



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR

Introduction

This hearing was a new hearing of the landlords' application for an order of possession and a monetary order. The landlords appeared at the hearing; the tenant did not.

The landlords originally applied for this relief by Direct Request. On March 21, 2016 the landlords were granted an order of possession effective two days after service and monetary order in the amount of \$1795.00. A clerical error on both orders was corrected on April 5, 2016. The amended orders were served on the tenant by personal service on the same date.

On April 7 the tenant filed an application for a review of the decision and the orders. The tenant was successful on his application and a new hearing was ordered. The new hearing was set for May 19, 2016, at 10:30 am.

The tenant was provided with the Notice of Review Hearing and was advised he must serve a copy on the landlords. The landlords confirmed that they eventually received the Notice of Review Hearing, although not within the three days after receipt of the Review Decision as required by that decision.

Tenant's Evidence

The Review Decision sets out that "Each party must serve the other and the Residential Tenancy Branch with any evidence that they intend to rely upon at the new hearing."

The tenant did not serve the landlords with any evidence nor did he file any evidence for this hearing with the Residential Tenancy Branch. The only evidence from the tenant is the evidence he submitted in support of his application for review, which was not served on the landlords.

The tenant sought and obtained a new hearing on the grounds that the original decision was obtained by fraud. In her decision the arbitrator found that: "the Tenant provided sufficient evidence to prove the allegation that the Landlord may have provided fraudulent information regarding the non-payment of March 2016 rent". (Underlining added.) Some of

the evidence that the arbitrator relied upon in coming to this conclusion were copies of the tenant's bank statements and a snapshot of a text message.

Although these documents were never served on the landlords I am going to consider them and refer to them in this decision so the issues which the tenant raised on his Application for Review Decision may be fully addressed.

Landlord's Evidence

Because the tenant was represented by legal counsel the landlords' lawyer expected to be able to serve their evidence package on his lawyer. On May 3 the tenant's lawyer advised the Residential Tenancy Branch and the landlords' lawyer that she was withdrawing as counsel. The landlords' lawyer followed up with a request to the tenant's lawyer for updated contact information for the tenant. His lawyer replied: "Unfortunately, I don't have any other contact information for him. I withdrew because I don't know where he is and cannot get in touch with him myself."

The landlords' lawyer emailed the tenant on May 3 to arrange service of the evidence package on the tenant. There was no reply.

On May 4 the landlords' lawyer sent their evidence package to the rental unit by courier. The courier returned the documents to the lawyer as "undeliverable" because:

- There was no answer at the tenant's telephone number, although the number was called several times.
- There was no response from the tenant on the intercom system.
- The property manager of the building refused to accept delivery of the package per company policy.

The landlords filed the evidence package with the Residential Tenancy Branch on May 4, 2016.

The bulk of the landlords' evidence was provided by their sworn testimony in the hearing. The documents included in their evidence package which are relevant to the issues in this hearing are:

- The tenancy agreement;
- 10 Day Notice to End Tenancy for Non-payment of Rent dated March 2, 2016;
- Emails and text messages between the tenant and the landlords; and,
- Copies of cheques written by the tenant.

All of these are either documents generated by the tenant or are already in his possession. Many of them were filed as exhibits to the affidavit submitted in support of his Application for Review Consideration. As there is no prejudice suffered by the tenant by the admission of

these documents into evidence even though they were not served on him by the landlords I accept them into evidence and have considered them in the course of making my decision.

Issue(s) to be Decided

- Is the 10 Day Notice to End Tenancy for Non-Payment of Rent dated March 2, 2016 valid?
- Should a monetary order be made in favour of the landlords and, if so, in what amount?

Background and Evidence

The rental unit is owned by one sister and managed by the other on her behalf. The manager's daughter is a lawyer and has acted as her mother and her aunt's lawyer throughout.

This tenancy commenced November 1, 2014 as a one year fixed term tenancy. The written tenancy agreement provided that at the end of the fixed term the tenancy ends and the tenant must move out. The monthly rent of \$1750.00 was due on the first day of the month. The tenant paid a security deposit of \$875.00.

Near the end of the term the parties agreed that the tenancy would continue as a month-to-month tenancy at a monthly rent of \$1795.00.

On October 3, 2016 the tenant provided the landlord with 13 post-dated cheques, each in the amount of \$1795.00.

The October rent cheque was returned NSF on October 5, 2015. The tenant provided the landlord with a replacement cheque that did clear the bank.

On January 13, 2016 the tenant's January rent cheque was returned NSF. The tenant gave the landlord a replacement cheque. This cheque was also returned NSF. After numerous requests the tenant delivered a bank draft for the January rent to the lawyer's office on January 28.

Because there is always a few days delay between when a cheque is deposited and when the payee is advised that it has been returned NSF the landlord decided to have the February rent cheque certified. She went to the branch of the tenant's bank where he has his account and presented the cheque for certification. She was told that the cheque was not negotiable. She attended a different branch of the same bank the next day and was told the same thing.

On February 2 she issued and posted a 10 Day Notice to End Tenancy for Non-Payment of Rent. In e-mail communication with the tenant she advised that the February cheque was

“not negotiable”. On February 4 the tenant delivered a bank draft for the February rent to the lawyer’s office; two days later than promised by him.

