



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, ERP (Tenant)
 FFL, OPRM-DR (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 November 1, 2018 (the “Tenant’s Application”). The Tenant disputed a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated October 27, 2018 (the “10 Day Notice”). The Tenant also applied for emergency repairs to be made to the rental unit.

The Landlord filed his application November 7, 2018 (the “Landlord’s Application”). The Landlord applied for an Order of Possession based on the 10 Day Notice, to recover unpaid rent and for reimbursement for the filing fee.

The Landlord and Tenant appeared at the hearing. The Tenant was going to call a witness during the hearing; however, it was determined and agreed upon by the Tenant that the witness was not necessary given the issues before me.

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

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

The Landlord confirmed he received the hearing package and evidence for the Tenant’s Application and raised no issues in this regard.

The Tenant advised that he had not received either the hearing package or evidence for the Landlord's Application. The Landlord confirmed he did not serve the hearing package or evidence on the Tenant and said this was because the Tenant had already filed the Tenant's Application. I explained that the Landlord was still required to serve the hearing package and evidence.

I explained to the parties that the issues raised in the Tenant's Application were the same issues raised in the Landlord's Application. I explained to the Tenant that if I dismissed the Landlord's Application due to service issues I would do so with leave to re-apply and explained what this meant. The Tenant advised that he was agreeable to me hearing the Landlord's Application in the circumstances.

I reviewed the evidence submitted by the Landlord with the Tenant. All the evidence was evidence the Tenant would have been aware of regardless of service. The Tenant agreed to the admission of the evidence given the nature of it.

Given the position of the Tenant, I heard the Landlord's Application and admitted the Landlord's evidence.

The parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. 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.

During the hearing, the Tenant advised that the emergency repair requested had been completed and that he was satisfied with the repair. He confirmed that his request for emergency repairs was no longer an issue. I therefore have not considered this request.

Issues to be Decided

1. Should the 10 Day Notice be cancelled?
2. If the 10 Day Notice is not cancelled, is the Landlord entitled to an Order of Possession based on it?
3. Is the Landlord entitled to recover unpaid rent?
4. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement had been submitted as evidence and the parties agreed it is accurate. It is between the Landlord and Tenant in relation to the rental unit. The tenancy started June 1, 2018 and is for a fixed term ending May 31, 2019. Rent is \$1,380.00 per month due on the first day of each month.

The Notice states the Tenant failed to pay rent in the amount of \$1,380.00 that was due October 1, 2018. It is addressed to the Tenant and refers to the rental unit. It is signed and dated by the Landlord. It has an effective date of November 6, 2018.

The Landlord testified that he mailed both pages of the 10 Day Notice to the Tenant on October 27, 2018. The Tenant testified that he believed he received both pages of the 10 Day Notice on October 31, 2018 by mail.

The Tenant acknowledged that he did not pay rent for October by October 1, 2018. Further, the Tenant testified that he has not paid any rent since the 10 Day Notice was issued.

The Tenant testified as follows in relation to the basis for his dispute of the 10 Day Notice. The police kicked in his door in May. The door was broken. He notified someone from the Landlord's office about this and they said they would let the Landlord know. He continued to pay rent until it got colder outside. The Landlord did not do anything about the door for six months. The Landlord attended in September and observed the door; however, it did not get fixed until the end of November. The door has now been fixed and he is satisfied with the repair. He did not pay rent for December because he was waiting for this hearing.

The Tenant submitted that it was the Landlord's responsibility to fix the door. He said he was not allowed to fix the door because the rental unit is part of a strata. The Tenant testified that the broken door resulted in him having six months of sleepless nights because the door did not lock. He said there should be some sort of compensation for this.

I asked the Tenant what section of the *Residential Tenancy Act* (the "Act") he was relying on as authority to withhold rent in the circumstances described. The Tenant advised that he was relying on the emergency repairs section of the *Act*. I asked the Tenant how the circumstances meet section 33 of the *Act*. The Tenant said he feels like the circumstances do. He reiterated that he is not allowed to make repairs to the rental unit. He also mentioned having a child and asked how he was supposed to sleep at night. He submitted that the broken door was an emergency repair.

The Landlord testified that he heard about the broken door in September. He said the Tenant contacted the strata manager about it. The Landlord said he did not know about the door until he attended the rental unit in September. He said he started contacting the strata and started getting quotes to fix the door. The Landlord agreed the door was not fixed until the end of November. The Landlord did not take the position that the door was broken by the Tenant.

The Landlord testified that the Tenant has not paid rent for October, November and December and agreed the outstanding rent amount is \$4,140.00. The Tenant agreed he has not paid rent for October, November and December and agreed with the amount.

