



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant's application: CNR, MT, OLC, OPT, PSF, RPP, FF

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

Introduction

This hearing was scheduled to deal with cross applications. The tenants applied to cancel a 10 Day Notice to End Tenancy for Unpaid rent, an extension of time to dispute the Notice to End Tenancy; Orders for compliance and possession of the rental unit; for the landlord to provide services or facilities required by law; and, for the landlord to return personal possessions of the tenants. The landlord applied for an Order of Possession for unpaid rent and a Monetary Order for unpaid and/or loss of rent, late fees, and utilities; and, authorization to retain the security deposit and pet damage deposit. 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

At the outset of the hearing, I heard that the landlord speaks little or no English and she was largely represented by her granddaughter. I also heard that the tenants had dealings with the landlord's granddaughter, son and daughter-in-law during the tenancy. I considered the landlord's family members in attendance at the hearing to have been acting as the landlord's agents during the tenancy. Accordingly, reference to landlord in this decision includes the landlord and the family members in attendance at this hearing.

The Rules of Procedure require that the applicant serve the respondent with an Application for Dispute Resolution together with a Notice of Hearing, and Fact Sheets provided by the Residential Tenancy Branch which is referred to as "the hearing package". I determined that the tenants had not served the landlord with a hearing package that complies with the Rules of Procedure. Rather, the tenants had served the landlord's granddaughter, whom I accepted has been acting as an agent for the

landlord, with a print-out of a "Submitted Application" that the tenants had submitted to the Residential Tenancy Branch online before the Branch had prepared the hearing package. While the "Submitted Application" contains much of the same information that appears on an Application for Dispute Resolution in the hearing package, the landlords were not served with a Notice of Hearing or Fact Sheets with the tenants' application. I heard that the landlord determined the date set for hearing the tenant's application when the landlord filed an Application for Dispute Resolution.

Despite the insufficient service of the tenant's hearing package, I was satisfied the landlord was aware of the issues identified by the tenants on the tenant's Application and learned of the date of hearing shortly thereafter. I proceeded to consider the tenants' request for an extension of time to dispute the Notice to End Tenancy.

The Notice to End Tenancy that is the subject of these applications is a 10 Day Notice to End Tenancy for Unpaid Rent that was served to the tenants in person on November 28, 2015 with a stated effective date of December 8, 2015. The Act provides that a tenant has five days to file an Application to dispute a 10 Day Notice meaning the tenants had until December 3, 2015 to dispute the Notice. The tenants submitted an Application on December 9, 2015 which is six days after the filing deadline. Section 66 of the Act provides that an extension of time may be granted in certain circumstances; however, section 66(3) provides that "The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice." Since the Notice to End Tenancy has an effective date of December 8, 2015 I cannot consider granting an extension until December 9, 2015. Therefore, I have considered the subject Notice to End Tenancy as undisputed by the tenants. I did hear the tenant's position that the 10 Day Notice was cancelled by agreement of the parties and I have considered that position in determining whether the landlord is entitled to an Order of Possession under the landlord's application.

With respect to the tenants' requests for an Order of Possession for the rental unit; for the landlord to provide services or facilities; and, for return of personal possessions, I heard that since filing the tenant's application the landlord has restored the tenants' access to the second living room and laundry room and the hydro service was restored. Therefore, I did not further consider issuing orders for the landlord to return these services and facilities or personal property to the tenants but I have issued Orders for compliance to the landlord as requested by the tenants.

The landlord requested that the landlord's monetary claim be increased to reflect additional utilities incurred since the landlord's application was filed. I noted that the landlord had not provided copies of the utility bills to me and the landlord acknowledged

that the tenants had not been provided copies. The tenant stated that she was unprepared to agree to the amount sought by the landlord without first seeing the bills. I found the landlord's request to amend the application without providing copies of the utility bills to the tenants first to be unreasonable and prejudicial and I did not permit the amendment. The parties were informed that the landlord retains the right to pursue the tenants for unpaid utilities by way of another Application if the issue remains unresolved.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession?
2. Is the landlord entitled to a Monetary Order for unpaid and/or loss of rent, late fees, and utilities as claimed?
3. Is the landlord authorized to retain the tenants' security deposit and pet damage deposit?
4. Is it necessary and appropriate to issue Orders for compliance to the landlord?

