



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR (Tenant)
 MNRL-S, OPR (Landlord)

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Tenant filed his application May 3, 2018 (the “Tenant’s Application”). The Tenant sought to dispute a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated May 2, 2018 (the “Notice”).

The Landlord filed her application May 11, 2018 (the “Landlord’s Application”). The Landlord applied for an Order of Possession based on the Notice. The Landlord also sought to recover monies owed for unpaid rent and to keep the security deposit.

The Tenant appeared at the hearing. The Landlord appeared at the hearing with the Translator who was a friend assisting the Landlord. I explained to the Translator her obligation to translate between me and the Landlord without additions or interpretation. I explained the hearing process to the parties and neither had questions when asked. Both parties provided affirmed testimony.

The Tenant had submitted the Notice as evidence. The Landlord had submitted the following evidence: photo of the Tenant holding the Notice; letter from the Tenant to the Landlord dated January 25, 2018; tenancy agreement; and the Notice. I addressed service of the hearing package and evidence. The Landlord confirmed she received the hearing package and Tenant’s evidence.

The Landlord testified that her husband gave the Tenant her application May 12, 2018. The Landlord said she did not serve her evidence on the Tenant. The Tenant said he did not receive the Landlord’s hearing package or evidence as the Landlord’s husband brought him a copy of his own application.

I explained to the Tenant that if I did not allow the Landlord to proceed with her application due to service issues it would be dismissed with leave to re-apply and she could simply apply again. I explained to the Tenant that the Landlord's Application and Tenant's Application relate to the same issues and evidence. I pointed out that the Tenant should know what rent is outstanding. I also explained that I would be determining whether an Order of Possession should issue based on the Notice on the Tenant's Application in any event. The Tenant said he was fine with me allowing the Landlord to proceed with her application given these explanations.

I reviewed the Landlord's evidence with the Tenant and pointed out that it is all evidence he would have been aware of. The Tenant did not take issue with admission of the evidence. Pursuant to rule 3.17 of the Rules of Procedure (the "Rules"), I admit the Landlord's evidence despite it not being served on the Tenant in accordance with the Rules. I find admitting the evidence is not prejudicial to the Tenant and does not result in a breach of the principles of natural justice given the nature and content of the evidence.

Both parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. However, the Tenant exited the conference call at 10:26 a.m. prior to the conclusion of the hearing. The Tenant had told me his phone battery was dying during the hearing. I told the Tenant I would continue in his absence if his phone died as it is expected parties will appear at the hearing with a phone that is charged and working for the duration of the hearing. The Tenant exited the conference during settlement discussions which then could not continue. I note that, pursuant to Policy Guideline 24, a review will not be granted because a party's phone dies. I proceeded with the hearing in the absence of the Tenant pursuant to rule 7.3 of the Rules.

I have considered all documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. Is the Landlord entitled to an Order of Possession based on the Notice?
3. Is the Landlord entitled to recover monies owed for unpaid rent?

Background and Evidence

A written tenancy agreement was submitted as evidence. The parties agreed this related to a different suite and the Tenant had since moved suites; however, both agreed the agreement remained the same other than the rent amount. The parties agreed the tenancy started January 30, 2009 and is a month-to-month tenancy. The parties agreed rent is \$850.00 per month. The Tenant said rent is due on the first of each month. The Landlord said rent is due within the first week of each month. The Tenant said he paid a security deposit of \$217.50. The Landlord said the security deposit was half of \$475.00 which would be \$237.50. The Landlord confirmed she still has the security deposit.

The Notice states the Tenant failed to pay \$3,185.00 rent that was due April 30, 2018. The Landlord testified the Notice should state \$3,135.00 was outstanding. She also said this amount was due in the first week of April.

The Landlord testified she served the Notice on the Tenant personally May 2, 2018. The Landlord had submitted a photo of the Tenant holding a piece of paper. The Tenant said this was him holding the Notice.

The Landlord confirmed rent has been \$850.00 since January of 2018. The Landlord testified that the Tenant did not pay any rent from January to May except for \$265.00 in March. The Landlord testified that the Tenant did not pay any of the outstanding rent since the Notice was issued. The Landlord confirmed \$3,985.00 is currently outstanding and asked to amend her application to reflect the correct amount. The Landlord testified the Tenant did not have a right to withhold rent under the *Act*.

Analysis

Section 26(1) of the *Act* requires a tenant to pay rent in accordance with the tenancy agreement unless they have a right to withhold rent under the *Act*.

