Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPRM-DR, FFL

Introduction

On April 16, 2016, the Landlord filed an Application for Dispute Resolution (the "Application") under the *Residential Tenancy Act* (the "*Act*") seeking an Order of Possession and a Monetary Order for unpaid rent. A decision was rendered in favor of the Landlord on April 25, 2018, and a Monetary Order and an Order of Possession were granted to the Landlord.

The Tenants subsequently filed an Application for Review Consideration on May 25, 2018, and a decision was rendered in favor of the Tenants on June 5, 2018, ordering a new hearing on the basis of fraud and suspending the decision and orders dated April 25, 2018, pending the outcome of the new hearing.

The new hearing was convened by telephone conference call at 9:30 AM on July 26, 2018, and was attended by the agent for the Landlord (the "Agent") and the Tenant F.A., both of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"); however, I refer only to the relevant facts and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be e-mailed to them at the e-mail addresses provided in the hearing.

Preliminary Matters

Preliminary Matter #1

At the outset of the hearing I advised the parties that the purpose of the reconvened hearing was to hear matters in relation to the original Application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent. I also advised the parties that in my decision I would confirm, vary, or set aside the original decision and order dated April 25, 2018.

Preliminary Matter #2

The Tenant testified that their evidence was sent to the Landlord by registered mail on June 8, 2018, to the address for doing business listed on the tenancy agreement and the Application. In support of this testimony the Tenant provided me with the registered mail tracking number. The Agent denied ever having received this evidence from the Landlord, who is the owner of the named company listed as the Landlord on the tenancy agreement, and stated that he does not know if the Landlord ever received it.

I logged into the mail service provider's website and verified that the registered mail had been sent as described above and that it had yet to be picked up. Residential Tenancy Branch Policy Guideline (the "Policy Guideline") #12 states that where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision of the *Act* and that parties wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received.

I do not find the Agent's testimony that they did not receive the registered mail from the Landlord sufficient to override the deeming provisions of the *Act* and I find no reasonable reason, based on the documentary evidence and testimony before me, that the registered mail should not have been received as it was sent to the Landlord's address for doing business. As a result, I am not satisfied by the Agent that neither they nor the Landlord had a fair opportunity to be notified of the registered mail or to collect and review it prior to the hearing.

Section 90 of the *Act* states that documents sent by registered mail are considered received five days after they are sent, unless earlier received. As a result, I find that the

Landlord was deemed served with the Tenants' evidence on June 13, 2018, five days after it was sent by registered mail. As a result, I accept the Tenants' documentary evidence for consideration in this matter.

The Agent also testified that he served his evidence on the Tenant's personally, at the dispute address, on April 3, 2018. The Tenant denied ever receiving this evidence as he stated that they have in fact not lived in the rental unit for over 19 months. In support of this testimony the Tenant provided a copy of a tenancy agreement for a different address effective November 1, 2016, and copies of rent cheques paid to the new Landlord since the start of the tenancy. The Agent did not submit any documentary evidence to corroborate his testimony and although he attempted to have a witness attend the hearing to provide testimony, they did not attend the hearing.

Rule 3.5 of the Rules of Procedure states that at the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the *Act* and these Rules of Procedure.

As the Tenant denied receipt of the Landlord's evidence and the Agent could not provide any evidence to corroborate his testimony that it was personally served on the Tenants as described, I find that he has failed to satisfy me, on a balance of probabilities that the documentary evidence before me on behalf of the Landlord was served in accordance with the *Act* and the Rules of Procedure. Further to this, the Tenants submitted significant documentary evidence in support of their testimony that they have not lived at the address the landlord used for service for some time and therefore could not have been personally served at that address as described by the Agent.

The ability to know the case against you and to provide evidence in your defense is fundamental to the dispute resolution process. As a result, I find that it would be fundamentally unfair and a breach of both the principles of natural justice and the Rules of Procedure to accept the Landlord's documentary evidence for consideration in the hearing as it has not been exchanged in accordance with the *Act* or the Rules of Procedure. As a result, I have not considered any of the documentary evidence submitted to the Residential Tenancy Branch (the "Branch") by the Landlord or the Agent in rendering this decision.

Preliminary Matter #3

At the end of the hearing the Agent requested to withdraw the Application and have the previous orders cancelled. The Tenant objected stating that the Agent only wishes to withdrawn now as he feels he will be unsuccessful after hearing the totality of the evidence. As a result, the Tenant requested that the Agent not be allowed to withdraw and that a decision be rendered based on the merits of the case. The Agent denied the allegations of the Tenant stating that he did not know he could request a withdrawal at the start of the hearing and simply wishes to have no further dealings with the Tenants.

The Rules of Procedure clearly outline how an applicant may withdraw their application prior to the start of the hearing. However, I find that these provisions do not apply and would not be appropriate under the circumstances as a full hearing was conducted and the Tenants have objected to the withdrawal.

Further to this, I find the timing of the Agent's request to withdraw suspect as it was made at the end of the hearing after I had already excluded his documentary evidence from consideration and full evidence and testimony had been presented by both parties. As granting the Agent's request for withdrawal would enable the Landlord to reapply and effectively allow them to rehabilitate their claim, I decline to grant the request for withdrawal. As a result, I have rendered a decision in this matter based on full consideration of the documentary evidence and oral testimony before me for consideration.