Background and Evidence

The parties executed a written tenancy agreement for a tenancy that commenced on May 1, 2015 for a fixed term of six months that converted to a month to month tenancy upon the expiration of the fixed term. The tenants paid a security deposit of \$950.00 and a pet damage deposit of \$500.00. The tenants were required to pay rent of \$1,900.00 on the first day of every month. The tenancy agreement indicates that electricity and heat are not included in the monthly rent. The addendum to the tenancy agreement also provides for late fees of \$25.00 per occurrence.

It was undisputed that the tenants failed to pay rent of \$800.00 for the month of September 2015; and did not pay any rent for October 2015 and November 2015.

On November 28, 2015 the tenants were personally served with a 10 Day Notice to End Tenancy for Unpaid Rent with a stated effective date of December 8, 2015 indicating rent of \$4,700.00 was outstanding as of November 28, 2015 (the Notice). I heard that the \$4,700.00 appearing on the Notice includes represents \$4,600.00 in rent plus \$100.00 in late fees for the four months of September through December 2015.

The tenants did not pay the outstanding rent after receiving the Notice. Nor, did the tenants dispute the Notice within five days of receiving the Notice. The tenants did submit an Application seeking to dispute the Notice on December 9, 2015 but that was

too late to consider the Notice under dispute for the reasons I have provided already in this decision.

The tenants continue to occupy the rental unit and they did not pay rent for December 2015 and did not pay any monies to the landlord for occupancy of the unit for January 2016.

The tenant argued that the Notice was cancelled by way of an agreement between the parties. The tenant testified that the agreement was captured on an audio recording but the tenant did not submit the audio recording as evidence. Nor, was a transcript of the recording provided as evidence. The tenants had referred to the agreement in the details of dispute section of their Application but I noted that the tenants failed to provide the date the purported agreement was reached or the terms of the agreement. I asked the tenant to provide further particulars as to the agreement during the hearing. Her testimony was vague and unclear as to the date the agreement was reached and the terms of the agreement. The tenant testified that an agreement was reached "in the first week" of December 2015. Then she stated that it was reached two days preceding December 8, 2015 when the electricity was terminated. As to the terms of the agreement the tenant stated that they were to pay the landlord \$1,000.00 or \$2,000.00 on December 12, 2015. The tenant testified that she was to pay "what she could" on December 15, 2015 and then she stated that she was to pay \$4,000.00 on December 15, 2015. The tenant submitted that in exchange, the landlord would not pursue further action. Despite an agreement to make payments to the landlord, the tenant acknowledged that she made no payments.

In response, the landlord's son testified that on December 8, 2015 the tenant promised to pay \$2,000.00 on December 11, 2015. The landlord's Application was filed on December 10, 2015 in the event the tenant failed to fulfill the agreement, which is what happened.

The landlord seeks to regain possession of the rental unit as soon as possible. The tenant stated that they are prepared to move out by the end of January 2016. The landlord was not agreeable to the tenant's request considering that the tenants had indicated they were moving out in December 2015 and they did not.

The landlord seeks to recover unpaid rent for the months of September 2015 through December 2015 and loss of rent for January 2016 since the tenants continue to occupy the rental unit. The landlord seeks late fees for the months of September 2015 through December 2015. The landlord seeks to recover unpaid hydro of \$35.00 for the months of August and September 2015. The tenant did not dispute these amounts.

As to the tenant's request for orders for compliance, the tenant described how the landlord's family members terminated the electricity and restricted access to the laundry room and a second living room on December 8, 2015. The tenant pointed out that despite owing the landlord rent there is a legal process that the landlord must follow and that access to the property and services cannot be restricted or terminated by the landlord. The landlord acknowledged that the landlord's family members had done the things the tenant described and that after the police contacted them the hydro and access to the rental unit was restored later that same day. The landlord now understands that the landlord is not permitted to change locks or restrict access and terminate services.

Analysis

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement. Where a tenant does not pay rent the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent.

When a tenant receives a 10 Day Notice the tenant 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. If a tenant does not pay the outstanding rent or dispute the Notice within five days then, pursuant to section 46(5) of the Act, the tenant is conclusively presumed to have accepted the tenancy will end and must vacate the rental unit by the effective date of the Notice.

In this case, it was undisputed that a 10 Day Notice was served upon the tenants personally on November 28, 2015. Although the 10 Day Notice incorrectly indicated \$4,700.00 in rent was outstanding, I find the \$100.00 error not so significant as to make the Notice invalid especially considering the tenants did not pay any portion of the outstanding rent and I am unconvinced that they would have paid \$4,600.00 if the Notice read \$4,600.00.

