



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, RP, OPR, MNR, MNSD, FF

Introduction

This hearing dealt with cross applications. The tenant applied to cancel a 10 Day Notice to End Tenancy for Unpaid Rent and for repair orders. The landlords applied for an Order of Possession for Unpaid Rent and a Monetary Order for unpaid rent. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

The tenant appeared at the hearing after it commenced. The tenant cited technical difficulties connecting to the hearing. Prior to the tenant appearing I had heard from the landlords with respect to service of hearing documents. Once the tenant appeared I confirmed service of the hearing documents with her.

During the hearing the landlords orally requested authorization to retain the security deposit in partial satisfaction of the unpaid rent. As this request reduces any Monetary Order provided to the landlord, which is also beneficial to the tenant, I found the request non-prejudicial and I permitted the amendment.

During the hearing, I concluded that the tenancy has ended due to unpaid rent. As such, I found the tenant's request for repair orders to be moot and did not consider them further.

Issue(s) to be Decided

1. Should the 10 Day Notice to End Tenancy for Unpaid Rent be upheld or cancelled?
2. Are the landlords entitled to an Order of Possession?

3. Are the landlords entitled to a Monetary Order?
4. Are the landlords authorized to retain the tenant's security deposit?

Background and Evidence

The parties executed a written agreement on March 6, 2015 for a tenancy set to commence April 1, 2015. The tenant paid a security deposit of \$325.00 and was required to pay rent of \$650.00 on the 1st day of every month pursuant to the tenancy agreement. The parties subsequently agreed that the monthly rent would be reduced to \$630.00 due to problems securing a telephone line for the rental unit.

The tenant paid \$430.00 toward the rent due for June 2015 on June 5, 2015. The landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) dated June 11, 2015 indicating the tenant failed to pay rent of \$200.00 that was due on June 1, 2015.

The parties provided differing submissions as to service of the 10 Day Notice. In filing their respective Applications, both parties indicated the Notice was served on June 11, 2015. During the hearing, both parties testified that it was served on June 10, 2015. The landlords testified that the 10 Day Notice was given to the tenant in person. The tenant confirmed this to be accurate initially and then changed her testimony near the end of the hearing to say it was posted. The landlords submitted that they did post a 1 Month Notice to End Tenancy for Cause on the tenant's window but that the 1 Month Notice was not submitted as evidence as it was not the subject of this dispute. I also noted that in filing her Application, the tenant submitted that the 10 Day Notice was "left on my BBQ".

The landlords testified that after posting the 10 Day Notice the tenant paid \$100.00 on June 22, 2015 leaving \$100.00 outstanding for June 2015; the tenant paid \$480.00 toward rent for July 2015 on July 10, 2015 leaving \$150.00 outstanding for July 2015; and, the tenant paid \$500.00 toward August 2015 rent on August 1, 2015 leaving \$130.00 outstanding for August 2015. In total, the landlords submit that they have suffered a loss of \$380.00 in rent for the months of June, July and August 2015.

The tenant agreed that the landlords' submissions with respect to the partial payments she made are correct and that she has withheld a total of \$380.00 from the landlords. The tenant submitted that the reason for withholding rent is because she experienced financial difficulties and because she had not been provided laundry and parking facilities as agreed upon and because of a bad odour coming from the bathroom. The tenant stated that she sent the landlord an email outlining her concerns. The tenant

confirmed that the landlord did not authorize the tenant to make any deductions from rent other than the \$20.00 agreed upon for the telephone line. The tenant also confirmed that she did not incur any emergency repair expenses and had not obtained prior authorization from an Arbitrator to withhold any part of her rent.

The tenant also submitted that the landlords did not do a move in inspection report and their right to claim against the security deposit is extinguished.

The tenant also submitted that the rental unit is not a legal suite and the landlords are not entitled to orders since they do not have “clean hands”.

The landlords requested an Order of Possession effective August 31, 2015.

Analysis

The tenant raised the question of enforceability of orders provided to the landlords on the basis the rental unit is not a legal suite. The Act is a provincial statute that applies to tenancy agreements between landlords and tenants concerning possession of a living accommodation on a residential property. With respect to illegal suites, Residential Tenancy Policy Guideline 20: *Illegal Contract* provides policy statements that include:

This guideline deals with situations where a landlord rents premises in a circumstance where the rental is not permitted under a statute. Most commonly this issue is raised where municipal zoning by-laws do not permit secondary suites and rental of the suite is a breach of the zoning by-law. However municipal by-laws are not statutes for the purposes of determining whether or not a contract is legal, therefore a rental in breach of a municipal by-law does not make the contract illegal.

Breach of a statute which is only incidental to the rental of premises, where the rental would otherwise be legal, does not make the contract illegal and thus void. For example, while failure to have a written tenancy agreement is a breach of the provisions of the Residential Tenancy Regulation and the Manufactured Home Park Tenancy Regulation, it does not make the tenancy agreement itself illegal and thus unenforceable.

