Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: **OPR, MNR, MNSD, FF**

Introduction

This was a cross-application hearing.

On June 23, 2016 the tenants applied requesting more time to cancel a 10 day Notice to end tenancy for unpaid rent, to cancel the Notice, an order to reduce rent for repairs, services or facilities agreed upon but not provided and to recover the filing fee from the landlord.

On July 5, 2016 the landlord applied requesting an order of possession for unpaid rent and a monetary order for unpaid rent. The application was initially made via the Direct Request Proceeding ex parte process and then scheduled to this participatory hearing as the tenants had applied to dispute the Notice ending tenancy.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the included evidence and testimony provided.

The parties each confirmed receipt of evidence that was reviewed at the start of the hearing. The tenant confirmed receipt of 27 pages of documents supplied by the landlord. The landlord confirmed receipt of a total of 13 pages of documents from the tenant. The written submissions included a copy of the applications.

I note that the tenant application names an applicant who is not included on the tenancy agreement.

The landlord has named as respondents the two individuals who signed the tenancy agreement, as tenants. The landlord said that service was completed to the tenants via courier. This is not a method of service contemplated by the legislation; however the tenant present at the hearing confirmed receipt of the hearing documents. There was no evidence before me that tenant S.S. was also given a copy of the hearing documents as part of a separate hearing package. Therefore I find that the landlord's application is amended to include only the tenant who was at the hearing.

The parties confirmed that they recently attended a hearing in relation to a claim made by the tenants (see cover sheet for file number.) The tenant confirmed that the matters related to compensation for emergency repairs and rent abatement were dealt with at that previous hearing. Therefore, the only matter to consider on the tenants' application is the Notice to end tenancy; the balance of the claim was withdrawn.

Issue(s) to be Decided

Are the tenants entitled to more time to make an application to dispute 10 day Notice to end tenancy for unpaid rent?

Is the landlord entitled to an Order of possession for unpaid rent or should the Notice be cancelled?

Is the landlord entitled to a monetary Order for unpaid rent?

Background and Evidence

The tenancy commenced on January 1, 2015. Rent in the sum of $1,050.00 per month is due in two installments; on the fifth and 20th day of each month. The landlord is holding a security deposit in the sum of $525.00. A copy of the tenancy agreement was supplied as evidence.

The tenant confirmed receipt of a 10 day Notice ending tenancy for unpaid rent or utilities, which was issued on June 9, 2016 and had an effective date of June 26, 2016. The tenant said that the Notice was received on June 12, 2016; however registered mail evidence supplied by the landlord indicates that the Notice was received by the tenants on June 13, 2016.

The Notice indicated that the Notice would be automatically cancelled if the landlord received $6,400.00 within five days after the tenants received the Notice. The Notice also indicated that the tenants were presumed to have accepted that the tenancy was ending and that the tenants must move out of the rental by the date set out in the Notice unless the tenants paid the rent or filed an Application for Dispute Resolution within five days.

The tenant said that at the time the Notice was received the landlord had been served with Notice of the tenant's hearing that included a monetary claim (in the sum of $18,077.00;) this included the cost of emergency repairs that had been deducted from rent owed. That application had been made on May 25, 2016; prior to the Notice ending tenancy issue date. At the time of this hearing a decision had not been issued in relation to the tenant's previous application which was held over two dates; on June 22 and July 19, 2016.

The tenant said that when the Notice ending tenancy was served the tenants sent a rebuttal submission to the landlord's legal counsel, prior to the June 22, 2016 hearing. The tenants did not amend their application to dispute the Notice at the hearing scheduled for June 22, 2016; they thought the Notice would be considered and that they were not required to take any further steps to dispute the Notice. The tenant said that at the hearing held on June 22, 2016 a request to consider the Notice ending tenancy was declined by the arbitrator.

On June 23, 2016 the tenants submitted a separate application to dispute the Notice ending tenancy that was issued on June 9, 2016. The tenant said that she believed the Notice had been properly addressed by the submission of the rebuttal to the landlord's legal counsel; that the Notice had been issued only in response to the tenant's application for dispute resolution and that the sums included on the Notice did not relate to possible rent owed and was related to the emergency repair costs claimed.

Analysis – Tenant Application to Extend Time to Dispute Notice

I find that the tenants received the Notice on June 13, 2016; the date provided by the landlord's Canada Post tracking information. Receipt of the Notice occurred nine days prior to the hearing that was scheduled in response to the tenant's application for emergency repair costs and rent abatement.

