



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OLC, FFT

Introduction

This hearing was scheduled to deal with a tenant's application made on November 13, 2018 to cancel a *10 Day Notice to End Tenancy for Unpaid Rent* and orders for the landlord to comply with the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

The landlord's agents confirmed receipt of the tenant's hearing package via registered mail. The tenant confirmed receipt of the landlord's evidence package sent by registered mail and delivered to the tenant through the building's concierge.

The tenant had uploaded additional evidence to the Residential Tenancy Branch on December 11, 2018 and claims to have sent it to the landlord via registered mail on December 11, 2018. The landlord's agent stated they did not receive such a package and the tenant was unable to provide the registered mail tracking number as proof of service. The tenant also uploaded further evidence on December 17, 2018 but acknowledged this evidence was not served to the landlord. I did not admit the evidence uploaded in December 2018 but permitted the tenant to provide oral submissions.

The landlord's agents requested that a Monetary Order be provided to the landlord with this decision. I confirmed that the landlord has yet to file an Application for Dispute Resolution. Where a tenant files to dispute a Notice to End tenancy, an Order of Possession may be provided to the landlord, pursuant to section 55(1) of the Act; however, the Act does not permit a Monetary Order to be issued in favour of the landlord under a tenant's application. The landlord's agents were informed of their right

to make their own Application for Dispute Resolution to seek monetary compensation against the tenant.

Similarly, the tenant sought remedy for the landlord's breaches of the Act. The tenant had requested orders for compliance but had not made a monetary claim. The tenant was informed of his right to make a monetary claim against the landlord by way of another Application for Dispute Resolution.

On another procedural note, I amended this Application to reflect the landlord's name as it appears on the *10 Day Notice to End Tenancy for Unpaid Rent*.

Issue(s) to be Decided

1. Should the *10 Day Notice to end Tenancy for Unpaid Rent* be upheld or cancelled?
2. Is it necessary and appropriate to issue orders to the landlord to comply with the Act, regulations or tenancy agreement?

Background and Evidence

The tenancy agreement started on November 6, 2017 and was to be for a fixed term expiring on November 30, 2018. At the start of the tenancy the tenant gave the landlord's agent a certified cheque in the sum of \$16,321.67. Both parties provided consistent testimony that the tenant was required to pay the "first and last" month's rent at the start of the tenancy. The landlord's accounting records reflects that the sum of \$16,321.67 represents rent of \$6,995.00 for the month of November 2017, rent of \$6,995.00 for the month of November 2018, plus a security deposit of \$3,497.50. The tenancy agreement also reflects a security deposit of \$3,497.50 and a monthly rent of \$6,995.00.

The tenant testified that after the initial payment of \$16,321.67 he would pay his rent by depositing a certified cheque(s) in the landlord's bank account. The landlord provided a listing of payments received from the tenant and the dates received. Several rent payments were received late and then in August 2018 the rent was made in two installments and for September 2018 the rent was paid in three installments with the last instalment being received on October 4, 2018. The tenant confirmed that the last payment he deposited into the landlord's bank account was on October 4, 2018 as reflected by the landlord's accounting record and the tenant did not make a payment or deposit of rent for the month of October 2018.

On November 9, 2018 the landlord posted a *10 Day Notice to End Tenancy for Unpaid Rent* ("10 Day Notice") indicating the tenant failed to pay rent of \$6,995.00 that was due on October 1, 2018 and the 10 Day Notice has a stated effective date of November 19, 2018. The tenant did not pay the outstanding rent but did file to dispute the 10 Day Notice within time.

The tenant was of the position that the rental unit was supposed to be rented to him for \$5,995.00 per month and that the tenancy agreement was altered by the landlord to reflect the monthly rent as being \$6,995.00. The tenant claims that he was told orally by the realtor showing him the unit that the monthly rent was \$5,995.00 and that when he was presented the tenancy agreement he signed it in a rush and without reading it. He also claims to have paid the amount of \$16,321.67 as requested in order to secure the rental unit. After a couple of months he contacted the landlord to raise the issue of the rent and his position that it should be \$5,995.00 but the landlord's response to him was that the rent was \$6,995.00 per month. Despite the disagreement, the tenant continued to make the payments of \$6,995.00 per month.

The tenant claims that he offered to pay October 2018 rent but that the landlord wanted three months' worth of rent to extend the lease. The tenant stated that he only wanted to pay a month at a time.

The tenant also stated that he found advertisements for the rental unit showing that it is advertised at \$5,995.00 per month starting on March 1, 2019.

The landlord's agent refuted that the monthly rent was anything other than the \$6,995.00 per month that is reflected in the tenancy agreement and that the tenant had been paying. One of the landlord's agents stated that it was he who showed the rental unit and other available units to the tenant when the tenant was looking to rent a unit and he orally told the tenant the rental unit was renting for \$6,995.00. The landlord was of the position the tenant has made up this story that rent was supposed to be \$5,995.00 per month and that the landlord has never advertised the unit for rent that low.

As for non-compliance with the Act, the tenant testified that the landlord's agents had his fobs deactivated; however, they have been reactivated after the police were involved. The tenant also stated the internet service has been terminated and that he has had to open his own internet account.

The landlord's agents acknowledge communicating with the Strata council and after that the tenant's fobs were deactivated. I cautioned the landlords that a landlord may not cause a tenant's access to be denied or otherwise influence another party to do so and that resorting to such tactics is illegal and may result in a monetary claim being filed by the tenant and *Administrative Penalties* being levied by the Director. The landlord's agent assured me that they will not impede the tenant's access to the property without obtaining the Writ of Possession and services of a Court Bailiff.

