Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MNSD, FF, OPR

Introduction:

A hearing was convened under the *Residential Tenancy Act* (the "Act") to deal with cross-applications based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated June 22 (the "10 Day Notice").

The landlord applied for an order of possession based on the 10 Day Notice. The tenant applied for an order cancelling the 10 Day Notice, for return of a pet damage deposit, and for recovery of the application filing fee.

An agent of the corporate landlord attended on behalf of the landlord, and the tenant attended with his father as an advocate. Both parties were given a full opportunity to be heard, to present documentary evidence, to make submissions, and to respond to the submissions of the other party.

The landlord acknowledged receipt of the tenant's application, notice of hearing, and evidence.

The tenant said he had not received the landlord's application or notice of hearing and the landlord could not confirm that the tenant had been served with these materials. The landlord was reminded that an application cannot be heard unless it is served and service can be established (see Residential Tenancy Branch ["RTB"] Rule of Procedure 3.5). As service was not established, the landlord's application is dismissed.

The landlord did not file any evidence in support of its application or in response to the tenant's application. The landlord was reminded that although a landlord can obtain an order of possession without bringing its own application under s.55 of the Act, this usually cannot occur unless the notice to end tenancy is in evidence (see RTB Rule 2.5).

Preliminary issues:

The tenant's advocate submitted that the landlord should not be able to obtain an order of possession based on the 10 Day Notice submitted by the tenant, and that it is the landlord's obligation to submit any evidence upon which it seeks to rely. Section 75 of the Act authorizes

me to admit any record that I consider necessary, appropriate, and relevant. The tenant's copy of the 10 Day Notice is all of these things. I can consider it because it is before me and because it is what caused the tenant to file his application in the first place. Accordingly, I do not accept the tenant's submission, and I will consider the 10 Day Notice regardless of the fact that the landlord did not submit it.

The hearing was acrimonious. The parties interrupted one another and interrupted me. The landlord expressed her frustration at the process on many occasions. The landlord may wish to consult with a lawyer or an RTB information officer for clarity on the process and her rights and obligations under the Act.

Issues to be Decided

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

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

Is the tenant entitled to recover the application filing fee?

Background and Evidence

There is no written tenancy agreement. According to the "shelter information" document in evidence and the agreed upon facts, this tenancy began October 1, 2014. It is a month to month tenancy with rent of $715.16 payable on the first day of each month.

The tenant was initially uncertain of the monthly rent, and said that the Ministry of Human Resources/Ministry of Social Development and Social Innovation (the "Ministry") has always paid rent directly to the landlord on his behalf. At the bottom of the "shelter information" document, there is a comment directed to the landlord as follows: "The ministry may arrange to set up monthly direct deposit payments of the rent directly to the landlord, on the client's behalf. For more information on how to set up direct deposit, please visit . . . ."

Another document, titled "application for rental accommodation," was in evidence. It indicates the payment of both a security and pet deposit, of $375.00 each. It also indicates that the tenant is a smoker.

The landlord testified that she purchased the rental property in March, 2017, and that the tenant's March rent was paid by the prior owner as a term of the purchase agreement, but that rent for April and May was unpaid. The landlord also said that the Ministry has paid rent directly to the landlord for July, August, and September, but that rent for April and May remain outstanding. The landlord did not provide receipts or accounting ledgers or any other evidence establishing the amounts received and outstanding with respect to this tenancy.

The tenant testified that he was unaware that the Ministry had not paid April or May rent directly to the landlord until the hearing of a dispute between the parties in June 13, 2017 regarding the landlord's 2 Month Notice for Landlord's Use of Property. The written decision with respect to that dispute was not in evidence and there was no consensus between the parties about its outcome.

In response to my question as to why the landlord initially served the tenant with a 2 Month Notice rather than a 10 Day Notice, the landlord said that the tenant's rental unit was dirty on inspection and that she decided it required renovation.

The tenant's father testified that immediately after learning that the tenant owed money, he attended at the Ministry office and re-filed the original "shelter information" document. A copy of that document with a stamp indicating that it was filed on June 13, 2017 was in evidence. The tenant's father advised that his son had filed this form once already with the Ministry after ownership of the building changed, but that the Ministry had lost it. He testified that when he filed it this second time he made sure to have it date-stamped and took a copy of it. The tenant believes that the Ministry has paid or will pay outstanding rent directly to the landlord as a result of this re-filing.

The tenant acknowledged that he received the 10 Day Notice on June 23, 2017. The 10 Day Notice indicates $1,430.32 outstanding as of June 1, 2017.

The parties agreed that the tenant signed a cheque from the Ministry over to the landlord on June 28, 2017. A copy of a cheque for $695.00 and dated June 28, 2017 was in evidence. The Ministry's text indicates the cheque is "rent for June." Handwriting on the cheque states: "28 June 2017 received original. For May Rent for 'Occupancy Only.' " The handwritten notation is signed by SM, who appears to be an agent of the landlord, having also signed the 10 Day Notice. The landlord stated that this cheque was for June rent and that SM made a mistake by indicating it was for May.

It was also agreed that the tenant made a $500.00 cash payment to the landlord after receiving the 10 Day Notice. Neither party submitted a receipt for this.

According to the landlord, taking the tenant's $500.00 cash payment into account, $930.00 remains outstanding for April and May. The landlord did not provide any documentation with respect to the amount outstanding or the payment or non-payment of rent in general.

The tenant and his father stated that they are unaware what may be owing because the landlord has not provided them with receipts or any accounting.