Section 46 of the Act requires a tenant to either pay the rent in full or dispute a 10 day Notice to end tenancy within five days of receipt of the Notice. The tenants had until June 18, 2016 to pay any rent owed or to dispute the Notice.

Section 66 of the Act provides:

Director's orders: changing time limits

> ***66*** *(1) The director may extend a time limit established by this Act only in exceptional circumstances, other than as provided by section 59 (3) [starting proceedings] or 81 (4) [decision on application for review].*
>
> *(2) Despite subsection (1), the director may extend the time limit established by section 46 (4) (a) [landlord's notice: non-payment of rent] for a tenant to pay overdue rent only in one of the following circumstances:*
>
> *(a) the extension is agreed to by the landlord;*
>
> *(b) the tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an order of the director.*
>
> *(3) The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.*
>
> (Emphasis added)

The tenants applied to dispute the Notice on June 23, 2016; three days before the effective date indicated on the Notice and five days outside of the required time limit.

During the hearing the landlord did not agree to an extension of time allowing the tenants to apply to dispute the Notice ending tenancy.

I then considered section 66(2)(b) of the Act in relation to the tenant's request for more time to apply to cancel the Notice. I find that the tenants believed that they possessed the right to make deductions from rent due as a result of emergency repairs. I do not know if that was a valid assumption on the part of the tenants, but at the time the tenants believed they had a claim for the cost of emergency repairs.

I have then considered whether the time limit to dispute the Notice ending tenancy should be extended due to exceptional circumstances; pursuant to section 66(1) of the Act.

Residential Tenancy Branch (RTB) policy suggests:

> *that the word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word*

> *"exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse. Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.*

Policy provides an example of hospitalization as one possible exceptional circumstance. Policy suggests that reasons such as not knowing the law or a failure to pay attention to correct procedure do not support an extension of time limits.

RTB policy provides suggested criteria that may be considered by an arbitrator in making a determination as to whether or not there were exceptional circumstances that support an extension of a time limit. These include:

- Whether the party willfully failed to comply with the relevant time limit;
- If the party had a bona fide intention to comply with the relevant time limit;
- Whether reasonable and appropriate steps were taken to comply with the relevant time limit;
- If the failure to meet the relevant time limit was caused or contributed to by the conduct of the party;
- If the party has filed an application which indicates there is merit to the claim; and
- The party has brought the application as soon as practical under the circumstances.

I find that there was no willful intention on the part of the tenants to avoid compliance with the time limit. As the tenants had a hearing scheduled within nine days of receiving the Notice I find they had a reasonable expectation the Notice would form part of that hearing. The tenants supplied the landlord with some sort of rebuttal prior to the June 22, 2016 hearing, as a way of informing the landlord of their intention to dispute the Notice. I find this supports a bona fide intention by the tenants to dispute the Notice; even though they failed to submit a formal amendment to their application for dispute resolution or a new application.

Residential Tenancy Branch Rules of Procedure section 4.6 requires a party to serve an amended application to the respondent and RTB no later than 14 days prior to a hearing. The tenants received the Notice to end tenancy on June 13, 2016; only nine days prior to the June 22, 2016 hearing. This left the tenants in a position where an amendment to their application would not comply with section 4.6 of the Rules of Procedure. Again, given this Rule, it would have been a reasonable expectation that the Notice could be brought forward at a scheduled hearing rather than through the formal filing of a new application.

In relation to the cause for the failure to dispute the Notice within the required time limit I find that the tenants had a reasonable expectation that they had taken appropriate steps to dispute the Notice by indicating that intention to the landlord. I find on the balance of probabilities that the conduct of the tenants does not support a denial of the request for an extension of time. I find, when viewed against all other factors that the actions of the tenants was not unreasonable. As soon as the tenants realized the Notice would not be considered at the June 22, 2016 hearing they immediately filed an application to dispute the Notice. Further, combined with the claim made by the tenants and the submission made regarding inconsistencies between the tenants' record of rent paid and those of the landlord, I find that there may be some merit to the tenant's claim regarding rent owed against that claimed by the landlord.

Taking all of these factors into account, I find on the balance of probabilities that the circumstances that existed at the time were exceptional. This was not a case of the tenants simply ignoring the legislation or making an excuse for not applying within the required time limit. From the evidence before me, I find on the balance of probabilities that that the tenants faced considerable uncertainty,

as they were awaiting a hearing and decision on their monetary claim. That claim included a considerable sum for rent reduction due to emergency repairs; leaving the payment of rent owed in doubt. I find that this formed an unusual and exceptional set of circumstances.

