



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, FFL, CNR, LRE, FFT, OLC

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the “**Act**”). The landlords’ application for:

- an Order of Possession for non-payment of rent pursuant to section 55;
- a monetary order for unpaid rent in the amount of \$2,900.00 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

And the tenant’s application for:

- cancellation of the landlords’ 10 Day Notice to End Tenancy for Unpaid Rent (the “**Notice**”) pursuant to section 46;
- an order requiring the landlords to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to suspend or set conditions on the landlords’ right to enter the rental unit pursuant to section 70; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The landlords were represented by counsel at this hearing, and did not themselves attend. The tenant attended this hearing on her own behalf. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlords’ counsel stated that the tenant was served with the notice of dispute resolution proceeding form and the supporting evidence package in advance of the hearing. The tenant confirmed receipt of all documents associated with this dispute.

Preliminary Matter – Dismissal of Tenant's Application

At the outset of the hearing, the landlords sought a dismissal of the tenant's application without leave to reapply. The landlords' counsel submitted an affidavit from the receptionist her law firm in which her receptionist swore that she had not received a Dispute Resolution Proceeding form from the tenant. Counsel for the landlords submitted that she was unable to prepare a response to the tenant's application as she did not know what relief the tenant sought.

The tenant testified that she sent her evidence package to the landlords by registered mail of February 22, 2019 (the Canada Post Tracking number of which is reproduced on the cover of this decision), and that this package contained the Notice of Application for Dispute Resolution form.

Landlords' counsel confirmed receipt of the evidence by registered mail, but stated the package received did not contain the Dispute Resolution form, as alleged by the tenant. Counsel stated, Rule 3.1 requires that the form be served within three days of the tenant receiving it from the Residential Tenancy Branch, and the application ought to be dismissed on this basis.

I have reviewed the Residential Tenancy Branch Records and find that the Notice of Application for Dispute Resolution form was issued February 14, 2019.

As such, I find that, even if it was included in the registered mail package sent by the tenant on February 22, 2019 (which is deemed served on February 27, 2019, as per section 90 of the Act), the tenant would be in breach of Rule 3.1.

The landlords' counsel submitted that the tenant's application should be dismissed without leave to reapply as this hearing was the fourth hearing between the parties, and the previous hearings had sufficiently considered the merits of the tenant's claims.

The tenant testified that she has already moved out of the rental property. She testified that, at a hearing on January 28, 2019, she sought a monetary order for damages caused by a flood in the rental property, as well as an order that repairs and emergency repairs be made. In a decision dated February 29, 2019, the arbitrator ordered that the tenant's claim for a monetary order be severed from the tenant's claim for repairs, and

dismissed it with leave to reapply. The tenant has yet to reapply for a monetary order for damages.

As the tenant no longer resides at the rental property, Pursuant to Section 62 of the Act, I dismiss **without** leave to reapply the tenant's applications to cancel the Notice, for an order restricting the landlord's right to access the rental property, and for repayment of her filing fees of this application.

Pursuant to Section 62 of the Act, I dismiss **with** leave to reapply the tenant's application for an order that the landlords comply with the Act, as this relief encompasses an application for a monetary order.

Preliminary Matter – Amendment to Landlord's Claim

At the hearing the landlords' counsel sought to further amend their application to include a claim for February 2019 rent (in the amount of \$2,900.00) which she stated remains outstanding.

Rule of Procedure 4.2 states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

In this case the landlords are seeking compensation for unpaid rent that has increased since he first applied for dispute resolution. I find that the increase in the landlords' monetary claim should have been reasonably anticipated by the tenant. Therefore, pursuant to Rule 4.2 and section 64 of the Act, I order that the landlords' application be amended to include a claim for outstanding rent for February 2019 in the amount of \$2,900.00, for a total claim of \$5,800.00.

Issue(s) to be Decided

Are the landlords entitled to:

- an Order of Possession for non-payment of rent;
- a monetary order for unpaid rent in the amount of \$5,800.00; and
- authorization to recover the filing fee for this application from the tenant?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting March 31, 2016. Monthly rent is \$2,900.00 and is payable on the first of each month. The tenant paid the landlords a security deposit of \$1,450.00. The landlords still retain this deposit.

Counsel for the landlords submitted that the tenant had failed to pay rent for the months of January and February 2019.

The tenant agreed that she did not pay rent in January and February 2019, and testified that this was due to the landlords' breach of the Act which caused her to suffer significant monetary loss.

The landlords served a 10 Day Notice to End Tenancy for Non-Payment of Rent (the "**Notice**") dated January 18, 2019 on the tenant on January 18, 2019 by posting it on the tenant's door. The Notice stated rent was owed in the amount of \$2,900.00 due on January 1, 2019.

The parties attended for hearing on February 14, 2019 wherein the tenant sought to have the Notice cancelled.

In the written decision dated February 14, 2019 (the "**February Decision**") the presiding arbitrator made the following findings of fact:

I find that the Tenant received the 10-Day notice on January 21, 2019, three days after it was posted to the front door of the rental unit, pursuant to section 90 of the Act, and that she did apply to dispute the Notice within the legislated timeline.

I accept the testimony of both parties that the Tenant has not paid the rent for January and February 2019. Therefore, I find that the Tenant is in breach of section 26 of the Act by not paying the rent in accordance with the tenancy agreement and I dismiss the Tenant's application to cancel the Notice.

The arbitrator granted an order of possession to the landlord, pursuant to section 55 of the Act.

The tenant testified that she no longer resides at the rental property.

The landlords seek a monetary order as follows:

Outstanding rent for January and February 2019	\$5,800.00
Credit for retaining security deposit	-\$1,450.00
Filing Fee	\$100.00
Total	\$4,450.00

Analysis

Order of Possession

The landlords were already granted an order of possession in the February Decision. I find that this matter has already been adjudicated, and is therefore not properly before me. Accordingly, I dismiss the landlords' application for an order of possession without leave to reapply.

Monetary Order

I am bound by the findings made by the arbitrator in the February Decision. Accordingly, I find that the Notice is valid and properly served. Likewise, I find that tenant was obligated to pay monthly rent of \$2,900.00 and has failed to pay rent for January and February 2019.

Section 26 of the Act states:

Rules about payment and non-payment of rent

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.

Accordingly, I find that the landlords' alleged failure to comply with the Act, and the existence of any damage that this alleged failure caused, is not a permissible basis on which the tenant may withhold rent.

Accordingly, pursuant to sections 7, the tenant must pay the landlords \$5,800.00 representing the unpaid rent for January and February 2019.

Pursuant to section 72(2) of the Act, I order that the landlords may retain the security deposit of \$1,450.00 in partial satisfaction of the amount owed by the tenant.

Pursuant to section 72(1) of the Act, as the landlords were successful in this application, I find that they are entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I dismiss the landlords' application for an order of possession without leave to reapply.

Pursuant to sections 67 and 72, I order that tenant pay the landlords \$4,450.00, representing the following:

Outstanding rent for January and February 2019	\$5,800.00
Credit for retaining security deposit	-\$1,450.00
Filing Fee	\$100.00
Total	\$4,450.00

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 18, 2019

Residential Tenancy Branch