



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ERP (Tenant)
 FFL, MNRL, OPR (Landlord)

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Tenant filed the application January 22, 2019 (the “Tenant’s Application”). The Tenant applied for an order that the Landlord make emergency repairs.

The Landlord filed the application February 6, 2019 (the “Landlord’s Application”). The Landlord applied for an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 24, 2019 (the “Notice”). The Landlord also sought unpaid rent and reimbursement for the filing fee.

The Landlord filed an amendment dated February 8, 2019 increasing the amount of outstanding rent (the “Amendment”).

The parties confirmed the correct rental unit address and spelling of their names and these are reflected in the style of cause and on the front page of this decision.

The Landlord appeared at the hearing. At the outset, the Landlord said he could call two witnesses. It was determined that these witnesses were not relevant to the issues before me and therefore I did not hear from them during the hearing.

The Tenant called into the teleconference late. He appeared with the witness and S.C. to assist. The witness left the room until required. Near the end of the hearing, the Tenant exited the conference call without warning. The conference call continued for approximately 10 more minutes. The Tenant did not call back into the conference prior to the end of the hearing. I proceeded with the hearing in the absence of the Tenant as

parties are expected to call into the hearing and remain on the line until the hearing is concluded. I did not hear from the witness in the circumstances.

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence.

The Tenant confirmed he received the hearing package and evidence for the Landlord's Application.

The Landlord advised that he did not receive a hearing package or evidence for the Tenant's Application.

The Tenant testified that the hearing package and evidence were served on the Landlord by registered mail. The Tenant did not have the tracking number for this. The Tenant could not tell me what date he served the package despite being asked numerous times for this information. I attempted to obtain information about service from the Tenant numerous times at the outset of the hearing. The answers provided by the Tenant did not make sense and related to different issues. No evidence was submitted by the Tenant showing that the hearing package and evidence were served on the Landlord.

The Tenant was required to serve the Landlord with the hearing package and evidence for the Tenant's Application pursuant to the *Residential Tenancy Act* (the "Act") and Rules of Procedure (the "Rules").

Rule 3.5 of the Rules states:

At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.

The Tenant testified that the hearing package and evidence were served on the Landlord. The Landlord denied receiving these. The Tenant has the onus to prove the hearing package and evidence were served in accordance with the *Act* and Rules. The Tenant submitted no evidence in support of his position that the Landlord was served as

required. The Tenant gave confusing and incomplete information about service. In the circumstances, I was not satisfied of service and dismissed the Tenant's Application with leave to re-apply.

I heard the parties on whether the Tenant's evidence submitted on the Tenant's Application should be admitted or excluded in relation to the Landlord's Application. I excluded the Tenant's evidence as I found it would be unfair to admit it when the Landlord said he did not receive it and I was not satisfied that it was served as required.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all admissible documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession based on the Notice?
2. Is the Landlord entitled to recover unpaid rent?
3. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord had submitted one page of a written tenancy agreement. He testified that this agreement was never finalized between him and the Tenant and that the Tenant had added to it without his agreement.

The Landlord testified as follows in relation to the tenancy agreement. There was a verbal tenancy agreement between the parties in relation to the rental unit. The tenancy started September 15, 2018 and is a month-to-month tenancy. Rent is \$2,500.00 per month due on the first day of each month. There was no security or pet deposit paid.

The Tenant testified as follows in relation to the tenancy agreement. There was a written tenancy agreement which was signed by the parties. The agreement is between the Landlord and him in relation to the rental unit. The tenancy started December 01, 2018 and is for a fixed term of three years with a verbal option to buy. Rent is \$2,500.00 per month due on the first day of each month. There was no security or pet deposit paid.

The Tenant advised that he has allowed other individuals to move into the rental unit and rent rooms from him.

The Notice states the Tenant failed to pay \$4,000.00 in rent due January 01, 2019 as follows:

- October 2018 - \$1,000.00
- November 2018 - \$2,500.00
- January 2019 - \$500.00

The Landlord testified that he served both pages of the Notice on the Tenant in person January 24, 2019. The Tenant advised he was not sure when he received the Notice but said he would go with what the Landlord said and agreed he received the Notice.

The Landlord confirmed that the outline of outstanding rent above is correct. He testified that the Tenant paid \$1,800.00 and a further \$500.00 for rent February 7, 2019. The Landlord testified that the Tenant has not paid rent for March.