On March 1 the landlord again went to the tenant’s bank to have the rent cheque certified. She was told it was not negotiable. She presented the cheque to a different branch of the same bank the next day and was again told the cheque was not negotiable.

The landlord testified that it was explained to her by the bank officials that when a cheque is not negotiable that means that either there are insufficient funds in the account or there is a hold on the account. She was also told that if there were sufficient funds in the account their procedure was to call the account holder and confirm that it would be okay for the bank to certify the cheque. The landlord testified that on neither March 1 nor March 2 did the teller attempt to call the tenant.

On March 2 the landlord issued and posted a 10 Day Notice to End Tenancy for Non-Payment of Rent on the door of the rental unit.

On March 9 the tenant sent the landlord an e-mail in which he promised to deliver a bank draft for the March rent. He did not.

On March 15, 2016, the landlord applied by way of Direct Request Proceeding. On March 21, 2016 the landlords were granted an order of possession effective two days after service and monetary order in the amount of \$1795.00.

The landlord did not hear from the tenant until March 28 when she received a text message from him. He apologized for not paying the rent and offered to meet on March 31. The meeting did not occur because the landlord was not able to confirm the date and time of the meeting with the tenant.

On April 1 the landlord received a text message from the tenant advising her that he would deliver the March and April rents to the lawyer’s office by the end of business that day. Around 11:00 pm that evening she received another text from the tenant advising that he had not been able to access the lawyer’s office but he had left it with the security desk at a different building who said they would deliver the cheque to the lawyer’s office,

This is the same text message that the tenant had submitted in the evidence filed in support of his Application for Review Consideration. However, in the affidavit filed in support of his application he said the check was delivered on March 9, 2016; and the snapshot of the text message was undated. The snapshots filed by the landlords show the date and time of the message: “ Fri, Apr 1, 11:03 PM”.

The cheque was delivered to the lawyer's office on April 4. When the cheque was received it was dated April 1, 2016; was in the amount of \$3600.00; and was drawn on an account that was "in trust" for the tenant, not an account that was in the tenant's name. It was not certified.

The landlord did not attempt to deposit this cheque because she had obtained the order of possession and did not want to compromise her rights pursuant to that order.

A clerical error on both orders was corrected on April 5, 2016. The amended orders were served on the tenant by personal service on the same date.

On April 7 she received a telephone message from someone who identified themselves as the tenant's lawyer advising her that the tenant had filed for a review of the decision and orders. Late in the evening of the same day she received a text message from the tenant advising her of the same but in more profane terms. She has not heard from the tenant since.

On his Application for Review Consideration the tenant submitted a partial print-out of his bank account. The print-outs are confusing because the transactions are not listed in chronological order (which seems odd for a bank print-out). However, they show the following:

- On January 4, 2016 a cheque in the amount of \$1795.00 was returned NSF. A second cheque in the amount of \$1820.00 was returned NSF on January 19. The sums of \$1792.00 and \$100.00 were transferred to this account on January 28. Also on that date a bank draft in the amount of \$1852.50 was withdrawn from the account.
- On February 1 the sum of \$1880.00 was transferred to this account and on February 4 a bank draft in the amount of \$1802.50 was withdrawn.

There is a print-out for March. The print-out is dated April 7. It shows that as of March 1 the account balance was \$1947.86; on March 31 it was \$1932.94; and on April 7 it was (\$14.54).

Analysis

An unsuccessful attempt by a payer to have a cheque certified will not be recorded on the payee's bank statement in the way that a dishonoured cheque and the bank's NSF fees are. Similarly, "holds" are not recorded on the bank statement.

I accept the landlords' evidence that she presented the March rent cheque to the tenant's bank to be certified on two occasions and was told on both occasions that it could not be certified. It was not necessary for the landlord to deposit the cheque and wait for the NSF

notification from the bank before issuing and serving a 10 Day Notice to End Tenancy for Non-Payment of Rent.

The notice to end tenancy was posted at the rental unit on March 2 and pursuant to section 90 of the *Residential Tenancy Act* is deemed delivered on March 5. The tenant had until March 10 to pay the March rent thereby rendering the notice ineffective. He promised payment on March 9, thereby establishing that he received the notice, but the evidence is that the tenant did not tender payment of the March rent until April 1. If he had the money in his account in March, as he said he did, why did he not deliver a bank draft for the March rent as he had done for previous month's rent?

I find that the tenant was properly served with a 10 Day Notice to End Tenancy for Non-Payment of rent in the prescribed form. He did not pay the outstanding rent or file an application to dispute the notice within the required time and is therefore conclusively presumed to have accepted that the tenancy ended on the effective date of the notice. Based on the above facts I find that the landlords are entitled to an order of possession effective two days after service.

I find that the landlords have established a total monetary claim of \$1795.00 for the March rent and I grant the landlords an under section 67 in that amount.

Conclusion

- a. An order of possession effective two days after service has been granted to the landlords. If necessary, this order may be filed in the Supreme Court and enforced as an order of that court.
- b. A monetary order in the amount of \$1795.00 has been granted to the landlords. If necessary, this order may be filed in the Provincial Court and enforced as an order of that court.

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: May 30, 2016

Residential Tenancy Branch