Upon receiving the 10 Day Notice the tenants did not pay the outstanding rent within five days. Nor, did the tenants file to dispute the Notice within five days. The tenants' request to extend the deadline to dispute the Notice beyond the effective date of the Notice is prohibited under section 66(3) of the Act. Therefore, pursuant to section 46(5) of the Act, I find the tenants were conclusively presumed to have accepted that the tenancy would end on December 8, 2015 and that they would have to vacate the unit by that date.

The tenant argued that the Notice was subsequently cancelled by agreement between the parties. The parties provided different dates as to when the agreement was reached and the terms of the agreement. I found that I preferred the landlord's version of the agreement as the landlord was very specific as to the date and terms as opposed to the tenant's vague and changing testimony. However, regardless as to which version of the agreement I were to accept, it remains that the tenants failed to fulfill either version since they paid no monies to the landlord by the deadline agreed upon. Accordingly, I find the agreement reached between the parties became void by the tenants' failure to perform as agreed. Therefore, I reject the tenant's position that the Notice was cancelled by agreement and I find the landlord entitled to regain possession of the rental unit pursuant to the 10 Day Notice.

Considering the tenants have failed to pay the monthly rent since September 2015 and the amount of outstanding rent is significant at this point, I find the tenant's request for more time to move out is unreasonable in the circumstances as it would put the landlord at an undue risk to suffer further losses. Accordingly, I grant the landlord's request for an Order of Possession as soon as possible. Provided to the landlord with this decision is an Order of Possession effective two (2) days after service upon the tenants.

As to the landlord's monetary claims, I find the landlord's claims for unpaid rent and late fees supported by the tenancy agreement before me and I award the landlord unpaid rent for September 2015 through December 2015 in the sum of \$6,500.00 and late fees of \$25.00 for each of these months for a further award of \$100.00. Since the tenants continue to occupy the rental unit I also award the landlord loss of rent for the month of January 2016 in the amount of \$1,900.00 as requested. Finally, given the undisputed request to recover \$35.00 for utilities for August and September 2015 I grant the landlord this amount as well.

I authorize the landlord to retain the tenant's security deposit and pet damage deposit in partial satisfaction of the rent owed the landlord. I also award the landlord the filing fee paid for the landlord's Application.

In light of the above, the landlord is provided a Monetary Order to serve and enforce upon the tenants, calculated as follows:

Rent: September 2015	\$ 800.00
Rent: October 2015	1,900.00
Rent: November 2015	1,900.00
Rent: December 2015	1,900.00
Loss of Rent: January 2016	1,900.00
Late fees: September through December 2015	100.00
Utilities for August and September 2015	35.00
Filing fee	100.00
Less: security deposit	(950.00)
Less: pet damage deposit	<u>(500.00)</u>
Monetary Order for landlord	\$7,185.00

Having heard the landlord had turned off the electricity and restricted the tenants' access to parts of the rental unit or common area on December 8, 2015 I find it appropriate to order the landlord to comply with the Act until such time vacant possession of the property is lawfully returned to the landlord. Section 27 of the Act prohibits a landlord from terminating an essential service in any event and if the service is non-essential it only be terminated with one month of written notice. Section 28 of the Act also entitles the tenant to exclusive possession of the rental unit, subject only to the landlord's restricted right to enter the rental unit, and reasonable access to common areas of the property. Section 31 prohibits a landlord from changing the locks to a rental unit unless the tenants are provided new keys. Regaining possession of the rental unit must be accomplished in a manner that complies with section 57 of the Act. Therefore, **I make the following orders to the landlord:**

1. Do not restrict or terminate any services or facilities until lawful possession of the rental unit has been returned to the landlord.
2. Do not change locks or otherwise restrict the tenants' ability to access or use any part of the rental unit or impede the tenants' use of common areas until such time lawful possession is returned to the landlord.
3. Do not take or seize or otherwise restrict the tenants' ability to retrieve their personal possessions unless accomplished in manner that complies with the Act.

Conclusion

The landlord has been provided an Order of Possession effective two days after service upon the tenants.

The landlord has been authorized to retain the security deposit and pet damage deposit in partial satisfaction of unpaid rent and has been provided a Monetary Order for the balance of \$7,185.00 to serve and enforce.

I have granted the tenant's request for orders for compliance and the balance of the tenants' application has been dismissed.

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: January 14, 2016

Residential Tenancy Branch

