



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes AAT CNR FFT LRE MNDCT RP

Introduction

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

- an order to allow access for the tenant or their guests to the unit,
- an order to suspend or set conditions on the landlord's right to enter the rental unit,
- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the "Ten-Day Notice"),
- an order for regular repairs to be made to the unit,
- an order for compensation for damage or loss under the Act, regulation or tenancy agreement and
- reimbursement of the filing fee.

Tenant JD and advocate NC appeared on behalf of the tenants. Landlord, landlord's agent TS, and landlord's process server SM appeared on behalf of the landlord. All parties had full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions.

The tenants testified they served the landlord with the Notice of Hearing and Application for Dispute Resolution by registered mail sent on January 29, 2019. Furthermore, the tenants testified that they served the landlord with their evidence by registered mail sent on February 21, 2019. The tenants provided the Canada Post tracking numbers in support of service referenced on the first page of the decision.

Based on the undisputed testimony of the tenants, I find the tenants have properly served the landlord with the Notice of Hearing and Application for Dispute Resolution documents pursuant to section 89 of the *Act* and the tenants have properly served their

evidence pursuant to Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the “*Rules*”). Furthermore, I find that the landlord has properly served his evidence except for the landlord’s rent ledger which the landlord admitted that he did not serve.

The Ten-Day Notice was dated January 19, 2019. The notice stated \$9,000.00 in unpaid rent were due as of January 1, 2019. The landlord’s process server, SM, testified that he served the Ten-Day Notice on January 19, 2019. SM testified that he approached the rental unit to post the notice on the door of the rental unit and a tenant opened a window right above the process server. SM testified that he advised the tenant that he was delivering a notice to end tenancy and the tenant asked SM to place the notice on the tenant’s mailbox. SM testified that he left the Ten-Day Notice on the tenant’s mailbox as requested by the tenant. *Residential Tenancy Branch Policy Guidelines #12* defines personal service as:

This requires physically handing a copy of the document to the person being served. If the person declines to take the document, it may be left near the person so long as the person serving informs the person being served of the nature of the document being left near them.

I find that SM did personally serve the tenants with the Ten-Day Notice by informing the tenants of the nature of the document and leaving the notice near the tenants at their request. Accordingly, I find that the landlord has personally served the tenants with the Ten-Day Notice on January 19, 2019 pursuant to section 88 of the *Act*.

Preliminary Matter: Non-Service of Landlord’s Rent Ledger

The landlord submitted a rent ledger to the Residential Tenancy Branch one business day before the hearing. The landlord admitted that they did not serve a copy of this document on the tenant. *Rules* 3.15 requires that the respondent must serve its evidence on the applicant seven days before the hearing. In this matter the landlord did not serve the evidence at all. *Rules* 3.7 states that evidence can be precluded where:

...there has been a willful or recurring failure to comply with the Act, Rules of Procedure or an order made through the dispute resolution process, or if, for some other reason, the acceptance of the evidence would prejudice the other party or result in a breach of the principles of natural justice.

I find that the failure to serve the tenant is a willful failure to comply with the *Rules* and the acceptance of the evidence would prejudice the tenant and breach the principles of natural justice. Accordingly, I exclude the landlord's rent ledger.

Preliminary Issue: Severance of Portion of Tenant's Application

Residential Tenancy Branch Rules of Procedure, Rule 2.3 states that:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the Ten-Day Notice and the continuation of this tenancy is not sufficiently related to any of the tenants' other claims to warrant that they be heard together. The parties were given a priority hearing in order to address the question of the validity of the Ten-Day Notice.

The tenants' other claims are unrelated in that they do not pertain to facts relevant to the grounds for ending this tenancy as set out in the Ten-Day Notice. I exercise my discretion to dismiss all the tenants' claims with leave to reapply except for the application for cancellation of the Ten-day Notice and recovery of the filing fee for this application.

All parties were informed of Section 55 of the *Act* which requires, 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 in compliance with the *Act*.

Issue(s) to be Decided

Are the tenants entitled to cancellation of the landlord's Ten-Day Notice?

Are the tenants entitled to reimbursement of the filing fee?

Background and Evidence

The landlord testified that the tenancy started on October 15, 2012. The rent was initially \$1,500.00 per month and the rent increased to \$2,000.00 on January 1, 2018.

