Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes   CNR, MNDC, OLC, FF, OPR, MNR, MDSD & FF

Introduction

The Application for Dispute Resolution filed by the Tenant makes the following claims:
   a. An order to cancel the 10 day Notice to End Tenancy dated October 7, 2015.
   b. A monetary order in the sum of $75?
   c. An order to recover the cost of the filing fee.

The Application for Dispute Resolution filed by the landlord makes the following claims:
   a. An Order for Possession for non-payment of rent
   b. A monetary order in the sum of $1347.50 for unpaid rent
   c. An order to recover the cost of the filing fee?

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the Notice to End Tenancy was served on the Tenant by posting on October 7, 2015. Further I find that the Application for Dispute Resolution/Notice of Hearing filed by the tenant was served by mailing, by registered mail to where the landlord carries on business on October 10, 2015. I find that the Application for Dispute Resolution/Notice of Hearing filed by the landlord was served by mailing, by registered mail to where the tenant resides on October 21, 2015.

Unfortunately the tenancy relationship is marked by acrimony. The issue between the parties is could easily have been resolved. However, both the tenant and representative of the landlord have become entrenched and stubbornly maintain their

position. Further, both have demonstrated abusive behaviour and a lack of civility towards each other.

The Application for Dispute Resolution filed by the landlord is in the name of the building manager only. There is no evidence that the corporate landlord has authorized him to bring the claim in his name only. I considered dismissing the landlord's claim on this basis only. However, I decided to proceed with the hearing on the basis the individual landlord had the authority to act with the hopes these matters can be dealt with expeditiously.

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to an order cancelling the 10 day Notice to End Tenancy dated October 7, 2015?
b. Whether the tenant is entitled to a monetary order and if so how much?
c. Whether the tenant is entitled to recover the cost of the filing fee?
d. Whether the landlord is entitled to an Order for Possession?
e. Whether the landlord is entitled to A Monetary Order and if so how much?
f. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

In 2003 the parties entered into a written tenancy agreement that provided that the tenancy would start on March 1, 2003. The tenant paid a security deposit of $497.50 on February 10, 2003. The present rent is $1312.50 plus $35 for parking for a total of $1347.50 payable in advance on the first day of each month. The arrangement between the parties was that the tenant would leave a cheque for the rent and parking in the manager's mailbox on or before the due date.

At the end of September the tenant was down to his last cheque. He testified that he photocopied that blank cheque, filled the particulars including the amount of the rent, signed it and left in the mailbox for the manager to collect. He testified he did not hear from the landlord until October 7, 2015 at which time the manager told him the cheque was not valid and demanded payment of the full amount of the rent plus a $25 late fee.

The tenant testified he had previously given a similar type cheque to another party and his bank honoured the cheque. The tenant testified he told the landlord he was prepared to give a replacement cheque provided the landlord returned the original

cheque but he was not prepared to pay the $25 late fee.   The situation escalated with both parties filing an Application for Dispute Resolution. The rent for November was paid and accepted unconditionally by the landlord.

The landlord submits the cheque is not valid. He submitted an email that had been sent from an Associate Account Manager, Real Estate Royal Bank of Canada to RW (a representative in the landlord's office) that states "Hi R, further to our conversation I can confirm that due to the lack of a security foil seal Cheques written on photocopies will not by negotiated by the bank…"

The tenant disputes this. He testified his bank has previously honoured a cheque that was on a photocopy. He further testified he received information from his bank in the last 14 days (thus could not be submitted in evidence) that they would honor his cheque that was on a photocopy.

Analysis:
Unfortunately, the evidence presented by both parties was not satisfactory.

The landlord has the burden of proof to establish that the form of cheque that was tendered by the tenant would not be honoured. The landlord relies on an e-mail allegedly sent from an Account manager from his bank. There is no letterhead or other indication that it was actually sent by the bank. The termination of a tenancy is a significant event and an arbitrator must ensure that an Order for Possession is not issued without careful consideration of the evidence. It would have been preferable for the bank official from the landlord's bank to attend the hearing, gave oral testimony and be cross examined. This did not happen. The landlord could have presented documents kept in the ordinary course that showed the form of cheque was not honored by the tenant's bank. However, there is no evidence that the landlord's bank actually presented this form of cheque to the tenant's bank. I determined the landlord failed to provide sufficient proof to establish that the cheque would not have been honoured.

Tenant's Application:
I determined the tenant is entitled to an order cancelling the 10 day Notice to End Tenancy dated October 7, 2015. The tenant tendered payment by cheque. I determined there is insufficient evidence to establish this cheque would not be honoured by the tenant's bank. The tenancy shall continue with the rights and obligations of the parties remaining unchanged.

I dismissed the tenant's application for a monetary order in the sum of $75 and for an order recover the cost of the filing fee. While the tenant was successful with his

application to cancel the 10 day Notice to End Tenancy, the tenant could have easily avoided this problem by working in a civil manner with the landlord. Further, the tenant failed to present sufficient direct evidence from his bank that the cheque would have been honored.

Landlord's Application:

Analysis - Order of Possession:
For the reasons set out above I determined the landlord failed to prove that the tenant's cheque would not be honored and I ordered that the 10 day Notice to End Tenancy dated October 7, 2015 cancelled.

Further, the landlord accepted the rent payment for November without qualification. As a result I dismissed the landlord's application for an Order for Possession based on the Notice to End Tenancy dated October 7, 2015.

Analysis - Monetary Order and Cost of Filing fee:
I dismissed the landlord's application for a monetary order for the reasons set out above.

If the cheque is not honored or if the tenant fails to pay the $1347.50 owed for October by another method the landlord retains the right to re-apply.

I dismissed the landlord's claim for a $25 late fee. Section 7 of the Residential Tenancy Act Regulations provides that a landlord may charge up to $25 for a late fee. However, the landlord can only charge such a fee if the tenancy agreement provides the landlord can charge "that fee." The tenancy agreement in this case provides the landlord can charge a $20 late fee. It is not appropriate for policy reasons for an arbitrator to replace the $25 claim with a $20 claim as it permits abuses by the landlord as it would open the door for the landlord to charge fees not permitted by the Regulations with the hope they would not be questioned. As a result I dismissed the landlord's claim for a late fee without leave to re-apply.

I dismissed the landlord's claim for the cost of the filing fee as the landlord has not been successful.

Conclusion:
I ordered the 10 day Notice to End Tenancy cancelled and dismissed the balance of the tenant's claim. I dismissed the landlord's claim for an Order for Possession. I also dismissed the landlord's claim for non-payment of rent for October with liberty to re-

apply. I dismissed the landlord's claim for the $25 late fee and the filing fee without leave to re-apply.

This matter can be easily resolved as follows:
- The tenant can immediately provide the landlord with a replacement cheque in the sum of $1347.50 and the landlord can return the previous form of cheque to the tenant.
- If the landlord refuses to return the previous form of cheque, the tenant can tender the replacement cheque and when honoured by his bank the landlord would no have a basis for serving a new 10 day Notice to End Tenancy for non-payment.
- If the landlord refuses to return the original cheque the tenant would have the right to file a claim against the landlord for its return or compensation for the amount.
- If the tenant refuses to provide a replacement cheque, the landlord can attempt to negotiate the cheque it has and if is not honoured by the tenant's bank the landlord can serve a new 10 day Notice to Tenancy on the tenant.

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: November 19, 2015

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Residential Tenancy Branch