



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MO, FF

Introduction

This was the landlord's application under the *Residential Tenancy Act* (the "Act") based on a 10 Day Notice for Unpaid Rent or Utilities (the "10 Day Notice") seeking the following:

- an order of possession for unpaid rent or utilities pursuant to s. 55;
- a monetary order for unpaid rent or utilities, pursuant to s. 67;
- an order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement pursuant to s. 67; and
- authorization to recover the filing fee for this application, pursuant to s. 72.

At the outset of the hearing the landlord advised that he had not meant to apply under s. 67 for money owed or compensation for damages or loss under the Act, regulation, or tenancy agreement, and I have amended his application accordingly.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The landlord testified that he served the tenant with the 10 Day Notice on November 2, 2016 in person and provided a Proof of Service document signed by a witness in support. The tenant confirmed receipt of the 10 Day Notice on November 2, 2016.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent or utilities?

Is the landlord entitled to a monetary award for unpaid rent or utilities?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

Although the tenancy agreement in evidence is unusual and somewhat difficult to read, this tenancy appears to have started in December of 2009 as a month to month tenancy. A recent Notice of Rent Increase shows that the current monthly rent is \$531.28. Based on the testimony of both parties I find that rent is due on the first of the month. Both parties agreed that the landlord usually collects the rent from the tenant in cash in person on the first of the month.

The landlord provided affirmed testimony that he issued the 10 Day Notice dated November 2, 2016 based on unpaid rent for October and November of 2016. The landlord also submitted the following correspondence in evidence [reproduced as written]:

1. Note dated November 20, 2016 from tenant to landlord as follows:

“Yesterday, [M] informed me that you claim not to have received my rent for Oct/Nov 2016.

On Nov. 5th I obtained a certified cheque for \$1062.52. I have a witness who saw me place it in an envelope and deliver it to [address omitted].

On Monday, I will be contacting my Credit Union to find out if it has been cashed.

I am surprised that, in the two weeks since November 5th, I have no indication – visit, note on door – that you had not received it. I am also deeply concerned that I only found out about this accidentally, through a third party.

Please contact me at: [phone number omitted]”

2. Note dated November 21, 2016 from landlord to tenant as follows:

“This will acknowledge your note of November 20, 2016. You say in that note that on November 5, 2016 you obtained a certified cheque in the amount of 1062.56 and delivered it to [address omitted]. Where did you leave it?”

3. Note dated November 23, 2016 from tenant to landlord indicating that the tenant had not heard from the landlord by phone or message since they spoke on Monday and stating:

“It is important that I know whether you found the cheque. If so, I would appreciate a receipt. If not, I will have to cancel it and obtain a new one. I am anxious to resolve this matter as quickly as possible. Please contact me at [telephone number deleted].”

4. Note dated November 27, 2016 from landlord to tenant stating:

“Please be advised that I found your October and November Rent cheque. Also along with this note, please accept a 2 Month Notice to End the Tenancy.”

The landlord also submitted in evidence some other 10 Day Notices to End Tenancy for Unpaid Rent or Utilities dated between 2012 and 2016 that had been issued to the tenant and letters from the landlord to the tenant dated May 13, 2013 and July 2, 2015 confirming that rent is due on the first of the month.

The tenant did not submit any documentary evidence in support of his position. However, he gave affirmed testimony that after receiving the 10 Day Notice, he encountered some difficulty paying the outstanding rent to the landlord. He said that he first attempted to speak to a woman in the building who had been the building manager (“M”), but she advised she was no longer employed as the building manager. He then made inquiries and found out the landlord’s residential address, which was not posted in the rental building, and delivered a certified cheque for the arrears on November 5, 2016, accompanied by another person as a witness.

The tenant also testified that on November 5 he delivered a certified cheque to the landlord’s address. He said that he left a note on the door for the landlord that he was paying the rent, and that he put the actual cheque in the landlord’s mailbox. He subsequently heard from M that the landlord had not received the cheque, and so he left the note dated November 20 on the landlord’s residence. The landlord then left the note dated November 21 on the tenant’s door. The tenant then saw the landlord in person and advised, in response to the landlord’s inquiry by note dated November 21, that the cheque had been left in the landlord’s mailbox. The tenant then left a follow-up note dated November 23 on the landlord’s door. On November 27 the landlord wrote confirming receipt of the cheque.

Neither party submitted the certified cheque in evidence, but both testified that it was dated November 5, 2016. The landlord testified that he had found the cheque at the back of his large mail box. However, he did not accept that the tenant had paid the amounts owing within five days of receipt of the 10 Day Notice and suggested instead that the tenant might have been carrying the certified cheque dated November 5, 2016, around with him for a time before leaving it in the landlord's mailbox.

Both parties agreed that in spite of the fact that the landlord generally picked up rent from the tenant in cash, the landlord did not attend at the tenant's rental unit in the five days after service of the 10 Day Notice to collect the arrears.

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.

Based on the documentary evidence and the agreed upon testimony of both parties, I find that the tenant paid the arrears owing within 5 days of receipt of the 10 Day Notice. It is more likely that the tenant delivered the certified cheque, which is dated November 5, on November 5, than that the tenant later arranged for a certified cheque to be backdated to November 5 or that the tenant carried a certified cheque drafted on November 5 around with him for a number of weeks before leaving it for the landlord. I find that the landlord initially overlooked the cheque until looking more carefully for it after corresponding with the tenant as to its whereabouts. My conclusion is consistent with the fact that it appears the tenant has paid arrears owing under prior 10 Day Notices within the 5 day time limit.

I also note the difficulty the tenant had in contacting the landlord in order to pay the arrears. The landlord testified that he did not contact the tenant because he understood that the tenant did not have his own phone, and that the number given by the tenant to the landlord would not have worked. The tenant stated that he now has a phone and that the phone number he had given to the landlord was his own. The landlord also knew where the tenant resided.

At the hearing I offered the parties an opportunity to settle their dispute pursuant to s. 63 of the Act, and suggested that a settlement might include an agreement around a more

efficient and reliable way of ensuring timely collection of rental monies. The landlord did not wish to avail himself of this option.

As this was not an application based on a 1 Month Notice for Cause for the repeated late payment of rent, the tenant's prior late payments are not relevant.

As the 10 Day Notice was dated and served on November 2, 2016, and as the tenant paid the rental arrears by November 5, the tenant is within the 5 day timeline permitted by s. 46. Accordingly, I cancel the 10 Day Notice and I order that the tenancy continue until ended in accordance with the Act.

Conclusion

The landlord's 10 Day Notice is cancelled. The tenancy continues until ended in accordance with the Act.

As the tenant has paid the arrears upon which the 10 Day Notice was based, there is no monetary order.

As the landlord's application has failed, I do not allow his application for recovery of the filing fee.

The 2 Month Notice that the landlord appears to have served on the tenant in late November is not before me, and it is up to the tenant whether he wishes to dispute that Notice within the 15 days after service.

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 15, 2016

Residential Tenancy Branch

