



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPUM-DR, FFL

Introduction

This matter proceeded by way of an *ex parte* Direct Request Proceeding, pursuant to section 55(4) of the *Residential Tenancy Act* (the “*Act*”), and dealt with an Application for Dispute Resolution by the landlords for an Order of Possession based on unpaid rent and a monetary Order.

The landlords submitted a signed Proof of Service of the Notice of Direct Request Proceeding which declares that on February 08, 2018, the landlord “MK” served the tenant with the Notice of Direct Request Proceeding via registered mail. The landlords provided a copy of the Canada Post Customer Receipt containing the Tracking Number to confirm this mailing. Section 90 of the *Act* determines that a document served in this manner is deemed to have been received five days after service.

Based on the written submissions of the landlords, and in accordance with sections 89 and 90 of the *Act*, I find that the tenant has been deemed served with the Direct Request Proceeding documents on February 13, 2018, the fifth day after their registered mailing.

Issue(s) to be Decided

Are the landlords entitled to an Order of Possession for unpaid rent pursuant to sections 46 and 55 of the *Act*?

Are the landlords entitled to monetary compensation for unpaid rent pursuant to section 67 of the *Act*?

Are the landlords entitled to recover the filing fee for this application pursuant to section 72 of the *Act*?

Background and Evidence

The landlords submitted the following evidentiary material:

- A copy of the Proof of Service of the Notice of Direct Request Proceeding served to the tenant;
- A copy of a residential tenancy agreement which was signed by the landlord “MK” and the tenant on March 01, 2017, indicating a monthly rent of \$900.00 due on the first day of the month for a tenancy commencing on March 01, 2017;
- A Direct Request Worksheet showing the rent owing and paid during the portion of this tenancy in question, on which the landlords establish a monetary claim in the amount of \$1,491.24. The landlords indicate that \$1,491.24 is owed for unpaid utility charges owed by the tenant for oil provided to the rental unit. The landlords indicate that the tenant paid \$900.00 on January 18, 2018 for unpaid rent owed by January 01, 2018;
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) dated January 04, 2018, which the landlords state was served to the tenant on January 04, 2018, for \$900.00 in unpaid rent due on January 01, 2018, with a stated effective vacancy date of January 14, 2018. The landlords also indicate that \$1,491.24 is owed for unpaid utilities;
- A copy of a receipt, dated January 18, 2018, demonstrating that the tenant provided a rental payment of \$900.00 for the month of January 2018;
- A handwritten agreement between the parties, dated January 18, 2018, indicating that the landlord agrees to extend the tenancy and requests payment for the unpaid utilities claimed as being owed by the tenant;
- Copies of receipts for oil delivery;
- A copy of the Proof of Service of the Notice showing that the landlord “MK” served the Notice to the tenant by way of personal service via hand-delivery at 4:30 PM on January 04, 2018. The Proof of Service form establishes that the service was witnessed by “GH” and a signature for “GH” is included on the form.

The Notice restates section 46(4) of the Act which provides that the tenant had five days to pay the rent in full or apply for Dispute Resolution or the tenancy would end on the effective date of the Notice. The tenant did not apply to dispute the Notice within five days from the date of service and the landlords alleged that the tenant did not pay the rental arrears.

Analysis

Direct Request proceedings are *ex parte* proceedings. In an *ex parte* proceeding, the opposing party is not invited to participate in the hearing or make any submissions. As there is no ability for the tenants to participate, there is a much higher burden placed on landlords in these types of proceedings than in a participatory hearing. This higher burden protects the procedural rights of the excluded party and ensures that the natural justice requirements of the Residential Tenancy Branch are satisfied.

In this type of matter, the landlord must prove they served the tenant with the Notice of Direct Request Proceeding, the Notice, and all related documents with respect to the Direct Request process, in accordance with the *Act* and Policy Guidelines. In an *ex parte* Direct Request Proceeding, the onus is on the landlord to ensure that all submitted evidentiary material is in accordance with the prescribed criteria and does not lend itself to ambiguity or give rise to issues that may need further clarification beyond the purview of a Direct Request Proceeding. If the landlord cannot establish that all documents meet the standard necessary to proceed via the Direct Request Proceeding, the application may be found to have deficiencies that necessitate a participatory hearing, or, in the alternative, the application may be dismissed.

I have reviewed all relevant documentary evidence provided by the landlords and find that in accordance with section 88 of the *Act* the tenant was duly served with the Notice on January 04, 2018.

