



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, OPB, OPR (Landlord)
AAT, CNC, ERP, LRE, MT, OLC, PSF (Tenant)

Introduction

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

The Tenants filed their application September 24, 2018 (the “Tenants’ Application”). The Tenants applied as follows:

- For the Landlord to allow access to the unit;
- To dispute a One Month Notice to End Tenancy for Cause dated September 1, 2018 (the “One Month Notice”);
- For the Landlord to make emergency repairs;
- To suspend or set conditions on the Landlord's right to enter the rental unit;
- Requesting more time to file the Application;
- For the Landlord to comply with the *Residential Tenancy Act* (the “Act”), *Residential Tenancy Regulation* and/or the tenancy agreement; and
- For the Landlord to provide services or facilities required by the tenancy agreement or law.

The Landlord filed her application September 26, 2018 (the “Landlord’s Application”). The Landlord applied for an Order of Possession based on a vacate clause in the tenancy agreement.

The Landlord submitted an amendment to the Landlord’s Application on October 19, 2018 (the “Amendment”). The Amendment adds a request for an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “10 Day

Notice”). It also adds a monetary claim for \$2,440.00 for unpaid rent for October and November and for the security deposit.

The Tenants did not specifically dispute the 10 Day Notice; however, the Tenants uploaded a copy of the Amendment and stated that the Landlord gave them the 10 Day Notice after the One Month Notice even though they have this hearing coming up.

The Tenants and Landlord appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Rule 2.3 of the Rules of Procedure (the “Rules”) requires matters to be related to each other in an Application for Dispute Resolution. I told the Tenants at the outset that I would only consider the dispute of the One Month Notice and request for more time to file and all remaining claims would be dismissed with leave to re-apply.

I explained to the parties that I would consider the following issues:

- The dispute of the One Month Notice;
- The request for more time to file the Application;
- The request for an Order of Possession based on a vacate clause in the tenancy agreement;
- The request for an Order of Possession based on the 10 Day Notice; and
- The monetary claim for \$2,440.00 for unpaid rent.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence.

The Tenants confirmed they received the hearing package, Amendment and evidence for the Landlord’s Application.

The Landlord said she did not receive anything from the Tenants. The Tenants said they did not serve anything on the Landlord. Pursuant to rules 3.1, 3.14 and 3.15 of the Rules, the Tenants were required to serve the hearing package and their evidence on the Landlord. Given the Tenants failed to do so, I dismiss the Tenants’ Application with leave to re-apply. This does not extend any time limits under the *Act*. I also will not consider any of the evidence submitted by the Tenants.

The parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. I have considered the Landlord's documentary evidence and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

During the hearing, the Landlord acknowledged that the One Month Notice is invalid as it was not based on any of the grounds outlined in section 47 of the *Act* and instead states the following in the details of cause "Family member moving in Oct 1 2018". Given the Landlord's acknowledgement that the One Month Notice is invalid, and given it is not based on any of the grounds set out in section 47 of the *Act*, I will not deal with the One Month Notice further in this decision.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?
2. Is the Landlord entitled to recover \$2,440.00 for unpaid rent?
3. Is the Landlord entitled to an Order of Possession based on a vacate clause in the tenancy agreement?

Background and Evidence

A written tenancy agreement was submitted as evidence. It is between the Landlord and Tenants in relation to the rental unit. The agreement started July 1, 2018 and was for a fixed term ending October 1, 2018. It includes a vacate clause stating that a family member is moving into the rental unit. The vacate clause is initialled by the Landlord and Tenants. Rent is \$1,200.00 per month. The agreement does not state when rent is due but the parties agreed it is due on the first day of each month. There is no security deposit noted on the agreement and there is a \$100.00 pet deposit noted. The agreement is signed by the Landlord but not the Tenants.

At first, the Tenants took the position that this was not the tenancy agreement between the parties. Tenant J.D. said there was no pet deposit. He said there was a different tenancy agreement between the parties in relation to the rental unit. He testified that the tenancy started a year ago. He did not know the term of the tenancy. He did not know if there was a vacate clause in the agreement. He agreed rent was \$1,200.00 per

month due on the first of each month. He testified that a \$600.00 security deposit was paid. He said the written agreement was signed by all three parties.

Neither party had submitted a copy of a tenancy agreement as outlined by Tenant J.D. The Tenants said they did not know they needed to submit this tenancy agreement and that they did not have time to submit it.

The Tenants were unable to look at the tenancy agreement submitted to me as they had lost the package served on them by the Landlord.

The Tenants said they recalled initialling the tenancy agreement with the vacate clause. I asked the Tenants why I should find that they did not agree to the terms in the written tenancy agreement submitted and the Tenants said they do not know and that they are under too much stress.