The Act affords tenants many rights under the Act; however, with rights also come obligations. To find a tenancy agreement illegal and void because a tenant is residing in suite that was not permitted in a particular municipality would result in tenants losing

rights provided to them under the Act. Therefore, in keeping with the policy guideline, I did not consider the tenant's submission that the rental unit is not a legal suite and I proceed on the basis the Act applies to this tenancy relationship.

Under section 26 of the Act a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has the legal right to withhold rent. The Act provides very limited and specific circumstances when a tenant may withhold rent, such as: overpayment of rent; overpayment of the security deposit; incurring emergency repair costs; or receiving prior authorization to make deductions from the landlord or an Arbitrator. An inability to pay rent due to one's personal financial circumstances is not a legal basis for withholding rent otherwise payable. The need for repairs does not automatically entitle a tenant to withhold rent either and a tenant who believes they have been denied services or facilities has a remedy under the Act but before they can withhold rent they must receive the authorization from the landlord or an Arbitrator. A tenant is not at liberty to withhold rent and then seek authorization for deductions retroactively.

In this case, it was undisputed that the tenant withheld \$200.00 from the rent due for June 2015 yet the tenant did not present a legal right under the Act that would entitle her to withhold \$200.00 from rent payable. Therefore, I find the landlords were entitled to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent under section 46 of the Act.

I was provided differing submissions as to when and how the 10 Day Notice was served upon the tenant. I find the preponderance of evidence points to the tenant receiving the 10 Day Notice on June 11, 2015 as this is what both parties submitted as being the date it was served in filing their respective Applications; the tenant's written submissions indicate she received the 10 Day Notice on June 11, 2015; and, it is the date the 10 Day Notice was signed by the landlord. Therefore, I find the 10 Day Notice was served upon and received by the tenant on June 11, 2015.

A tenant who receives a 10 Day Notice has five days to pay the outstanding rent to nullify the Notice or the tenant has five days to dispute the Notice by filing an Application for Dispute Resolution. In this case, the tenant did not pay the outstanding \$200.00 within five days of receiving the 10 Day Notice. The tenant did file to dispute the Notice on June 18, 2015 which is more than five days after she received it. The tenant did not provide a reason for filing her Application more than five days later that would entitle her to an extension of time due to "exceptional circumstances" as permitted under section

66(1) of the Act. In any event, the tenant did the tenant establish a legal basis under the Act for withholding rent. Therefore, I dismiss her Application to cancel the Notice.

Since I have found the 10 Day Notice was served on June 11, 2015 the earliest the Notice could be effective is June 21, 2015 as provided by section 46 of the Act. Although the 10 Day Notice provided for my review does not indicate an effective date, pursuant to section 53 of the Act, an incorrect effective date automatically changes to comply with the Act. Therefore, the effective date reads June 21, 2015 and this is the date the tenancy legally ended.

Although the tenant presented the landlord with enough money that would satisfy the outstanding rent for June 2015 by July 10, 2015, which is after the tenancy legally ended, I am satisfied the tenancy was not reinstated as the landlords had already put the tenant on notice that they were seeking to regain possession of the rental unit in serving her with the Landlord's Application for Dispute Resolution on July 3, 2015.

In light of the above, I find the tenancy has ended for unpaid rent, the tenancy was not reinstated and I find the landlords entitled to an Order of Possession. Provided to the landlords with their copy of this decision is an Order of Possession that is effective on August 31, 2015, as they requested.

Considering the tenant has continued to occupy the rental unit and it is undisputed the landlords have suffered a loss of rent in the amount of \$380.00 up to and including the month of August 2015 I award the landlords compensation in this amount. I also award the landlords recovery of the \$50.00 filing fee paid for the Landlord's Application.

I authorize the landlords to retain the tenant's \$325.00 security deposit in partial satisfaction of the rent owed to the landlords. Although the tenant raised the issue of extinguishment citing the landlords' failure to complete a condition inspection report at the start of the tenancy, extinguishment only applies to claiming against the security deposit for damage to the unit or property. A landlord retains the right to claim against the security deposit for other amounts such as unpaid and/or loss of rent. Since the landlords have requested the security deposit to be applied toward the award for unpaid and/or loss of rent I have granted their request to retain the security deposit.

In light of the above, the landlords are provided a Monetary Order calculated as follows:

Unpaid and/or loss of rent	\$380.00
Filing fee	50.00
Less: security deposit	<u>(325.00)</u>

Monetary Order

\$105.00

To enforce the Monetary Order it must be served upon the tenant and it may be filed in Provincial Court (Small Claims) to enforce as an order of the court.

Conclusion

The tenant's application has been dismissed.

The landlords have been provided an Order of Possession effective August 31, 2015. The landlords have been authorized to retain the tenant's security deposit in partial satisfaction of unpaid and/or loss of rent and have been provided a Monetary Order for the balance of \$105.00 to serve and enforce as necessary.

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: August 19, 2015

Residential Tenancy Branch

