



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

The Application for Dispute Resolution filed by the Tenant seeks the following:

- a. A monetary order in the sum of \$3200
- b. An order to recover the cost of the filing fee.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was served on landlord by mailing, by registered mail to where the landlord resides on January 19, 2017. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenant is entitled to a monetary order and if so how much?
- b. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

The tenancy began on December 1, 2014. The rent was \$1600 per month payable in advance on first day of each month. The tenant(s) paid a security deposit of \$800 the start of the tenancy.

On November 12, 2015 the landlord served a 2 month Notice to End Tenancy on the Tenant setting the end of tenancy for February 1, 2016.

The landlord previously served a one month Notice to End Tenancy for repeated late payment of rent. In a decision dated January 11, 2016 the arbitrator dismissed the Tenant's application to cancel the Notice to End Tenancy and granted an Order of Possession on 2 days Notice. The Tenant's application for review was dismissed.

The parties were involved in an arbitration held on August 31, 2016 with a decision made September 1, 2016.

The tenant testified the landlord has not acted in good faith and failed to occupy the rental unit. She produced the following evidence:

- A screen shot showing the landlord was renting the rental unit for the period of January 2016, December 2016 and January 2017.
- Air BnB reviews from guest who stayed in the unit from June 2016 to December 2016 and responses
- Craigslist ads posted on October 27 2016 and November 20, 2016 listing the rental unit.

The Law:

The Notice to End Tenancy relies on section 49 of the Residential Tenancy Act. That section provides as follows:

- The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse

The tenant seeks an order for the equivalent of double the monthly rent under section 51(2) of the Residential Tenancy Act provides as follows:

Tenant's compensation: section 49 notice

- 51 (2) In addition to the amount payable under subsection (1), if
- (a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or
 - (b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,

the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

The landlord gave the following evidence and submission:

- He lived in the rental unit to November.
- The tenancy ended after an arbitrator issued an Order of Possession on January 16, 2016 for repeated late rent payments and as a result the Tenant cannot make this monetary claim.

Analysis:

After carefully considering all of the evidence I determined the landlord failed to prove that he occupied the rental unit within a reasonable period after the effective date of the Notice and that he used it for his residence for at least 6 months beginning a reasonable period after the effective date of the notice. The landlord failed to present evidence to support this allegation. The tenant's application was served on the landlord in January 2017 and he had over 5 months to submit the evidence. The evidence produced by the Tenant show that the landlord made extensive use of the rental property as an Air BnB including the months of June 2016, December 2016 and January 2017. .

I do not accept the submission of the landlord that the Tenant is precluded from filing this claim because the landlord obtained an Order of Possession for repeated late payment of rent in the middle of January 2016. In my view the triggering effect allowing the Tenant to make this claim is the service of a 2 month Notice to End Tenancy. It is not whether the tenancy ended as a result of the 2 month Notice.

This argument was made by the landlord and rejected by an arbitrator in a decision dated September 1, 2016. In that hearing the tenant sought a monetary order under section 51 of the Act and the landlord sought an order for unpaid rent for January 2016. The arbitrator made the following comments:

“With regard to the landlord's application for unpaid rent; the landlord issued a One Month Notice to the tenant on October 28, 2016 this was deemed served three days later as it was posted to the tenant's door. The tenant filed an application to dispute that Notice and the landlord also filed an application for an Order of Possession. The hearing was scheduled for January 08, 2016. Meanwhile on November 12, 2015 the landlord also served the tenant with a Two Month Notice to End Tenancy for landlord's use of the property. Had the landlord not served the Two Month Notice then the tenant would have been responsible to pay rent for January, 2016. As the landlord did serve the Two Month Notice prior

to a decision being made on the One Month Notice then the Two Month Notice remains in force and effect and as such I find the tenant relied on the Two Month Notice and planned to end her tenancy in accordance with that Notice if her application to cancel the One Month Notice was successful.

Even though the tenant's application was not successful the tenant is still entitled to compensation for the Two Month Notice as it remained in force and effect throughout the month of January. I refer the parties to the Residential Tenancy Policy Guidelines # 11 which provides guidance on the amendment and withdrawal of Notices. This guideline states, in part, that a landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

Furthermore, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

Consequently, as the landlord gave the tenant the One Month Notice first and then the Two Month Notice both Notices remained in force and effect until the tenancy ended on January 29, 2016 after the tenant had unsuccessfully applied for a review consideration of the decision issued on January 08, 2016. To this end the tenant is still entitled to receive the compensation equivalent to one month's rent or is entitled to withhold the last month's rent due to the Two Month Notice pursuant to s. 51 of the Act. The landlord's application to recover rent for January, 2016 is therefore dismissed."

While the decision of another arbitrator is not binding on me I find the analysis persuasive and I agree with the result.

As a result I determined the tenant is entitled to an Order for the equivalent of 2 months rent or the sum of \$3200.

Monetary Order and Cost of Filing fee

I ordered the landlord(s) to pay to the tenant the sum of \$3200 plus the sum of \$100 in respect of the filing fee paid for a total of \$3300.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

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: June 27, 2017

Residential Tenancy Branch