



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 116 WEST HASTINGS HOLDINGS
LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, OPR, FF

On March 4, 2019, the landlord's application for an order of possession and a monetary order were granted at an ex parte proceeding.

On March 7, 2019, the tenant made an application for review consideration, which on March 11, 2019, was granted on the basis of fraud. The Arbitrator ordered the parties to participate in a new hearing, and the original decision was suspended. The Arbitrator at the new hearing may confirm, vary, or set aside the original decision.

This new hearing dealt with an Application for Dispute Resolution by the landlord to for an order of possession, for a monetary order for unpaid rent and to recover the filing fee.

The landlord indicated that they no longer require an order of possession as they received possession of the rental unit on March 11, 2019.

Both parties appeared, gave testimony, and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

The tenant confirmed they received the landlord's evidence. The landlord's agent stated they did not receive any evidence from the tenant.

The tenant testified that they served their evidence by placing it in the landlord's mail box and they sent a further copy by email.

In this case, I do not accept the tenant sent their evidence by placing it in their mail box or by email. The email attachments filed as evidence shows the only documents the landlord was served was a copy of the review consideration decision, a copy of the notice of hearing and a change of address.

The review consideration decision states that the tenant is required to serve the other party and the Residential Tenancy Branch with any evidence that they intend to rely upon at the new hearing. The tenant did not follow those instructions. Therefore, the only evidence to be considered by the tenant will be their affirmed testimony.

Issue to be Decided

Is the landlord entitled to a monetary order?

Background and Evidence

The parties agreed that they entered into a fixed term tenancy which began on December 1, 2017 and was to expire on November 30, 2018. Rent in the amount of \$1,100.00 was payable on the first of each month. The tenant paid a security deposit of \$550.00 and a fob, key deposit of \$50.00.

The landlord claims as follows:

a.	Unpaid rent for January, February and March 2019	\$3,300.00
b.	Filing fee	\$ 100.00
	Total claimed	\$3,400.00

The landlord testified that tenant failed to pay rent for January, February and March 2019. The landlord stated that they attended the rental unit for an inspection in January and February 2019, and the tenants personal belongings were there. The landlord stated that in March 2019, they inspected the unit and most of the tenants belongings were gone; however, there were still items left behind.

The tenant testified that they moved out of the rental unit in July 2018. The tenant stated that they had subleased the rental unit to a friend. The tenant stated that they gave the landlord notice to end the tenancy on October 7, 2018, with an effective date of November 30, 2018.

The tenant testified that they are not responsible for any loss of rent. The tenant stated that their subtenant paid rent directly to the landlord for December 2018 and that should be sufficient to create a new tenancy. The tenant stated that the subtenant did not pay any additional rent because the landlord would not enter into a new tenancy agreement.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the landlord has the burden of proof to prove their claim.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Section 7(1) of the Act states that if a landlord or tenant does not comply with the Act, regulation or tenancy agreement, the non-comply landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Section 34 of the Act, Assignment and subletting

- 34 (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.
- (2) If a fixed term tenancy agreement has 6 months or more remaining in the term, the landlord must not unreasonably withhold the consent required under subsection (1).
- (3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section

The Residential Tenancy Policy Guideline #1 Assignment and Sublet reads in part,

Under s. 34 of the *Residential Tenancy Act*, a tenant must not assign a tenancy agreement unless the landlord consents in writing. A landlord must not unreasonably withhold consent if the tenancy agreement has six months or more remaining in the fixed term. (By implication a landlord *has* the discretion to withhold consent, without regard to reasonableness, in the case of a fixed term

tenancy agreement with less than six months remaining). The Act does not specifically refer to month-to-month (periodic) tenancies.

When a rental unit is sublet, **the original tenancy agreement remains in place between the original tenant and the landlord**, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement).

Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.

I accept the evidence of the tenant that they vacated the rental unit at the end of July 2018, and had their friend moved into the rental unit. However, the tenancy agreement was not assigned as required by section 34 of the Act.

Further, in order for the tenant to sublease the rental unit they must have the written consent of the landlord and any agreement with a subtenant must be in writing and the period to rent the premise must be shorter than the term of the original tenant's tenancy agreement.

In this case, no such agreement was entered in to between the tenant and the tenant's friend. Therefore, I find no sublease agreement was made and the person that moved into the rental unit was an occupant. An occupant has no legal rights or obligations under the tenant's tenancy agreement.

Even if I accept the tenant gave notice to end their tenancy effective November 30, 2018, it was the tenant's responsibility to ensure that their occupant had vacated the premises on that date.

In addition, even if the landlord accepted rent for December 2018 that alone does not automatically create a new tenancy agreement. In order for a new tenancy agreement to be made it must be in writing or at the very least a verbal agreement between the parties. The evidence supports the landlord was not entering into a new agreement with the occupant.

Under the Act, the tenant is responsible for all guest and occupants. As the tenant's occupant did not vacate the property until March 11, 2019. I find the tenancy legally ended on March 11, 2019. I find the tenant is responsible for unpaid rent for January, February and March 2019. Therefore, I find the landlord is entitled to recover unpaid rent in the amount of **\$3,300.00**.

I find that the landlord has established a total monetary claim of **\$3,400.00** comprised of the above described amount and the \$100.00 fee paid for this application.

Further, I find it appropriate to offset the tenant's security deposit and fob deposit. I order that the landlord retain the security deposit of **\$550.00** and the fob deposit of **\$50.00** in partial satisfaction of the claim and I grant the landlord an order under section 67 of the Act for the balance due of **\$2,800.00**.

This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court. The **tenant is cautioned** that costs of such enforcement are recoverable from the tenant.

Based on the above, I find it appropriate to cancel the original order and decision and this decision and order takes effect.

The tenant should be aware that since they did not enter into a subtenant agreement and since I have found the occupant has no legal rights or obligation under the Act, the only remedy the tenant has, if they pursue a claim against their occupant is in the Provincial Court (Small Claims Division).

Conclusion

The original decision and order are cancelled and replaced with this decision and order.

The landlord is granted a monetary order and may keep the security deposit in partial satisfaction of the claim and the landlord is granted a formal order for the balance due.

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: May 02, 2019

Residential Tenancy Branch