Also in evidence from the tenant is an email dated December 6, 2016 from a Human Rights Tribunal member to counsel for the tenant and counsel for the prior landlord setting out an agreement reached by the parties as of that date. By way of that agreement, the parties agree

that the Human Rights Tribunal hearing is adjourned, the tenant commits to inquiring with his physician as to whether there are other options to smoking medical marihuana to address his medical issue, and the landlord "agrees to accommodate the complainant's disabilities by providing him with the first available one bedroom or bachelor suite on the main or basement floor of the apartment." The landlord also agrees to return the tenant's pet deposit, subject to an inspection of the unit.

The landlord stated that the prior owner did not make her aware of this agreement, and that her building is a non-smoking building.

The tenant also submitted a letter he wrote to the landlord dated June 24, 2017 advising that he would be contesting the 10 Day Notice and stating that his rent is paid directly by the Ministry every month and that the landlord had not advised that rent was owing until the June 13, 2017 hearing. The letter continues: "I had previously given MHR/MSDSI the Shelter Information I received in April of 2017 which they stated there was not a copy in my file when I went to inquire why the rent had not been paid to the new owner . . . ".

The tenant's letter also says that after the tenant received the 10 Day Notice, he "again inquired with MHR/MSDSI as to the reason my rent was not paid and was informed that my rent was paid as per the Shelter Information date stamped 13 June 2017." Lastly, the tenant's letter requests the return of the pet deposit, plus interest, on the basis that the current landlord has assumed the prior landlord's obligations as set out in the agreement set out by the Human Rights Tribunal member.

A letter dated July 5, 2017 from the tenant's father to the landlord also in evidence states that the tenant has repeatedly reported to maintenance that the main entrance door buzzer for his apartment has not been working since he served the landlord with his application and notice of hearing for this dispute. It further states that the tenant has a medical condition requiring emergency door access to his apartment through this buzzer and asks the landlord to address this issue.

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 tenant 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.

Once a tenant disputes a notice to end tenancy, the burden is on the landlord on a balance of probabilities to establish that rent is unpaid (see RTB Rule 6.6).

The landlord says that April and May remain outstanding, less the $500.00 received. However, the landlord has not submitted any evidence in support of this.

The tenant submits that the Ministry has always paid his rent directly to his landlord and that he expects the Ministry has or will make up the arrears the landlord alleges for April and May. The tenant also says that the cheque in evidence was for May rent. The tenant also argues that this landlord owes him the pet deposit under the terms of the agreement reached with the former landlord. If I were to accept the tenant's submissions, the cheque for $695.00, plus the $375.00 owed for the pet deposit, would indicate an overpayment of rent,, or that there was no rent owing within five days of the tenant's receipt of the 10 Day Notice.

However, I will not decide if this landlord ought to have refunded the pet deposit under the terms of the Human Rights Tribunal agreement, and, if so, whether that amount ought to be counted against the arrears alleged. Although it seems likely that the current landlord has assumed the former landlord's liabilities under that agreement, I do not have jurisdiction with respect to the terms of a settlement reached through another tribunal. Accordingly, I dismiss the tenant's application for return of the pet deposit.

I find that there is insufficient evidence to establish that there is money owing. The tenant claims that the Ministry has always paid rent on his behalf directly to the landlord. The landlord argued that the tenant's receipt of the June 28 cheque made out directly to him establishes that the Ministry has not consistently paid rent on his behalf directly to the landlord. I do not accept the landlord's submission. Instead, I consider that it is more likely that the tenant received this one cheque directly from the Ministry when he applied for it after learning from the landlord that the usual process upon which he had been relying may not have been working.

The landlord has not supported its allegation with any sort of accounting, and the cheque in evidence from the tenant, which the landlord says was mistakenly labeled as being for May but was actually for June, suggests the landlord is not keeping a careful accounting.

Additionally, the fact that the landlord did not serve the tenant with a 10 Day Notice in April is inconsistent with the landlord's allegations that rent was outstanding as of April 2, 2017.

If rent for April or May was not received by the current landlord, this may be because the Ministry was still directing its payments to the former landlord. The current landlord did not say that it inquired with the former landlord as to whether this was happening.

At the same time the current landlord did not alert the tenant to the fact that rent was outstanding, and the tenant was therefore not given the opportunity to address this issue in a timely way. Nor is there any evidence as to the instructions from the current or prior landlord as to having rent redirected. To allow the landlord to end the tenancy on this basis would not be fair.

I also note there was no documentary evidence with respect to the change of ownership of the rental building. While I can accept the current landlord's oral testimony in this regard, the fact that the current landlord is now receiving the Ministry's payment only after the "shelter information" with the original landlord's name was re-filed does not make sense.

There may be some amount outstanding for April and May, or there may not be. I am not satisfied the landlord has established on a balance of probabilities that money was owing on the date that the 10 Day Notice to End Tenancy was issued.

Conclusion

Based on the above, the tenant's application to cancel the 10 Day Notice is allowed. The 10 Day Notice is cancelled and is of no effect. The tenancy will continue until it is ended in accordance with the Act.

The tenant's application for return of the pet deposit before the end of the tenancy and in accordance with the terms of the Human Rights Tribunal settlement is dismissed for lack of jurisdiction.

Although the tenant has been partially successful, the tenant is not entitled to recover the filing fee as that fee was waived.

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 and is final and binding except as otherwise provided in the Act.

Dated: September 07, 2017

Residential Tenancy Branch