



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, FF, CNR, MNSD

Introduction

This hearing was convened as a result of cross applications for dispute resolution under the *Residential Tenancy Act* (the "Act"). The landlord applied for an order of possession and a monetary order for unpaid rent based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated December 2, 2016 (the "10 Day Notice"). The landlord also sought recovery of the filing fee.

By application dated December 5, 2016 the tenant sought cancelation of the 10 Day Notice, return of all or part of his security and/or pet deposit, an order requiring the landlord to comply with the Act, regulation, and/or tenancy agreement, and return of the filing fee.

The tenant did not attend the hearing. The landlord attended the teleconference with her property manager. Both were given the opportunity to provide affirmed testimony, refer to the evidence they had submitted, make submissions and ask questions.

As the tenant did not attend the hearing, service of the landlord's Notice of Hearing dated December 9, 2016 (the "Notice of Hearing") and Application for Dispute Resolution dated December 9 (the "Application") was considered. The landlord testified that these were served on the tenant by registered mail sent December 21, 2016 to the forwarding address that had been provided by the tenant, who is no longer in the unit. A Canada Post Registered Mail receipt was provided in evidence. I accept that the tenant was sufficiently served.

The landlord has issued three different notices to end tenancy. At the outset of the hearing the landlord went over the history of the tenancy. It appeared that an Order of Possession had already been issued based on an undisputed 2 Month Notice to End Tenancy. The landlord testified that a previous arbitrator had deferred the question of whether the landlord had cause to end the tenancy under a 1 Month Notice to End Tenancy for Cause over to this hearing.

However, it was not clear to me that the 1 Month Notice to End Tenancy for Cause was properly before me. Accordingly, I advised the landlord that she was welcome to make submissions on the cause alleged but that I may not be able to decide the question. The landlord did make submissions on cause.

Issues to be Decided

Is the 1 Month Notice to End Tenancy for Cause properly before me?

Is the landlord entitled to an Order of Possession based on the 10 Day Notice before me?

Is the landlord entitled to a monetary order based on the 10 Day Notice before me, and if so, in what amount?

Is the landlord entitled to the recovery of the cost of the filing fee under the Act?

Background and Evidence

There were two tenancy agreements in evidence. According to the terms of the second, which involves a different second tenant, and appears to replace the first, a new month to month tenancy began in October of 2015 with a most recent monthly rent of \$1,644.00 due on the first of each month. An \$800.00 security deposit is recorded as having been paid under the second tenancy agreement. Under the first agreement, the tenants appeared to have paid both security and pet deposits in the amount of \$800.00 each. The landlord testified that she holds \$800.00 for each type of deposit.

At the outset of the hearing the landlord advised of the following, which I have attempted to set out chronologically:

On or about **October 5, 2016**, she served the tenant with a 2 Month Notice for Landlord's Use of Property dated October 5, 2016 with an effective date of December 10, 2016 and a corrected effective date of **December 31, 2016** (the "2 Month Notice"). The 2 Month Notice was served because the landlord was selling the rental unit. The landlord understood that when a tenancy is ended on the basis of a 2 Month Notice the tenant is entitled to receive an amount equivalent to one month's rent from the landlord and may therefore withhold the last month's rent (here, December's rent). A copy of the 2 Month Notice was in evidence.

After service of the 2 Month Notice the landlord became aware that the tenant had a puppy in the rental unit and that an occupant who had not been approved by the landlord was also living in the rental unit, both of which the landlord believed were breaches of the tenancy agreement. The landlord also became aware that the tenant was smoking in the unit.

On October 31, 2016 the landlord issued a 1 Month Notice to End Tenancy for Cause (the "1 Month Notice"). The 1 Month Notice is dated October 31, 2016 with an effective date of **November 30, 2016**. A copy of the 1 Month Notice was in evidence.

The tenant applied to dispute the 1 Month Notice. A hearing was scheduled for December 29, 2016. The file number for that application is reproduced on the cover page of this decision.

On **December 2, 2016** the landlord served the tenant with the 10 Day Notice that was before me. The landlord believed that December rent was owing because the tenancy was or would be ended on the basis of the 1 Month Notice rather than the 2 Month Notice, and it is only when the tenancy is ended under a 2 Month Notice that the landlord is required by s. 51 of the Act to compensate the tenant in the amount of one month's rent and the tenant is authorized to withhold the last month's rent for this reason.

On **December 5, 2016** the tenant applied to dispute the 10 Day Notice and this hearing was scheduled. In the "reasons for dispute" section of his application the tenant has stated "landlord is trying to get out of the free month rent as required by previous 2 month notice to end tenancy."

A hearing was held on **December 29, 2016** as a result of the tenant's application to cancel the 1 Month Notice. Both the tenant and the landlord attended. At that hearing the tenant advised the arbitrator of the 2 Month Notice, which he had not applied to dispute, and which the landlord testified was valid and had not been withdrawn and the landlord was issued an Order of Possession on the basis of the undisputed 2 Month Notice.

According to the landlord, the arbitrator at that hearing deferred the question of whether the landlord had "cause" to end the tenancy under the 1 Month Notice over to this hearing today, which has been scheduled with respect to the 10 Day notice. The landlord had not submitted those reasons or the Order of Possession with her evidence and I did not have them before me during the hearing.

The landlord advised that the tenant vacated the rental unit in early January, 2017, and that she sold the unit and was no longer claiming for January rent.

Analysis:

I have reviewed the December 29, 2016 decision and the materials submitted by the landlord, and I accept the sequence of events set out above with one qualification: there is no indication in the December 29 decision that the arbitrator deferred the question of whether or not the landlord had cause to end the tenancy under the 1 Month Notice to today's hearing. The arbitrator only found that there was no need to consider the allegations of cause under the 1 Month Notice because the tenancy could end on the basis of the undisputed 2 Month Notice. Accordingly, the issue of the 1 Month Notice was not properly before me.

Additionally, as the tenancy was ended on December 31, 2016, and as a tenancy can only end once, I cannot issue another Order of Possession. That issue is moot.

An Order of Possession has been issued based on the 2 Month Notice. The tenancy ended based on the 2 Month Notice. Section 51 authorizes the tenant to withhold the last month of rent in the circumstances. It provides in part as follows:

51 (1) A tenant who receives a notice to end a tenancy under section 49 is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

Here, the tenant received the 2 Month Notice under s. 49. He withheld the "authorized amount" from the last month's rent, due on December 1, 2016, as contemplated by subsection (1.1).

The landlord must deal with the security and/or pet deposits in accordance with the Act.

Conclusion

Based on the above, the answers to the issues set out above are as follows:

1. The 1 Month Notice to End Tenancy for Cause is not properly before me and would be moot in any event as the tenancy has already ended on the basis of the 2 Month Notice.
2. I cannot grant an Order of Possession based on the 10 Day Notice before me because an Order of Possession has already been granted.
3. The landlord is not entitled to monetary order based on the 10 Day Notice because the tenant was entitled to withhold December rent under s. 51 of the Act.
4. As the tenancy ended as a result of a 2 Month Notice, and an order of possession has already been granted, the landlord is not entitled to recover the filing fee for this application.

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 s. 9.1(1) of the Act.

Dated: January 19, 2017

Residential Tenancy Branch