



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, CNL, MT, CNR, LRE, FFT (Tenant)
OPRM-DR, FFL (Landlords)

Introduction

This hearing was convened by way of conference call in response to Applications for Dispute Resolution that had been crossed.

The Landlords filed the application January 20, 2020 (the “Landlords’ Application”). The Landlords sought an Order of Possession and Monetary Order based on unpaid rent and a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 09, 2020 (the “10 Day Notice”). The Landlords also sought reimbursement for the filing fee.

The Landlords’ Application went through the direct request process and the Landlords were issued an Order of Possession effective two days after service on the Tenant and a Monetary Order for \$4,097.00 for unpaid rent and the filing fee in a decision dated February 03, 2020.

The Tenant sought a review hearing of the February 03, 2020 decision and was granted a review hearing in a decision dated February 07, 2020. The review hearing was set as a cross-application to the Tenant’s Application for Dispute Resolution.

The Tenant filed the application January 21, 2020 (the “Tenant’s Application”). The Tenant applied as follows:

- For an order that the Landlord comply with the Act, regulation and/or the tenancy agreement;
- To dispute a Two Month Notice to End Tenancy for Landlord's Use of Property;
- To dispute the 10 Day Notice;
- For more time to dispute the 10 Day Notice;

- To suspend or set conditions on the Landlord's right to enter the rental unit; and
- For reimbursement for the filing fee.

The Tenant appeared at the hearing. J.H.L. and S.W. appeared for the Landlords.

The Tenant advised at the outset that she had been in the hospital since December and was released the weekend before the hearing. The Tenant said she was not staying at the rental unit but staying at another location. The Tenant said her family had removed many of her belongings from the rental unit but that some of her belongings were still in the rental unit. The Tenant wanted to continue with her disputes of a Two Month Notice to End Tenancy for Landlord's Use of Property and the 10 Day Notice.

S.W. advised that the Landlords are asking that the Order of Possession and Monetary Order issued February 03, 2020 be confirmed.

I explained the hearing process to the parties who did not have questions when asked. The Tenant and S.W. provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence.

S.W. confirmed receipt of the hearing package and evidence for the Tenant's Application. S.W. said some of the evidence was received March 19, 2020. S.W. confirmed he had a chance to review the evidence. I did not go into the date of service further as I did not see any prejudice to the Landlords in receiving evidence March 19, 2020 when they had a chance to review it and could speak to it at the hearing.

S.W. confirmed receipt of the decision dated February 07, 2020 granting a review hearing on the Landlords' Application.

The Tenant confirmed she understood we would be dealing with the Landlords' Application at the hearing given the decision dated February 07, 2020 granting a review hearing on the Landlords' Application. The Tenant testified that she did not receive the hearing package or evidence for the Landlords' Application. The Tenant confirmed she had people going to the rental unit while she was in hospital.

S.W. testified that the hearing package and evidence for the Landlords' Application was served on the Tenant at the rental unit by registered mail. The Landlords had submitted

a registered mail receipt for this with Tracking Number 1 on it. I looked this up on the Canada Post website which shows the package was sent January 22, 2020 and that notices were left January 24, 2020 and January 29, 2020.

S.W. testified that further evidence was sent to the rental unit by registered mail on March 10, 2020. S.W. provided Tracking Number 2. I looked this up on the Canada Post website which shows notices were left March 12, 2020 and March 17, 2020.

I am satisfied based on the evidence provided that the Landlords served the Tenant with the hearing package and evidence in accordance with sections 88(c) and 89(1)(c) of the *Residential Tenancy Act* (the "Act"). I acknowledge that the Tenant was in the hospital since December and therefore not at the rental unit. However, I am also satisfied based on what was said during the hearing that people were attending the rental unit on behalf of the Tenant. It is reasonable to expect that these people would have alerted the Tenant to important mail that came to the rental unit.

I do note that the relevant evidence considered below includes the tenancy agreement, 10 Day Notice and letter that the Tenant submitted. The Tenant was aware of the tenancy agreement and 10 Day Notice regardless of service.

Pursuant to rule 2.3 of the Rules of Procedure (the "Rules"), I advised the parties I would deal with the following from the applications:

- The Tenant's dispute of a Two Month Notice to End Tenancy for Landlord's Use of Property;
- The Tenant's dispute of the 10 Day Notice;
- The Tenant's request for more time to dispute the 10 Day Notice;
- The Tenant's request for reimbursement for the filing fee;
- The Landlords' request for an Order of Possession based on the 10 Day Notice;
- The Landlords' request for a Monetary Order for unpaid rent; and
- The Landlords' request for reimbursement for the filing fee.

The following requests in the Tenant's Application are dismissed with leave to re-apply as they are not sufficiently related to the issues noted above:

- The request for an order that the Landlord comply with the Act, regulation and/or the tenancy agreement; and

- The request to suspend or set conditions on the Landlord's right to enter the rental unit.