I asked the Landlord what evidence he had submitted showing rent was not paid. The Landlord testified that he has receipts and witnesses. The Landlord acknowledged that he did not know how the witnesses would know whether the Tenant paid rent. The Landlord had not submitted any rent receipts showing that partial rent was paid for October, January or what was paid in February.

The Tenant testified that he has paid rent for the term of the tenancy other than for March. The Tenant testified that he has paid the full rent amount each month. The Tenant testified that he pays rent by money order. The Tenant had not submitted evidence of these payments and said he did not know he had to.

The Tenant testified that he did not pay the outstanding rent noted on the Notice when he received the Notice as there was no rent outstanding.

The Tenant testified that he disputed the Notice; however, he referred to the file number which is the subject of this decision. The Tenant did not dispute the Notice or file an amendment to add a dispute of the Notice. The Landlord took the position that the Tenant did not dispute the Notice.

The Landlord submitted that the Tenant did not have authority under the *Act* to withhold rent.

Analysis

Pursuant to rule 6.6 of the Rules, it is the Landlord who has the onus to prove the claim.

Section 26(1) of the *Act* requires tenants to pay rent in accordance with the tenancy agreement unless they have a right to withhold rent under the *Act*.

Section 46 of the *Act* allows a landlord to end a tenancy where tenants have failed to pay rent. The relevant portions of section 46 state:

- 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...
- (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.
- (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 parties gave conflicting evidence about when this tenancy started. The Landlord submitted one page of a written tenancy agreement which he states is not representative of the agreement between the parties. It is not signed by the parties. I do not find this written tenancy agreement to assist in determining what the actual agreement between the parties was. The Landlord submitted no other evidence in support of his position that the tenancy started September 15, 2018. It is the Landlord's onus to prove the claim. I am not satisfied that the tenancy started September 15, 2018 as claimed by the Landlord.

Nor do I accept that there is a written tenancy agreement between the parties for a fixed term of three years with a verbal option to buy. The Tenant submitted no evidence in support of this. This is something I would expect to be written down and not done verbally between two parties. In the absence of any evidence that this was a fixed term tenancy for three years with a verbal option to buy, I do not accept that it was.

I accept that the Tenant owed \$2,500.00 per month in rent by the first of each month as both parties agreed with this.

The Landlord testified that the Tenant failed to pay \$1,000.00 for October, \$2,500.00 for November and \$500.00 for January which is the basis for the Notice.

The Tenant testified that the tenancy started in December and that he paid rent for December and January.

The Landlord submitted no evidence in support of his position on outstanding rent despite stating that he has receipts showing the partial and late payments. Again, it is the Landlord who has the onus to prove the claim. In the absence of any evidence to support the position of the Landlord, I am not satisfied the Tenant had failed to pay rent when the Notice was issued.

I am not satisfied the Landlord was entitled to issue the Notice pursuant to section 46(1) of the *Act*. Nor am I satisfied that section 46(4)(a) of the *Act* does not apply in the circumstances. Given this, I decline to uphold the Notice or issue an Order of Possession based on it. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

In relation to unpaid rent, the parties gave conflicting evidence about what is currently outstanding. The Tenant denied that he owes rent other than for March. Again, the Landlord submitted no evidence in support of his position about unpaid rent. I am not

satisfied the Landlord is entitled to recover unpaid rent for October, November, January or February. This request is dismissed without leave to re-apply.

The parties agreed the Tenant has not paid rent for March. The Tenant exited the conference call without warning and for an unknown reason before I had a chance to fully question the parties on this issue. I am unaware of whether the Tenant had authority under the *Act* to withhold rent. In the circumstances, I decline to award the Landlord a monetary order for unpaid rent for March. However, this request is dismissed with leave to re-apply.

Given the Landlord was not successful in this application, I decline to award the Landlord reimbursement for the filing fee.

Conclusion

The Landlord's request for an Order of Possession based on the Notice is dismissed **without** leave to re-apply.

The Landlord's request to recover unpaid rent for October, November, January and February is dismissed **without** leave to re-apply.

The Landlord's request to recover unpaid rent for March is dismissed **with** leave to re-apply.

The Landlord is not entitled to reimbursement for the filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: March 08, 2019

Residential Tenancy Branch