Issue(s) to be Decided

Is the Landlord entitled to a Monetary Order for unpaid rent pursuant to section 67 of the *Act*?

Is the Landlord entitled to an Order of Possession pursuant to sections 46 and 55 of the *Act*?

Is the Landlord entitled to recovery of the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

The parties agreed that the one year fixed-term tenancy at the dispute address began on November 1, 2015, and that rent in the amount of $995.00 was due on the first day

of each month, plus a $30.00 fee for parking. They also agreed that a $500.00 security deposit was paid which has previously been dealt with by the Branch.

Despite the foregoing there was significant dispute between the parties regarding whether the tenancy was currently in effect or had ended 19 months prior. The Tenant testified that they vacated the rental unit in October of 2016 and that the Landlord's claim that they owe rent for April of 2018 is fraudulent.

In support of their testimony the Tenant provided a police file number, text messages with the Agent regarding a move-out inspection and the return of their security deposit dated October 31, 2016, a new tenancy agreement at a new rental address effective November 1, 2016, and copies of rent cheques in the name of the new Landlord starting November 1, 2016.

The Agent testified that the Tenants in fact rented two separate one bedroom rental units in different buildings on the same street at the same time, and that only one was vacated at the end of October 2016. The Agent stated that although the rental unit numbers and the amount of rent payable for both units were the same, the physical street addresses were different. The Agent stated that after moving out of one of the units, the Tenants remained in possession of the other unit and when they did not pay their $995.00 in rent as required for April of 2018, a 10 Day Notice to End Tenancy for Unpaid Rent or utilities (the "10 Day Notice") was served. The Agent stated that although the Tenants vacated the rental unit on or before April 15, 2018, as of the date of the hearing the $995.00 in rent owed for April of 2018 remains outstanding.

The Tenant denied having been served with the 10 Day Notice and as the documentary evidence of the Agent and Landlord was excluded from consideration in this matter; a copy was not properly before me for review. Although the Tenant acknowledged that they lived in a different unit of the same building for one month prior to moving into the dispute address, he denied having ever rented more than one rental unit at a time from the Agent or the Landlord or having rented a unit in a different building from either the Agent of the Landlord. The Tenant stated that the Agent has not submitted any evidence to substantiate this claim, such as another tenancy agreement, a ledger, or rent receipts for both units he claims they rented as it does not exist. The Agent acknowledged that they did not submit any of their own evidence that the Tenants rented more than one rental unit but pointed to documentary evidence submitted by the Tenants showing that a decision and Monetary Order were received by them on November 8, 2017, for a rental unit with the same unit number but a different street

address. The Agent relied on the street address in this decision and Monetary Order as evidence that the Tenants did in fact rent two different rental units.

The Tenant denied ever having applied for dispute resolution against the Agent or the Landlord for any other address than the one being dealt with in this hearing. Further to this, he stated that the address listed in the previous decision and Monetary Order must be a clerical error. As a result the Tenant requested that the matter be dismissed and that the Landlord be fined or sanctioned by the Branch for fraud.

Analysis

Rule 6.6 of the Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities and that the onus to prove their case is on the person making the claim. As a result, I find that the Landlord and Agent bear the burden of proof in this matter.

Although significant and conflicting testimony was provided by both parties, the only documentary evidence accepted for consideration in this matter supported the testimony provided by the Tenant. This documentary evidence conflicted with the testimony of the Agent regarding both the service of the 10 Day Notice and the existence of a tenancy at the dispute address after October of 2016.

Further to this, while I acknowledge that the decision and Monetary Order issued in favor of the Tenants on November 8, 2017, lists a different street address than the dispute address in this case, records at the Branch show that the Tenants Application was in fact made in relation to the same dispute address as this hearing.

As the decision does not explain the discrepancy between the dispute address listed in the Tenants' Application and the dispute address listed in the corresponding decision and Monetary Order, and the only difference is one number in the middle of the street address, I find that it is likely a clerical error in the recording of the address.

In any event, I find the testimony and supporting documentary evidence provided by the Tenants for consideration in this matter more compelling and reliable than the Agent's unsupported testimony and as a result, I prefer the evidence and testimony of the Tenants that they were not served with the 10 Day Notice for April and in fact do not owe the rent sought for April of 2018 as they have not resided in or held possession of the dispute address since October of 2016.

Based on the above, I set aside the original decision and orders dated April 25, 2018, and I dismiss the Landlord's claim without leave to reapply. I also order that the 10 Day Notice for April rent be cancelled and of no force or effect. As the Landlord was unsuccessful in their Application, I also decline to grant recovery of the filing fee.

Although the Tenants requested that a fine be levied against the Landlord in relation to fraud, I do not have the authority to do so through the dispute resolution process. However, the Tenants remain at liberty to seek information from the Branch on how to pursue administrative penalties, should they wish to do so.

Conclusion

I set aside the original decision and orders dated April 25, 2018, and dismiss the Landlord's Application without leave to reapply. I also order that the 10 Day Notice for April rent be cancelled and of no force or effect

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: August 3, 2018

Residential Tenancy Branch