This decision does not extend any time limits set out in the *Act*.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the relevant documentary evidence and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Two Month Notice to End Tenancy for Landlord's Use of Property be cancelled?
2. Should the 10 Day Notice be cancelled?
3. Should the Tenant be given more time to dispute the 10 Day Notice?
4. Is the Tenant entitled to reimbursement for the filing fee?
5. Are the Landlords entitled to an Order of Possession based on the 10 Day Notice?
6. Are the Landlords entitled to a Monetary Order for unpaid rent?
7. Are the Landlords entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started February 01, 2019 and was for a fixed term ending January 31, 2020. Rent is \$3,997.00 per month due on the first day of each month. The Tenant paid a security deposit of \$1,950.00 and pet damage deposit of \$1,950.00. The agreement includes a vacate clause initialled by both parties stating:

At the end of this time, the tenancy is ended and the tenant must vacate the rental unit...

Reason tenant must vacate (required): The owner's family might move back

In relation to a Two Month Notice to End Tenancy for Landlord's Use of Property, the Tenant testified that she received a letter from Landlord K.R. about vacating the rental unit.

S.W. testified that the Tenant was not served with a Two Month Notice to End Tenancy for Landlord's Use of Property on an RTB form.

The 10 Day Notice was submitted in evidence. It states that the Tenant failed to pay \$3,997.00 in rent due January 01, 2020. It is addressed to the Tenant and refers to the rental unit. It is signed and dated by S.W. It has an effective date of January 22, 2020.

S.W. testified that both pages of the 10 Day Notice were posted on the door of the rental unit January 09, 2020.

The Tenant testified that her mother found the 10 Day Notice posted on the door of the rental unit and sent her a picture of the first page on January 10, 2020. The Tenant did not know if both pages were posted.

S.W. testified that the Tenant failed to pay January rent and has not paid February or March rent. S.W. confirmed the Landlords are seeking unpaid rent for February and March at this point.

The Tenant agreed she did not pay January rent and has not paid February or March rent.

The Tenant testified as follows in relation to the request for more time to dispute the 10 Day Notice. She was in the hospital January 10, 2020. She had just had surgery and was not herself. She has had two brain surgeries in 2020. She had a stroke. She would have disputed the 10 Day Notice in time if not for her circumstances. She has been in the hospital since December and was just released the weekend before the hearing. Her mother filed the dispute on her behalf.

S.W. testified that the Tenant has had someone helping her out and attending the rental unit while she is in hospital.

In relation to the dispute of the 10 Day Notice, the Tenant testified that she is disputing it because of the letter she received from Landlord K.R. about vacating the rental unit so Landlord J.H.L. can take possession of the rental unit for personal use. The Tenant testified that she was worried she would pay January rent but still have to vacate and not get one month's free rent. The Tenant acknowledged that the letter did not say she was entitled to withhold rent for January.

The Tenant testified that she did not pay February or March rent because she thought her belongings had been removed from the rental unit. The Tenant acknowledged that some of her belongings remain in the rental unit.

I note that, given the testimony provided, the only evidence submitted that I find relevant to this decision is the tenancy agreement and 10 Day Notice.

I have also looked at the letter that was sent to the Tenant by Landlord K.R. in December about vacating the property as this is a document the Landlords would be aware of given it came from them. The letter states that the owner and her family are moving back into the rental unit so the tenancy will not be extended according to the terms stated on page two of the tenancy agreement.

Analysis

Should the Two Month Notice to End Tenancy for Landlord's Use of Property be cancelled?

A Two Month Notice to End Tenancy for Landlord's Use of Property is issued pursuant to section 49 of the *Act*. A notice issued pursuant to section 49 of the *Act* must comply with section 52 of the *Act* pursuant to section 49(7) of the *Act*. Section 52 of the *Act* requires a notice to end tenancy issued by a landlord to be on the approved form meaning the RTB form.

The Tenant was not issued a notice pursuant to section 49 of the *Act*. The Tenant was sent a letter by Landlord K.R. seeking to uphold the vacate clause on page two of the tenancy agreement. This is clear from the wording of the letter. The letter does not reference section 49 of the *Act*. Seeking to uphold a vacate clause that purports to comply with the *Act* and *Residential Tenancy Regulation* is a separate issue from a notice to end tenancy served pursuant to section 49 of the *Act*.

There is no Two Month Notice to End Tenancy for Landlord's Use of Property for the Tenant to dispute. This request is dismissed without leave to re-apply.

Should the 10 Day Notice be cancelled?

Should the Tenant be given more time to dispute the 10 Day Notice?

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.

Section 46 of the *Act* allows landlords 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...

There is no issue that the Tenant owes \$3,997.00 in rent each month by the first day of each month pursuant to the tenancy agreement.

