



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, FF

Introduction

This hearing dealt with cross applications under the *Residential Tenancy Act* (the “Act”). Both applications were based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 5, 2017 (the “10 Day Notice”). The tenant applies to cancel the 10 Day Notice. The landlord applies for an order of possession based on the 10 Day Notice and for recovery of the application filing fee.

Both the tenant and the landlord attended the hearing. Both gave affirmed testimony and were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions. Both parties acknowledged receipt of the application, notice of hearing, and associated evidence served by the other party.

Issues

Is the tenant entitled to an order cancelling the 10 Day Notice?

If not, is the landlord entitled to an order of possession and a monetary order?

Is the landlord entitled to return of the filing fee?

Background and Evidence

The 10 Day Notice is dated January 5, 2017. The landlord provided a Proof of Service document signed by the landlord indicating that it was posted on the tenant’s door on January 6, 2016. The tenant testified that he did not receive the 10 Day Notice until January 18, 2017, and that he filed the application to dispute it the same day. He stated that he found the 10 Day Notice with a pile of mail that had been left on the table in the rental unit by another of the occupants. He acknowledged that his application indicates that it was received on January 6, 2017, but testified that this was written in by mistake.

A copy of the tenancy agreement was submitted in evidence. It shows a tenancy beginning on July 1, 2015 with a monthly rent of \$1,550.00 due on the first of each

month. A security deposit of \$775.00 was paid at the start of the tenancy and remains in the landlord's possession.

The tenancy agreement does not include electricity or heat or cablevision. The tenant before me today confirmed that his signature is on the agreement. Although there is another tenant identified on the lease, his signature is not on the agreement, and the tenant before me advised he no longer resides in the residence. The tenancy agreement also indicates in a note written on the bottom that it is restricted to four people in total, 3 adults and 1 child.

Apparently when the agreement was entered the tenant and his girlfriend and their child and another adult friend were to reside in the residence. The others have moved out, and of the original four, only the signatory tenant remains. However, several other adults now reside in single family home with him, including at least two adults brought in by the landlord (employees of the landlord) who live in the basement bedrooms. The landlord complained that the tenant before me did not allow those occupants access to the kitchen at all times. The tenant complained that the landlord had imposed them upon him.

The landlord alleged that the tenant was subletting without his authorization. In response the tenant assured him that two female upstairs occupants (C and A) were in the process of moving out. The landlord responded that he did not even know who C and A were, and the tenant appeared to suggest that the landlord should know who they are because he had "signed their welfare slips."

The 10 Day Notice alleges \$950.00 is owing as of January 1, 2017. The landlord testified that this is for outstanding December rent. He said that he received \$300.00 from the tenant before me and \$600.00 "from downstairs," with the result that \$650.00 remained outstanding. The tenant responded that he had paid the landlord \$650.00 in cash for which he had not received a receipt and that he understood the other occupants had made up the balance. He also stated that he was paying the utilities bills for the whole of the residence, including for the use of heat and electricity for the basement tenants installed by the landlord. He asserted that he and the landlord had reached an agreement with respect to the amount of monthly rent he was required to pay in light of this.

There was no documentary evidence to support the landlord's allegation of unpaid rent. The landlord did not submit receipts, ledgers, bank statements, demands for amounts owing, or anything that could substantiate the amount he claims for December. The landlord appeared to acknowledge that he does not issue receipts.

The landlord testified that he had received \$600.00 from the tenants downstairs for January, and nothing from the tenant for January or February rent. The tenant alleged that in fact the landlord owed him money as the landlord had been overpaid for December and because the tenant had been paying all of the utilities. However, the 10 Day Notice is based on outstanding December rent only, with the result that I do not need to decide this issue.

The landlord was advised that he could issue another 10 Day Notice for unpaid rent in January and February, 2017, but that he would have to be able to substantiate the unpaid rent. The tenant was advised that he in turn would have to be able to substantiate that he had paid rent.

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 tenant's testimony that he did not receive the 10 Day Notice until January 18, 2017 and on both parties' testimony about the current number of disparate adult occupants in the residence, I accept that the tenant did not receive the 10 Day Notice until January 18, 2017, and that he applied to dispute the notice within the 5 day timeline permitted by s. 46.

The burden is on the landlord to establish that the amount alleged to be outstanding is actually outstanding. A landlord is also required by s. 26(2) to provide receipts for all cash accepted. This landlord is not issuing receipts. He is collecting portions of the total monthly rent from various occupants, some of whom were not chosen by the tenant named in the tenancy agreement. There was no documentary evidence in support of the landlord's claim and he is clearly not keeping careful account of monies received. I conclude that the landlord has failed to provide sufficient evidence to prove the shortfall alleged for December.

Accordingly, I dismiss the landlord's application in its entirety, without leave to reapply, and I allow the tenant's application. The 10 Day Notice here at issue is cancelled and is of no force or effect. The tenancy will continue until ended in accordance with the Act.

Both landlord and tenant were advised to immediately begin keeping clear records of payments made and received. They were also advised that they could agree between themselves to end this tenancy, which appears to have already been significantly modified, and that the landlord could then enter into separate agreements with each of the individual tenants. The tenant indicated that he would prefer that the landlord remove those occupants he had installed into the lower bedrooms and that the he remain responsible for the whole of the residence and the rental payment.

The landlord is also advised that if the situation continues as it is, and the occupants in the residence installed by the landlord remain there, the tenant before me should not be responsible for utilities. This would very likely be unconscionable. Utilities are now in the tenant's name and are a considerable monthly cost to the tenant. The landlord appeared not to want to take responsibility for the utilities and/or for apportioning the cost between the individuals from whom he is receiving rent. However, the landlord appears to have entered into his own tenancy agreement with respect to the downstairs tenants and it is the landlord who is responsible for providing services essential to the tenant's use of the rental unit.

Conclusion

The landlord's application is dismissed and the tenant's is allowed. The tenancy will continue until ended in accordance with the Act. As the tenant's application has been allowed, I grant the tenant recovery of the filing fee in the amount of \$100.00 and authorize the tenant to deduct this amount from a future month's rent in satisfaction of the recovery of the 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: February 16, 2017

Residential Tenancy Branch

