



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, OPB, MNR, FF

Introduction

This hearing dealt with an application by the landlord for an order of possession and a monetary order. Both parties appeared and had an opportunity to be heard.

One of the landlords named on this application is the owner of the property and the other is her agent. The landlord was not able to give very much information about the financial transactions with the tenant because those were handled by the agent.

The agent had difficulty with her telephone throughout the hearing. She was the first witness to be sworn in. After a few minutes her connection with the conference call was broken. I waited a few minutes to see whether she would call back into the hearing. When she did not I swore in the owner and received her testimony.

At the request of the owner I called the agent, reached her and added her to the call. The agent told me she was in her vehicle and was having trouble with her telephone. I advised her that if she was disconnected again to call back using the same telephone number and hearing code.

I was able to hear some additional evidence from the agent before her connection was broken again. For the balance of the hour long hearing the agent continued to try to rejoin the conference. Either her connection was immediately broken or she could not hear anything and would hang up.

Issue(s) to be Decided

- Are 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

This month to month tenancy commenced June 1, 2014. The monthly rent of \$1200.00, which does not include heat or electricity, is due on the first day of the month. A security deposit was not paid.

The tenant gave the landlord two cheques for the January rent; one dated January 1, 2015 in the amount of \$750.00 and the other dated January 15 in the amount of \$450.00.

There are a number of issues at the rental unit involving the many other people staying there. As a result of those issues the tenant stopped payment of the two cheques.

The landlords served the tenant personally with a 10 Day Notice to End Tenancy on January 3, 2015.

The tenant did not file an application for dispute resolution with the Residential Tenancy Branch disputing the notice.

Before she was disconnected from the call the agent testified that the tenant paid \$400.00 on January 4 or 5 and an additional \$400.00 on January 15. The tenant testified that she gave the agent \$400.00 cash on January 5 and additional \$450.00 cash on January 15. She testified that she received a receipt from the agent for the January 15 payment that contained the notation "\$350.00 to be owed from downstairs". The owner of the property said she had not seen the receipt and did not know anything about it. By this time the agent was no longer on the call and was never able to rejoin it.

The agent and the tenant both testified that the tenant paid \$1155.00 towards the February rent on February 2. The tenant said that was all the money she had at the time and the agent has always allowed her to pay the rent in installments.

Both the agent and the tenant testified that the tenant was given a receipt for this payment.

Both also testified that none of the receipts given to the tenant included a notation that the payment was accepted "for use and occupancy only".

Copies of the receipts were not filed in evidence by either party.

Analysis

Quite a bit of evidence was given by both parties about people living with the tenant, people living in the basement, and people living in the shed. Once I realized that this evidence was being given in support of the landlords' application to end the tenancy for breach of an agreement I stopped the parties.

I explained to the parties that that particular application relates to situations where the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit at the end of the fixed term or, the landlord and tenant have agreed in writing that the tenancy is ended.

I explained to the parties that a landlord may apply to end a tenancy for cause if the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 but that the landlord must first serve the tenant with a 1 Month Notice to End Tenancy for Cause.

I explained to the parties that s. 26(1) of the Residential Tenancy Act requires a tenant to pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, regulation or tenancy agreement, unless the tenant has a legal right under the Act to deduct all or a portion of the rent. (The most usual situation is where a tenant has an order from an arbitrator authorizing the withholding of all or a portion of the rent.)

I explained to the parties the consequences of s. 46(4). If a tenant does not pay the arrears of rent in full or file an application for dispute resolution disputing the 10 Day Notice to End Tenancy within five days of being served with the notice 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 by the effective date of the notice.

I also explained that acceptance of all or a portion of the rent after the effective date of the notice will be interpreted as reinstatement of the tenancy unless the landlord has made it clear, in writing, to the tenant that the payment is being accepted "for use and occupancy only".

Based on the evidence I cannot find that the landlord did make it clear to the tenant that they did not intend to reinstate the tenancy when they accepted the January 15 and February 2 payments. Accordingly, the landlord's application for an order of possession based upon the 10 Day Notice to End Tenancy is dismissed without leave to re-apply.

The landlord's application for an order of possession based upon a breach of the agreement is dismissed without leave to re-apply, because that is not the proper application for this situation.

Because the landlord's agent was not able to finish her testimony and, in particular, was not able to explain the meaning of the January 15 receipt or the circumstances around that payment, I am not going to make any finding as to whether there is rent owed for January. Accordingly, this part of the landlord's application is dismissed with leave to re-apply.

There is only a small balance owing for February. The tenant has an obligation to comply with the tenancy agreement and to pay the balance. Failure to do so gives the landlord the right to issue and serve a new 10 Day Notice to End Tenancy for Non-Payment of Rent.

As the landlords have not been successful on this application, no order from reimbursement from the tenant of the filing fee paid by the landlords will be made.

Conclusion

For the reasons detailed above, the landlords' application is dismissed.

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: February 12, 2015

Residential Tenancy Branch

