



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OLC, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking to cancel a notice to end tenancy.

The hearing was conducted via teleconference and was attended by the tenant and the landlord.

The parties agreed that they had exchanged evidence packages and no concerns were raised by either party regarding evidence with one exception. The landlord stated that the tenant did not serve the Notice of Hearing documents within the 3 days required. The landlord stated she did not receive the Notice of Hearing documents until a week later.

Regardless of the requirement to serve the respondent with notice of an Application for Dispute Resolution within three days of it being accepted by the Residential Tenancy Branch, I find the landlord was prepared for this hearing; submitted a substantial volume of evidence (67 pages); and was not prejudiced in anyway but the delayed service on the part of the tenant. The hearing proceeded.

While the landlord acknowledged receiving the tenant's evidence I noted that there had been no evidence submitted to the Residential Tenancy Branch from the tenant. The tenant testified that she had faxed it to the Branch on May 19, 2016. As the landlord confirmed she had received the tenant's evidence I found no reason to adjourn the hearing and allowed for the tenant to re-submit her evidence to the Branch no later than the end of business on Friday, June 3, 2016. The tenant's evidence was received by the Branch by the end of business on Friday, June 3, 2016

I note that Section 55 of the *Residential Tenancy Act (Act)* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession

if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a 10 Day Notice to End Tenancy for Unpaid Rent and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 46, 67, and 72 of the *Act*.

Should the tenant be unsuccessful in seeking to cancel the 10 Day Notice to End Tenancy for Unpaid Rent it must also be decided if the landlord is entitled to an order of possession pursuant to Section 55(1) of the *Act*.

Background and Evidence

The landlord submitted into evidence a copy of a tenancy agreement signed by the tenant as both the tenant and the landlord's agent in August 2013. The agreement also named the tenant as the tenant and the landlord in care of the corporate landlord.

The agreement stipulated that the tenancy began on September 1, 2013 as a 1 year fixed term tenancy that would convert to a month to month tenancy on September 1, 2014 for a monthly rent of \$850.00 due on the 1st of each month with no security deposit or pet damage deposit required. The agreement also stipulated that this rental unit is the manager's rental unit.

The landlord submits that prior to the tenant moving into the rental unit the agreement was for the tenant to receive a reduction each month from the "market value" of rent for the unit, lowering the rent to \$850.00. In addition, the tenant was provided with free parking while she was employed but that when her employment ended she would have to pay \$50.00 per month for parking.

The landlord submits that the market value of the rental unit, based on what was received for rent from the previous tenant of the rental unit was \$1,440.00. In support of this position the landlord submitted a copy of a tenant ledger for the tenancy in the subject rental unit immediately prior to this tenancy.

The landlord submitted that despite their determination that the market rent of the unit should be \$1,440.00 they agreed to only charge the tenant \$1,350.00 plus \$50.00 for parking for a total of \$1,400.00 per month beginning December 1, 2016 after her employment with the landlord ceased.

The landlord submits that despite informing the tenant of the requirement to pay this amount she has only paid \$1,250.00 for each month of December 2015, January, February, March, April, May, and June 2016.

The tenant submits that the original agreement was that the market rent was \$1,250.00 which included parking and a locker and she would receive a \$400.00 per month credit while she was employed reducing her rent to \$850.00 per month. The tenant submitted that when she signed a new employment contract with the new landlord and was given an additional \$100.00 rent reduction to \$750.00 per month.

The landlord testified that she was not aware of any other tenancy agreement or employment contract that spoke to the issues of what impact on rent would be should the tenant lose her employment with the landlord.

The tenant confirmed that she did not submit a copy of either of her employment contracts with the landlord into evidence for this hearing. However, she stated that the second employment contract did include a clause that addressed returning the rent of the unit to "market value" should the tenant cease to work for the landlord.

The parties confirmed the tenant received, on or about May 2, 2016 a 10 Day Notice to End Tenancy for Unpaid Rent signed by the landlord on May 2, 2016 with an effective vacancy date of May 15, 2016 due to unpaid rent in the amount of \$290.00 due May 1, 2016.

The tenant submitted that she had received a second 10 Day Notice to End Tenancy for Unpaid Rent issued and received on May 13, 2016 stipulating the amount of rent unpaid was \$1,600.00. The landlord did not dispute this notice was issued. The tenant confirmed that she did not submit a new Application for Dispute Resolution seeking to cancel the 2nd 10 Day Notice.

Analysis

While the tenant did not file a new Application for Dispute Resolution or submit an amendment to her original Application to dispute the second 10 Day Notice issued on May 13, 2016 I find that the rent the landlord stated on the May 13, 2016 Notice is the specific amount the landlord has referenced to in this hearing as the amount outstanding at the time both Notices were issued.

