



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, OPC, MNSD, FF

Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession based on the 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) issued to the tenants pursuant to section 55;
- an Order of Possession based on the expiration of a fixed term tenancy pursuant to section 55;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As Tenant AA (the tenant) confirmed that the landlords' 1 Month Notice was handed to one of the tenants on June 8, 2017, I find that the tenants were duly served with this notice on that date in accordance with section 88 of the *Act*.

As the tenant confirmed that the landlords' dispute resolution hearing package and written evidence package were received from the landlords by registered mail after their mailing on September 8, 2017, I find that the tenants were duly served with these documents in accordance with sections 88 and 89 of the *Act*. As Landlord BS (the landlord) confirmed that the tenants' written evidence was also received from the tenants, I find that this evidence was duly served to the landlords.

At the commencement of this hearing, I noted that the tenants' written evidence included a copy of an August 29, 2017 decision issued by another arbitrator appointed under the *Act* with respect to the end of the fixed term tenancy. Since a decision on the merits has already been made by another arbitrator with respect to the landlords' application to obtain an Order of Possession based on the expiration of this fixed term

tenancy, I find that the legal principle of *res judicata* prevents me from considering the landlords' application for an Order of Possession based on the expiration of this fixed term tenancy. I am without jurisdiction to consider this aspect of the landlords' application.

Issues(s) to be Decided

Are the landlords entitled to an Order of Possession for cause based on the 1 Month Notice? Are the landlords entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested? Are the landlords entitled to recover the filing fee for this application from the tenants?

Background and Evidence

This tenancy began as a one-year fixed term on July 1, 2015. Monthly rent was initially set at \$1,795.00, payable in advance on the first of each month. When the initial fixed term expired, a new one-year fixed term tenancy was created on June 23, 2016, for an increased monthly rent of \$1,850.00. On August 31, 2017, the landlord sent the tenants a Notice of Rent Increase on the prescribed Residential Tenancy Branch forms, which will increase the monthly rent by the allowed 3.7 % to \$1,918.45 on December 1, 2017. The landlords continue to hold the tenants' \$897.50 security deposit paid when this tenancy began in June 2015.

The landlords entered into written evidence a copy of their 1 Month Notice of June 8, 2017. In that Notice, requiring the tenants to end their tenancy by July 1, 2017, the landlords cited the following reasons for the issuance of the Notice:

Tenant is repeatedly late paying rent.

The landlords provided no written evidence to support their assertion that there had been repeated late payment of rent by the tenants. At the hearing, the landlord gave undisputed sworn testimony regarding the tenants' payment of rent for November 2016 when the tenants paid half of their rent on time and the second half a week later. The landlord also gave undisputed sworn testimony that the tenants were \$250.00 short in their monthly rent payment for April 2017, an amount that was paid in full on April 8, 2017. The landlord had no further details regarding specific late payments of rent, but said that there had been "multiple times" before November 2016, when full rent payments were two or three days late.

Although the tenant did not deny the landlord's allegations, he said that since April 2017, there have been no late rent payments, and any that occurred before November 2016, were unique situations that occurred during a period when he was no longer living in the rental unit.

Analysis

As discussed at the hearing, section 47 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. Although this did not occur, the tenants had by then been served with the landlords' application to end this tenancy on the basis of the ending of the fixed term tenancy to be heard on August 25, 2017. On this point, I note that the landlords had also initially intended to pursue the 1 Month Notice as part of their application heard on August 25, 2017.

In considering this matter, I must also be satisfied that the landlords complied with the form and content provisions of section 52 of the *Act*, which states that the Notice must: be in writing and must: (a) be signed and dated by the landlord or tenant giving the notice, (b) give the address of the rental unit, (c) state the effective date of the notice, (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy, and (e) when given by a landlord, be in the approved form. In this case, the sole reason identified in the landlords' application for ending this tenancy for cause was on the basis of repeated late payment of rent.

Residential Tenancy Branch Policy Guideline 38 establishes guidelines to assist arbitrators in the consideration of applications to end tenancies for late payment of rent. That Guideline reads in part as follows;

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 this case, the landlord was only able to provide specific evidence regarding two late payments of rent over the past year. The landlord's references to other times when rent was late were vague and occurred over a year ago. Under these circumstances, I find that the landlords have failed to demonstrate that the grounds cited in the 1 Month Notice were sufficient to warrant the issuance of that Notice. The landlords' application to obtain an Order of Possession based on the 1 Month Notice is dismissed. At the hearing, I advised the parties that the landlords remained at liberty to issue a new 1 Month Notice should there be another late payment of rent in the next several months should I dismiss the landlords' current application.

As the landlords were unsuccessful in their application, I make no award to recover their filing fee for this application. As the tenancy is continuing, I also make no order regarding the security deposit for this tenancy.

Conclusion

I am without jurisdiction to make a decision on the landlords' application to obtain an Order of Possession on the basis of the end to this fixed term tenancy.

I dismiss the remainder of the landlords' current application without leave to reapply. The landlords' 1 Month Notice of June 8, 2017 is cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act*. The monthly rent as of December 1, 2017 is set at \$1,918.45, as per the Notice of Rent Increase issued to the tenants by the landlords on August 31, 2017.

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 28, 2017

Residential Tenancy Branch