



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPRM, FFL

Introduction

On February 15, 2018, an adjudicator appointed pursuant to the *Residential Tenancy Act* (the *Act*) considered the landlord's application for dispute resolution using the Residential Tenancy Branch's direct request process. As the adjudicator did not believe there was sufficient information provided whereby she could conduct an *ex parte* hearing of this matter, she adjourned the landlord's application to a participatory hearing in her Interim Decision of February 15, 2018.

I have been delegated authority to consider the landlord's application for the following in this participatory hearing:

- an Order of Possession for unpaid rent pursuant to sections 46 and 55 of the *Act*;
- a monetary order for unpaid rent pursuant to section 67 of the *Act*; and
- authorization to recover her filing fee for this application from the tenants pursuant to section 72 of the *Act*.

The landlord filed an Amendment to an Application for Dispute Resolution dated April 10, 2018, to amend her monetary claim for unpaid rent from \$1,450.00 to \$0.00.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's application to effectively withdraw the application for a monetary award.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 9:55 a.m. to enable them to call into the teleconference hearing scheduled for 9:30 a.m. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

There is no documentary evidence filed to prove if and when the tenants were served with copies of the Interim Decision, the Notice of Reconvened Hearing, and additional written evidence, as was required in the Interim Decision, dated February 15, 2018.

At the hearing, the landlord testified that she had served these documents on each of the tenants by registered mail on February 20, 2018. She was able to provide me with the numbers of both registered mail receipts. Based on the landlord's uncontradicted testimony I find that both tenants were served with copies of the Interim Decision and the Notice of Reconvened Hearing, and additional written evidence as of February 25, 2018.

As noted in the Interim Decision, the residential tenancy agreement submitted into evidence by the landlord does not state the day in the month on which the rent is due. This information is necessary in order to be able to determine the validity of a 10 Day Notice as a landlord cannot ask for rent before the day it is due.

At the hearing, the landlord testified that this was an oversight as she was tired and had neglected to add this information in the tenancy agreement when this was signed by her and the tenant SW on February 3, 2018. She did testify that she, her husband and both tenants, met on February 19, 2018 and, at the time all parties agreed that effective April 1st and thereafter, rent was payable on the first day of each month. There is a copy of page 2 of 6 of the tenancy agreement in evidence with a handwritten notation "19.2.18", and, what appears to be the initials of both tenants on it that supports the landlord's evidence that the rent would be payable on the 1st day of the month after that date. It was the landlord's uncontradicted evidence that this was to be effective as of April 1, 2018, only as she agreed the time of the meeting with the tenants to accept the March 2018, rent on March 9th.

According to the written tenancy agreement filed by the landlord, the tenancy began as a one-year fixed term tenancy on February 1, 2018. Initial rent was set at \$1,450.00, payable each month.

The landlord's first 10 Day Notice identified \$1,450.00 in unpaid rent owing for February 2018, stated as due and payable on February 1, 2018. There is a signed statement by the landlord filed in evidence that she served this Notice by leaving a copy in the tenant's mailbox on February 5, 2018. This is confirmed by a signed witness statement of JW.

The residential tenancy agreement submitted into evidence by the landlord was only signed by the landlord and the tenant SW on February 3, 2018. It is not signed by the tenant JC. The signing of the residential tenancy agreement by the landlord and the tenant SW on February 3, 2018, and the fact that the tenant SW was not even present at the time, is confirmed by the witness statement of AM, which was filed by the landlord in support of her application.

The landlord's second 10 Day Notice identified \$1,450.00 in unpaid rent owing as of April 3, 2018, that was due and payable on April 1, 2018. There is a signed statement by the landlord filed in evidence that she served this Notice personally on both tenants on April 3, 2018. This is confirmed by a signed witness statement of JW. The landlord confirmed these facts in her affirmed testimony at the hearing.

The landlord filed an Amendment to an Application for Dispute Resolution dated April 10, 2018, which states that the April rent owing of \$1,450.00, was paid in full on April 6, 2018. The landlord confirmed these facts in her affirmed testimony at the hearing.

Analysis

Sections 88 and 89 of the *Act* confirm that there are prescribed methods for the service of different types of documents, including various forms of a Notice to End Tenancy, Applications for Dispute Resolution and, the evidence in support thereof.

In the present case, the Interim Decision dated February 15, 2018, specifically required the landlord to serve the tenants with copies of the Interim Decision and the Notice of Reconvened Hearing, and additional written evidence.

Rule 3.5 of the Rules of Procedure provides that at the hearing, the applicant must demonstrate to the satisfaction of the arbitrator that each respondent was served with the relevant documents and all evidence as required by the *Act* and the Rules.

In an application brought by a landlord, the onus is on the landlord to ensure that all required materials filed are in accordance with the prescribed criteria as to form and content and, that all such material has been properly served on the respondent tenant(s). If the landlord cannot establish that all documents meet the standard necessary to proceed with the hearing, and were properly served the application may be adjourned or dismissed, with or without leave to apply in accordance with Policy Guideline 12 (16).

Here the landlord has met the onus to prove actual service of the of the Interim Decision and the Notice of Reconvened Hearing, and additional written evidence, as was required in the Interim Decision, dated February 15, 2018. Accordingly, I make an Order pursuant to section 71 (1) of the *Act* that the Interim Decision and the Notice of Reconvened Hearing, and additional written evidence, have been sufficiently served.

The tenants failed to pay the rent identified as owing in the first 10 Day Notice in full within five days of receiving that Notice. The tenants did not make application pursuant to section 46(4) of the *Act* within five days of receiving the first 10 Day Notice. However, at the time the tenants received the first 10 Day Notice the parties had not agreed that rent was due and payable on the 1st of each month. This was the uncontradicted evidence of the landlord. Accordingly, I find that the first 10 Day Notice was void as it did not comply with section 46 (1) of the *Act*. A landlord cannot ask for rent before the day it is due. At the time the first 10 Day Notice was issued and delivered to the tenants, there was no agreement between the parties as to when rent was due each month.

The landlord's second 10 Day Notice identified \$1,450.00 in unpaid rent owing as of April 3, 2018, that was due and payable on April 1, 2018. This second Notice was served personally on both tenants on April 3, 2018. The April rent owing of \$1,450.00, was paid in full on April 6, 2018, as the landlord confirmed in her affirmed testimony at the hearing. Accordingly, I find that the second 10 Day Notice has no effect in accordance with section 46 (4) (a) of the *Act*.

As the landlord was not successful in this application, I find that the landlord is not entitled to recover the \$100.00 filing fee paid for this application from the tenants.

Conclusion

I dismiss the landlord's application for an order of possession based on unpaid rent and recovery of the application fee without leave to reapply. This tenancy continues until ended in accordance with the *Act*.

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: April 26, 2018

Residential Tenancy Branch