



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNRL, MNDCL

Introduction

Pursuant to the *Residential Tenancy Act* (the *Act*), I was designated to hear this matter. This hearing dealt with the landlord's application for:

- an Order of Possession pursuant to sections 46 and 55 of the *Act*, based on a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) served to the tenant;
- a Monetary Order pursuant to section 67 of the *Act* for unpaid rent;
- a Monetary Order pursuant to section 67 of the *Act* for compensation or other money owed.

The landlord attended the hearing by way of conference call. The tenant did not attend this hearing, although I waited until 11:10 AM in order to enable the tenant to connect with this teleconference hearing scheduled for 11:00 AM. The landlord attending the hearing was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The landlord testified that the tenant was served, by way of registered mail, the Landlord's Application for Dispute Resolution hearing package ("dispute resolution hearing package"). The Canada Post tracking number was provided as evidence during the hearing. The landlord could not recollect the date on which the registered mail package was sent to the tenant. According to the Canada Post website, the information associated with the tracking number depicts that the registered mail package was accepted at the post office on January 15, 2018.

Section 90 of the Act determines that a document served by registered mail is deemed to have been received five days after service. As such, in accordance with sections 89 and 90 of the Act, I find that the tenant has been deemed served with the dispute resolution hearing package on January 20, 2018, the fifth day after its registered mailing.

The landlord testified that he did not serve any evidence to the tenant along with the hearing package. Therefore, the landlord was instructed that the only evidence that I would consider would be those documents included as part of the landlord's evidence that were previously served to the tenant during the course of the tenancy.

Preliminary Issue – Scope of Landlord's Application

The landlord testified that he amended his application to include a request for a Monetary Order. However, the landlord did not serve the amended application to the tenant. The landlord stated that he wished to withdraw his request for a Monetary Order and wished to only pursue an Order of Possession based on the 10 Day Notice. I amended the landlord's application accordingly pursuant to section 64(3) of the Act.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent pursuant to sections 46 and 55 of the *Act*?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent, not all details of the submissions and /or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below. The landlord provided undisputed evidence at this hearing, as the tenant did not attend.

The landlord testified that the tenancy began on July 01, 2014. The monthly rent was determined to be due on the first day of each month. The initial amount of rent owed each month was \$800.00. The parties agreed that the tenant provided a security deposit in the amount of \$400.00, \$200.00 of which continues to be held by the landlord. The landlord provided as evidence a copy of a written tenancy agreement which confirms the details provided by the landlord. The landlord testified that the

current amount of monthly rent owed under the tenancy is \$910.00, and continues to be due on the first day of each month.

The landlord gave sworn testimony that the 10 Day Notice, dated February 02, 2019, was served to the tenant on January 02, 2019, by way of posting the 10 Day Notice to the door of the rental unit. The 10 Day Notice alerted the tenant to unpaid rent owed in the amount of \$910.00 by January 01, 2019 and provided an effective date of January 12, 2019.

The landlord provided a copy of the Proof of Service of the Notice form showing that the landlord's agent served the 10 Day Notice to the tenant by way of posting it to the door of the rental unit on January 02, 2019. The Proof of Service form establishes that the service of the Notice was witnessed and a name and signature for the witness are included on the form.

The landlord testified that an incorrect date was mistakenly written on the 10 Day Notice. The landlord testified that his testimony, along with the Proof of Service of the Notice form, which includes signatures from the person serving the Notice and from the witness, demonstrate that the Notice was served on January 02, 2019.

The landlord testified that the 10 Day Notice was served by his son, in the presence of a witness, on January 02, 2019. The landlord stated that his son mistakenly placed an incorrect date of February 02, 2019 as the date of the 10 Day Notice. The landlord pointed out that the first page of the Proof of Service of the Notice form provides that the 10 Day Notice was served on January 02, 2019 and that on the second page of the Proof of Service of the Notice form, the witness attested to having witnessed the service of the 10 Day Notice and signed her name on January 02, 2019.

By way of oral testimony, the landlord provided that at the time the 10 Day Notice was issued, the tenant had failed to pay any rent for the month of January 2019, and owed a balance of unpaid rent in the amount of \$910.00. The landlord testified that the tenant subsequently provided a partial payment of \$200.00 on January 10, 2019, and a second payment of \$735.00 on January 20, 2019.

