



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR

Introduction

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

The landlord submitted a signed Proof of Service of the Notice of Direct Request Proceeding which declares that on March 10, 2015, the landlord served the tenant with the Notice of Direct Request Proceeding via registered mail. The landlord provided a copy of the Canada Post Customer Receipt containing the Tracking Number to confirm this mailing. Section 90 of the *Act* determines that a document served in this manner is deemed to have been received 5 days after service.

Based on the written submissions of the landlord, and in accordance with sections 89 and 90 of the *Act*, I find that the tenant has been deemed served with the Direct Request Proceeding documents on March 15, 2015, the fifth day after their registered mailing.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent pursuant to sections 46 and 55 of the *Act*?

Is the landlord entitled to monetary compensation for unpaid rent pursuant to section 67 of the *Act*?

Background and Evidence

The landlord submitted the following evidentiary material:

- A copy of the Proof of Service of the Notice of Direct Request Proceeding served to the tenant;
- A copy of a residential tenancy agreement which was signed by the tenant on January 30, 2015, indicating a monthly rent of \$800.00 due on the first day of the

month for a tenancy commencing on January 1, 2015. The tenancy agreement demonstrates that another tenant, identified as "DH", was also a signatory to the tenancy agreement. However, "DH" is not named as a respondent in this application. The landlord's name is listed on the tenancy agreement; however, the landlord's signature does not appear on the tenancy agreement. A tenancy agreement is an instrument of the landlord, and, once endorsed by the tenant, the landlord's failure to sign their own agreement does not invalidate it.

- A Monetary Order Worksheet showing the rent owing during the portion of this tenancy in question, on which the landlord establishes a monetary claim in the amount of \$1,200.00 for outstanding rent owing for February 2015 and March 2015;
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) dated March 2, 2015, which the landlord states was served to the tenant on March 2, 2015, for \$1,200.00 in unpaid rent due on March 1, 2015, with a stated effective vacancy date of March 12, 2015; and
- A copy of the Proof of Service of the Notice showing that the landlord served the Notice to the tenant by way of posting it to the door of the rental unit at 10:00 pm on March 2, 2015. The Proof of Service form establishes that the service was witnessed by "DD" and a signature for DD is included on the form.

The Notice restates section 46(4) of the *Act* which provides that the tenant had five days to pay the rent in full or apply for Dispute Resolution or the tenancy would end on the effective date of the Notice. The tenant did not apply to dispute the Notice within five days from the date of service and the landlord alleged that the tenant did not pay the rental arrears.

Analysis

I have reviewed all documentary evidence provided by the landlord. Section 90 of the *Act* provides that because the Notice was served by posting the Notice to the door of the rental unit, the tenant is deemed to have received the Notice three days after its posting. In accordance with sections 88 and 90 of the *Act*, I find that the tenant is deemed to have received the Notice on March 5, 2015, three days after its posting.

Section 46 of the *Act* provides, in part, the following with respect to a 10 Day Notice to End Tenancy for Unpaid Rent:

46 (4) Within 5 days after receiving a notice under this section, the tenant may

- (a) pay the overdue rent, in which case the notice has no effect, or
- (b) dispute the notice by making an application for dispute resolution.

I find that, as the tenant received the Notice on March 5, 2015, the tenant's latest opportunity to either pay, in full, the amount listed on the Notice, or to file for dispute resolution to dispute the Notice, would have been March 10, 2015. By extension of the provisions of subsection 46(4)(b) of the *Act*, the landlord's earliest opportunity to apply for an Order of Possession would therefore have been March 11, 2015. I find that the landlord has made an application early by one day. I further find that the landlord has not provided any evidentiary material to clearly demonstrate that the tenant received the Notice earlier than March 4, 2014.

The landlord provided a copy of a text message which depicts that the sender of the message is an individual identified as the tenant. The copy of the text message, by the manner in which it presents, does not include a date and time, and further, the contents of the message are ambiguous. The message alludes to "a little letter" placed on the door which the tenant confirms receipt of. There is no additional evidence provided to elaborate as to the nature of, or the contents of, the item referred to as the "little letter" or the date on which the item was received. In the absence of any evidentiary material to prove that the tenant received the Notice on a date earlier than March 5, 2015, I rely on the Proof of Service of the Notice provided by the landlord and find that the tenant received the Notice on March 5, 2015.

