



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, MNR, MDSD & FF

Introduction

The Application for Dispute Resolution filed by the Tenant makes the following claims:

- a. An order to cancel the 10 day Notice to End Tenancy dated September 1, 2017, October 2, 2017 and November 3, 2017.
- b. An order that the landlord comply with the Act, regulation and/or the tenancy agreement

The Application for Dispute Resolution filed by the landlord makes the following claims:

- a. An Order for Possession for non-payment of rent
- b. A monetary order in the sum of \$1320 for unpaid rent and damages
- c. An order to retain the security deposit
- d. 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. The parties acknowledged they had received the documents of the other party.

I find that that the landlord served the following 10 Notices to End Tenancy as follows:

- September 1, 2017 Notice to End Tenancy served in person on September 1, 2017
- October 2, 2017 Notice to End Tenancy served in person on October 2, 2017
- November 3, 2017 Notice to End Tenancy served by posting on November 3, 2017.

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenants are entitled to an order cancelling the 10 day Notices to End Tenancy dated September 1, 2017, October 2, 2017 and November 3, 2017?

- b. Whether the tenant is entitled to an order that the landlord comply with the Act, regulation and/or the tenancy agreement?
- c. Whether the landlord is entitled to an Order for Possession?
- d. Whether the landlord is entitled to A Monetary Order and if so how much?
- e. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- f. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

The parties entered into a written tenancy agreement that provided that the tenancy would start in 2009. The rent is \$1295 per month payable in advance on the first day of each month. The tenant paid a security deposit of \$647.50 at the start of the tenancy.

The tenant(s) paid the rent as follows:

- The rent for September was paid on September 8, 2017.
- The rent for October was paid on October 7, 2017
- The rent for November was paid on November 7, 2017.

The landlord acknowledged that no rent is owed at the present time. However, he seeks to recover a late fee in the sum of \$25 per month.

Tenant's Application:

The Residential Tenancy Act, Regulations, Policy Guidelines and common law provides as follows:

- The tenant has the full day pay the rent on the due date. Thus if the rent is due on the first of the month, the landlord must wait until the 2nd day of the month to serve the 10 day Notice. A Notice to End Tenancy served on the first day of the month is not effective where the due date is the first.
- If the tenant pays the rent within 5 days from receiving the Notice to End Tenancy is void.
- If the landlord serves the Notice to End Tenancy by posting, the Act provides that it is not deemed served until 3 days later. If the landlord serves the Notice to End Tenancy by mail or registered mail, it is not deemed received until 5 days after mailing,
- If the tenant pays the rent after the 5 day period the landlord has an election to make. He/she/it can accept the payment for "use and occupation only" and thus not reinstate the tenancy. The tenant would have to vacate at the end of the rental payment period (in most cases the end of the month). Usually the landlord will make this clear by putting a notation on the receipt as follows "Accepted for use and occupation only. This does not reinstate the tenancy." If the landlord has not made it clear he is accepting the rent

payment by “use and occupation only” it is open for the arbitrator to determine that the landlord has reinstated the tenancy.

- Policy Guideline 11 includes the following:

“The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of “waiver” can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.
 - whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
 - the conduct of the parties.”
- Where a tenant is repeatedly late paying the rent the landlord has the right to serve a one month Notice to End Tenancy. Policy Guideline 39 provides as follows:

“38. Repeated Late Payment of Rent Apr-04

The Residential Tenancy Act and the Manufactured Home Park Tenancy Act² both provide that a landlord may end a tenancy where the tenant is repeatedly late paying rent.

Three late payments are the minimum number sufficient to justify a notice under these provisions. It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late

A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent.

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision.

Determination and Orders:

After carefully considering all of the evidence I determined that the landlord failed to establish sufficient cause to end the tenancy for the following reasons:

- The rent was paid after the Notices to End Tenancy were served. In all cases the landlord accepted the payments unconditionally. The landlord did not make it clear to the tenants they were accepting the payment for “use and occupation only.” The receipts do not indicate the payment was accepted “for use and occupation only.” The landlord acknowledged the rent was paid to his office and it is unlikely the person receiving the payment would have indicated the rent was being accepted on a conditional basis. Thus the landlord has reinstated the tenancy. On this basis alone the three Notices to End Tenancy must be cancelled.
- Further, the landlord served the 10 day Notice on September 1, 2017 and at that time the rent was not late.
- The November Notice to End Tenancy on November 3, 2017 by posting. It is deemed received 3 days later. The tenants paid the rent on November 7, 2017 and thus that Notice is void.
- The landlord has not served a one month Notice to End Tenancy for repeated late payment of rent so the issue of repeated late payment was not before the arbitrator..

In summary I ordered that the Notice to End Tenancy dated September 1, 2017, October 7, 2017 and November 7, 2017 be cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged. .

Landlord's Application - Order of Possession:

For the reasons set out above I dismissed the landlord's application for an Order of Possession as the three Notices to End Tenancy have been cancelled. .

Analysis - Monetary Order and Cost of Filing fee:

I dismissed the landlord's claim for a monetary order including the cost of the filing fee. The tenant has been paid. The landlord failed to prove he is entitled to the late fee. Section 7 of the Residential Tenancy Act Regulations provide as follows:

“Non-refundable fees charged by landlord

7 (1) A landlord may charge any of the following non-refundable fees:

...

(d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides **for that fee.**" (my emphasis)

I dismissed the landlord's claim for a late fee as he failed to include the Addendum allowing for the late fee. Further, he acknowledged the late fee was higher than \$25.

This is prohibited by the Regulations set out above.

Conclusion:

In summary I ordered that the three Notices to End Tenancy be cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged. I dismissed the landlord's application for an Order of Possession and a monetary order.

This decision is final and binding on the parties.

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: November 23, 2017

Residential Tenancy Branch