The landlord testified that the tenants were consistently late paying rent for several months and that the tenants were delinquent by \$9,000.00 when the Ten-Day Notice was issued. The landlord testified that the tenant owed \$1,000.00 in unpaid rent from September 2018 and \$2,000.00 in unpaid rent from each month from October 2018 to January 2019 for a total of \$9,000.00 in rent arrears as of the service the Ten-Day Notice. The landlord testified that the tenant made the following rent payments since from September 2018 to January 2019:

<u>Date of Payment</u>	<u>Amount Paid</u>	<u>Month Payment Attributed To</u>
September 13, 2018	\$1,000.00	June 2018
September 30, 2018	\$1,000.00	July 2018
October 10, 2018	\$1,000.00	July 2018
October 29, 2018	\$500.00	August 2018
November 11, 2018	\$500.00	August 2018
November 25, 2018	\$1,000.00	August 2018
December 9, 2018	\$1,000.00	September 2018

The landlord submitted receipts corroborating the payments.

The tenants disputed the landlord's testimony and they testified that they are current with the rent payments. The tenants testified that they make their rent payments twice a month in cash. The tenants testified that the landlord did not provide rent receipts and the receipts submitted by the landlord in this matter were generated after this application for dispute resolution was filed to generate evidence to bolster the landlord's case.

The tenants testified that their rent payments are evidenced by their bank statements. Specifically, the tenants testified that they withdrew \$1,000.00 twice a month which is shown on their bank statement. The tenants provided bank statements from July 2018 to September 2018 to show the withdrawals.

Although the tenants did not provide any bank statements after September 2018 to evidence their rent payments, the tenants accessed their banking records on their computer during the hearing and the tenants testified that their bank records show the following cash withdrawals for rent from September 2018 to January 2019:

<u>Date</u>	<u>Amount</u>
September 04, 2018	\$1,000.00
September 15, 2018	\$1,000.00
October 1, 2018	\$1,000.00
October 15, 2018	\$1,000.00
October 29, 2018	\$500.00
November 15, 2018	\$800.00
November 26, 2018	\$1,000.00
December 10, 2018	\$1,000.00
December 24, 2018	\$1,000.00
January 7, 2019	\$1,000.00
January 21, 2019	\$1,000.00

The tenants testified that the parties were recently involved in another application for dispute resolution regarding a very similar dispute over the payment of cash rent payments. The tenants provided the Residential Tenancy Branch (RTB) file number and I reviewed the decision in the prior matter. The RTB file number for the prior hearing is referenced on the first page of this decision.

In the prior matter, the arbitrator held that the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent on September 18, 2018 for unpaid rent in the amount of \$6,000.00. A hearing was held in the prior matter on January 15, 2019 and landlord's notice to end tenancy from September 18, 2018 was cancelled.

Analysis

A tenant may dispute a 10 Day Notice to End Tenancy for Unpaid Rent pursuant to section 46(4) of the *Act*. Pursuant to *Rules* 6.6, the landlord has the onus of proof to establish, on the balance of probabilities, that notice to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct.

The landlord has provided testimony that the tenants have made rent payments totaling \$6,000.00 from September 2018 to January 2019 and the landlord provided receipts corroborating these payments. However, the landlord testified that the \$9,000.00 in rent arrears stated on the Ten-Day Notice was based on nonpayment of half of the rent from September 2018 and nonpayment all of the rent from October 2018 to January 2019. The landlord explained that the rent payments received from September 2018 to January 2019 actually related to prior rental periods from June 2018 to September 2018. However, without evidence of past delinquencies from June 2018 to September 2018, I find that the landlord has failed to provide satisfactory evidence that the rent payments made from September 2018 to January 2019 related to prior rental periods. Furthermore, the tenant has provided bank statements from June 2018 to September 2018 showing deposit withdrawals to pay rent.

I find that the landlord has failed to satisfy his onus of proof to establish that the tenant owed \$9,000.00 in unpaid rent as of the date of the issuance of the Ten-Day Notice. Accordingly, I grant the tenant's application to cancel the landlord's Ten-Day Notice. The landlord's Ten-Day Notice is cancelled and is of no force or effect. This tenancy shall continue until it ends pursuant to the *Act*.

Since the tenants have prevailed in this matter, I grant the tenants' request for reimbursement of the filing fee. The tenants shall be permitted to deduct the \$100.00 filing fee from one future rent payment.

Conclusion

I dismiss all the tenants' claims with leave to reapply except for the application for cancellation of the Ten-day Notice and recovery of the filing fee for this application.

I grant the tenant's application to cancel the landlord's Ten-Day Notice. The landlord's Ten-Day Notice is cancelled and is of no force or effect. This tenancy shall continue until it ends pursuant to the *Act*.

I grant the tenant's request for reimbursement of the filing fee. The tenants shall be permitted to deduct the \$100.00 filing fee from one future rent payment.

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: March 15, 2019

Residential Tenancy Branch