



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the landlord: OPU, MNRL-S, FFL
For the tenants: CNR, FFT

Introduction

This hearing was convened as a result of an Application for Dispute Resolution (“application”) from both parties seeking remedy under the *Residential Tenancy Act* (“Act”). The landlord applied for an order of possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated September 18, 2018 (“10 Day Notice”), for a monetary claim of \$9,869.52 for unpaid rent and utilities, to retain the tenants’ security deposit, and to recover the cost of the filing fee. The tenants applied to cancel the 10 Day Notice and to recover the cost of the filing fee.

This hearing original began as a tenant application where the original arbitrator had received the incorrect codes and did not attend the original hearing as a result. An Interim Decision was issued dated December 17, 2018 (“Interim Decision”), which should be read in conjunction with this Decision. The Interim Decision indicates that the landlord’s application was joined as a cross-application and was adjourned until this date, January 15, 2019. The agent stated that the landlord could not attend the hearing as he had to work.

On this date, January 15, 2019, tenant JD (“tenant”), a tenant advocate NC (“advocate”), landlord agent TS (“agent”), and the spouse of the landlord (“support person”) attended the teleconference hearing.

The agent testified that the landlord did not serve the tenant with any documentary evidence in support of the landlord’s application. Residential Tenancy Branch (“RTB”) Rules of Procedure Rule 3.10.1 requires that identical digital evidence be served on each respondent. As the landlord failed to do that, I have excluded all of the landlord’s

documentary evidence as it was not served on the respondents and to consider it, I find would unfairly prejudice the tenants. While the agent originally stated that the landlord received the tenant's documentary evidence, the agent later changed his testimony regarding the tenant's bank statements by claiming he did not receive that document, which I will address later in this decision.

Preliminary and Procedural Matters

As the landlord failed to submit documentary evidence to support the amount of the unpaid rent and utilities being claimed, the agent was advised at the outset of the hearing that the landlord's monetary claim was being refused, pursuant to section 59(5)(c) of the *Act*. I find the landlord failed to serve a supporting monetary order worksheet on the tenants as to the breakdown of the landlord's monetary claim.

Both parties have the right to a fair hearing. The tenants would not have the opportunity to know the details of the monetary claim against them without having been served with a Monetary Order Worksheet.

Therefore, I grant the landlord liberty to re-apply for the landlord's monetary claim. The landlord is reminded when seeking monetary compensation to ensure that monetary amount specified in the details of dispute matches the Monetary Order Worksheet, Form RTB-37, which available on the RTB website under Tenancy Forms. This will prevent any confusion on the part of the respondents and the arbitrator. As a result, I will only be determining whether the 10 Day Notice is cancelled or upheld and if either party is entitled to the recovery of the cost of the filing fee under the *Act*.

At the outset of the hearing, the first name of tenant JD was corrected on the landlord's application to reflect the correct spelling of the tenant's name. This amendment was made in accordance with section 64(3) of the *Act*.

Issues to be Decided

- Should the 10 Day Notice cancelled or upheld?
- Should the tenancy continue or should an order of possession be granted?
- Is either party entitled to the recovery of the cost of the filing fee under the *Act*?

Background and Evidence

The parties agreed that the tenancy began in October of 2012. The parties also agreed that the monthly rent is currently \$2,000.00 per month. The parties did not agree as to when rent was due. The landlord neglected to properly serve a copy of the tenancy agreement in evidence and the tenant stated that they were not provided with a copy of a signed tenancy agreement.

The tenant testified that monthly rent is due in two \$1,000.00 instalments which are deducted every two weeks on bi-weekly Fridays. The agent stated that his father, the landlord, would never agree to that method of payment, although the agent was reminded that the landlord was not present to provide direct testimony at the hearing.

A copy of the 10 Day Notice was submitted in evidence by the tenant. The parties agree that the 10 Day Notice is dated September 18, 2018. The tenant confirmed that they received the 10 Day Notice on September 18, 2018, and applied to dispute the 10 Day Notice two days later on September 20, 2018. The amounts owing listed on the 10 Day Notice are \$6,000.00 in rent owing as of September 1, 2018, plus \$1,869.525 in unpaid utilities, which is not a typographical error, it is listed on the 10 Day Notice. The 10 Day Notice indicates that a demand for payment was dated September 1, 2018; however, the demand for payment of utilities was not properly served in evidence.