Section 55 of the *Act* provides, in part, the following with respect to the manner in which a landlord can obtain an Order of Possession:

55 (2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

(b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;

As provided by section 55 of the *Act*, a landlord may request an order of possession of a rental unit *after* the time afforded to a tenant to make an application for dispute resolution to dispute a notice to end the tenancy has expired. In the matter before me, I find that the time provided to the tenant to dispute the Notice extended to March 10, 2015 and the landlord's earliest opportunity to apply for an Order of Possession would therefore have been March 11, 2015. The provisions of section 55 of the *Act* further demonstrate that the landlord has submitted an application for dispute resolution early by one day. Therefore, I dismiss the landlord's application with leave to reapply.

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 for the tenants 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.

In this type of matter, the landlords must prove they served the tenant with the Notice of Direct Request Proceeding, the Notice, and all related documents with respect to the Direct Request process, in accordance with the *Act* and Policy Guidelines. In an *ex parte* Direct Request Proceeding, the onus is on the landlord to ensure that all submitted evidentiary material is in accordance with the prescribed criteria and does not lend itself to ambiguity or give rise to issues that may need further clarification beyond the purview of a Direct Request Proceeding. If the landlord cannot establish that all documents meet the standard necessary to proceed via the Direct Request Proceeding, the application may be found to have deficiencies that necessitate a participatory hearing, or, in the alternative, the application may be dismissed.

Furthermore, I find that there is a deficiency in the tenancy agreement drafted by the landlord which brings into question the actual amount of rent owed by the tenant. The tenancy agreement signed by the tenant does not establish that the agreement includes an addendum. However, the landlord has provided a hand-written document titled "Additional Term-Rental Tenancy Agreement" which does not contain the signature of the tenant. The document does not contain any names and includes only two signatures, which in the absence of any accompanying names, cannot be identified as belonging to either the tenant or the landlord. Therefore, based on the foregoing, I cannot determine whether the tenant endorsed the additional terms, as outlined in the document, as forming a part of the actual tenancy agreement.

Furthermore, the first additional term creates a scenario whereby the monthly rent may fluctuate between \$800.00 and \$1000.00 depending upon whether the landlord provided daycare services which account for the \$200.00 discrepancy in monthly rent owed. This condition is reflected on the Notice, on which the landlord includes an additional fee of \$200.00, as the landlord describes, "in lieu of daycare see rental agreement." The landlord's monetary claim, as well as the amount listed on the Notice, rely on the inclusion of this additional fee which cannot be addressed by the Direct Request process. The Direct Request process allows landlords to seek a monetary claim arising only from unpaid rent or utilities. The inconsistency with respect to the Notice is further aggravated as I find that the tenant signed a tenancy agreement which listed a monthly rent amount of \$800.00 and did not include any additional fee of \$200.00 which may have caused a subsequent fluctuation in the monthly rent owed by increasing it to \$1000.00.

The text message provided by the landlord also includes a statement provided by the tenant which alludes to the tenant being in possession of all past receipts with respect to rent paid. Although there are inconsistencies with respect to the correct amount of rent owed under this tenancy, the landlord has demonstrated, by way of an uncontested Notice provided to the tenant, that there may be rent owing for the month of March 2015.

I find that the landlord's application contains deficiencies which do not permit me to consider this application for dispute resolution via the Direct Request process. These deficiencies cannot be remedied by inferences in the absence of more evidentiary material, or oral testimony, which clarifies the questions raised by these inconsistencies. Therefore, I dismiss the landlord's application for an Order of Possession and a monetary Order with leave to reapply.

It remains open to the landlord to reapply for dispute resolution via the Direct Request process if all requirements for an application for dispute resolution via Direct Request, as outlined in Policy Guideline #39, can be met, or, in the alternative, the landlord may wish to submit an application for dispute resolution to be heard via a participatory hearing. Given the nature of the deficiency identified with respect to the tenancy agreement, the landlord may wish to submit an application for dispute resolution to be heard via a participatory hearing

Conclusion

I dismiss the landlord's application with leave to reapply.

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 18, 2015

Residential Tenancy Branch

