



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, OPR (Landlord)
 CNR, FFT, LRE, OLC, RP, RR (Tenant)

Introduction

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

The Landlord filed the application July 10, 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 July 04, 2019 (the “10 Day Notice”). The Landlord sought reimbursement for the filing fee.

The Tenant filed the application July 12, 2019 (the “Tenant’s Application”). The Tenant applied as follows:

- To dispute the 10 Day Notice;
- To suspend or set conditions on the Landlord's right to enter the rental unit;
- For an order that the Landlord comply with the Act, regulation and/or the tenancy agreement;
- For repairs to be made to the unit or property;
- To reduce rent for repairs, services or facilities agreed upon but not provided;
and
- For reimbursement for the filing fee.

The Tenant appeared at the outset. The Tenant advised that she is living at the rental unit but in the process of moving. The Landlord called into the hearing late. I explained the hearing process to the Tenant. Both parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence. The Landlord confirmed he received the hearing package and evidence for the Tenant's Application. The Tenant confirmed she received the hearing package and evidence for the Landlord's Application.

Prior to the Landlord calling into the conference, the Tenant provided details about the tenancy when asked what she intended to do with her application given she was in the process of vacating the rental unit. After a discussion about this, the Tenant indicated she wanted to continue with the dispute of the 10 Day Notice.

Pursuant to rule 2.3 of the Rules of Procedure (the "Rules"), I advised the Tenant I would consider the dispute of the 10 Day Notice and dismiss the remaining issues as they are not sufficiently related to the dispute of the 10 Day Notice. The Tenant had questions about this and made submissions about why the other issues are related to the dispute of the 10 Day Notice. After a discussion about this, I advised the Tenant we would proceed with further preliminary issues and come back to her claims.

I heard from the Tenant on service of the hearing package and evidence for her application as the Landlord had not yet called into the hearing. I confirmed with the Tenant that she had received the Landlord's Application. At this point, the Landlord called into the conference. Given this, some of the preliminary issues already addressed had to be revisited.

Around 10:00 a.m., the Tenant advised that she had to go back to work and had to hang up. I made it clear to the Tenant that I would proceed without her and therefore not hear her testimony or consider her evidence in relation to the substantive issues before me. The Tenant submitted that this was unfair because she had called into the hearing on time and the Landlord had called into the hearing late. The Tenant exited the hearing.

I proceeded with the hearing in the absence of the Tenant. These hearings are set for one hour. Parties are required to make themselves available for the entire hour. If a party is not available on the date of the hearing or at the time of the hearing, they should attempt to reschedule the hearing pursuant to the Rules. If parties choose to exit the hearing before it concludes, the hearing proceeds in their absence. This was made clear to the Tenant. The Tenant chose to exit the hearing despite this.

The Landlord was given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered the Landlord's documentary evidence and oral testimony. I will only refer to the evidence I find relevant in this decision.

Pursuant to rule 2.3 of the Rules, I will consider the Tenant's dispute of the 10 Day Notice and request for reimbursement for the filing fee. The remaining issues are dismissed with leave to re-apply. This does not extend any time limits set out in the *Residential Tenancy Act* (the "Act").

Issues to be Decided

Landlord's Application:

1. Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?
2. Is the Landlord entitled to reimbursement for the filing fee?

Tenant's Application:

1. Should the 10 Day Notice be cancelled?
2. Is the Tenant entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence. It is between the Landlord and Tenant in relation to the rental unit. The tenancy started February 01, 2018 and was for a fixed term ending January 31, 2019. The tenancy then became a month-to-month tenancy. Rent is \$3,200.00 per month due on the first day of each month. The Tenant paid a security deposit of \$1,600.00. The agreement is signed by the parties.

The 10 Day Notice states the Tenant failed to pay \$1,200.00 in rent due July 01, 2019. It is addressed to the Tenant and refers to the rental unit. It is signed and dated by the Landlord. It has an effective date of July 15, 2019.

The Landlord testified that he provided both pages of the 10 Day Notice to the Tenant's son at the rental unit on July 04, 2019. The Landlord testified that the Tenant's son is an adult and lives at the rental unit. He said he has seen the Tenant's son at the rental

unit previously when he attended to do repairs. The Landlord submitted a Proof of Service signed by his sister as a witness.