As such, I find it is unnecessary for the tenant to either submit a new Application or amend this current Application to include the May 13, 2016. I find that the Notices were

issued for the same purpose and as such I have considered the cancellation of both Notices in this decision.

Section 46 of the *Act* states a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy on a date that is not earlier than 10 days after the date the tenant receives the notice. A notice under this section must comply with Section 52 of the *Act*.

In a case where a landlord wants to end a tenancy for unpaid rent the burden rests with the landlord to establish that rent was owed on the date that the 10 Day Notice to End Tenancy was issued. As such, the landlord must first establish that amount of rent that was due and how much of that rent was unpaid on the date the Notice was issued.

Where the amount of rent agreed upon for the tenancy is in dispute the burden rests with the landlord, as noted above, to provide sufficient evidence to establish how much rent is due each month and how much was unpaid.

In the case before me, I find that in the absence of any written agreement as to what the rent would be in the event that the tenant ceased to be employed by the landlord the landlord has failed to provide any evidence at all to what the rent should be for the following reasons:

1. There is no document submitted (either tenancy agreement or employment contract) by either party that confirms that the rent should be any different, if the tenant's employment changed, from what is noted in the tenancy agreement of August 2013;
2. Based on the testimony of both parties I accept that the parties had agreed that the rent would return to "market value" if the tenant lost her employment with the landlord. However, there is no specific definition of what "market value" means to either party. Specifically, was the intent to be "market value" of all similar units in the geographic area; "market value" of this specific rental unit; and/or "market value" at the start or the end of her employment;

Section 6(3) of the *Act* stipulates that a term of a tenancy agreement is not enforceable if the term is inconsistent with this Act or the regulations, the term is unconscionable, or the term is not expressed in a manner that clearly communicates the rights and obligations under it.

As such, I find the only evidence to confirm that the rent should be increased at all is the tenant's agreement that it was intended to be at a higher rate should she not be

employed by the landlord. However, there is nothing in the tenant's submissions that tie the amount of the higher rate to a "market value".

Even if some agreement stipulated an increase of rent to "market value" I am not satisfied that there were any explicit expectations as to what "market value" meant or to which time period the "market value" was to be set. As such, I find the term "market value" to be too ambiguous to clearly communicate the expected rent amount.

As per the tenant's testimony that from April 2015 to the end of her employment the rent reduction was in the amount of \$500.00 and that prior to April 2015 she was receiving a \$400.00 reduction. The landlord's evidence, such as tenant ledgers, confirms that as of April 2015 the tenant began paying \$750.00 per month reduced from the previous payments of \$850.00.

As to whether parking is included in the amount of rent or considering it to be an additional \$50.00 charge I note that the original and only documented agreement between the parties signed by the tenant as both the landlord's agent and the tenant in August 2013 stipulates that parking is included in the rent paid for the tenancy.

As such, I find the provision of parking is a facility provided as part of the tenancy and is independent of the employment agreement. Furthermore, I find the landlord cannot charge an additional fee for parking unless the landlord provides a 1 month written notice of their intent to remove parking as part of the tenancy; reduce the rent by the amount of value of parking; and then if the tenant wished to pay for parking she could enter into a separate parking agreement with the landlord.

For these reasons and on a balance of probabilities, I find the rent for this rental unit is \$1,250.00 per month which includes parking as an included facility. As such, and based on the landlord's testimony that the tenant has paid rent in the amount of \$1,250.00 for each of the months of December 2015, January, February, March, April, May, and June 2016 I find that at all times the tenant has paid all rent.

The landlord has provided no additional evidence to show that the tenant had not paid the amount of \$1,250.00 after the date it was due for any of the month's identified or that the 10 Day Notices issued were issued for any amount paid up to \$1,250.00 or any other reason.

Therefore, I find the landlord has failed to establish that any amount of rent was unpaid at the time they issued either the May 2, 2016 or May 13, 2016 10 Day Notice to End

Tenancy for Unpaid Rent. As a result, I find the landlord cannot rely on Section 46 to the tenancy from the above noted Notices.

Conclusion

Based on the above, I order that both the 10 Day Notice to End Tenancy for Unpaid Rent issued on May 2, 2016 and the 10 Day Notice to End Tenancy for Unpaid Rent issued on May 13, 2016 are cancelled. I order the tenancy remains in full force and effect.

I find the tenant is entitled to monetary compensation pursuant to Section 67 in the amount of **\$100.00** for the fee paid by the tenant for this application. I order the tenant may deduct this amount from a future rent payment, pursuant to Section 72(2)(b) of the *Act*.

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: June 06, 2016

Residential Tenancy Branch