Therefore, the landlord testified, the tenant provided full payment of rent owed on January 20, 2019, but that the full amount of rent was not paid within five days of the tenant receiving the 10 Day Notice. As a result, the landlord stated that the tenant did not pay within the five-day period after receiving the 10 Day Notice to cancel the Notice.

Therefore, the landlord is seeking an Order of Possession pursuant to the 10 Day Notice.

The landlord testified that after accepting the full payment of rent owed for January 2019, he did not discuss with the tenant whether the full payment was accepted for the purpose of reinstating the tenancy, or whether the landlord's intention was to continue pursuing an end to the tenancy based on the 10 Day Notice and the landlord's application for dispute resolution seeking an Order of Possession.

The landlord further testified that the tenant provided full payment of rent for the month of February 2019, and that the landlord accepted that payment without discussing whether the full payment was accepted for the purpose of reinstating the tenancy.

Analysis

Section 90 of the *Act* provides that because the 10 Day Notice was served by posting the Notice to the door of the rental unit, the tenant is deemed to have received the Notice three days after its posting. In accordance with sections 88 and 90 of the *Act*, I find that the tenant is deemed to have received the Notice on January 05, 2018, three days after its posting.

Although the landlord provided an incorrect date of February 02, 2019, I find that by doing so, the 10 Day Notice is not rendered invalid, as the form and content of the 10 Day Notice adheres to the requirements of section 52 of the *Act*. I have amended the date of the 10 Day Notice to be January 02, 2019, to match the testimony and documentary evidence provided by the landlord, pursuant to section 68(1) of the *Act* as it is reasonable to do so under the circumstances.

Pursuant to section 46 of the *Act*, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

Subsection 26(1) of the *Act* sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this *Act* to deduct all or a portion of the rent.

I accept the uncontested testimony provided by the landlord, which depicts that the tenant was not permitted to withhold any portion of the monthly rent owed at any time

during the tenancy, either in accordance with the Act or by mutual agreement between the parties.

I accept the landlord's undisputed evidence and find that after receiving the 10 Day Notice, the tenant did not pay the rent owed in full within the five days granted under section 46(4)(a) of the Act and did not apply to dispute the Notice within that five-day period granted under section 46(4)(b) of the Act.

The landlord provided testimony to establish that the tenant subsequently paid the full amount of rent owed for the month of January 2019 on January 20, 2019. However, as the outstanding rent was not paid within five days of receipt of the 10 Day Notice, it remains open for the landlord to pursue an Order of Possession.

Based on the foregoing, I find that the tenant is conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the corrected effective date of the Notice, January 15, 2019. Therefore, this required the tenant and anyone on the premises to vacate the premises by January 15, 2019.

As this has not occurred, I find that the landlord would have been entitled to an Order of Possession for unpaid rent, based on the 10 Day Notice, pursuant to section 55 of the Act, as the 10 Day Notice complies with section 52 of the Act.

Residential Tenancy Policy Guideline #11 provides, in part, the following, with respect to the issue of "waiver" as it pertains to a Notice to End Tenancy:

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- *whether the receipt shows the money was received for use and occupation only.*
- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

By accepting from the tenant full payment of the outstanding rent owed for January 2019, which formed the basis of the unpaid rent owed on the January 02, 2019 10 Day Notice issued to the tenant, the landlord has effectively reinstated the tenancy by not acknowledging receipt of the full payment as being received for use and occupancy only.

The landlord's additional actions by accepting the full rent owed for the month of February 2019 without issuing a receipt indicating that the payment was received for use and occupancy only, or by having any discussion with the tenant regarding whether the payment for February is not intended to reinstate the tenancy, further entitles the tenant to occupy the rental unit for the entirety of that month, thereby tacitly instructing the tenant that she is able to extend the tenancy for the following month of February 2019, after having issued a 10 Day Notice to end the tenancy in January 2019.

Based on the foregoing, I find that when the landlord's actions are viewed in conjunction with the guidelines around waiver and reinstatement of tenancies, as outlined in Residential Tenancy Policy Guideline #11, the tenancy has been reinstated.

Therefore, I find that the landlord is not entitled to an Order of Possession.

Conclusion

I dismiss the landlord's application for an Order of Possession, based on the 10 Day Notice to End Tenancy dated January 02, 2019, without leave to reapply.

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: February 08, 2019

Residential Tenancy Branch