



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Landlord's application: OPR, MNR, MNSD, MNDC, FF

Tenant's application: CNR, MNDC, RP, RR, FF

Introduction

This hearing dealt with cross applications. The landlord applied for an Order of Possession for unpaid rent and a Monetary Order for unpaid rent and loss of rent; and, authorization to retain the security deposit. The tenants applied to cancel a 10 Day Notice to End Tenancy for Unpaid Rent; monetary compensation for damage or loss under the Act, regulations or tenancy agreement; orders for repairs; and, authorization to reduce rent payable.

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.

At the outset of the hearing, the tenants stated that they had not been able to serve or submit their evidence. They cited various reasons, including: waiting on third parties; digital evidence that was on their cell phones; and, the female tenant had been in a car accident. Considering the tenants had been in receipt of the landlord's application since September 25, 2015 and the tenants filed their own application on October 1, 2015, I was of the position that the tenants have had sufficient opportunity to gather and serve evidence applicable to the matters under dispute given the date of this proceeding. Accordingly, I informed the parties that the tenants may describe their evidence orally during the hearing. As the hearing progressed I did not hear the tenants describe evidence that would have had a significant impact on the outcome of this dispute and I did not order or authorize the tenants to submit evidence after the teleconference call.

Issue(s) to be Decided

1. Should the 10 Day Notice to End Tenancy for Unpaid Rent be upheld or cancelled?
2. Is the landlord entitled to an Order of Possession for unpaid rent?
3. Is the landlord entitled to recover unpaid and/or loss of rent as claimed?
4. Is the landlord authorized to retain the security deposit?
5. Have the tenants established an entitlement under the Act to compensation they claimed against the landlord?
6. Is there a basis to order a reduction of rent payable?
7. Is it necessary to issue orders for the landlord to make repairs to the property?

Background and Evidence

The parties executed a written tenancy agreement for a tenancy that started October 1, 2014 for a one year fixed term that converted to a month to month tenancy upon expiration of the fixed term. The tenants paid a security deposit of \$825.00 and were required to pay rent of \$1,650.00 on the 1st day of every month pursuant to the tenancy agreement.

The landlord submitted that he issued a 10 Day Notice to End Tenancy for Unpaid Rent to the tenants on September 10, 2015 indicating rent of \$1,650.00 was payable as of September 1, 2015 and a stated effective date of September 25, 2015. The 10 Day Notice was sent to the tenant via registered mail on September 10, 2015. The landlord provided a copy of the registered mail receipt, including tracking number, as proof of service. The landlord testified that it was returned to him as unclaimed.

The tenants stated that they received a notice card for the registered mail on September 28, 2015 but that they did not pick up the mail because the notice card indicated it would only be held until September 27, 2015. The tenants did not provide a copy of the notice card they were referring to for my consideration. A search of the tracking number showed that Canada Post actually held the registered mail until October 11, 2015 before returning it to the landlord. The landlord was of the position the tenants were avoiding service as he had told them he had sent them a 10 Day Notice. Nevertheless, the tenants filed to dispute the Notice when they filed their application on October 1, 2015 since they were aware that the landlord had filed his application. Out of an abundance of fairness to the tenants I considered the 10 Day Notice under dispute and considered their reasons for not paying rent. I was satisfied the landlord would not be prejudiced by considering the Notice to be disputed as he had provided evidence to demonstrate his position that the tenants were required to pay rent for September 2015.

The tenants' reasons for disputing the Notice relate to an agreement they had with the landlord to perform certain work at the residential property (herein referred to as "the yard and fence project"). The tenants submitted that the work they had done on the property was worth \$5,500.00 and that the tenant had invoiced the landlord for this amount. The tenant was of the position the landlord still owed him \$1,500.00 for this invoice. I informed the parties that I do not have jurisdiction to resolve disputes concerning a contract for services except where it specifically relates to an agreement to waive or withhold rent otherwise payable. The parties were informed and appeared to understand that disputes concerning a contract for services must be resolved in the appropriate forum such as Small Claims Court.

The landlord had produced a copy of an agreement for the yard and fence project that was signed by the landlord and the male tenant on August 22, 2015 (herein referred to as the contract). I explored the contract as since it did provide the tenants certain rights to not pay rent for certain months.

The contract indicated that it was replacing an earlier written agreement of August 14, 2015. The contract provided that most of the work on the project had been done but that further work of leveling out the land, completing the fence, and boxing off the tree with landscape ties would have to be completed by September 1, 2015. The contract recognized the tenants did not owe rent for July and August 2015. The contract provided that if the project was completed by September 1, 2015 the tenants would be permitted to withhold \$800.00 from the rent payable for September 1, 2015 and would pay the balance of \$850.00. If the project was not completed by September 1, 2015 the tenants would have to pay the full amount of rent of \$1,650.00 that was due for September 2015.