The landlords also acknowledged suspending the internet service to the rental unit due to the tenant's failure to pay rent. I cautioned the landlords not to terminate any services or facilities and to do so without an order of the Director would contravene the Act and may entitle the tenant to monetary compensation and subject the landlord to *Administrative Penalties*. The landlord's agents stated they were unaware they could not do such things but confirmed they understood my direction during the hearing. The tenant clarified that because he had set up his own internet service now he does not want the landlord to reinstate their internet service for fear it will conflict with his internet service and needs.

Analysis

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent.

Where a tenant does not pay rent the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent. The landlord served the tenant with a 10 Day Notice indicated rent for October 2018 was unpaid. Upon review of the 10 Day Notice I find that it is in the approved form and appears duly completed.

When a tenant receives a 10 Day Notice the tenant has five days to pay the outstanding rent to nullify the 10 Day Notice or the tenant has five days to dispute the 10 Day Notice by filing an Application for Dispute Resolution. In this case, the tenant filed to dispute the 10 Day Notice within five days of receiving the 10 Day Notice.

The parties provided consistent evidence that the last time the tenant made a rent payment is was for the balance of rent owed for September 2018 and that a rent payment was not made for the month of October 2018. The parties also provided consistent submissions that at the start of the tenancy the tenant paid for the first month's rent and the last month's rent which the landlord applied to November 2018.

While requiring a tenant to pay “last month’s” rent at the start of the tenancy contravenes the Act, I find the application of this advance payment to the month of November 2018 was expected by both parties since November 2018 was the last month of the fixed term. In other words, I find the tenant did not have an expectation that the “last month’s” rent payment be applied to October 2018 because the tenancy was not set to end any earlier than November 30, 2018. However, if the tenant did expect the “last month’s” rent to be applied to October 2018 then there would be rent outstanding for November 2018. Accordingly, I do not see any consequence to the tenant whether the “last month’s” rent was applied to October 2018 or November 2018 and the tenant has benefited for use and occupation of the rental unit for both of those months, plus December 2018.

In support of his request to cancel the 10 Day Notice, the tenant argued that the monthly rent was supposed to be \$5,995.00. Where a tenant overpays rent, the tenant is entitled to withhold the overpayment from a subsequent month’s rent. As such, if the tenant overpaid the rent by \$1,000.00 per month, the tenant may have been entitled to withhold at least one month’s worth of rent. However, the landlord refuted the tenant’s position and claims the rent was always set at \$6,995.00 per month.

I have reviewed the tenancy agreement, and I find that the amount of rent reads \$6,995.00. The tenant implied that the amount of \$6,995.00 was an alteration and that it originally read \$5,995.00. While typographical errors do occur from time to time and it is possible that some parties fraudulently alter a document, I find that is not likely the case here based on the following factors.

- The security deposit required by the landlord and paid by the tenant was \$3,497.50, which is exactly 50% of \$6,995.00, the lawful amount where rent is \$6,995.00 per month.
- The tenant paid rent of \$6,995.00 for numerous months and I would expect that a tenant overpaying \$1,000.00 per month would seek resolution much sooner than a year after the tenancy started.
- The images the tenant produced of a cell phone screen depicting an online advertisement at the rental rate of \$5,995.00 starting March 1, 2019 is insufficient in itself to persuade me the rent was fraudulently altered on the tenancy agreement by the landlord at the start of this tenancy is easily manufactured without verification.

In light of the above, I find the tenant was obligated to pay rent of \$6,995.00 for the month of October 2018 and I reject his position that he had overpaid the previous month's rent by \$1,000.00 per month.

Finally, the tenant claims he offered to pay the outstanding rent to the landlord and the landlord refused it; however, I find that submission is inconsistent with the tenant's usual pattern of depositing cheque into the landlord's bank account. The tenant did not present any evidence to suggest the tenant was somehow unable to make a deposit to the landlord's bank account as he had done many times before.

In light of all of the above, I find the tenant has not established a basis for me to cancel the 10 Day notice and I dismiss the tenant's request that I cancel it.

Section 55(1) of the Act provides as follows:

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

- (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

Having found the 10 Day Notice complies with the form and content requirements of the Act and having dismissed the tenant's application that I cancel the Notice, I find the criteria of section 55(1) have been met. Accordingly, I provide the landlord with an Order of Possession with this decision.

Considering the landlord has already suffered a loss of two months of rent, I find it would be unduly prejudicial to the landlord to delay enforcement of the Order of Possession. Therefore, **I provide the landlord with an Order of Possession effective two (2) days after service of the Order upon the tenant.**

The tenant is strongly encouraged to comply with the Order of Possession. Failure to do so will entitle the landlord to apply for a Writ of Possession and the services of the Court Bailiff.

Having heard the tenant's access to the property has been impeded after the landlord contacted the Strata council, I find it appropriate to formalize the cautions given to the landlord's agents during the hearing and **I FURTHER ORDER THAT:**

- 1. While the tenant remains in possession of the rental unit, the landlord must not, in any way, take possession of the rental unit from the tenant, or cause the tenant's access to the property to be impeded, without obtaining a Writ of Possession.**
- 2. The landlord must not suspend, terminate or otherwise restrict any services or facilities prior to lawfully regaining possession of the rental unit.**

Conclusion

The tenancy has ended for unpaid rent and the landlord is provided an Order of Possession effective two (2) days after service upon the tenant.

In this decision, I have also issued other orders for the landlord to comply with the Act, regulations or tenancy agreement.

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: December 28, 2018

Residential Tenancy Branch