



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MNDC, MNSD, FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the landlords' 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their security deposit and pet damage deposit (the deposits) pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

The tenants both appeared. The landlords appeared. The parties in attendance were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlords were represented by their agents: VN and WN.

At the hearing the landlords' agent VN made an oral request for an order of possession.

The tenants seek a total monetary order in the amount of \$2,780.00: The tenants claim for return of \$1,390.00 from their deposits and \$1,250.00 for the cost of their alternative accommodation for the period 16 to 30 June 2015.

The landlords did not raise any issue with service of the tenants' documents.

Preliminary Issue – Amendment to Tenants' Application

At the hearing the tenants indicated that they vacated the rental unit in June. I asked the tenants if they wished to withdraw their application to cancel the 10 Day Notice. The

tenants indicated that they did not wish to make such an amendment. The tenants sought to amend their application to include an order of possession in their favour.

Paragraph 64(3)(c) allows me to amend an application for dispute resolution. In determining whether to grant an amendment I must consider the effect on the responding party.

In this case, the landlords did not have any notice that the tenants sought to amend their application in this way. I refused to grant the amendment as the amendment would result in undue prejudice to the landlords.

Preliminary Issue – Landlords' Evidence

The tenant GB testified that she received the landlords' evidence in an express post mailing dated 16 July 2015. This evidence is deemed received by the tenants 21 July 2015. The tenants submitted that the landlords' evidence was served outside the time limits prescribed by the *Residential Tenancy Branch Rules of Procedure* (the Rules).

Rule 3.15 sets out that an applicant must receive evidence from the respondent not less than seven days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.15 and the definition of days, the last day for the landlords to file and serve evidence in reply to the tenants' application was 18 July 2015.

This evidence was not served within the timelines prescribed by rule 3.15 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

As the tenants would be prejudiced by the admission of the landlords' documentary evidence, I refused to admit it.

Issue(s) to be Decided

Should the landlords' 10 Day Notice be cancelled? If not, are the landlords entitled to an order of possession? Are the tenants entitled to a monetary award for the return of a portion of their deposits? Are the tenants entitled to a monetary award for loss arising out of this tenancy? Are the tenants entitled to recover the filing fee for this application from the landlords?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and my findings around it are set out below.

This tenancy began 2 October 2014. The tenancy was for an initial fixed term of one year. Monthly rent of \$2,780.00 was due on the first. At the beginning of the tenancy, the landlords collected a pet damage deposit in the amount of \$1,390.00 and a security deposit in the amount of \$1,390.00, which they continue to hold. The tenancy ended 15 June 2015 when the tenants vacated the rental unit. The tenants provided me with a recording dated 15 June 2015 of the rental unit completely empty of its contents.

On 1 June 2015 the tenants wrote to the landlords:

Further to your emails dated February 3, 2015...and your voice mail of February 2, 2015, we are ending our tenancy early and will be vacating [the rental unit] by July 1, 2015.

Please apply both our security and pet deposits as this final month's June 2015 rent.

The tenants submit that they were entitled to end the tenancy before the end of the fixed term.

The agent VN testified that on the morning of 2 June 2015 the landlord DN telephoned the tenants to demand payment of rent. Later on 2 June 2015, the landlords personally served the tenants with the 10 Day Notice. The 10 Day Notice set out an effective date of 15 June 2015. The 10 Day Notice set out that the tenants had failed to pay rent in the amount of \$2,780.00 that was due 1 June 2015.

The agent VN testified that the landlords did not consent to the deposits being applied as rent. The agent VN testified that the landlords have not received payment since the issuance of the 10 Day Notice. The agent VN testified that to the best of his knowledge there are no reasons that would permit the tenants to deduct any amount from rent.

The agent VN testified that the order of 5 March 2015 in the tenants' favour has been satisfied.

The tenants contend that the 10 Day Notice was unlawful. The tenants submit that they, in good faith and not dishonourably, offered their deposits in full satisfaction of June's rent. The tenants submit that by failing to return the deposits within ten days of the end of the tenancy, the landlords have accepted the tenants' offer.

The tenants admit they have not provided their forwarding address in writing to the landlord.

Analysis

The issue of whether the tenants' email notice of 1 June 2015 is valid is not before me. The issues before me are whether the 10 Day Notice is valid and to what, if any, compensation are the tenants entitled.

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

Section 21 of the Act establishes that, unless the landlord gives written consent, a tenant must not apply a security deposit or a pet damage deposit as rent.

The landlords did not provide written consent for the tenants to apply their deposits as rent. The tenants submit that the landlords' failure to return the deposits at the end of the tenancy is proof of the landlords' acceptance.

In contract law, failure to reject an offer cannot amount to acceptance without more. In this case, the landlords acted quickly to indicate that they were not consenting to the deposits being applied to rent. The landlords provided the 10 Day Notice on 2 June 2015. I cannot agree with the tenants' submission that the landlords consented in any way to the deposits being used as rent. As such, the tenants failed to pay rent for June due 1 June 2015.

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.

The tenants failed to pay rent for June. The tenants did not pay the rent arrears in full within five days of receiving the 10 Day Notice. I was not provided with any evidence that indicates that the tenants were entitled to withhold any amount from rent.

As the tenants have failed to pay their rent in full when due, I find that the 10 Day Notice issued 2 June 2015 is valid and dismiss the tenants' application to cancel the 10 Day Notice without leave to reapply. As the tenants' application to cancel the 10 Day Notice is dismissed, the landlords were entitled to possession of the rental unit on 15 June 2015, the effective date of the 10 Day Notice. The tenants returned possession of the rental unit to the landlords on 15 June 2015 when they vacated the rental unit. I was provided with a video that shows the same. Accordingly, I find that the tenancy ended 15 June 2015. As possession of the rental unit has already returned to the landlords, I dismiss their application for an order of possession as the issue is moot.

The tenants have applied for the cost of their alternate accommodation for the second half of June.

Section 67 of the Act establishes the test for a monetary order for losses:

...if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

For the reasons set out above, the landlords have acted lawfully by ending the tenancy by issuing a 10 Day Notice. As the landlords have not breached the Act, they are not liable for the costs the tenants incurred as a result of the landlords' lawful actions. The tenants' application for the cost of their alternate accommodation is dismissed without leave to reapply.

The tenants have applied for return of a portion of their deposits.

Subsection 38(1) of the Act establishes the landlords' obligation to return security or pet damage deposits is triggered fifteen days from the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing.

Pursuant to paragraph 38(1)(b), as the tenants have not provided their forwarding address in writing to the landlords the landlords obligation to return the deposits has not yet been triggered. The tenants are not entitled to return of all or a portion of their deposits until this precondition has been satisfied. The tenants' application for return of a portion of their deposits is dismissed with leave to reapply in the event that they provide their forwarding address in writing to the landlords.

As the tenants have been unsuccessful in their application they are not entitled to recover their filing fee.

Conclusion

The tenants' application to cancel the 10 Day Notice is dismissed without leave to reapply. The tenancy ended 15 June 2015.

The landlords request for an order of possession is dismissed as the issue is moot because possession has already returned to the landlords.

The tenants' claim for return of a portion of their deposits is dismissed with leave to reapply.

The tenants' claim for compensation for their alternate accommodation for the remainder of June is dismissed without leave to reapply.

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: July 27, 2015

Residential Tenancy Branch