Therefore, given the circumstances that existed at the time the Notice to end tenancy was issued I find pursuant to section 62(3) and 66 of the Act, that the tenants must be granted more time to apply to cancel the Notice ending tenancy issued on June 12, 2016.

Balance of Claims

The landlord submitted a record of rent payments made by the tenants since the start of this tenancy. The records indicated the sums paid for rent since February 2015.

The records supplied by the landlord included a notation that the total unpaid rent owing to June 30, 2016 was $7,075.00. The document included a claim for unpaid rent in the sum of $6,400.00; the sum indicated on the 10 day Notice to end tenancy issued on June 9, 2016. The landlord said that the Notice to end tenancy issued on June 9, 2016 included all rent owed for June. The document supplied by the landlord setting out the sums paid and owed was not provided in a typical ledger format, but in the form of notes made over three pages.

The tenant said that they owe $200.00 from December 2015 plus rent for January, May and June 2016; totaling $3,400.00. The tenant supplied a copy of bank records showing electronic payments made to the landlord. When this document was referenced during the hearing the landlord responded that they did not have the electronic payment record before them; despite having confirmed receipt of the evidence reviewed at the start of the hearing. The landlord said that in fact they had a binder of 100 pages. The tenant confirmed that additional evidence had been given to the landlord that was not supplied to the RTB. I then determined that I would not reference the bank statement supplied by the tenant, but the tenant was able to reference that document during the hearing.

The tenant reviewed some bank transfers that had been made and said that they did appear to align with payments shown in the landlord's records, but that some transfer payments were missing from the landlord's record.

The tenant said that when the Notice was issued on June 12, 2016 the amount of rent indicated as owed at that time was incorrect and did not take into account the claim the tenants had made related to emergency repairs. According to the tenant, total rent owed if the tenants claim failed would be $3,450.00.

Analysis

I have considered the evidence before me and find that the 10 day Notice to end tenancy for unpaid rent issued on June 12, 2016 fails to disclose the correct sum of rent that may be owed. I found the landlord's evidence regarding rent owed inconsistent and confusing. The ledger supplied, setting out rent paid and owed was not in a typical ledger format but did supply sums paid and owed. The landlord confirmed that the Notice included rent that was not due at the time, but rent owed up to June 20, 2016. A Notice cannot include a demand for rent that is not yet owed.

My calculation of the amounts provided by the landlord as paid to May 20, 2016 is $10,575.00. From February 2015 to June 1, 2016 the total sum of rent owed was $15,750.00. This would result in a deficit in the sum of $5,175.00, to June 9, 2016.

From the evidence before me I am unable to align the sums on the landlord's ledger of rent owed and paid against the sum claimed on the Notice to end tenancy and the sum the tenant says may be owed if their claim fails.

At the time the Notice was issued the landlord was aware that the tenants' hearing was imminent and that the hearing was being held to consider a claim for rent reduction for emergency repairs paid by the tenants. If there is any validity to the tenants' claim section 46(3) of the Act would authorize the tenants to make deductions from rent owed. I do not know the outcome of the tenants' monetary claim as a decision has not yet been issued, but the landlord would have been aware of at least the potential of a rent reduction for emergency repairs.

Taking all of these factors into consideration I find that the landlord has failed to prove on the balance of probabilities that the sum indicated on the Notice to end tenancy for unpaid rent issued on June 9, 2016 is accurate. Therefore, I find, pursuant to section 62(3) of the Act that the Notice issued on June 9, 2016 is cancelled and of no force and effect.

The tenancy will continue until it is ended in accordance with the Act.

The landlords' claim for unpaid rent is dismissed with leave to reapply. The landlord is at liberty to issue a 10 day Notice to end tenancy for unpaid rent that is due up to the time the Notice is issued, taking into account any sum that may be ordered deducted from rent due.

As the tenants' application has merit I find that the tenants are entitled to deduct the $100.00 filing fee from rent due.

Conclusion

The tenants are granted more time to apply to cancel the 10 day Notice to end tenancy for unpaid rent issued on June 9, 2016.

The Notice ending tenancy for unpaid rent issued on June 9, 2016 is cancelled.

The landlords' claim for unpaid rent is dismissed with leave to reapply, as set out above.

This decision is final and binding and 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 29, 2016

Residential Tenancy Branch