The Tenant had submitted photos of the broken door.

Analysis

Section 26(1) of the *Act* states as follows:

26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

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.

...

Section 55(1) of the *Act* requires an arbitrator to issue an Order of Possession when a tenant has disputed a notice to end tenancy and the application is dismissed or the notice is upheld. The notice must comply with section 52 of the *Act*.

There was no issue that the Tenant was obligated to pay \$1,380.00 for October rent by October 1, 2018 pursuant to the tenancy agreement.

The Tenant submitted that he had a right to withhold rent under section 33 of the *Act*.

Section 33 of the *Act* states as follows in relation to emergency repairs:

33 (1) In this section, "emergency repairs" means repairs that are

- (a) urgent,
- (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and
- (c) made for the purpose of repairing

...

- (iv) damaged or defective locks that give access to a rental unit,

...

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

- (a) emergency repairs are needed;

(b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;

(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

(a) claims reimbursement for those amounts from the landlord, and

(b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:

(a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;

(b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);

(c) the amounts represent more than a reasonable cost for the repairs;

(d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

[emphasis added]

Section 33(7) outlines the circumstances in which a tenant can withhold rent based on emergency repairs. This is only permitted when the landlord does not reimburse a

tenant pursuant to section 33(5) of the *Act*. To be eligible for reimbursement, the tenant must have complied with section 33(5) of the *Act*. Further, section 33(6) of the *Act* sets out circumstances in which tenants will not be entitled to reimbursement.

It is clear from section 33 of the *Act* that a tenant must have had emergency repairs done, and paid for those repairs, in order to be entitled to withhold rent under section 33(7) of the *Act*. Further, the tenant must have complied with the requirements set out in section 33(5) of the *Act*.

Here, the Tenant did not make emergency repairs. I acknowledge that the Tenant submitted that he was not permitted to make the repairs. However, this does not result in section 33 being applicable in the circumstances. Where a tenant does not make the emergency repairs they are not entitled to withhold rent under section 33 of the *Act*.

The Tenant did not point to any other section of the *Act* that permitted him to withhold rent. I note that the Tenant submitted that he withheld December rent because he was waiting for this hearing. Tenants are not permitted to withhold rent because there is a dispute resolution hearing pending.

Given the above, 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.

The Tenant acknowledged that he did not pay rent for October by October 1, 2018. Given the Tenant failed to pay rent as required, the Landlord was entitled to serve him with the 10 Day Notice pursuant to section 46(1) of the *Act*. Based on the testimony of the parties, I find the Tenant was served with the 10 Day Notice in accordance with section 88(c) of the *Act*. I accept the undisputed testimony of the Tenant that he received the 10 Day Notice October 31, 2018.

Upon a review of the 10 Day Notice, 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 10 Day Notice on October 31, 2018 to pay or dispute it under section 46(4) of the *Act*. The Tenant acknowledged that he did not pay any rent within the five days and testified that he has not paid any rent since the 10 Day Notice was issued.

The Tenant did dispute the Notice on November 1, 2018, within the five-day deadline. The Tenant said his basis for disputing the 10 Day Notice was the broken door and

emergency repair issue. However, as stated above, the Tenant was not entitled to withhold rent for emergency repairs given he did not complete the repairs. I do not accept that the Tenant had a valid basis to withhold rent and therefore dismiss his dispute of the 10 Day Notice.

Given I have dismissed the Tenant's dispute of the 10 Day Notice and have found the 10 Day Notice complies with section 52 of the *Act*, the Landlord is entitled to an Order of Possession pursuant to section 55(1) of the *Act*.

I find the Landlord is entitled to an Order of Possession based on the 10 Day Notice and grant the Landlord this Order. The Landlord agreed to the Order of Possession being effective December 31, 2018 if issued based on the 10 Day Notice.

The Tenant acknowledged that he had not paid rent for October, November or December. As noted above, I do not accept that the Tenant had a basis to withhold rent under the *Act*. I amend the Landlord's Application to include the full amount of outstanding rent, which both parties agreed is \$4,140.00, pursuant to rule 4.2 of the Rules of Procedure. I find the Landlord is entitled to recover the \$4,140.00 in unpaid rent.

As the Landlord was successful in this application, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Landlord is entitled to monetary compensation in the amount of \$4,240.00. Pursuant to section 67 of the *Act*, I grant the Landlord a Monetary Order in this amount.

Conclusion

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

The Landlord's Application is granted.

The Landlord is granted an Order of Possession effective at 1:00 p.m. on December 31, 2018. 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 is entitled to monetary compensation in the amount of \$4,240.00 and the Landlord is awarded a Monetary Order in this amount. 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.

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: December 10, 2018

Residential Tenancy Branch