



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

OPR, MNR

Introduction

This hearing was convened to deal with the landlord's application under the *Residential Tenancy Act* (the "Act") based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated June 6, 2017. The landlord applied for an order of possession for unpaid rent and a monetary order for unpaid rent.

An agent appeared on behalf of the landlord, as did a witness. The tenant also attended. Both parties had a full opportunity to be heard, to present affirmed testimony and documentary evidence, and to respond to the submissions of the other party.

Service of the landlord's application, notice of hearing, and documentary evidence was not at issue.

At the conclusion of the hearing the landlord's agent made clear that he had filed an amendment to the application, seeking compensation for cleaning and other costs. I advised the landlord that the amendment was not yet before me and that I had not confirmed his service of the amendment on the tenant, and that I therefore could not deal with the relief sought in the amendment, with the exception of the claim for damages for breach of the fixed term lease.

I am able to consider the landlord's claim for damages for breach of a fixed term lease because the landlord made clear from the beginning of the hearing that he was seeking this and the tenant had an opportunity to respond to the landlord's claim in this regard. The Rules of Procedure allow me to amend a claim where the amendment can be reasonably anticipated. In this case the tenant could reasonably expect that the landlord would want damages for the term of the lease. There is also correspondence in evidence from the landlord's counsel to the tenant indicating as much. Accordingly, I amend the landlord's claim to include his claim for damages for breach of the fixed term tenancy agreement.

Issues to be Decided

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

Is the landlord entitled to a monetary award for unpaid rent and/or for breach of a fixed term lease?

Background and Evidence

According to the written tenancy agreement in evidence and the agreed-upon facts, this tenancy began on May 5, 2017 for a term expiring September 30, 2017. Rent of \$3,800.000 was payable on the first day of each month. A security deposit of \$1,800.00 was paid in May and the landlord continues to hold that amount.

The addendum to the tenancy agreement includes a provision that the landlord is responsible for hydro, cable, and internet to a maximum of \$150.00 and that any overages are payable by the tenant.

It was agreed that the tenant paid rent for May but has not paid rent since then.

The landlord testified that the 10 Day Notice was posted on the door of the rental unit on June 6, 2017. A Proof of Service document signed by a witness was in evidence. The tenant said that she received the 10 Day Notice by mail at her mother's mailing address in late June, and in response the landlord's agent advised that the 10 Day Notice was sent in a variety of ways as the landlord was having difficulty contacting the tenant.

The 10 Day Notice claims \$3,166.67 outstanding as of June 6, 2017. The landlord advised that this amount represents the prorated monthly rent because the tenancy began on May 5, 2017.

The tenant acknowledged that she has not paid rent since May, and that she has not applied to dispute the 10 Day Notice under consideration.

The landlord's position is that this was a fixed term agreement and that the tenant owes for the remainder of the term. It claims \$3,800.00 for each of remaining months in addition to the \$3,166.67 for June.

The landlord's agent testified that the tenant represented herself as having ample means when she applied to lease the rental unit in question, and that the landlord's own investigations supported this. He said that the tenant signed a declaration of income suggesting that her annual income was \$200,000.00. He also said that the landlord rejected other applicants for the rental unit in favour of the tenant based on her representations.

The landlord's agent submitted that the landlord acted reasonably and attempted to re-lease the unit. Although there was no documentary evidence with respect to any attempts to re-lease the

rental unit, the landlord's witness, LC, a rental agent, described some efforts to find another tenant.

The landlord's agent testified that the corporate landlord is itself renting the unit from another party. The agent said that the master lease expires at the end of September, with no guarantee of extension. The agent also submitted that it was difficult to sublease the unit after the responded broke the lease because the remaining term was very short. He testified that by mid-June the landlord was aware that the tenant had stopped payment on her rent cheque. At that point the landlord engaged a real estate company to assist in securing another tenant.

A rental agent from that company agent testified for the landlord. She confirmed that she was retained in mid-June to attempt to sublease the unit. She testified that she posted an advertisement for the unit and was able to show it several times. She received one application and submitted it to the building manager. However, because the building manager has very strict criteria for approving renters, the prospective applicant was rejected based on his credit rating and because he owned a pet.

The landlord's agent pointed to Residential Tenancy Branch Policy Guideline #19, section D, and argued that the Act's provisions around subleasing meant that the applicant landlord, itself a tenant, had very little recourse against its landlord for not approving the new applicant because the sublease was for a term under six months.

The agent further said that the tenant was uncooperative after vacating the rental unit, did not return the keys in a timely way, and subsequently advertised the unit on Air B & B, which put the building manager on high alert, as the building does not allow temporary vacation rentals. It became more difficult to secure another renter once the building manager was on high alert and therefore less inclined to approve sub-tenants.

The applicant landlord's agent further stated that his company is leasing the space for \$3,500.00 per month, but that utilities and cable, which were included in the monthly rent for the tenancy under consideration, add another \$300.00 to the monthly cost.

Lastly, the agent suggested that if the tenant were willing to pay the amounts owing or if I were to order her to do so, the tenant could have use of the space for September as it remains empty.

The tenant in response said she has no use for the suite, and that this landlord knew through its rental agent that she was leaving by mid-May. The tenant said that in fact she did not ever move into the unit. She also said that she attempted to return the keys in a timely way but the rental agent told her to retain them for the time being, and ultimately she had to mail them back. The tenant included a copy of an email from herself to the rental agent, LC, stating that the landlord had called her yesterday confused as to whether she was ending the lease, and confirming for LC that she was indeed ending the lease.

