



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, ERP, LRE, OLC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an order to have the landlord to make emergency repairs to the rental unit pursuant to section 33;
- an order suspend or set conditions on the landlord's right to enter the rental unit or site pursuant to section 29; and
- and order to have the landlord comply with the *Act* and/or tenancy agreement.

The tenant, the landlord, the landlord's interpreter, and the landlord's counsel, appeared at the hearing. All parties present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that he served the notice of dispute resolution package to the landlord personally, by hand, on November 20, 2018. The landlord confirmed receipt of the notice of dispute resolution package. Therefore, I find that the landlord has been duly served with the notice of dispute resolution package, in accordance with section 89 of the *Act*.

The tenant provided evidence to the Residential Tenancy Branch (RTB), and testified that the same evidence was not disclosed to the landlord, as the tenant failed to serve the evidence to the landlord.

The landlord's counsel confirmed that neither he nor his client received the tenant's evidence, and therefore, were not afforded an opportunity to prepare a response to some of the items included as part of the tenant's application in advance of the hearing and are not able to respond to the evidence by way of testimony during the hearing.

Rule 3 of the Residential Tenancy Branch Rules of Procedure, and its accompanying subsections, outline the guidelines to which parties must adhere with respect to the exchange of evidence. I find that by not disclosing his evidence to the landlord, the tenant did not adhere to the rules governing evidence, as outlined in Rule 3. Therefore, I will not consider the tenant's documentary evidence. However, I did give the tenant an opportunity to speak to the substantive issues which formed the basis of providing evidence in support of the merits of his application.

I also note that some of the evidence provided by the tenant was provided in duplicate, since the landlord submitted evidence to the RTB, which included documents upon which the tenant relied during his testimony. The landlord testified that he provided evidence to the RTB within the timeframe outlined in the Rules of Procedure, and confirmed that he served the evidence to the tenant as well.

The landlord was not able to recollect the date on which, nor the manner in which, his evidence was served to the tenant. However, as the tenant confirmed receipt of the evidence, and asserted that he felt it was received at a suitable time in advance of the hearing, I will consider the landlord's evidence as part of this application.

I note that section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Preliminary Issue – Scope of Application

I advised the parties the tenant has applied for a number of items as part of his application. Residential Rules of Procedure, Rule 2.3 states that, if, in the course of the dispute resolution proceeding, the Arbitrator determines that it is appropriate to do so, the Arbitrator may sever or dismiss the unrelated disputes contained in a single application with or without leave to apply.

I informed the parties at the beginning of the hearing that I was concerned that we would not have time to cover all aspects of both applications in the time allotted. I informed the parties that the application in relation to dispute the 10 Day Notice took precedence and as such, it would be given priority. The remainder of the tenant's application was dismissed with leave to reapply.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled?

If the tenant is unsuccessful in cancelling the 10 Day notice is the landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

The parties agreed that the tenancy began on January 15, 2011. The monthly rent was determined to be due on the first day of each month, and the monthly rent was set at \$450.00. The tenant testified that a tenancy agreement was signed at the start of the tenancy, although the landlord cannot recollect whether an agreement was signed.

Neither party submitted a copy of a written tenancy agreement as evidence. The landlord did provide a copy of an agreement titled "Tenant Code", dated July 27, 2017. However, the document lists expectations set out to which the landlord wishes the tenant to adhere, and the parties agreed that the document is not the tenancy agreement signed at the beginning of the tenancy.

The landlord testified that the tenant has not paid rent for the month of November 2018, and that the 10 Day Notice was issued as a result of the non-payment for that month. The landlord confirmed receipt of a payment in the amount of \$450.00 on October 29, 2018 and asserted that it was received as a late payment for the month of October 2018.

The landlord issued a 10 Day Notice, dated November 12, 2018, which the landlord states was served to the tenant on November 12, 2018, for \$450.00 in unpaid rent due on November 09, 2018, with a stated effective vacancy date of November 19, 2018.

The 10 Day Notice also included a section in which the landlord asserts that the tenant owes a separate amount of \$125.00 for unpaid utilities owed by November 09, 2018.

The tenant has applied to dispute the 10 Day Notice, claiming that he paid the rent owed for November 2018 in full, and that the tenancy agreement between the parties stipulates only that monthly rent is owed in the amount of \$450.00, and no other fees or utilities are owed each month under the agreement.

The tenant asserted that the amount of \$125.00 claimed by the landlord as being owed related to additional movies purchased through the cable service, and do not amount to utilities owed under the agreement, such that the landlord is entitled to treat that amount as unpaid rent.

The tenant testified that he is aware that the monthly rent is due one the first day of each month. The tenant provided that his routine practice has been to provide payment of the monthly rent on the last day of the month preceding the month for which rent is due.

The tenant referred to rent receipts provided by the landlord to support his testimony that this method of payment has been his practice for a very long time. Although the tenant could not recollect the duration of time for which he has been paying monthly rent on the last day of a given month for the purpose of having it applied as the rent owed for the following month, the tenant testified that he has been doing this for at least over a year, and that the rent receipts depict payment received and acknowledged by the landlord at the end of the month. The rent receipts do show that the landlord has issued the receipts on dates routinely occurring the last week of a given month.

The tenant testifies that the landlord has never raised an issue with rent being provided at the end of a given month for the purpose of it being received by the landlord as rent owed for the following month, and that the rent receipts show that this has been the tenant's payment pattern since February 2017, and throughout the entirety of 2018.