The Tenant disputed the 10 Day Notice July 12, 2019.

The Landlord testified that the Tenant failed to pay \$1,200.00 of July rent and this is what is reflected on the 10 Day Notice. The Landlord testified that the Tenant made the following payments after the 10 Day Notice was issued:

- \$500.00 on July 04, 2019;
- \$2,000.00 on August 01, 2019;
- \$500.00 on August 02, 2019;
- \$2,000.00 on September 01, 2019; and
- \$500.00 on September 02, 2019.

The Landlord testified that \$2,100.00 in rent is currently outstanding.

The Landlord testified as follows. The Tenant did not have authority under the *Act* to withhold rent. The Tenant asked for repairs to be made to the rental unit and he did a lot of the repairs. The Tenant told him she could only pay \$2,500.00 in rent because the house was in poor condition. He told the Tenant he did not agree with this. The Tenant continued to pay \$2,500.00 per month.

The Landlord sought an Order of Possession effective two days after service on the Tenant.

The Landlord submitted payment information showing he received \$2,500.00 via e-transfer from the Tenant on August 08, 2018 and \$500.00 on July 08, 2019.

The Landlord submitted a text message chain showing a history of late rent payments and showing the Tenant had not paid rent by July 02, 2019.

The Tenant exited the hearing prior to testifying about her dispute of the 10 Day Notice.

The Tenant has made the following comments on her application under the dispute of the 10 Day Notice:

After receiving my formal written requests for repairs he had a contractor & a Certified Mold & Asbestos inspector look at the property. He then served me with a 4 month eviction for plumbing repairs. There are many o/s repairs that could cause health dangers. Now landlord refuses to maintain property. In the past I've taken initiative (sic) for repairs; collecting from him is stressful each time I try to collect I get served with the 10 day notice. He usually doesn't acknowledge my requests or messages.

Proof Rent Was Paid or Not Owed - After the backstairs collapsed I was injured and off work for several weeks,,,,,September through November. He blackmailed me into settling with his insurance company. But he promised to make the repairs

10 Day Notice to End Tenancy Form - This notice was served while I was out of town. We are disputing lack of maintenance to property. The only time he usually acknowledges my request is when money or injury is involved so my options are limited for communication.

I understood from the discussions with the Tenant at the outset of the hearing that her dispute of the 10 Day Notice is related to the Landlord failing to do repairs and failing to maintain the rental unit.

Analysis

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*.

The only section of the *Act* that allows a tenant to withhold rent for repair or maintenance issues is section 33 of the *Act* in relation to emergency repairs. Section 33 of the *Act* sets out what specific repairs constitute emergency repairs. Section 33 of the *Act* states in part:

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

(a) emergency repairs are needed;

- (b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;
 - (c) following those attempts, the tenant has given the landlord reasonable time to make the repairs...
- (5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant
- (a) claims reimbursement for those amounts from the landlord, and
 - (b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.
- (6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:
- (a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;
 - (b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);
 - (c) the amounts represent more than a reasonable cost for the repairs;
 - (d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.
- (7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

[emphasis added]

Section 46 of the *Act* allows a landlord to end a tenancy when a tenant fails 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.

...

Section 55(1) of the *Act* requires an arbitrator to issue an Order of Possession when a tenant has disputed a notice to end tenancy and the application is dismissed or the notice is upheld. The notice must comply with section 52 of the *Act*.

Based on the written tenancy agreement, I find the Tenant was obligated to pay \$3,200.00 in rent per month by the first of each month.

I do not find the Tenant had authority under the *Act* to withhold rent. I understood the Tenant to say she is disputing the 10 Day Notice because of maintenance and repair issues with the rental unit. The Tenant was not permitted to withhold rent because of repair or maintenance issues.

The only related section of the *Act* that would have permitted the Tenant to withhold rent is section 33. This section only relates to emergency repairs, as defined in the *Act*, and requires the Tenant to have complied with a number of steps before withholding rent. The Tenant did not testify about emergency repairs during the hearing. The Tenant exited the hearing before providing full testimony on her dispute of the 10 Day Notice. The Tenant has not submitted evidence showing she complied with section 33 of the *Act* and the Landlord failed to reimburse her as required by section 33(5) of the *Act*. I do not find that section 33 of the *Act* applies.