In reply, the Landlord testified that the Tenants have lived in the rental unit since July of 2017. She said they were going to vacate the rental unit after one year. She testified that Tenant R.D. had knee surgery and given the timing of this she gave the Tenants three extra months in the rental unit. She said this is how the written tenancy agreement came about and that the Tenants initialled the vacate clause. She said her daughter is moving into the rental unit. She testified that the Tenants had already paid the security deposit and that is why the agreement does not list a security deposit amount. She said she never received the pet deposit from the Tenants.

The Landlord asked to keep the security deposit towards unpaid rent.

Neither party had submitted a copy of the 10 Day Notice. The Landlord said she had submitted it; however, there was no copy of it uploaded or available to me. I gave the Landlord until 4:00 p.m. on November 7, 2018 to re-submit the 10 Day Notice.

The Landlord testified that she served the 10 Day Notice on someone who lives with the Tenants on October 17, 2018. The Tenants did not know when they received the Notice but agreed with how it was served.

I asked the Landlord to get a copy of the 10 Day Notice in front of her during the hearing so that we could go over the contents of the Notice. At first, the Landlord was not able to locate the 10 Day Notice. The Landlord then said she found it; however, when asked about the form number she provided the form number for the Amendment not the 10

Day Notice. The Landlord was given a further opportunity to locate the 10 Day Notice and advised that she had located it. The Landlord then testified about the contents of the 10 Day Notice. In particular, she testified that the 10 Day Notice was dated October 17, 2018 with an effective date of October 17, 2018. I asked about the dates more than once and the Landlord confirmed that both dates were October 17, 2018 and provided a reason for this.

The Tenants did not have a copy of the 10 Day Notice as they had lost it. The Tenants could not comment on the contents of the 10 Day Notice.

The Landlord subsequently submitted a copy of the 10 Day Notice and a Proof of Service in relation to it. The 10 Day Notice submitted is dated October 12, 2018 with an effective date of October 22, 2018. The Proof of Service states that the 10 Day Notice was served on the Tenants October 12, 2018.

The parties agreed that \$540.00 of the rent is paid by a third party to the Landlord directly and that the Tenants are responsible for paying \$660.00 of the rent each month. The Landlord confirmed she received the \$540.00 for October and November but not the \$660.00 from the Tenants for October or November. The Tenants acknowledged that they did not pay \$660.00 of the rent in October or November. The Tenants said this was because they were robbed. The Tenants acknowledged that they had no authority under the *Act* to withhold rent.

Tenant J.D. said the Tenants did not pay the outstanding rent after the Notice was issued. Tenant J.D. said the Tenants did not dispute the Notice.

Prior to obtaining evidence about the vacate clause, I asked the Tenants further about the written tenancy agreement submitted. Tenant J.D. agreed that the Landlord and Tenants discussed doing a new tenancy agreement with a three-month term.

I asked the Landlord about the basis for the vacate clause. She said her daughter is moving into the rental unit. She explained that the rental address has three separate residences and that the Tenants live in one, her daughter lives in another and she lives in the third. The Landlord testified that she is going to remodel her daughter's unit and therefore her daughter needs to move into the rental unit. She said she is going to remodel and then rent her daughter's unit to students or that her daughter might move back into the remodeled unit. She said this was the intention when the new tenancy agreement was entered into and that this remains the intention.

I asked the Landlord if she submitted any evidence to support her testimony in relation to the plan for the rental unit. She confirmed she did not.

The Tenants said they do not agree that the above was the plan when the tenancy agreement was entered into. The Tenants said the agreement just stated that a family member was going to move in and they did not know who or what the plan was. The Tenants said they believe the Landlord is planning to re-rent the rental unit once they vacate.

Analysis

Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?

In order to issue an Order of Possession based on a notice to end tenancy, a copy of the notice must be submitted so that I can confirm it complies with section 52 of the *Act*.

Here, neither party submitted a copy of the 10 Day Notice prior to the hearing. During the hearing, the Landlord provided affirmed testimony in relation to the contents of the 10 Day Notice served on the Tenants. She said she had the 10 Day Notice in front of her. She provided affirmed testimony that the 10 Day Notice was dated October 17, 2018 with an effective date of October 17, 2018. I questioned her on this given the dates and she confirmed these were the dates and even provided a reason for why the dates were the same. She also provided affirmed testimony that the 10 Day Notice was served on the Tenants October 17, 2018.

The Tenants were unable to comment on the content of the 10 Day Notice as they had lost it.