I heard undisputed evidence that the tenants had previously paid \$500.00 toward the rent for July 2015 but that this was refunded to the tenant upon signing the contract. The landlord provided a copy of the cancelled cheque for \$500.00 issued to the male tenant. The landlord also provided photocopies of the tenants' rent cheques in the amounts of \$1,650.00 for July 1, 2015 and August 1, 2015 to demonstrate that he had not cashed them pursuant to their agreement. The tenants did not dispute that those cheques remained uncashed. Pursuant to all of this evidence, the landlord was of the position the tenants had been compensated \$3,300.00 for the yard and fence project.

The landlord took pictures of the property on October 2, 2015 and submitted them as evidence to show the work agreed upon was not completed meaning the tenants owed the full amount of rent for September 2015 pursuant to their contract.

The landlord submitted that he asked the tenants for the rent for September 2015 and they stated they did not have the money. The tenant pointed out that the landlord had a post-dated cheque for September 1, 2015 in his possession and he did not try to cash it. The landlord acknowledged that to be true and explained that due to the tenants' financial difficulties in the months prior and their statements to him that they did not have the funds he did not try cashing the cheque. I asked the tenants as to whether the tenants had sufficient funds in the bank account had the landlord tried to cash the cheque. The tenant response was that that she did not know.

The tenants submitted that the contract for the yard and fence project was signed late at night and because the tenants wanted the landlord to leave the property. The tenants submitted that subsequent oral agreements were entered into after the contract. The landlord acknowledged that he offered the tenants an extension to finish the work but that the tenants were not agreeable to the offer. The landlord submitted that the only valid agreement was the one he submitted as evidence.

The tenants provided testimony indicating that they were suffering financial difficulty due to multiple reasons: loss of a job, a car accident, a workplace accident, and, injury while helping someone move. The tenants did not deny that the fencing was not completed explaining that they asked the landlord for a drill so as to complete the fence work and one was not provided. When asked whether the tenants had the funds to pay the rent owed the tenants stated that they could only pay \$1,500.00 at the end of the month.

The landlord requested an Order of Possession effective as soon as possible as he was of the position he has already suffered great financial losses due to this tenancy. The tenants requested occupancy until the end of December 2015 explaining they do not have the money to move and have a disabled child to care for.

Analysis

Under the Act, a tenant is required to pay rent when due under their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent. Where a tenant fails to pay rent the landlord may serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent.

It is undisputed that the landlord did not collect rent for the month of September 2015. I also accept the registered mail evidence before me that the landlord issued a 10 Day Notice and mailed it to the tenants via registered mail on September 10, 2015. Pursuant to section 90 of the Act the tenants are deemed to have received the 10 Day

Notice five days later on September 15, 2015. The deeming provision of section 90 exists so that a person cannot delay or avoid service; however, the deeming provision is a rebuttable presumption with sufficient evidence. Although the tenants submit they did not receive the registered mail containing the 10 Day Notice, they did acknowledge receiving the registered mail notice card on September 28, 2015. I was not overly persuaded by their submission that they did not receive the notice card until September 28, 2015 as Canada Post recorded that two notice cards had been left for the tenants several days prior to that. I am of the view that the landlord's submission that the tenants were avoiding service is more likely but even if the tenants did not receive the notice card until September 28, 2015 they failed to exercise due diligence in picking it up before it was returned on October 11, 2015. Nevertheless, the tenants filed to dispute the 10 Day Notice and I considered the 10 Day Notice to be under dispute even though they filed to dispute it later than permitted under the Act out of an abundance of fairness to the tenants. Below, I consider each of their arguments to cancel the 10 Day Notice.

As provided under the Act, a tenant may withhold rent where the tenant has a legal right to withhold rent. The legal right to withhold rent is limited to a certain specific circumstances under the Act. One such right is where the landlord has agreed that the tenant may withhold rent or otherwise waives entitlement to rent.

The tenants pointed to the agreement for them to do yard and fence work in lieu of paying rent in filing their application. I was presented a written agreement by the landlord with respect to the yard and fence project dated August 22, 2015. While the tenants argued that the contract of August 22, 2015 was replaced with subsequent oral agreements I find their argument unsupported and insufficient. Where parties have a written agreement, the agreement cannot be modified orally. In other words, an oral agreement is insufficient to modify a written agreement. Further, the landlord's testimony pointed only to discussions between the parties after the contract was executed, in particular, about an extension of time, but that there was no new agreement reached. Considering the landlord reduced their agreement for yard and fence work to writing on August 14, 2015 and again on August 22, 2015 I find it unlikely the landlord would enter into a verbal agreement. Therefore, I have relied solely upon the contract of August 22, 2015 as I find it is the only valid agreement that provided the tenants the right to withhold rent.

