostat doesn't work. The average is \$224.00 per month and it seems that the tenant is paying for all of the rental units. The tenant paid \$700.00 in total for utilities, not \$100.00 as claimed by the landlord.

The tenant also disputes that the landlord has any claim for the amenities purchased by the landlord. The landlord has retained all of the items purchased.

Analysis

I am satisfied in the evidence before me that the parties agreed to a sub-let arrangement with the landlord collecting rent from sub-tenants. I am also satisfied that the parties had a tenancy agreement for rent in the amount of \$1,350.00 per month. The landlord collected rent from the sub-tenants and also claims the monthly rent from the tenant. The landlord was not able to provide any testimony with respect to how much was collected from sub-tenants, but clearly the landlord collected more than the tenant was required to pay under the tenancy agreement. Therefore, I find that the landlord has not established that the tenant owed any rent for the months of July, August or September, 2014. The landlord also failed to establish what over-payment there may have been during the sub-tenancies, and the landlord has testified that the agreement was to pay the tenant the sum of \$6,400.00. In the absence of any evidence of what exactly the landlord collected by other tenants, I am not satisfied that the landlord has established that the tenant owes any amount for rent or utilities.

With respect to the landlord's application for a monetary order for items purchased for the rental unit, any such monetary award must not put the landlord in a better financial situation than the landlord would be if the parties had not made such an agreement. In this case, the landlord has failed to establish their worth and has retained all of the items. Clearly any monetary award for these items would put the landlord in a better financial situation – the landlord would receive money for items that she retained. I dismiss the landlord's application for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement.

The landlord also testified that the landlord served 2 notices to end the tenancy upon the tenant on October 8, 2014 but that both notices contained errors. The tenant disputed them by filing an application for dispute resolution on October 10, 2014. The landlord testified that the notices were then re-issued due to the errors, and has provided a copy of a 10 Day Notice to End Tenancy issued on November 1, 2013 for unpaid rent in the amount of \$1,350.00 that was due on November 1, 2014. The tenant was served on November 2, 2014 by posting it to the door of the rental unit, and because the tenant's application had already been filed, the landlord submits that the tenant has failed to dispute that notice. I don't disagree, however, the documentation shows that the notice was issued a year before the alleged breach, and the *Residential Tenancy Act* states that in order to be effective, a notice given by the landlord must be dated, signed by the landlord, and give an effective date. Therefore, I find that it is not effective and the landlord's application for an Order of Possession based on that notice cannot succeed.

With respect to the 1 Month Notice to End Tenancy for Cause, the *Act* requires that a notice ending the tenancy when given by the landlord must be dated, signed by the landlord, and give an effective date. In this case, the notice is not dated, and therefore is not effective, and the landlord's application for an Order of Possession based on that notice cannot succeed.

Since the landlord has not been successful with the applications for a monetary order, the landlord is not entitled to keep the security deposit to off-set the claim, and I dismiss that portion of the landlord's application.

With respect to the tenant's application, the notices that the tenant seeks to cancel are superseded by the other notices described in the landlord's evidence portion of this Decision, and therefore, the tenant's application to cancel those notices is hereby dismissed.

Since neither party has been successful with the applications, I decline to order that either party recover the filing fee.

Having dismissed the landlord's applications for Orders of Possession, the tenancy continues. I suggest that the parties provide evidentiary material to each other to determine the amount of rent that the landlord has collected and what amount remains for the tenant to pay, if any.

Conclusion

For the reasons set out above, the applications of the landlord and of the tenant are dismissed, and the tenancy continues.

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: December 04, 2014

Residential Tenancy Branch

