



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR

Introduction

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

- an order of possession for unpaid rent pursuant to section 55; and
- a monetary order for unpaid rent pursuant to section 67.

All parties attended the hearing and 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.

Preliminary Issue – Late Attendance by Landlord J

The landlord J attended significantly after the commencement of the hearing and after the conclusion of the landlord N's direct evidence and during the tenant's evidence. Despite the landlord J's considerably late appearance he was permitted to provide direct evidence. To ameliorate any prejudice to the tenant, the tenant was permitted to provide rebuttal evidence to the landlord J's evidence.

I encourage the landlord J to make a punctual appearance in any future proceedings. Failure to appear on time may result in an inability to provide oral evidence.

Preliminary Issue - Service

The tenant testified that he served the landlords with the review package for this hearing in early August by placing the package in the landlords' mailbox. The tenant testified that he knows that the landlords received the package because a neighbour told him that the landlords were complaining about the package. The landlord N testified that she received the package, but that there was no additional evidence in the envelope.

The tenant testified repeatedly and consistently that all of the evidence he intended to rely on today was included.

Subsection 89(1) of the Act deals with service of a decision of the director to proceed with a review:

An application for...a decision of the director to proceed with a review..., when required to be given to one party by another, must be given in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;

Leaving documents in a mailbox is not specifically contemplated by this subsection. As such the tenant has not met the requirements of subsection 89(1) of the Act.

Paragraph 71(2)(c) allows me to order that a document not served in accordance with section 89 is sufficiently given or served for the purpose of the Act. In this case, the landlord N admits receipt of a portion of the package. The tenant has provided sworn testimony that all evidence was contained within that package. In this case, I prefer the tenant's evidence over that of the landlord N. I prefer the tenant's evidence as I find his version of events to be more plausible. Further, the landlords had notice of the issue as the issue of the defective notice is thoroughly canvassed in the decision on review. I find that the landlords actually received the review hearing package including all the tenant's evidence and order that it is sufficiently served for the purpose of the section 89.

Procedural History

This application was originally made by direct request on 8 July 2015. An adjudicator issued a decision on 20 July 2015 granting the landlords' direct request application.

The tenant applied for review on 27 July 2015. The tenant applied for review on the basis of fraud as the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) he received was substantially different from that provided by the landlords in support of their application. In particular, the 10 Day Notice the tenant submitted he

received was incomplete. On 31 July 2015, an arbitrator granted the tenant's review application on the basis of the landlord's fraud.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent? Is the landlord entitled to a monetary award for unpaid rent?

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 landlord's claim and my findings around it are set out below.

There are two 10 Day Notices provided in respect of this application: one was provided by the landlord, the other is the notice that the tenant says that the landlords served him. There is no obvious discrepancy in the handwriting between the two notices.

The landlords' 10 Day Notice is dated 18 June 2015. The notice is signed by the landlord J. The effective date of the notice is 30 June 2015. The 10 Day Notice sets out that the tenant had failed to pay \$950.00 in rent that was due 1 June 2015, which included rent arrears of \$300.00 from May and \$650.00 from June. The landlords provided a proof of service for the 10 Day Notice. That proof of service set out that the tenant was served in person on 18 June 2015. The proof of service sets out that the landlord N witnessed the landlord J serve the document.

The tenant's 10 Day Notice is undated. The notice is unsigned. There is no effective date. The 10 Day Notice sets out that the tenant failed to pay \$900.00 in rent that was due on 1 June 2015, which included rent arrears of \$250.00 from May and \$650.00 from June.

The landlord N testified that the 10 Day Notice was served 18 June 2015 to the tenant in person. The landlord N testified that the landlord J served the 10 Day Notice to the tenant in person at the front door rental unit. The landlord N testified that she did not accompany the landlord J to the rental unit to serve the tenant. I asked the landlord to explain why she was listed as a witness to the landlord J's proof of service if she was not there. The landlord N then testified that she may have been there. The landlord N then testified that she was there when the tenant was served and that the tenant took the 10 Day Notice and crumpled it up and said he was not moving.

The landlord J testified that he served the tenant in person with the landlord N. The landlord J testified that he served the tenant when the tenant was working on his truck. The landlord J testified that the landlords served a 10 Day Notice first by posting the notice to the tenant's door, but when the landlords realised that this service was insufficient for a direct request proceeding, they reserved the 10 Day Notice in person.

The tenant testified that the only copy of the 10 Day Notice he ever received was undated, unsigned, and set out rent owing of \$900.00. The tenant testified that this notice was taped to his door and that he never received it personally. The tenant testified that the only document he received personally was the order of possession that he received in person on 23 July 2015. The tenant testified that he was working on his truck on 23 July 2015. The tenant testified that he received the notice on or about 21 June 2015 when he returned from visiting his mother on Vancouver Island. The tenant testified that his son saw the 10 Day Notice on or about 20 June 2015. The tenant testified that he did not apply to cancel the 10 Day Notice as he did not believe that it was valid as it was incomplete. The tenant said that he viewed it as a warning or threat.

The tenant submitted a letter from a witness who saw the 10 Day Notice taped to the tenant's door on 20 June 2015.

Analysis

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. Pursuant to subsection 46(2), a notice to end tenancy under that section must comply with section 52 of the Act.

Section 52 of the Act reads in part as follows:

In order to be effective, a notice to end tenancy must be in writing and must...

- (a) be signed and dated by the landlord or tenant giving the notice,
- (b) give the address of the rental unit,
- (c) state the effective date of the notice,
- (d) except for a notice under section 45(1) or (2) [tenant's notice], state the grounds for ending the tenancy, and
- (e) when given by a landlord, be in the approved form.

In this case, the landlords provided inconsistent testimony as to service of the document. The landlord N testified that she did not accompany the landlord J to serve the 10 Day Notice. The landlord N later testified that she may have been there. The landlord N testified that the landlord J served the tenant at the front door of the rental

unit. The landlord J testified that he served the tenant with the 10 Day Notice when the tenant was working on his truck. There are serious and concerning discrepancies in the landlords' testimony. On the other hand, the tenant's testimony was internally consistent. On the basis of this credibility finding, I find that it was the tenant's version of the 10 Day Notice that he received on his door and that no other 10 Day Notice was served, personally or otherwise.

The 10 Day Notice that was served to the tenant was not signed or dated and did not set out an effective date of the notice. Pursuant to paragraphs 52(a) and (c), the notice was not effective. As such, the notice is a nullity. For this reason, the landlord's application for an order of possession dismissed.

The 10 Day Notice that was served to the tenant indicates that the tenant had rent arrears of \$900.00. The landlords' version of the 10 Day Notice sets out a claim of \$950.00 in rent arrears. This amount is then carried into the landlords' application. The tenant testified that he has serious doubts as to the amount of rent arrears if any. The landlords did not submit any ledger or provide any accounting for their calculation of rent. On this basis, I find that the landlords have failed to prove, on a balance of probabilities, the amount, if any, of rent arrears for May and June. The landlords' application for a monetary order is dismissed.

Conclusion

The landlords' application 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: October 13, 2015

Residential Tenancy Branch