The contract presented to me provides that, minimally, the tenants would have to pay rent of \$850.00 as of September 1, 2015 if the yard and fence project were completed. They did not even pay this amount. The contract further provides that the full rent of \$1,650.00 was payable for September 2015 if the yard and fence project was not

completed. Based on this contract, I find there to be no circumstance that entitled the tenants to withhold all of the rent for September 2015 as they did. Rather, based upon the landlord's photographs of the yard, and the tenants' own testimony that the project was not completed, I find the tenants were obligated to pay the full amount of rent for September 2015.

The tenants also stated that the yard and fence project could not be completed because the landlord did not supply the tenant with a drill. I note that there is no provision in the contract that the landlord would supply the tools required to do the project. Rather, it is customary for a contractor to supply their own tools, as opposed to an employee, and I find the contract to be more in keeping with a contract for services than an employment agreement. Therefore, I find the tenant's submission that the landlord did not provide him with a drill does not alter my decision that the project was not completed and the tenants owed the full amount of rent for September 2015.

The tenants argued that the landlord had a cheque for \$1,650.00 in his possession dated September 1, 2015 and that he did not try to cash it. While that was not disputed by the landlord, I find the landlord's response that he did not cash it because the tenants advised him they did not have the funds available to pay the rent to be reasonably likely considering:

- the tenants did not present me with a copy of their bank statement to show they had the funds available in the bank account for which the cheque was written;
- the tenant was unable to confirm that the funds were available in the bank account when asked during the hearing;
- the tenants apparently did not have sufficient funds to buy a relatively inexpensive tool such as a drill;
- the tenants did not pay even a portion of the rent owed for September 2015 even though the tenants had an obligation to pay \$850.00 if the yard and fence project had been completed; and,
- the tenants did not pay any rent for October or November 2015 and when asked if they had rent to offer the landlord the tenants stated they would only have \$1,500.00 at the end of the month.

For the reasons given above, I am of the position that the cheque dated September 1, 2015 that was in the landlord's position was non-negotiable as the landlord stated.

As provided above, I find the tenants owed the full amount of rent for September 2015; the tenants did not pay the rent for September 2015; and, the tenants did not have a

legal right to withhold rent for September 2015. Therefore, I uphold the 10 Day Notice and I find this tenancy at an end due to unpaid rent.

I grant the landlord's request for an Order of Possession effective two (2) days after service upon the tenants as I find it would unduly prejudice the landlord to permit the tenants occupancy until the end of December 2015 considering he has already suffered a loss three months of rent due to the tenants' actions.

For the reasons already provided above, I provide the landlord with a Monetary Order for unpaid rent of \$1,650.00 for the month of September 2015. I further award the landlord loss of rent for the months of October 2015 and November 2015 since the tenants have continued to occupy the rental unit and have not paid any monies for use and occupancy for those months. As the landlord was successful in his application, I award the landlord recovery of the \$50.00 filing fee he paid for his application. I also authorize the landlord to retain the tenants' security deposit in partial satisfaction of the amounts awarded to the landlord with this decision. Accordingly, the landlord is provided a Monetary Order calculated as follows:

Unpaid Rent – September 2015	\$ 1,650.00
Loss of Rent – October and November 2015	3,300.00
Filing fee	50.00
Less: security deposit	<u>(825.00)</u>
Monetary Order for landlord	\$ 4,175.00

As for the tenant's application, I dismiss their request to cancel the 10 Day Notice as I find they presented no legal basis for me to cancel it. As the tenancy has ended, I find it unnecessary to issue orders for the landlord to make repairs to the property and it is unnecessary to further consider their request to reduce future rent payable. As to the tenants' monetary claim of \$5,000.00, the tenants indicated in the details of dispute that it relates to work they did for the yard and fence project, and as the parties were informed during the hearing, I do not have jurisdiction to resolve disputes concerning a contract for services except as it pertains to the right to withhold rent. I have made findings as to the tenants' right to withhold rent but if the tenants are of the position they are owed more money that the compensation they have already received by not paying rent for July and August 2015 the tenants' remedy is to take the matter to the appropriate forum such as Small Claims court. Therefore, I dismiss the tenants' application in its entirety.

Conclusion

The tenancy has ended due to unpaid rent and the landlord has been provided an Order of Possession effective two (2) days after service upon the tenants.

The landlord has been authorized to retain the tenant's security deposit and has been provided a Monetary Order for the balance of \$4,175.00 to serve and enforce upon the tenants.

The tenants' application has been dismissed in its entirety.

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 20, 2015

Residential Tenancy Branch

