



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR

Introduction

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

- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (10 Day Notice), pursuant to section 46 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenant attended with advocate T.L. The landlord's agent A.C. attended and confirmed she was authorized to act on behalf of the landlord in this matter.

As both parties were present, service of documents was confirmed. The tenant testified that the landlord was served with the notice of this hearing by Canada Post registered mail (tracking number noted on cover sheet of this Decision) on June 28, 2019 and submitted into documentary evidence a copy of the Canada Post registered mail tracking report which confirmed this testimony and indicated that the package was "unclaimed" by the landlord. The tenant served the landlord with his evidence and another copy of the notice of this hearing by Canada Post registered mail (tracking number noted on the cover sheet of the Decision) on July 26, 2019. During the hearing, I accessed the Canada Post website to confirm that this package was signed for as received by the landlord on July 30, 2019. The landlord's agent stated that she could not confirm what documents or evidence was received by the landlord in the package. However, during the hearing, the landlord's agent confirmed that the voice she was heard speaking to during the hearing was that of the landlord who she testified had briefly entered the room. When asked if the landlord's agent could have the landlord attend the hearing to provide testimony on the receipt of the evidence, the landlord's

agent declined. Therefore, I find that the testimony and evidence of the tenant regarding the service of evidence reliable and preferable to that of the landlord's agent. As such, I find that the landlord was served with the tenant's notice of hearing and evidence in accordance with sections 88 and 89 of the Act.

The landlord's agent testified that the landlord did not serve the tenant with any evidence. Therefore, in accordance with Rules 3.15 and 3.17 of the Residential Tenancy Branch Rules of Procedure, I advised the parties that I would not consider any evidence submitted by the landlord to the Residential Tenancy Branch as it had not been served on the tenant.

Preliminary Issue - Procedural Matters

Section 55 of the *Act* requires that 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 tenant's Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Further to this, the standard of proof in a dispute resolution hearing is on a balance of probabilities. Usually the onus to prove the case is on the person making the claim. However, in situations such as in the current matter, where a tenant has applied to cancel a landlord's Notice to End Tenancy, the onus to prove the reasons for ending the tenancy transfers to the landlord as they issued the Notice and are seeking to end the tenancy.

Issue(s) to be Decided

Should the 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession on the basis of the 10 Day Notice?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

The parties confirmed that there was no written tenancy agreement between them. The parties confirmed their understanding of the following terms of the verbal tenancy agreement:

- This month-to-month tenancy began July 15, 2016.
- The tenant paid a security deposit of \$375.00 at the beginning of the tenancy, which continues to be held by the landlord.
- Monthly rent of \$750.00 is payable on the first of the month.

The landlord's agent testified that she always verbally reminded the tenant about the outstanding utilities amount but that the tenant was never served with a "written demand for payment" of the outstanding utilities amount owed.

The tenant confirmed that on June 20, 2019, he received the 10 Day Notice dated June 20, 2019 served to him personally by the landlord.

A copy of the 10 Day Notice was submitted into evidence by the tenant. The notice stated that \$561.77 in unpaid utilities was owed following the written demand on December 31, 2018 "onwards".

The tenant disputed the 10 Day Notice on the grounds that the notice was not served in compliance with the requirements of section 46(6)(b) of the *Act*, and further that the utilities amount sought by the landlord was as a result of an "unconscionable" term of the tenancy agreement and therefore not enforceable under the *Act*.

Analysis

Section 46 of the *Act* allows a landlord to treat unpaid utility charges as unpaid rent. If a tenant fails to pay rent when due, section 46 of the *Act* permits a landlord to end the tenancy by issuing proper written notice to end tenancy using a 10 Day Notice to End Tenancy. Section 46(6)(b) of the *Act* only allows that landlord to issue a written notice to end tenancy for unpaid utilities under section 46 of the *Act* "30 days after the tenant is given a written demand for payment of them"

A tenant who receives a 10 Day Notice to End Tenancy under section 46 of the *Act* has five days after receipt to either pay rent or utilities in full or dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

In this case, I find that the tenant received the 10 Day Notice on June 20, 2019 and filed an application to dispute the notice on June 21, 2019. Accordingly, the tenant complied with the five-day time limit provided by section 46 of the *Act*.

Where a tenant applies to dispute a 10 Day Notice, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 10 Day Notice is based.

In this matter, based on the testimony of both the tenant and the landlord's agent, there was no dispute that the landlord failed to serve the tenant with a written demand for payment of utilities 30 days prior to issuing the 10 Day Notice, as required by section 46(6)(b) of the *Act*. As such, based on the testimony and evidence before me, on a balance of probabilities, I find that the landlord has failed to meet the burden to prove the grounds on which the 10 Day Notice is based as the landlord was not entitled to serve the tenant with the 10 Day Notice due to the landlord's failure to comply with section 46(6)(b) of the *Act*.

Therefore, the landlord's 10 Day Notice is cancelled and of no force or effect.

In summary, the tenancy continues until ended in accordance with the *Act*.

Conclusion

The tenant was successful in his application to dispute the 10 Day Notice dated June 20, 2019, therefore the notice is cancelled and of no force or effect, and the tenancy continues, until ended in accordance with the *Act*.

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: August 16, 2019

Residential Tenancy Branch