There are six reasons a tenant can withhold rent including:

1. When a landlord collects a security or pet damage deposit that is above the permitted amount (section 19(2) of the *Act*);
2. When section 33 of the *Act* in relation to emergency repairs applies;

3. When the landlord imposes a rent increase that is above the amount allowed by law (section 43(5) of the *Act*);
4. When the landlord issues a tenant a notice to end tenancy under section 49 of the *Act* for landlord's use of property (section 51 of the *Act*);
5. When an arbitrator allows a tenant to withhold rent (section 65(1)(f) of the *Act*); and
6. When the landlord consents to a tenant withholding rent.

Section 51 of the *Act* states:

51 (1) A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement. (emphasis added)

The Tenant testified that she withheld January rent because of the letter sent to her about vacating the rental unit. As stated, this is not a notice to end tenancy issued pursuant to section 49 of the *Act*. It is a letter seeking to uphold the vacate clause in the tenancy agreement. The Tenant did not receive a notice to end tenancy issued pursuant to section 49 of the *Act*. Nor was the Tenant entitled to withhold rent based on the Landlords seeking to uphold the vacate clause in the tenancy agreement.

I find the Tenant did not have authority under the *Act* to withhold January rent. I find the Tenant was required to pay \$3,997.00 in rent by January 01, 2020 pursuant to section 26(1) of the *Act* and that section 46(3) of the *Act* does not apply.

There is no issue that the Tenant did not pay January rent as the parties agreed on this.

Given the Tenant failed to pay rent as required, the Landlords were entitled to serve her with the 10 Day Notice.

Based on the testimony of both parties, I accept the 10 Day Notice was posted to the door of the rental unit. The 10 Day Notice was served in accordance with section 88(g) of the *Act*. I accept the testimony of the Tenant that she received a photo of the 10 Day Notice from her mother January 10, 2020.

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 January 10, 2020 to pay or dispute it pursuant to section 46(4) of the *Act*.

Section 66 of the *Act* states:

66 (1) The director may extend a time limit established by this Act only in exceptional circumstances, other than as provided by section 59 (3) [starting proceedings] or 81 (4) [decision on application for review]...

(3) The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.

There is no issue that the Tenant did not pay the outstanding rent as the parties agreed on this.

The Tenant disputed the 10 Day Notice January 21, 2020, 11 days after receiving the 10 Day Notice. The Tenant explained why she disputed the 10 Day Notice late and I accept her explanation. I also accept that the Tenant's circumstances were exceptional circumstances that justify extending the time limit to dispute the 10 Day Notice. I note that January 21, 2020 was before the effective date of the 10 Day Notice.

Given I have extended the Tenant's time to dispute the 10 Day Notice, I have considered the Tenant's dispute of the 10 Day Notice. This has been considered above. As stated, the Tenant did not have authority under the *Act* to withhold rent. Therefore, the Tenant did not have a valid basis for disputing the 10 Day Notice. The Tenant's dispute is dismissed without leave to re-apply.

Section 55(1) of the *Act* states:

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

(a) the landlord's notice to end tenancy complies with section 52...and

(b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I have found the 10 Day Notice complies with section 52 of the *Act*. I have also dismissed the Tenant's dispute of the 10 Day Notice. Therefore, pursuant to section 55(1) of the *Act*, the Landlords are entitled to an Order of Possession. I issue the Landlords an Order of Possession effective two days after service on the Tenant.

Are the Landlords entitled to a Monetary Order for unpaid rent?

In relation to unpaid rent, there is no issue that the Tenant still has belongings in the rental unit and still has possession of the rental unit as the Tenant acknowledged this and sought to continue the tenancy.

Pursuant to the tenancy agreement, the Tenant is required to pay \$3,997.00 in rent by the first day of each month for the duration of the tenancy.

There is no issue that the Tenant did not pay January, February or March rent as the parties agreed on this. The Tenant has not provided a valid basis for withholding rent for these three months. The Tenant therefore owes the Landlords \$11,991.00 in rent.

Are the Landlords entitled to reimbursement for the filing fee?

Given the Landlords were successful, the Landlords are entitled to reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Tenant currently owes the Landlords \$12,091.00. Pursuant to section 67 of the *Act*, I issue the Landlords a Monetary Order in this amount.

Is the Tenant entitled to reimbursement for the filing fee?

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

Conclusion

There is no Two Month Notice to End Tenancy for Landlord's Use of Property to dispute. This request is dismissed without leave to re-apply.

The Tenant's dispute of the 10 Day Notice is dismissed without leave to re-apply.

The Tenant is not entitled to reimbursement for the filing fee.

The Landlords are issued an Order of Possession effective two days after service on the Tenant. This Order must be served on the Tenant. If the Tenant does not comply with the Order, it may be filed in the Supreme Court and enforced as an order of that Court.

The Landlords are issued a Monetary Order in the amount of \$12,091.00. 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: March 25, 2020

Residential Tenancy Branch