



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

FFL MNRL-S OPC

Introduction

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- an Order of Possession pursuant to section 55;
- an early end to this tenancy and an Order of Possession pursuant to section 56;
- a monetary order for unpaid rent in the amount of \$3,280 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord testified, and the tenant confirmed, that the landlord served the tenant with the notice of dispute resolution form and supporting evidence package. The tenant testified, and the landlord confirmed, that the tenant served the landlord with his evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue – Landlord’s Amendment

Prior to the hearing, the landlord amended her application to increase the amount of her monetary claim. At the hearing, she testified that she had issued a 10 Day Notice to End Tenancy (the “**10 Day Notice**”) to the tenant and attempted to rely on it as a basis to obtain an order of possession. She did not indicate on her amendment to an application for dispute resolution form (dated the same day as the 10 Day Notice) that she sought to amend her application to include an order of possession based on the 10 Day Notice.

As no amendment was made prior to the hearing, she cannot rely on the 10 Day Notice as a basis for an order of possession.

Rule of Procedure 4.2 allows for amendments to be made at the hearing. It states:

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.

I find in the circumstances that an amendment for an order of possession based on the 10 Day Notice at the hearing could not have been reasonably anticipated by the tenant. Such an amendment represents a new cause of action against the tenant. It is not reasonable to require respondents to prepare for unpleaded causes of action in advance of a hearing. This would be too onerous a burden to place on respondents. As such, I decline to order that the landlord’s claim be amended to include an application for an order of possession based on the 10 Day Notice.

The landlord’s application for an order of possession based on a One Month Notice to End Tenancy (the “**Notice**”) remains valid.

Issue(s) to be Decided

Is the landlord entitled to:

- 1) an order of possession;
- 2) a monetary order for non-payment of rent in the amount of \$3,280;
- 3) recover her filing fee; and
- 4) apply the security deposit against any monetary order made?

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 tenant and the prior owner of the rental property entered into an oral tenancy agreement starting May 1, 2014. The landlord took over the tenancy agreement when she purchased the residential property. Monthly rent is \$820. The tenant paid the prior owners a security deposit of \$360. The landlord retains this deposit.

The rental unit is a basement suite located in one half of a duplex. The landlord owns both halves of the duplex.

On June 10, 2019, the municipality in which the rental unit is located (the "**City**") notified the landlord that the rental property contained an illegal secondary suite.

The landlord's agent personally served the Notice on the tenant on June 28, 2019, with an effective date of August 1, 2019. The tenant acknowledged receipt of the Notice on this date.

The Notice set out the grounds for ending the tenancy as:

- 1) rental unit/site must be vacated to comply with a government order.

The tenant argues that the Notice contains several errors which make the Notice invalid: including

- 1) incorrect postal code for rental unit, (off by one letter);
- 2) incorrect postal code for landlord's address (the same as the incorrect rental unit postal code);
- 3) incorrect unit number (he denies that the rental unit address contains the prefix "B", and that it is rather the street address only, which is the address at which he receives mail);
- 4) incorrect tenant phone number;
- 5) Notice is not signed by landlord or landlord's agent; and
- 6) Notice does not indicate how its service was made.

The landlord did not deny that any of these errors existed. I should note that above the section of the Notice where details of how service was made it is written "failure to complete does not invalidate notice".

The tenant did not vacate the rental unit by August 1, 2019, nor did he make an application to dispute the Notice with the Residential Tenancy Branch.

At the hearing, the tenant argued that the tenancy should not be ended as the letter from the City did not specify that his unit was the illegal suite, rather it specified that the rental property (both halves of the duplex) had too many kitchens. He argued that the landlord did not have all the rental unit located in the duplex occupied by long-term renters since the City's letter was sent, and as such, there were times when his rental unit was the only operational kitchen on the rental property. As such, he argued, the City's letter does not require that the tenancy be ended.

The landlord also testified that the tenant has failed to pay rent for the months of July, August, September, and October 2019. She testified that the tenant is \$3,280 in arrears.

The tenant did not deny this. He testified that he had fallen on hard times recent and been unable to pay rent as required by the tenancy agreement.

Analysis

Order of Possession

Sections 47 of the Act states:

47(3) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.

(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not 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 by that date.

