



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking an order of possession and a monetary order.

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

Towards the end of the hearing the tenant testified she had not received any of the evidence from the landlord that I had been referring to during the hearing. She stated she had received only the Notice of Hearing documents and the Monetary Order Worksheet.

The landlord's agent originally testified that they had served the tenant with the Notice of Hearing documents; the Monetary Order Worksheet and the Statement of Account. After I clarified for him that they had submitted those documents as well as copies of the 10 Day Notice; the tenancy application; and tenancy agreement he changed his testimony to say that they had served the tenant with all of these documents.

On a balance of probabilities, I find it is unlikely that the landlord would have served the tenant with only a partial package in preparation for this hearing. As such, I find the landlord has served the tenant with their evidence as per the agent's testimony.

At the outset of the hearing the landlord's agent stated that when they received the tenant's evidence last week they discovered that the tenant had made payments of rent on April 20, 2016 in the amount of \$2,300.00; April 21, 2016 in the amount of \$3,450.00; May 2, 2016 in the amount of \$1,150.00; and June 2 in the amount of \$1,150.00 for a total of \$8,050.00.

The landlord's agent requested that we wait for 20 minutes to begin the hearing so he could confirm how much the landlord intended to claim as unpaid rent. I declined to allow the landlord this additional time and he decided within a few minutes that he would amend the Application to seek only \$1,150.00 and not the original \$10,350.00 as noted on the Application.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession for unpaid rent; to a monetary order for unpaid rent; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 46, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord submitted the following documentary evidence:

- A copy of a residential tenancy agreement which was signed by the parties on August 24, 2015 for a 1 year fixed term tenancy beginning on September 1, 2015 for the monthly rent of \$1,150.00 due on the 1st of each month and a security deposit of \$575.00 was paid; and
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent that was issued on March 14, 2016 with an effective vacancy date of March 24, 2016 due to \$4,600.00 in unpaid rent.

The landlord submitted that the tenant failed to pay the full rent owed since the beginning of the tenancy and that the tenant was served the 10 Day Notice to End Tenancy for Unpaid Rent on March 14, 2016, personally.

The landlord testified that while the tenant has made payments since the Notice was issued the payment in full was not made within the 5 days required once a 10 Day Notice is issued. The landlord testified that no receipts for use and occupancy were issued after receipt of these payments.

In her evidence, the tenant submitted confirmation of electronic payments made to the landlord on April 20, 2016; April 21, 2016; May 2, 2016; and June 2, 2016 for the total amount of \$8,050.00; and a negotiated cheque dated December 15, 2015 in the amount of \$3,450.00. The tenant submits that she has paid all of her rent now in full, including July 2016. The landlord's agent could not confirm if the tenant had paid rent for July 2016.

In referring to the landlord's Statement of Accounts, I asked the agent questions regarding payments and reversals made on the tenant's account since the Notice was issued. Specifically, I questioned the agent regarding the reversal of a tenant payment in the amount of \$3,450.00 dated April 11, 2016 that did not appear to be attached to any payment made by the tenant. The agent stated he could not answer that question and no one from his accounting department, who could explain it, would be available until the afternoon after the hearing.

Analysis

I have reviewed all documentary evidence and accept that the tenant has been served with notice to end tenancy as declared by the landlord. The notice is deemed to have been received by the tenant on March 14, 2016 and the effective date of the notice was March 24, 2016. I accept the evidence before me that the tenant failed to pay the rent owed in full within the 5 days granted under Section 46(4) of the *Act*.

Based on the foregoing, I find the tenant is conclusively presumed under Section 46(5) of the *Act* to have accepted that the tenancy ended on the effective date of the Notice.

However, Residential Tenancy Policy Guideline #11 states a Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- Whether the receipt shows the money was received for use and occupation only.
- Whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- The conduct of the parties.

Since the 10 Day Notice issued on March 14, 2016 indicated that the tenant owed \$4,600.00 and the tenant had paid the landlord on April 20 and 21, 2016 a total of \$5,750.00, I find the difference of \$1,150.00 constituted the payment of rent after the effective date of the Notice.

Based on this and the fact that the landlord confirmed that no receipts for use and occupancy were issued as a result of these payments, as well as the payments made on May 2, 2016 and June 2, 2016 I find the landlord has accepted the payment of rent for the months of April, May, and June 2016. As such, I find the landlord has reinstated the tenancy and the 10 Day Notice to End Tenancy for Unpaid Rent issued on March 14, 2016 is not enforceable.

As to the landlord's monetary claim, I find the landlord's evidence regarding the quantum of rental arrears to be unreliable for the following reasons:

1. The landlord has provided no direct evidence from either their own financial institution or the tenant's confirming total amounts rejected;
2. Based on the agent's testimony that the landlord didn't know that the tenant had made the payments of April 20; April 21; May 2; and June 2 2016 until the tenant submitted her evidence to them. I would expect that the landlord would have known these payments were made long before they submitted their Application for Dispute Resolution on June 10, 2016 and yet their Application indicated the tenant had made absolutely no payments for rent or arrears on April 20 or 21 2016;
3. The Statement of Accounts does acknowledge a payment of \$1,150.00 made on May 2, 2016 and another in the same amount on June 8, 2016 and yet the landlord still sought this rent in their original Application;
4. As noted above, the landlord issued the 10 Day Notice indicating \$4,600.00 in arrears for which the tenant paid that amount by April 21, 2016 and then made payments for the months of April; May and June 2016. The landlord's agent could not confirm in the hearing if July 2016 rent was paid despite the tenant's testimony that it was.

As a result, I favour the tenant's testimony and documentary evidence that she has paid all rent in full up to and including July 2016.

Conclusion

Based on the above, I dismiss the landlord's Application for Dispute Resolution in its entirety, 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: July 07, 2016

Residential Tenancy Branch