The Landlord then submitted a copy of the 10 Day Notice to me along with a Proof of Service. The Proof of Service says the 10 Day Notice was served on the Tenants October 12, 2018. This does not accord with the affirmed testimony of the Landlord. The 10 Day Notice is dated October 12, 2018 with an effective date of October 22, 2018. This does not accord with the affirmed testimony of the Landlord.

Given the conflict between the affirmed testimony of the Landlord and the copy of the 10 Day Notice and Proof of Service submitted, I am not satisfied that the copy of the 10 Day Notice submitted is an accurate copy of what was served on the Tenants. Nor am I

satisfied of the accuracy of the Landlord's testimony in relation to the contents of the 10 Day Notice served on the Tenants.

In the circumstances, I cannot confirm that the 10 Day Notice served on the Tenants complied with section 52 of the *Act*. I decline to issue an Order of Possession based on the 10 Day Notice.

Is the Landlord entitled to recover \$2,440.00 for unpaid rent?

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

Section 7 of the *Act* states:

7 (1) If a...tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying...tenant must compensate the [landlord] for damage or loss that results.

The parties agreed the Tenants are obligated to pay \$1,200.00 in rent by the first day of each month under the tenancy agreement. The parties agreed \$540.00 of this comes from a third party and \$660.00 is the responsibility of the Tenants to pay.

The Tenants acknowledged that they did not pay their portion of the rent for October or November. The Tenants testified that this was because someone robbed them and so they did not have the money for rent. This is not a basis for failing to pay rent under the *Act*. Tenant J.D. acknowledged that the Tenants had no authority under the *Act* to withhold rent.

I find the Tenants breached section 26(1) of the *Act* and the tenancy agreement by failing to pay their portion of the rent for October and November.

There is no issue that the Tenants have failed to pay \$1,320.00 in rent. I award the Landlord a Monetary Order in this amount. I decline to allow the Landlord to keep the security deposit towards unpaid rent at this point because the tenancy is going to continue and therefore the Landlord may wish to have the security deposit remain in place.

Is the Landlord entitled to an Order of Possession based on a vacate clause in the tenancy agreement?

Section 44(1)(b) of the *Act* states:

44 (1) A tenancy ends only if one or more of the following applies:

...

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

Section 55(2) of the *Act* allows a landlord to seek an Order of Possession in the following circumstances:

(c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

Section 13.1 of the *Regulations* states:

13.1 (1) In this section, "close family member" has the same meaning as in section 49 (1) of the *Act*.

(2) For the purposes of section 97 (2) (a.1) of the *Act* [prescribing circumstances when landlord may include term requiring tenant to vacate], the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that

(a) the landlord is an individual, and

(b) that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term. [emphasis added]

Pursuant to rule 6.6 of the Rules, it is the Landlord applying for an Order of Possession based on the vacate clause that has the onus to prove she is entitled to an Order of Possession under the *Act*.

I accept that the parties entered into the new tenancy agreement with a three-month term. The Tenants took the position at first that this tenancy agreement was not accurate. However, the Tenants acknowledged initialling the vacate clause. Even though the Tenants did not sign the last page of the new tenancy agreement, I find this agreement represents the agreement between the parties given the Tenants' initials on the vacate clause.

Section 13.1 of the *Regulations* includes a good faith requirement meaning the Landlord must be acting honestly. The Tenants called into question the good faith of the Landlord by submitting that the Landlord intends to re-rent the rental unit once they vacate.

The Landlord testified that her daughter is going to move into the rental unit. I do not find that I can rely on the Landlord's testimony alone given she provided affirmed testimony about the 10 Day Notice that conflicted with documentary evidence she later submitted. The Landlord did not provide any evidence to support her position that her daughter intended, and intends, to move into the rental unit once the Tenants vacate. In my view, it would have been easy for the Landlord to provide supporting evidence as she could have provided a statement from her daughter or called her daughter as a witness at the hearing.

In the absence of any evidence to support the Landlord's position, I am not satisfied that the intention was or is that the Landlord's daughter will occupy the rental unit. I therefore decline to enforce the vacate clause and decline to issue an Order of Possession based on it.

Conclusion

The Tenants' Application is dismissed with leave to re-apply. This does not extend any time limits set out in the *Act*.

The Landlord's Application is granted in part.

I decline to issue an Order of Possession based on the 10 Day Notice. I find the Landlord is entitled to recover \$1,320.00 in unpaid rent. I decline to issue an Order of Possession based on a vacate clause in the tenancy agreement.

The Landlord is granted a Monetary Order in the amount of \$1,320.00. This Order must be served on the Tenants and, if the Tenants do not comply with the Order, it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

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: November 07, 2018

Residential Tenancy Branch