Based on the testimony of the parties, I find that the tenant did not file an application to dispute the Notice within 10 days, as set out in section 47(4). I must determine if the Notice complies with section 52 of the Act, as required by section 47(3). If I find that it does, section 47(5) requires that I find that the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and I must grant an order of possession.

As such, it is not necessary for me to consider the tenant's argument regarding the legality of the suite. The proper time for a tenant to make that argument was at a hearing for an application to dispute the Notice made by the tenant. As stated above, he made no such application.

Section 52 of the Act states:

Form and content of notice to end tenancy

- 52 In order to be effective, a notice to end a tenancy must be in writing and must
- (a) be signed and dated by the landlord or tenant giving the notice,
 - (b) give the address of the rental unit,
 - (c) state the effective date of the notice,
 - [...]
 - (e) when given by a landlord, be in the approved form.

As discussed above, the Notice was not signed by the landlord, nor did it list the rental unit's address correctly. Based on these two errors, the Notice does not meet with the requirements of section 52. The balance of the errors on the Notice listed by the tenant do not cause the Notice to be non-compliant with section 52. However, section 68 of the Act states:

Director's orders: notice to end tenancy

- 68(1) If a notice to end a tenancy does not comply with section 52 *[form and content of notice to end tenancy]*, the director may amend the notice if satisfied that
- (a) the person receiving the notice knew, or should have known, the information that was omitted from the notice, and
 - (b) in the circumstances, it is reasonable to amend the notice.

Based on the facts that there are two units in the half of the duplex that the tenant's rental unit is located in, and that the rental unit is located in the basement of the duplex, I find it reasonable for the landlord to have identified the tenant's suite as unit "B" of the Notice. I find that the tenant knew or should have known that the Notice applied to his rental unit, as his name was correctly written on the Notice, and the Notice was personally served on him.

The signature field on the form is to be completed to signify the authenticity of the Notice and to indicate the landlord's intention that it be binding. I find that since the tenant was personally served with the Notice by the landlord's agent, that he knew or ought to have known that the Notice was genuine and that the landlord intended to issue it.

I find that, in consideration of all the circumstances, it is appropriate to amend the Notice so as to correct the address of the rental unit to remove the "B" designation for the rental unit, and so as to include the signature of the landlord's agent.

As I have found it appropriate to amend the Notice so that it complies with section 52 of the Act, and as the tenant did not apply for dispute resolution to have the Notice cancelled, as required by section 47(4), I find that he is conclusively presumed to have accepted that the tenancy ended on the effective date on the Notice, August 1, 2019.

As such, I order that the tenant vacate the rental unit by October 15, 2019, at 1:00 pm.

Monetary Order

Section 26(1) of the Act states:

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.

I find that the tenant was obligated to pay monthly rent in the amount of \$820. I find that he has failed to do so for the months of July, August, September, and October 2019. I find that he is in rental arrears of \$3,280.

While the tenant did not raise the issue at the hearing, his written submissions included an argument that the landlord should not be entitled to collect rent on a rental unit that is illegal. Policy Guideline 20 addresses illegal contracts. It states:

This guideline deals with situations where a landlord rents premises in a circumstance where the rental is not permitted under a statute. Most commonly this issue is raised where municipal zoning by-laws do not permit secondary suites and rental of the suite is a breach of the zoning by-law. However municipal by-laws are not statutes for the purposes of determining whether or not a contract is legal, therefore a rental in breach of a municipal by-law does not make the contract illegal.

As such, I find that the fact that the City determined the existence of the rental unit contravened a bylaw does not cause the tenancy agreement to be an illegal contract. As such, this is not a basis on which the tenant may withhold rent from the landlord.

I find that the landlord is entitled to receive rent in the combined amount of \$3280 for the months of July, August, September, and October. Pursuant to section 72(2), the tenant may retain the security deposit of \$360 in partial satisfaction of this amount.

As the landlord has been successful in her application, I order that the tenant reimburse her the filing fee of \$100.

In total, I order that the tenant pay the landlord \$3,020, representing the following

Rental arrears	\$3,280.00
Filing Fee	\$100.00
Security Deposit credit	-\$360.00
Total	\$3,020.00

Conclusion

Pursuant to section 67 and 72, I order that the tenant pay the landlord \$3,020.

Pursuant to section 55, I order that the tenant vacate the rental unit by October 15, 2019 at 1:00 pm.

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: October 7, 2019

Residential Tenancy Branch