



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR

Introduction

This matter proceeded by way of an *ex parte* Direct Request Proceeding, pursuant to section 55(4) of the *Residential Tenancy Act* (the “*Act*”), and dealt with an Application for Dispute Resolution by the landlord for an Order of Possession based on unpaid rent and utilities.

The landlord submitted a signed Proof of Service of the Notice of Direct Request Proceeding which declares that on March 03, 2016, the landlord served the tenant with the Notice of Direct Request Proceeding by way of posting it to the door of the rental unit at 4:15 PM. The Proof of Service form establishes that the service was witnessed by “BO” and a signature for “BO” is included on the form.

Based on the written submissions of the landlord, and in accordance with sections 89 and 90 of the *Act*, I find that the tenant has been deemed served with the Direct Request Proceeding documents on March 06, 2016, three days after their posting.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent pursuant to sections 46 and 55 of the *Act*?

Background and Evidence

The landlord submitted the following evidentiary material:

- A copy of the Proof of Service of the Notice of Direct Request Proceeding served to the tenant;

- A copy of a residential tenancy agreement which was signed by the landlord and the tenant on May 29, 2014, indicating a monthly rent of \$1,700.00 due on the first day of the month for a tenancy commencing on June 01, 2014;
- A Monetary Order Worksheet showing the rent owing and paid during the portion of this tenancy in question, on which the landlord establishes that the monthly rent owed for January 2016 was \$1,700.00 and that the tenant provided partial payments for January 2016 totaling \$1,700.00. The landlord indicates that a partial payment of \$1,000.00 was received on January 04, 2016, and a second partial payment of \$700.00 was received on January 07, 2016. The landlord indicates that there are unpaid utility charges owed by the tenant in the amount of \$567.84 which were due by January 03, 2016;
- A copy of a letter, dated January 08, 2016, from the landlord, addressed to the tenant, which demonstrates that a partial payment of \$700.00 was provided by the tenant on January 07, 2016, and was acknowledged by the landlord as being received for use and occupancy only;
- A copy of a letter, dated January 03, 2016, from the landlord, addressed to the tenant, which demonstrates that a partial payment of \$1,000.00 was provided by the tenant on January 04, 2016, and was acknowledged by the landlord as being received for use and occupancy only;
- A letter from the landlord, dated January 03, 2016, in which the landlord provides the tenant a written demand to provide payment of the outstanding utility charges owed by the tenant within 30 days;
- Copies of hydro bills and gas bills provided by the landlord;
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) dated January 03, 2016, which the landlord states was served to the tenant on January 03, 2016, for \$700.00 in unpaid rent due on January 01, 2016, with a stated effective vacancy date of January 13, 2016. The Notice also indicates that there is an amount outstanding of \$567.84 for unpaid utility charges which were due by January 03, 2016; and
- A copy of the Proof of Service of the Notice showing that the landlord served the Notice to the tenant on January 03, 2016 at 6:21 PM, by way of leaving the Notice with an adult who apparently lives with the tenant. The landlord indicates that the Notice was left with an individual identified as "CM" who the landlord indicates is the tenant's boyfriend and has resided with the tenant since the tenancy began on June 01, 2014. The Proof of Service form establishes that the service was witnessed by "BO" and a signature for "BO" is included on the form.

The Notice restates section 46(4) of the *Act* which provides that the tenant had five days to pay the rent in full or apply for Dispute Resolution or the tenancy would end on the

effective date of the Notice. The tenant did not apply to dispute the Notice within five days from the date of service and the landlord alleged that the tenant did not pay the rental arrears.

Analysis

Direct Request proceedings are *ex parte* proceedings. In an *ex parte* proceeding, the opposing party is not invited to participate in the hearing or make any submissions. As there is no ability for the tenants to participate, there is a much higher burden placed on landlords in these types of proceedings than in a participatory hearing. This higher burden protects the procedural rights of the excluded party and ensures that the natural justice requirements of the Residential Tenancy Branch are satisfied.

In this type of matter, the landlord must prove they served the tenant with the Notice of Direct Request Proceeding, the Notice, and all related documents with respect to the Direct Request process, in accordance with the *Act* and Policy Guidelines. In an *ex parte* Direct Request Proceeding, the onus is on the landlord to ensure that all submitted evidentiary material is in accordance with the prescribed criteria and does not lend itself to ambiguity or give rise to issues that may need further clarification beyond the purview of a Direct Request Proceeding. If the landlord cannot establish that all documents meet the standard necessary to proceed via the Direct Request Proceeding, the application may be found to have deficiencies that necessitate a participatory hearing, or, in the alternative, the application may be dismissed.

I have reviewed all documentary evidence and find that in accordance with section 88 of the *Act* the tenant was duly served with the Notice on January 03, 2016.

Subsection 46(6) of the *Act*, reads in part as follows:

If

(a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and

(b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

The landlord provided a copy of a letter, dated January 03, 2016, in which the landlord provided the tenant a written demand to provide payment of the outstanding utility charges owed by the tenant within 30 days. If a tenant is provided a written demand to provide payment of a utility charge for which she is responsible, the landlord may treat the unpaid utility charges as unpaid rent only if the utility charges remain unpaid more

than 30 days after the written demand. As the landlord issued a Notice for unpaid utilities on January 03, 2016, I find that the landlord has not waited more than 30 days from the date of the written demand to the tenant, and has, therefore, issued the Notice to the tenant on a date earlier than permitted under the *Act*.

I therefore find that, with respect to unpaid utilities, the January 03, 2016 Notice was not properly served in accordance with the *Act*, and it was not open to the landlord to treat the unpaid utility charges as unpaid rent as of January 03, 2016, the date on which the Notice was issued to the tenant.

Section 46 of the *Act* provides, in part, the following with respect to a 10 Day Notice to End Tenancy for Unpaid Rent:

46 (4) Within 5 days after receiving a notice under this section, the tenant may

- (a) pay the overdue rent, in which case the notice has no effect, or
- (b) dispute the notice by making an application for dispute resolution.

I find that, as the tenant was found to have received the Notice on January 03, 2016, the tenant's latest opportunity to either pay, in full, the amount listed on the Notice for unpaid rent, or to file for dispute resolution to dispute the Notice, would have been January 08, 2016. The landlord provided copies of two letters, which indicate that the tenant provided payments, in two installments, equal to the monthly rent owed in the amount of \$1,700.00. The Notice issued to the tenant, in the amount of \$700.00, alerts the tenant to pay the unpaid rent of \$700.00 within five days of receipt of the Notice. The tenant's latest opportunity to provide the payment of outstanding rent of \$700.00 was January 08, 2016. The landlord provided a copy of a letter, dated January 08, 2016, which demonstrates that a payment of \$700.00 was provided by the tenant on January 07, 2016.

As the tenant had paid the balance of overdue rent in full before January 08, 2016, and, as indicated above, since it was not open to the landlord to treat the unpaid utility charges as unpaid rent as of January 03, 2016, I find that the Notice dated January 03, 2016, is set aside and is of no force and effect.

As the landlord's application for an Order of Possession arises from a Notice that has been set aside, I dismiss the landlord's application for an Order of Possession, based on the January 03, 2016 Notice, without leave to reapply.

Conclusion

I dismiss the landlord's application for an Order of Possession, based on the January 03, 2016 Notice, without leave to reapply.

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: March 11, 2016

Residential Tenancy Branch