The tenant testified that he does not owe any unpaid rent for the month of November 2018. The tenant testified that he paid the full rent owed for November 2018, in the amount of \$450.00, on October 29, 2018, by hand to the landlord in the form of a cash payment, and that the landlord issued a receipt confirming acceptance of that payment. The tenant asserted that the landlord is being dishonest in claiming that the payment received on October 29, 2018 was meant as acceptance of late payment of rent owed for the month of October 2018.

The tenant testified that the landlord demanded \$575.00 for the month of November 2018, comprised of the \$450.00 owed as rent and an additional \$125.00 for the purchase of movies. The tenant testified that he paid the monthly rent owed for November 2018, and paid the additional \$125.00 owed for the movies as part of the payment of rent due for December 2018, and that the amount of \$125.00 no longer remains outstanding. The tenant testified that there is no agreement that the tenant pays an additional monthly sum for utilities, and as such, the \$125.00 claimed as being owed for movie purchases should not have been included on the 10 Day Notice.

The tenant testified that the landlord's routine practice is to issue a receipt after the rent has been collected, and that sometimes a receipt is not provided immediately. The tenant testified that the landlord does not have a receipt prepared in advance because the exact date on which the tenant provides payment of rent fluctuates, but that he usually provides payment at the end of the preceding month for which rent is due, or at the latest, on the first day of the month.

Analysis

Section 26 of the *Act* provides, in part, the following:

- 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.
- (2)A landlord must provide a tenant with a receipt for rent paid in cash.

Section 46 of the *Act* provides the following:

- 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 *[form and content of notice to end tenancy]*.
- (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.

Although this is the tenant's application disputing the 10 Day Notice, the burden of proof in such matters to end a tenancy pursuant to issuing a 10 Day Notice rests with the landlord. When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events without any form of evidentiary corroboration, the party making the claim (and bearing the burden of proof) has not met the burden on a balance of probabilities and the claim fails.

In the matter before me, I find that, on a balance of probabilities, it is more likely than not that the tenant's testimony outlining his pattern of providing payment of the monthly rent on the last day of the month preceding the month for which rent is due, represents a factual depiction of the events preceding the landlord's decision to issue the 10 Day Notice.

I find that the tenant was consistent in his testimony, and that his testimony fit with the evidentiary material provided, such as the date of the rent receipts which show the receipts issued, for the most part, during the last week of a given month.

I prefer the consistency and the logic of the tenant's testimony. I find that the landlord seemed hesitant and uncertain at times when providing testimony, and sometimes redacted a statement initially provided and needed time to deliberate when providing a response to seemingly straightforward and simple questions.

The landlord testified that in July 2017, the landlord approached the tenant to set out expectations with respect to the tenancy, such as the date on which rent is due. The tenant testified that since that time, he had been paying rent either on the first day of the month, but usually on the last day, or during the last week, of the month preceding the month for which rent is due.

In response, the landlord asserted that the tenant had always been late, and that the tenant's payment of the rent on the last day of a given month was meant as late payment for that given month. Therefore, the landlord asserted, the tenant's payment of the rent on October 29, 2018 was understood by the landlord as being late payment of rent for October 2018.

When asked why the landlord waited until November 2018 to address the issue of the tenant purportedly paying late rent in this manner for well over a year and a half, the

landlord was hesitant in his response, and required much time to deliberate and simply confirmed that the tenant's payment pattern represented a pattern of late rent.

I find that, as a whole, the landlord's testimony lacks an air of reality, such that I find it to be unreasonable that a landlord would accept late payment of rent for a period of a year and a half, as suggested by the landlord's testimony, before taking action to remedy the issue.

In light of the testimony from both parties, I find that the landlord has not illustrated why a rent receipt, dated November 2018, was prepared in advance, and is depicted as having the information crossed-out.

The tenant testified that the landlord does not prepare receipts in advance, as the exact date on which rent is provided fluctuates. Furthermore, the receipts provided by the landlord, which date back as far as 2017, confirm this pattern, as all other receipts provided by the landlord have an exact date, which include the month, day, and year, and include fluctuating dates, as stated by the tenant. The receipt of November 2018 does not fit this pattern. The landlord was not able to provide testimony as to why the November 2018 receipt was drafted in this fashion in advance, and why its contents were crossed-out.

In the absence of an adequate explanation from the landlord, I am led to believe that the November 2018 receipt could be viewed as an attempt by the landlord to present misleading information, such that one might accept that the October 29, 2018 receipt was not meant for payment towards November 2018 rent.

Based on the consistency of the tenant's testimony, and on a balance of probabilities, I find it more likely than not, that the tenant has established that rent for the last year has been paid on the last day of month for the preceding month, and that the rent payment of October 29, 2018, which was accepted by the landlord, was for the payment of rent owed for November 2018. Therefore, the tenant has demonstrated that the rent owed for November 2018 was paid on-time.

Therefore, I find that the conditions did not exist for the landlord to claim that rent remained unpaid for November 2018, such that it was open for the landlord to issue a 10 Day Notice to End Tenancy for Unpaid Rent in accordance with section 46 of the *Act*. Based on the foregoing, I set aside the 10 Day Notice dated November 12, 2018 and determine that it is of no force and effect.

Conclusion

The 10 Day Notice, dated November 12, 2018, is cancelled and is of no force or effect. The tenancy will continue until it is ended in accordance with the *Act*.

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 21, 2019

Residential Tenancy Branch