The Landlord testified that the Tenant did not have authority under the *Act* to withhold rent. I accept this as there is no evidence before me showing the Tenant did have such authority. I find the Tenant was required to pay \$3,200.00 in rent by July 01, 2019 pursuant to section 26(1) of the *Act* and that section 46(3) of the *Act* does not apply.

I accept the undisputed testimony of the Landlord and find the Tenant had failed to pay \$1,200.00 of July rent when the 10 Day Notice was issued. I acknowledge that the Landlord provided verbal testimony about rent payments that does not accord with his documentary evidence. However, I do not find that the documentary evidence contradicts the Landlord's verbal testimony about what was outstanding July 04, 2019.

Given the Tenant failed to pay rent as required, the Landlord was entitled to serve her with the 10 Day Notice pursuant to section 46(1) of the *Act*.

Based on the undisputed testimony of the Landlord and Proof of Service, I find the Tenant was served with the 10 Day Notice in accordance with section 88(e) of the *Act*. It is expected that the Tenant's son would have alerted the Tenant to the 10 Day Notice. The Tenant is considered to have received the 10 Day Notice July 04, 2019.

Upon a review of the 10 Day Notice, I find it complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*.

The Tenant had five days from receipt of the 10 Day Notice on July 04, 2019 to pay or dispute it pursuant to section 46(4) of the *Act*. The Tenant had until July 09, 2019 to

dispute the 10 Day Notice. The Tenant did not pay the filing fee until July 12, 2019. An Application for Dispute Resolution is not complete until the filing fee is paid. I find the Tenant disputed the 10 Day Notice July 12, 2019, outside of the five-day time limit. I note that the Tenant did not apply for more time to file the application.

The Tenant also had until July 09, 2019 to pay the outstanding rent. The Landlord's verbal testimony about what the Tenant paid and when after the 10 Day Notice was issued does not accord with his documentary evidence. However, at most, I find the Tenant paid \$500.00 on July 04, 2019 and \$500.00 on July 08, 2019 based on the Landlord's undisputed testimony and documentary evidence. Therefore, I am satisfied the Tenant did not pay the \$1,200.00 outstanding by July 09, 2019.

I find the Tenant did not pay the outstanding rent, or dispute the 10 Day Notice, within the five-day time limit set out in section 46(4) of the *Act*. Therefore, pursuant to section 46(5) of the *Act*, the Tenant is conclusively presumed to have accepted that the tenancy ended July 15, 2019, the effective date of the 10 Day Notice. The Tenant was required to vacate the rental unit by July 15, 2019. The Landlord is entitled to an Order of Possession pursuant to section 55(2) of the *Act*.

I note that I am dismissing the Tenant's Application to dispute the 10 Day Notice as the Tenant did not provide a valid basis for disputing the 10 Day Notice while she was involved in the hearing and the Tenant's evidence does not disclose a valid basis for disputing the 10 Day Notice. Therefore, even if the Tenant had disputed the 10 Day Notice within the five-day time limit, her dispute has been dismissed and the Landlord would have been entitled to an Order of Possession pursuant to section 55(1) of the *Act*.

The Landlord is entitled to an Order of Possession. The Order is effective two days after service on the Tenant.

As the Landlord was successful in this application, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

As the Tenant was not successful in this application, I decline to award her reimbursement for the filing fee.

Conclusion

The Tenant's dispute of the 10 Day Notice and request for reimbursement for the filing fee is dismissed without leave to re-apply.

The Landlord is granted an Order of Possession effective two days after service on the Tenant. This Order must be served on the Tenant and, if the Tenant does not comply with this Order, it may be filed and enforced in the Supreme Court as an order of that Court.

The Landlord is entitled to monetary compensation in the amount of \$100.00. I issue the Landlord a Monetary Order in this amount. This Order must be served on the Tenant and, if the Tenant does not comply with the Order, it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

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: September 06, 2019

Residential Tenancy Branch