



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ROCKWELL P.M. INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, FF

Introduction

This hearing dealt with the tenants' Application for Dispute Resolution (the "Application") filed November 3, 2016 seeking to cancel a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") and to recover their filing fee. The Application was brought under section 46(4) of the *Residential Tenancy Act* (the "Act").

The tenants attended the hearing and the male tenant gave affirmed testimony and was provided the opportunity to present his evidence orally and in written and documentary form, and to make submissions.

As the landlord did not attend the hearing, service of the Notice of a Dispute Resolution Hearing ("Notice of Hearing") was considered. The tenant testified that the Notice of Hearing package, which included the tenant's Application and evidence, was initially sent to the landlord by registered mail on November 9, but was returned owing to a mistake by the tenant in the address. As a result the tenant resent the materials by registered mail on November 18, 2016 to the service address provided by the landlord on the 10 Day Notice, which was also submitted in evidence. The tenants provided a registered mail tracking number and a copy of the registered mail address slip addressed to the landlord at that address. Based on the above, I find the landlord was sufficiently served with the Notice of Hearing, Application, and evidence in accordance with the Act.

Issues

Are the tenants entitled to an order cancelling the 10 Day Notice?

Are the tenants entitled to the return of their filing fee?

Background and Evidence

The 10 Day Notice is dated November 2, 2016. The tenant testified that he received the 10 Day Notice on the same day, and that he filed the Application on November 3, 2016. The 10 Day Notice is from two parties: "Rockwell P.M. Inc." and "Nav. Sunset."

A copy of the tenancy agreement was submitted in evidence. It shows that the tenancy began on July 1, 2000 as a one year fixed term with an expiry date of June 31, 2001 [reproduced as written] and with a rent of \$795.00 due on the first of each month. A security deposit of \$397.50 was paid at the start of the tenancy. The tenancy agreement does not include a charge for parking: the space where that cost could be inserted is struck through. The tenancy agreement provides that any change or addition to it must be signed to in writing and initialed by both landlord and tenant and must be reasonable, and that if a change is not agreed to in writing and initialed, or is not reasonable, it is not enforceable.

Although the tenancy agreement is between the tenants and "Equitex Mgt" and states that the rent is due on the first of the month, the tenant testified that he has been paying rent on the sixth of the month for several years, based on an agreement he made with the prior landlord several years ago. This arrangement was made because the tenant is paid on the fifth of the month.

The tenant also testified that the current management company took over in January of 2015, and that when they did, he asked the building manager, orally, whether he could continue to pay rent on the 6th of each month and was advised that this would be acceptable. He further stated that until receipt of the 10 Day Notice on November 2, 2016, the tenants had received no notice that this arrangement was not acceptable. In support of his testimony the tenant provided copies of monthly rent cheques over 2015 and 2016 payable to "Nav Sunset Apts," all of which are dated for the sixth of the month.

The tenant further testified that he had provided a series of post-dated cheques to the landlord, and that after receiving the 10 Day Notice on November 2, his rental cheque, which was already in the landlord's possession, and dated November 6, 2016, was cashed by the landlord for November rent.

Lastly, the tenant testified that the landlord has been trying to have him pay for parking. He believes that this is why the 10 Day Notice states that rent is owing in the amount of \$1,209.00 when the monthly rent is currently only \$951.38.

Analysis

Section 46 of the Act provides that a landlord may end a tenancy if rent is unpaid on any day after it is due by giving notice to end the tenancy effective on a date no earlier than 10 days after the tenant receives the notice. Under subsection (4), the tenant has 5 days after receipt of the notice to pay the overdue rent or dispute the notice by making an application for dispute resolution, failing which the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice.

As the 10 Day Notice was dated and served on November 2, 2016, and the tenants applied on November 3, 2016 to dispute it, the tenants are within the 5 day timeline permitted by s. 46.

The tenants have also paid the allegedly overdue rent within 5 days of their receipt of the 10 Day Notice. As set out above, the tenants paid rent on November 6, 2016 by way of the post-dated cheque already in the landlord's possession.

Furthermore, when the tenants apply to dispute a 10 Day Month Notice, the burden of proof is on the landlord to prove that the 10 Day Notice has merit and should be upheld. The landlords failed to attend the hearing and have thus failed to prove that the 10 Day Notice has merit. As set out above, the tenants also paid rent within 5 days of receipt of the 10 Day Notice. This is another basis for cancellation of the 10 Day Notice.

As the 10 Day Notice fails for these two reasons, I will not consider whether or not the landlord was entitled in the circumstances to insist that rent be paid on the first of the month. Therefore, based on all of the above, I find that the 10 Day Notice is not valid and I order that it is cancelled and that the tenancy will continue until ended in accordance with the Act.

Without making any binding finding on the matter, I note that the landlord's 10 Day Notice may represent notice that it now requires the rent on the first of each month according to the terms of the tenancy agreement. Accordingly, the tenants may wish to consider delivering the landlord newly post-dated cheques dated for the first of each month. Again, however, I make no findings or orders on this issue.

Conclusion

I order that the 10 Day Notice is cancelled and this tenancy will continue until ended in accordance with the Act.

As the tenants' application has merit, I grant the tenants' the recovery of their filing fee in the amount of \$100.00. I authorize the tenants to deduct \$100.00 from a future month's rent on a one-time basis in full satisfaction of the recovery of their filing fee pursuant to s. 72 of the Act.

This decision is final and binding on the parties, unless otherwise provided under the Act, 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: December 2, 2016

Residential Tenancy Branch