



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FF

Introduction

This hearing addressed the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent, ("10 Day Notice") pursuant to section 46; and
- authorization to recover the filing fee for this application from the landlords, pursuant to section 72.

The tenant and landlord SE attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. Landlord WB did not attend the hearing. Landlord SE confirmed receipt of the tenant's application ("Application") for dispute resolution package. In accordance with sections 89 and 90 of the *Act*, I find that the landlords were duly served with the Application.

Preliminary Issue – Jurisdiction

Landlord SE testified that she owns the rental property that contains the rental unit along with her husband and daughter. Landlord SE explained that initially her daughter and daughter's husband (the "tenant") lived in the rental unit. Landlord SE estimated that the relationship between her daughter and daughter's husband ended sometime in 2014. Landlord SE's daughter vacated the rental unit and the tenant refused to vacate. The tenant immediately began paying landlord SE's husband \$630.00 a month. Landlord SE testified that there was no written or verbal tenancy agreement.

Witness KB testified that in 2010 her parents approached her about purchasing an investment property. She agreed and her parents secured a mortgage. Neither she nor the tenant held any portion of the mortgage. She managed the upstairs tenant and resided in the lower rental unit along with the tenant. She collected rent from the upstairs tenant and deposited a portion to make up the mortgage payment to a joint bank account held by her and her parents. The tenant did not have access to the joint

bank account. Witness KB considered herself 1/3 owner of the rental property. Because the relationship ended between herself and the tenant she vacated the rental unit. The tenant refused to vacate and told witness KB he would pay \$750.00 a month to continue living there. The tenant did not pay \$750.00 a month; instead he paid her father \$630.00 a month. Witness KB testified that she did not agree to \$630.00 in rent.

The tenant testified that he began cohabiting with witness KB in November of 2007. On January 11, 2010, as common law partners they took possession of the rental property. The tenant and witness KB later married in 2012. On May 28, 2014 witness KB vacated the unit and the tenant filed for divorce. The tenant testified that although he was never on title of the rental property, his wife is one of the registered owners and that makes him a partial owner, not a tenant. The tenant continues to make "mortgage payments" in the amount of \$630.00 directly to witness KB's father.

All parties testified that the matter was brought to the Supreme Court (the "Court"). Landlord SE and witness KB testified that the Court determined because landlord SE and landlord WB hold majority ownership the matter falls under the Residential Tenancy Branch, whereas the tenant testified that the Court determined he had the right to reside in the matrimonial home. Neither party has submitted a copy of the Court decision. The landlords have submitted a letter from legal counsel which confirmed that on May 28, 2015 the landlords brought an application in the Supreme Court related to the tenant's occupation of the rental unit. The letter indicates that the application was dismissed for jurisdictional reasons and the landlords were advised to file with the Residential Tenancy Branch.

Based on the lawyer's letter, I find the Court has already made a finding on jurisdiction, consequently I find this matter falls within the realm of the Residential Tenancy Branch.

Issue(s) to be Decided

Should the landlords' 10 Day Notice be cancelled? If not, are the landlords entitled to an order of possession?

Is the tenant entitled to recover the filing fee for his application?

Background and Evidence

Following the separation on May 28, 2014 the tenant forwarded post-dated cheques for the first of each month in the amount of \$630.00 to landlord WB. The tenant did not

remit a security deposit or sign a tenancy agreement. The tenant continues to reside in the rental unit.

A 10 Day Notice for unpaid rent of \$888.16 due on March 1, 2016 was issued to the tenant on May 6, 2016. The notice indicates an effective move-out-date of May 16, 2016.

Landlord SE testified that the unpaid rent on the 10 Day Notice was comprised of \$630.00 for March rent and \$258.16 for April rent. The landlord claimed that the tenant paid a total of \$371.84 in rent for the above two months. The tenant billed the landlord \$888.16 for new locks by way of deduction from his monthly payments.

The tenant testified that the landlord broke into the family home on February 16, 2016 without notice and took 95% of the family belongings. Consequently, the tenant changed the locks and withheld \$888.16 for the cost of the changed locks from the monthly payments he made to landlord WB.

The tenant is also seeking to recover the \$100.00 filing fee for this Application from the landlords.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for unpaid rent and utilities the tenant may, within five days, pay the overdue rent and utilities or dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

The tenant filed an application essentially in an attempt to reargue jurisdiction that the Court had already determined. Although the tenant argued the monthly payments were mortgage payments and not rent, I find otherwise. The tenant was not on title to the rental property, did not hold the mortgage in his name and held no bank accounts related to the rental property. Upon the departure of his wife the tenant began paying a regular monthly amount that the landlord readily accepted. I find this recurring payment constitutes rent as this was an express or implied agreement between a landlord and tenant in regards to possession of a rental unit.

At no time did the tenant argue that rent had been paid in full. In fact the tenant acknowledged withholding March and part of April's rent to cover the cost of new locks. Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy

agreement, whether or not the landlord complies with the *Act*. Despite the lock issue the tenant was obligated to pay rent in full for March and April and failed to do so.

Based on the landlord's testimony and the notice before me, I find that the tenant was served with an effective notice. Accordingly I dismiss the tenant's application to cancel the 10 Day Notice and find that the landlord is entitled to a two (2) Day Order of Possession, pursuant to section 55 of the *Act*.

Conclusion

I grant an order of possession to the landlord effective two (2) days after service on the tenant.

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 23, 2016

Residential Tenancy Branch