Section 46 of the *Act* allows a landlord to end a tenancy where a tenant has failed to pay rent. The relevant portions of section 46 state:

46 (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

(2) A notice under this section must comply with section 52...

(3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(4) Within 5 days after receiving a notice under this section, the tenant may

(a) pay the overdue rent, in which case the notice has no effect, or

(b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit to which the notice relates by that date.

...

Based on the testimony of both parties, and the written tenancy agreement, I find the Tenant was obligated to pay monthly rent in the amount of \$850.00. Based on the testimony of the parties, I find rent was due either on the first of each month or within the first week of each month. I accept the undisputed testimony of the Landlord that the Tenant did not have a right to withhold rent under the *Act*. Therefore, I find the Tenant was required to pay rent under section 26(1) of the *Act* and that section 46(3) of the *Act* does not apply. I accept the undisputed testimony of the Landlord that the Tenant did not pay any rent from January to May except for \$265.00 in March.

Given the Tenant failed to pay rent as required, the Landlord was entitled to serve him with the Notice pursuant to section 46(1) of the *Act*. I accept the undisputed testimony of the Landlord that she served the Notice on the Tenant personally on May 2, 2018. This is supported by the photo and the Tenant's own testimony. I find the Notice was served on the Tenant in accordance with section 88(a) of the *Act*.

I accept the Landlord's testimony that the Notice should state that \$3,135.00 was outstanding and that it was due in the first week of April not April 30, 2018. Section 68 of the *Act* allows me to amend the Notice if the Tenant "knew, or should have known,

the information that was omitted” and it is reasonable to do so in the circumstances. I find the Tenant should have known the amount of rent outstanding and when it was due. Further, I find it reasonable to amend the Notice. It does not prejudice the Tenant to find he owes a lesser amount than claimed.

Upon a review of the Notice, and considering the amendments, I find it complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*.

The Tenant had five days from receipt of the Notice on May 2, 2018 to pay or dispute it under section 46(4) of the *Act*. I accept the undisputed testimony of the Landlord that the Tenant did not pay any of the outstanding rent after the Notice was issued. The Tenant did dispute the Notice on May 3, 2018. However, the Tenant exited the conference call prior to giving sufficient evidence about his dispute. I cannot find grounds to cancel the Notice based on the evidence the Tenant did provide.

I note that the Landlord has the onus to prove the Notice both in relation to the Tenant's Application and Landlord's Application. Based on my findings above, the Landlord has proved the Notice. Therefore, the Notice is upheld and the Tenant's Application is dismissed without leave to re-apply.

Given I have dismissed the Tenant's Application, and found the Notice complies with section 52 of the *Act*, I grant the Landlord an Order of Possession pursuant to section 55(1) of the *Act*. The Order is effective two days after service on the Tenant.

I accept the undisputed testimony of the Landlord that \$3,985.00 in rent is currently outstanding. This is less than what is requested in the Landlord's Application. I amend the Landlord's Application to request the correct amount pursuant to rule 4.2 of the Rules.

I told the Landlord I would not award June rent given her testimony that rent is due within the first week of the month as the hearing occurred the first day of the month. I dismiss the Landlord's request for June rent with leave to re-apply if the Tenant fails to pay June rent.

Given the above, I find the Landlord is entitled to monetary compensation in the amount of \$3,985.00 for unpaid rent. Pursuant to section 72(2)(b) of the *Act*, I authorize the Landlord to keep the security deposit to offset the monies owed. The parties disagreed on the amount of the security deposit. I will accept the Landlord's testimony on this

point as it is the higher amount of \$237.50. Pursuant to section 67 of the *Act*, I grant the Landlord a Monetary Order in the amount of \$3,747.50.

Conclusion

The Tenant's Application is dismissed without leave to re-apply.

The Landlord is granted an Order of Possession effective two days after service on the Tenant. This Order must be served on the Tenant and, if the Tenant does not comply with this Order, it may be filed and enforced in the Supreme Court as an order of that Court.

The Landlord's Application is granted in relation to the request to recover monies owed for unpaid rent and to keep the security deposit. The Landlord is entitled to monetary compensation in the amount of \$3,985.00. I authorize the Landlord to keep the \$237.50 security deposit to offset the monies owed. I grant the Landlord a Monetary Order in the amount of \$3,747.50. This Order must be served on the Tenant and, if the Tenant does not comply with the Order, it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The Landlord's request for June rent is dismissed with leave to re-apply if the Tenant fails to pay June rent.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: June 08, 2018

Residential Tenancy Branch