



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, OPR

Introduction

This matter proceeded by way of an *ex parte* Direct Request Proceeding, pursuant to subsection 55(4) of the *Residential Tenancy Act* (the “Act”), and dealt with an Application for Dispute Resolution by the landlords for an order of possession based on unpaid rent and a monetary order.

Issues to be Decided

Are the landlords entitled to an order of possession for unpaid rent? Are the landlords entitled to monetary compensation for unpaid rent?

Background and Evidence

The landlords submitted the following evidentiary material:

- copies of the Proofs of Service of the Notice of Direct Request Proceeding served to each of the tenants;
- a copy of the residential tenancy agreement;
- a Monetary Order Worksheet;
- a copy of a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice); and
- a copy of the Proof of Service of the 10 Day Notice.

On the Proofs of Service of the Notice of Direct Request Proceeding the landlords have not indicated that they served the tenants with the supporting documents for their application; however there is a handwritten note that seems to indicate that the documents were served to the tenants.

The tenancy agreement is dated 21 April 2008 and establishes a monthly rent of \$2,000.00.

The 10 Day Notice is dated 31 January 2015. The 10 Day Notice sets out outstanding rent of \$4,600.00 was due on 1 January 2015. The 10 Day Notice sets out an effective date of 10 January 2015.

The Proof of Service for the 10 Day Notice indicates that the 10 Day Notice was served 1 January 2015.

The landlords submitted a handwritten note that sets out that the landlords received a payment on 11 January 2015. A copy of the tenants' cheque indicates that it was provided for "Rent". I was not provided with a copy of the receipt provided to the tenants.

Analysis

Direct request proceedings are *ex parte* proceedings. In an *ex parte* proceeding, the opposing party is not invited to participate in the hearing or make any submissions. As there is no ability of the tenant to participate, there is a much higher burden placed on landlords in these types of proceedings than in a participatory hearing. This higher burden protects the procedural rights of the excluded party and ensures that the natural justice requirements of the Residential Tenancy Branch are satisfied.

There are numerous deficits and inadequacies in the landlords' application. I have identified four flaws fatal to the landlords' direct request application:

1. the 10 Day Notice was given on 1 January 2015 for rent due on 1 January 2015;
2. the 10 Day Notice sets out that it was created after it was delivered to the tenants;
3. the landlord may have reinstated the tenancy by receiving the payment from the tenants; and
4. the landlords have not provided me with proof of the current rent amount.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

In this case, the landlords served the tenants the 10 Day Notice on 1 January 2015 for rent that was due on 1 January 2015. As the 10 Day Notice was clearly not given the

day after rent was due, the 10 Day Notice was given too early in respect of the landlords' claim for January's rent.

Subsection 68(2) of the Act allows me to amend a notice given under the Act that does not comply with the Act. In this case, I could amend the 10 Day Notice to exclude January's rent. Although the mistake does not go to the substance of the 10 Day Notice, that is, a 10 Day Notice could have still been validly issued on 1 January 2015 as November's (partially) and December's (fully) rents were outstanding, I decline to exercise my discretion to do so. I decline to exercise my discretion to correct the 10 Day Notice as I have not received an application from the landlords to make such an amendment and it would be highly prejudicial to the tenants to do so in an *ex parte* application.

Similarly, the 10 Day Notice contained a defect in that the date given for the notice was 31 January 2015. It appears to me that the landlords likely intended to date the 10 Day Notice 1 January 2015. As mentioned above, subsection 68(2) would allow me to cure this defect; however I decline to exercise my discretion to amend this date. I decline to exercise my discretion as I am uncertain as to the correct date and I do not have any application from the landlords to make such an amendment. Further, it would be highly prejudicial to the tenants to make such an amendment in an *ex parte* application.

The landlords have accepted payment from the tenants after the issuance of the 10 Day Notice. The tenants' cheque indicates that they delivered the payment as rent. I have not been provided with any evidence that the landlords only accepted this payment for the tenants' use and occupancy of the rental unit. Without this evidence, it is uncertain if the tenancy has been reinstated.

Residential Tenancy Policy Guideline "39. Direct Requests" sets out the burden of proof on the landlord in a direct request proceeding. This guideline sets out that a landlord must provide copies of:

1. the tenancy agreement;
2. documents showing changes to the tenancy agreement or tenancy;
3. documents supporting the amount of rent due;
4. the 10 Day Notice; and
5. proof that the landlord served the tenant with the 10 Day Notice.

The tenancy agreement states that the tenants agreed to pay rent of \$2,000.00 per month, yet the landlords claim is for \$2,100.00 per month. I have not been provided with any proof that the landlords were entitled to this additional \$100 per month. In

failing to provide me with this evidence, the landlords have failed to provide me with documents that support the amount of rent due.

In addition to these fatal flaws, there are questions that remain unanswered as to the adequacy of the landlords' service to the tenants. In particular, the landlords failed to indicate whether they had served the tenants with copies of "all supporting documents".

On the basis of the landlords' flawed application, I am unable to grant the landlords any of the relief that they seek in their application. I dismiss the landlords' application with leave to reapply for a participatory hearing subject to the following caution.

Given the flaws in the current 10 Day Notice, the landlords may choose to reissue a 10 Day Notice to the tenants. In the alternative, the landlords may make a request of an arbitrator in a participatory hearing to amend the current 10 Day Notice. **The landlords are cautioned that this request may be granted at the arbitrator's discretion and the landlords are not entitled to any amendments.**

Conclusion

The landlords' application is dismissed with leave to reapply with the caution as noted above.

Leave to reapply is not an extension of any applicable limitation period.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: January 21, 2015

Residential Tenancy Branch

