



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Atira Property Management Inc.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, OPQ, MNDCL-S, FFL

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the “**Act**”). The landlord’s application for:

- an Order of Possession pursuant to section 55;
- a monetary order for unpaid rent and for damage to the unit, site or property pursuant to section 67; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

And the tenant’s application for:

- cancellation of the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent (the “**Notice**”) pursuant to section 46;

The tenant attended the hearing on her own behalf. The landlord was represented by three individuals: the property manager, the property manager assistant, and the residential caretaker (referred to hereinafter as the “landlord”). Both parties were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that the landlord was personally served the notice of dispute resolution package and support evidence on January 1, 2019. The landlord confirmed its receipt on this date.

The landlord testified that it served (in one envelope) two evidentiary packages (one in support of its application, accompanied by the notice of dispute resolution, and the other in response to the tenant’s application) by posting on the door on January 11, 2018. The tenant confirmed receipt of both these packages on that date.

I find that all parties were properly served with the necessary notices of dispute resolutions and evidentiary packages in accordance with the Act.

Preliminary Issue

Upon my review of the application materials prior to the hearing, I discovered that no documents had been uploaded by the landlord to the residential tenancy branch website relating to its own application. When I raised this issue with the landlord, I was advised that it had uploaded documents in support of their application, but were not able to provide an explanation as to why the documents were not available for my viewing. I am uncertain as to what caused my inability to view the documents.

As the landlord had served their application materials on the tenant per the Act (as set out above) and would not be prejudiced, I elected to allow the landlord to upload documents in support of its application during the hearing. I then proceeded to conduct the hearing of the tenant's application.

The landlord did not finish uploading the documents until there were 11 minutes left in the time allotted to hear both applications. I found that there would not be sufficient time to conduct a hearing on the landlord's application. At that time, I elected to dismiss the landlord's application with leave to reapply.

Issue to be Decided

Is the tenant entitled to a cancellation of the Notice?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' evidence and my findings are set out below.

The parties entered into a month to month tenancy agreement starting June 15, 2009. Monthly rent is currently \$526, to be paid on the first of each month. The tenant paid the landlord a security deposit of \$266 at the outset of the tenancy, which it retains. The tenant continues to reside at the rental unit.

On December 11, 2018, the landlord issued the 10 Day Notice with a stated effective vacancy date of December 25, 2018. It set out that the tenant had failed to pay \$526 in rent due on December 1, 2018. The landlord served the Notice on the tenant via personal service on December 13, 2018. The tenant acknowledged this service.

The tenant testified that she obtained a money order on December 4, 2018 (after rent was due, but prior to the Notice being served) in the amount of \$426, and mailed it (by regular mail) to the landlord that same day. She testified that she did not realize that money order was for \$100 less than what was owed, and that this was an error on her part.

The landlord testified that it did not receive the tenant's money order until December 13, 2018. I accept this evidence. It stated that the Notice had already been prepared and was given to the residence caretaker to be served on the tenant by the time it received the money order.

The parties agree that the balance of the December 2018 rent (\$100) remains outstanding, and that the tenant has paid January 2019 rent in full.

The landlord testified that the tenant refuses to provide them with post-dated rent cheques or with her banking information so it may withdraw monthly rent directly from her bank account. The landlord testified that there have been issues in the past regarding the tenant's late payment of rent, and they have sent several letters to the tenant on this issue.

The landlord testified that it advised the tenant that she may also drop her rent cheques off at the landlord's office in person, but that it must be before the rent become due, not after.

The landlord also testified that sometimes the residential caretaker would accept the tenant's rent cheques and drive them to the landlord's office for her. This was not done in December 2018.

The landlord testified that the caretaker told the tenant that she could not take the December rent cheques to the landlord's office (the tenant testified that the caretaker said she would be on vacation), and that it was the tenant's responsibility to make sure the landlord received the rent on time. The caretaker testified that she cautioned the

tenant against using the mail to send rental payment, because things can get lost in the mail.

Despite this caution, the tenant sent the money order to the landlord via post.

Analysis

Per section 26 of the Act, and the tenancy agreement, the tenant has an obligation to pay monthly rent in full and on time.

Based on the tenant's own testimony, I find that the tenant did not pay the rent for December 2018 on time. The tenant's money order of \$426 was issued and sent to the landlord on December 4, 2018, 3 days after the December 2018 rent was due.

The Notice was issued to the tenant on December 11, 2018 with an effective date of December 25, 2018. Pursuant to section 46(4) of the *Act* the tenant had until December 16, 2018 to pay the entire amount of outstanding rent or to apply for dispute resolution. The tenant failed to do either. Accordingly, she is conclusively presumed to have accepted that the tenancy ended on the corrected effect date set out in the Notice (December 26, 2018), as per section 46(5) of the *Act*.

Section 46 of the Act states (in part):

- (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.
- (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..

The landlord cautioned the tenant against using the mail to provide it with the rent payment. Delays in the mail can occur, and the tenant ought to have been aware of this possibility. A delay did occur, which caused the landlord not to receive the partial payment of rent until December 13, 2018.

I must consider the fact that the tenant had made a partial payment of rent on December 4, 2018, and the Notice did not reflect this. The balance of rent owing on December 13, 2018 was \$100, not \$526, as set out on the Notice. Had the Notice reflected this, it is possible that the tenant would have paid the difference within the five day window.

However, I find that the discrepancy between the Notice and the actual amount owing is due to the fact that the tenant mailed the money order, and that it was not received until after the Notice was prepared and given to the caretaker for service on the tenant. I find that, in the circumstances, the landlord acted properly in the preparation of the Notice.

Accordingly, I dismiss the tenant's application to cancel the Notice.

Per section 55 of the Act, since I have dismissed the tenant's application to cancel the Notice, I must issue an order of possession to the landlord.

I order that the tenant must deliver full and peaceable vacant possession and occupation of the rental unit to the landlord within two days of being served with this order by the landlord.

Additionally, the landlord is entitled to receive the balance of the rent owing for December, 2018 (\$100). Pursuant to section 72 of the Act, I order that the landlord may deduct this amount from the tenant's security deposit.

Conclusion

I dismiss the landlord's application, with leave to reapply.

I dismiss the tenant's application, without leave to reapply. I order that the tenant must deliver full and peaceable vacant possession and occupation of the rental unit to the landlord or within two days of being served with this order by the landlord.

I order that the landlord may deduct \$100 from the tenant's security deposit representing the balance of outstanding 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 *Residential Tenancy Act*.

Dated: January 31, 2019

Residential Tenancy Branch