The tenant referred to a bank statement, which includes dates between July 3, 2018 and September 4, 2018 ("bank statement"). The agent denied having been served with the bank statement. The tenant testified that the spouse of the landlord was personally served on November 30, 2018 with the tenants' evidence package and that the landlord's spouse accepted the evidence package. The agent was then directed to ask his mother, the spouse of the landlord, whether she was served on or about November 30, 2018. There was a few moments pause with no sound in the background or sounds of background conversation. The agent then stated that his mother confirmed that she was not served by the tenant. The agent was then asked why there was no evidence of background conversation or any sounds regarding him asking his mother who he originally stated was beside him in the room at the start of the hearing. The agent stated that his mother was cleaning in the other room and that he left to ask her the question and returned.

The tenant vehemently denied that she owed any rent or utilities as claimed by the landlord. A copy of the tenancy agreement was not before the arbitrator to support what was agreed in writing regarding the utilities.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

When a tenant disputes a 10 Day Notice, there is a reverse onus of proof on the tenant to provide sufficient evidence that rent was paid to the landlord. The tenant provided sufficient evidence by way of a bank statement to support that the amount as described by the tenant was withdrawn from her account. In the matter before me, the only documentary evidence before me was submitted by the tenant and the tenant has the onus of proof in terms of paying rent. The landlord did not attend the hearing due to having to “work” according to the agent; however, I find being a landlord is also work and the landlord made a decision not to attend the hearing to present direct testimony. In addition, neither the landlord, nor the agent properly served supporting evidence for my consideration such as a tenant rent ledger or other supporting evidence.

Also, I find the testimony of the agent to be inconsistent. I have reached this finding by considering many factors. Firstly, I find that the agent more likely than not failed to ask his mother the earlier question mentioned above regarding being served by the tenant, as there were no sounds in the background to support that his mother was cleaning near the agent or that the agent had spoken to his mother before answering my question. Instead, I find it more likely than not that the agent simply provided the answer he wanted to provide, which was that his mother was not served, which would benefit the landlord. Secondly, I find there was not enough time between my question and the agent’s answer for the tenant to leave the room and have a conversation in a different language with his mother. Thirdly, the agent had stated at the outset of the hearing that his mother was in the room and that he would be assisting his mother understand what was being said in English and at no time indicated that his mother had left the room to start cleaning. Fourthly, the agent did not state that he would need to leave the room to ask his mother the question posed, and finally, was later heard asking his mother a question after already providing me the answer.

In addition, while the landlord claims that a demand for payment of utilities was made dated September 1, 2018, the landlord failed to properly serve a copy of that demand letter and as a result, was not before me for my consideration as the agent failed to serve documentary evidence of the landlord on the tenant. Given the above, I prefer the testimony of the tenant over that of the agent.

Based on the above, I am not satisfied that the landlord has provided sufficient evidence to support that the 10 Day Notice is valid. I find the tenant has provided sufficient evidence that rent was paid by referring to bank statement submitted in evidence. I make no finding on the amount of rent paid as the monetary claim is not before me. Therefore, I dismiss the landlord's application for an order of possession based on the 10 Day Notice dated September 18, 2018. I cancel the 10 Day Notice due to insufficient evidence. The 10 Day Notice is of no force or effect. The tenant's application is successful as a result.

I ORDER that the tenancy to continue until ended in accordance with the *Act*.

As the landlord's application did not have merit, I do not grant the landlord the recovery of the cost of the filing fee.

As the tenant's application did have merit, I grant the tenant the recovery of the cost of the filing fee in the amount of **\$100.00**, pursuant to section 72 of the *Act*. I grant the tenant a one-time rent reduction in the amount of \$100.00 in full satisfaction of the recovery of the cost of the filing fee pursuant to section 67 of the *Act*. The one-time rent reduction will be deducted from February 2018 rent as the parties confirmed that the tenant has not yet paid February 2018 rent.

Conclusion

The 10 Day Notice dated September 18, 2018 has been cancelled due to insufficient evidence. The tenancy has been ordered to continue until ended in accordance with the *Act*.

The landlord's application did not have merit and is dismissed. As noted above, the landlord has liberty to reapply for the monetary claim that was not considered pursuant to section 59 of the *Act* and as indicated above.

The tenant's application is successful.

The filing fee for the tenant has been addressed above.

This decision will be emailed to the parties as indicated above.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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 15, 2019

Residential Tenancy Branch