As part of the application for a monetary Order, the landlords indicate on the Direct Request worksheet that they seek \$1,491.24 for an unpaid utility amount arising from, as the landlords assert, the amount owed by the tenant for oil delivery provided to the rental unit. Section 46(6) of the *Act* provides the following with respect to non-payment of utilities under a tenancy agreement:

46(6) If

(a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and

(b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

I find that the evidentiary material before me includes a copy of a tenancy agreement which does not demonstrate that the tenant is expected to pay utility charges with respect to payments owed arising from oil services provided to the rental unit. The landlords have not provided any documentary evidence to establish that the provisions of section 46(6) of the *Act* were adhered to by demonstrating that the tenancy

agreement included a term with respect to the tenant agreeing to provide additional payments for utility services such as oil delivery to the rental unit.

The landlords provided a copy of a handwritten document, dated January 18, 2018, in which the parties address the issue of unpaid utility services, whereby the landlord requests that the tenant provide payment for the oil delivery bill. Even if the landlord's request in this January 18, 2018 document is to be interpreted as a demand letter, and as establishing that the parties agreed that the tenant is expected to pay a portion of the oil utility, if a tenant is provided a written demand to provide payment of a utility charge for which she is responsible, the landlord may treat the unpaid utility charges as unpaid rent only if the utility charges remain unpaid more than 30 days after the written demand. If the landlord issued a Notice for unpaid utilities on January 18, 2018, I find that the landlord has not waited more than 30 days from the date of the written demand to the tenant, and has, therefore, issued the Notice to the tenant on a date earlier than permitted under the *Act*.

However, there is no provision in the tenancy agreement that demonstrates that the tenant is expected to pay a portion of utility charges with respect to oil delivery, nor is there an addendum to the agreement which includes an item that establishes that the tenant is expected to pay a portion of the services for oil provided to the rental unit. The landlords have not provided any documentary evidence to establish that the provisions of section 46(6) of the *Act* were adhered to by demonstrating that the tenancy agreement included a term with respect to the tenant agreeing to pay a portion of the utility services, such as oil service to the rental unit. I find that as the landlords have not followed the requirements under section 46(6) of the *Act*, it is not open for the landlords to treat the unpaid utilities as unpaid rent and seek reimbursement by way of a monetary Order via the Direct Request process. I dismiss that portion of the landlords' application for a monetary Order that deals with unpaid utilities with leave to reapply. I limit my consideration of the landlords' request for a monetary Order to the unpaid rent claimed as owing to the landlords.

The landlords provided a copy of a Notice for unpaid rent, dated January 04, 2018, for \$900.00 in unpaid rent due January 01, 2018, with a stated effective vacancy date of January 14, 2018. According to the evidence presented by the landlords, the tenant subsequently provided full payment of the unpaid rent owed for January 2018 in the amount of \$900.00 on January 18, 2018. On the Direct Request worksheet, the landlords indicate that full payment, in the amount of \$900.00, was received on January 18, 2018 for the month of January 2018.

The landlords have provided a copy of a receipt, dated January 18, 2018, which demonstrates that a rental payment in the amount of \$900.00 was provided by the tenant, which was received by the landlord and acknowledged as being a rental payment for the month of January 2018. The landlords have not provided any evidence to suggest that the payment of \$900.00 for January 2018 was accepted for use or occupancy only. The landlords also provided a copy of a handwritten document, dated January 18, 2018, in which the landlord "MK" agrees to extend the tenancy for an

additional month and subsequently directs the tenant to provide rental payment for the following month, February 2018. Therefore, by accepting from the tenant full payment of the outstanding rent owed for January 2018, which formed the basis of the unpaid rent owed on the January 04, 2018 Notice issued to the tenant, the landlord has effectively reinstated the tenancy by not acknowledging receipt of the full payment as being received for use and occupancy only and by further instructing the tenant that she wishes to extend the tenancy for the following month of February 2018.

Based on the foregoing, I find that the tenancy has been reinstated and further find that the Notice dated January 04, 2018 is set aside and is of no force and effect.

As the landlords' application for an Order of Possession arises from a Notice that has been set aside, I dismiss the landlord's application for an Order of Possession, based on the January 04, 2018 Notice, without leave to reapply. I dismiss that portion of the landlord's application for a monetary Order that deals with unpaid utilities with leave to reapply.

As the landlords were not successful in this application, I find that the landlords are not entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I dismiss the landlords' application for an Order of Possession, based on the January 04, 2018 10 Day Notice to End Tenancy for Unpaid Rent, without leave to reapply.

I dismiss the landlords' application for a Monetary order with leave to reapply.

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: February 15, 2018

Residential Tenancy Branch