



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking an order of possession.

The hearing was conducted via teleconference and was attended by one of the landlords and both tenants.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession for unpaid rent, pursuant to Sections 46 and 55 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord submitted into evidence the following relevant documents:

- A copy of a tenancy agreement signed by the parties on May 25, 1998 for a 2 year fixed term tenancy beginning on July 1, 1998 that converted to a month to month tenancy on July 1, 2000 with rent due on the 2nd of each month. The landlord testified current monthly rent is \$1,500.00;
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent issued by the landlord on February 3, 2017 with an effective vacancy date of February 13, 2017 citing the tenants failed to pay rent for the month of February 2017 in the amount of \$1,500.00; and
- A copy of a Proof of Service – Notice to End Tenancy that states the Notice was served to both tenants personally on February 3, 2017 at 12:30 p.m. by an agent for the landlord and that this service was witnessed by a third party. I note that neither the agent nor the witness attended this hearing.

The landlord testified the Notice to End tenancy was also posted to the rental unit door.

The tenants submitted that they had not received the 10 Day Notice to End Tenancy for Unpaid Rent personally on February 3, 2017. They stated that they had been away from the rental unit for some time and that when they returned they found the Notice posted to their door. They stated they returned on February 27, 2017 or February 28, 2017.

The tenants testified that they provided the landlord with a cheque for February 2017 rent and one for March 2017 rent. The tenants could not recall the date that they provided these cheques to the landlord. However, the landlord confirmed he received them on February 28, 2017.

The tenants were not certain but they believed that the cheque for February 2017 was dated either March 1, 2017 or March 2, 2017. The landlord testified that he believed the cheque for February rent was dated March 7, 2017. The parties agreed the cheque for March rent was dated March 15, 2017.

Neither party provided any documentary evidence that could establish the date of the February 2017 rent cheque.

Analysis

Section 46 of the *Act* states a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy on a date that is not earlier than 10 days after the date the tenant receives the notice. A notice under this section must comply with Section 52 of the *Act*.

Section 46(4) allows the tenant to either pay the rent or file an Application for Dispute Resolution to dispute the notice within 5 days of receipt of the notice.

Section 46(5) states that if a tenant who has received a notice under this section does not pay the rent or make an Application for Dispute Resolution to dispute the notice within the allowed 5 days the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

Despite the landlord's submission of a Proof of Service – Notice to End Tenancy signed by his agent and the agent's witness that the agent had served both tenants personally on February 3, 2017, the landlord himself had no direct knowledge of this service and the agent and witness did not attend the hearing.

As the tenants disputed receipt of the Notice on February 3, 2017 and no one with direct knowledge of the service was available at this hearing, I find the landlord has failed to establish that the tenants were personally served on February 3, 2017. Furthermore, I find it would be, on a balance of probabilities, unlikely that the landlord or his agent would serve the tenants with the Notice in person and then serve the same Notice by posting in the rental unit door.

As such, I accept the tenants received the 10 Day Notice for Unpaid Rent on February 27, 2017. I also accept, based on the testimony of both parties, that landlord received a cheque from the tenants on February 28, 2017 for February 2017 rent.

However, as neither party can confirm the date of the cheque, I note that the burden rests with the landlord to establish whether or not the tenants paid the amount of rent within 5 days of receiving the Notice. If the date of the cheque was after that 5 day mark then the tenants would be conclusively presumed to have accepted the tenancy would end on the effective date of the Notice.

As the landlord cannot establish the date of the cheque that paid February 2017 rent was after the 5 day deadline (ie. March 7, 2017 as he has testified), I find the landlord has failed to establish that the tenants failed to pay the outstanding rent within 5 days of receiving the 10 Day Notice to End Tenancy for Unpaid Rent.

Conclusion

Based on the above, I order the 10 Day Notice to End Tenancy for Unpaid Rent issued by the landlord on February 3, 2017 is cancelled and the tenancy remains in full force and effect.

Therefore, I dismiss the landlord's Application for Dispute Resolution, in its entirety and without leave to reapply.

This decision 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: March 15, 2017

Residential Tenancy Branch