The tenant acknowledged that she represented herself as having a considerable income when she applied to lease the space, but said that the majority of her income came from her husband, who left her in the interim. As a result of her husband's leaving, she could not afford the rental and remained with her young children in her mother's home.

The tenant also indicated that she was confused as to who her actual landlord was as between the corporate landlord and the rental agent. She also submitted that the applicant landlord is itself subleasing the rental unit.

The tenant also submitted that she did not receive a copy of her tenancy agreement until late June, when she received it along with other evidence in the landlord's application, and that she needed the tenancy agreement in order to be able to sublet the unit herself, as she did not otherwise know the terms of the tenancy. The landlord's agent disagreed and said that the tenant was provided with a copy of the lease agreement when the tenancy began.

The tenant submitted financial information supporting her submission that she could not afford the rental in question.

The tenant complained that an agent of the corporate landlord had forwarded her emails to her employer. In response the landlord's agent said that the employer had been listed by the tenant as a reference and the corporate landlord contacted the employer when it could not contact the tenant herself. The agent further said that the tenant's employer was then enlisted to help explain a fixed term tenancy to the tenant.

The tenant argued also that the applicant landlord could have negotiated with the building manager to extend its tenancy agreement so that the tenancy could have more easily been assigned or sublet.

Analysis

Based on the testimony of the landlord and the Proof of Service document in evidence, I find that the tenant was served with the 10 Day Notice on June 9, three days after it was posted, pursuant to s. 90 of the Act.

Section 46(5) of the Act provides that if a tenant does not apply to dispute a 10 Day Notice or pay the amount owing in full within five days of receipt, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice, and must vacate the rental unit by that date.

In accordance with section 46(5) of the Act, the failure of the tenant to apply to dispute the 10 Day Notice or pay the amount owing in full within five days led to the end of this tenancy on **June 19, 2017**, the corrected effective date on the 10 Day Notice.

The tenant and anyone on the premises were required to vacate the premises by that date. As the tenant has indicated she is not currently residing in the rental unit and has no wish to do so, I do not need to grant the landlord an order of possession.

Sections 7 and 67 of the Act establish that a tenant who does not comply with the Act, Regulation or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

It was agreed that the tenant has not paid rent since May. I find that the landlord is entitled to unpaid rent in the prorated amount claimed for June, and to damages for breach of the fixed term lease to the end of the term. Although this hearing was held August 31, I award the landlord its losses for September as well, as I am satisfied that the rental unit remains and that this will not change for September.

I accept the landlord's submission that because the term of the lease was under 6 months, it did not have the ability to require its own landlord to act reasonably in approving another subtenant. Section 34(2) of the Act requires that a landlord not unreasonably withhold its consent subleasing or assignment only in tenancies over 6 months. I also accept the landlord's submission that it is more difficult to sublet when the tenancy is time-limited.

I do not accept the tenant's submission that her landlord was required to attempt to renegotiate the term of its own lease so that it could better mitigate its losses by being able to offer a longer term tenancy. The applicant landlord had a contract with its own landlord to rent until the end of September. It cannot reasonably be expected to contract for a longer term, which would also expose it to the risk of another breach by another subtenant, in order to mitigate.

The landlord's agent advised that its monthly rent is \$3,500.00, and that utilities and cable cost another \$3,800.00. The agent did not explain why it did not disconnect the utilities and cable after it knew the tenant would not be residing in the unit. Additionally, his submission that the utilities and cable amount to \$300.00 monthly is not consistent with the provision in the addendum under which the landlord is responsible for these services to a maximum of \$150.00. Accordingly, I conclude that the applicant landlord's actual losses for breach of the fixed term agreement were, or would have been if the services had been disconnected, \$3,500.00 rather than \$3,800.00 monthly.

I do not accept the tenant's argument that she was unable to attempt to secure her own subtenant because she was not provided with a copy of her tenancy agreement until mid-June. I accept the landlord's evidence that the tenant was provided with a copy of the written tenancy

agreement when the tenancy began. This is consistent with the fact that there is no evidence that the tenant ever asked for a copy of the agreement.

I also note that that there is no evidence the tenant ever attempted to secure a subtenant. Nor do I accept that the tenant necessarily required a written copy of her agreement in order to do so.

It is not relevant whether this applicant landlord is itself a subtenant. Although unfortunate, the tenant's ability to afford the rent is not relevant in this analysis either. The tenant contracted to pay rent until the end of September and is liable to do so.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee.

The landlord continues to hold the tenants' security deposit of \$1,900.00. Over the period of this tenancy, no interest is payable on the deposit. In accordance with the offsetting provisions of section 72 of the Act, I order the landlord to retain the tenant's security deposit in partial satisfaction of the monetary claim.

Conclusion

I find that this tenancy ended on June 19, 2017 as a result of the 10 Day Notice to End Tenancy for Unpaid Rent.

I issue a monetary order for the landlord in the following terms, which allows the landlord to obtain a monetary award for unpaid rent and loss of rental income, and the filing fee, and to retain the security deposit for this tenancy:

Item	Amount
Unpaid rent June (\$3,166.67 [prorated as claimed]) and damages for July, August, and September (at \$3,500.00 per month)	\$13,666.67
Filing Fee	\$100.00
Less Security Deposit	-\$1,900.00
Total Monetary Order	\$11,866.67

tenant must be served with this order as soon as possible. Should the tenant fail to comply with this order, it 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 s. 9.1(1) of the Act. Pursuant to s. 77, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: September 8, 2017

Residential Tenancy Branch