



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR MNRL-S MNDC-L FFL CNR

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlords requested:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent or monetary losses pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- cancellation of the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and

SE (“landlords”) appeared for the landlords in this hearing. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another

Both parties confirmed receipt of each other’s applications for dispute resolution hearing package (“Applications”). In accordance with section 89 of the *Act*, I find that both the landlords and tenant were duly served with the Applications. The tenant confirmed receipt of the landlords’ amendment package. I find the tenant duly served with the amendment in accordance with section 89 of the *Act*.

Although the landlords had applied for a Monetary Order of \$8,892.00 in their initial claim for unpaid rent, since they applied another \$5,928.00 in rent has become owing that was not included in the original application for the months of February and March 2020. The landlord had filed an amendment to their application to include \$2,964.00 in unpaid rent for February 2020. RTB Rules of Procedure 4.2 allows for amendments to

be made in circumstances where the amendment can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made. On this basis, I have accepted the landlords' request to amend their application again to reflect the unpaid rent that became owing by the time this hearing was convened for a total monetary claim of \$14,820.00 for 5 months of unpaid rent from November 2019 through to March 2020.

Preliminary Issue: Service of 10 Day Notices to End Tenancy

The tenant confirmed receipt of the 10 Day Notice dated January 7, 2020. Accordingly, I find that the 10 Day Notice dated January 7, 2020 was served in accordance with the *Act*.

The landlords testified that they had served the tenant with a second 10 Day Notice dated February 3, 2020, by way of posting on the tenant's door. The tenant testified that he was never served with this 10 Day Notice. The tenant testified that he never even applied to dispute this second 10 Day Notice as he was unaware of ever being served with it. The landlord submitted proof of service of the second 10 Day Notice, which included a signed and witnessed proof of service by the second named landlord HM, as well as a photo of the 10 Day Notice posted on the tenant's door. Despite the proof of service provided by the landlords, I find that the tenant's sworn testimony raises doubt as to whether the tenant was indeed served with this 10 Day Notice. Accordingly, I am not satisfied that the landlords' second 10 Day Notice was served to the tenant in accordance with section 88 of the *Act*, and only the first 10 Day Notice dated January 7, 2020 will be considered for the purposes of this hearing.

Preliminary Issue – Landlords' Late Evidence

The landlords submitted further evidence within the 14 days preceding the hearing. The tenant requested that this evidence be excluded as he did not have the opportunity to review this late evidence before the hearing.

Rule 3.14 of the RTB's Rules of Procedure establishes that a respondent must receive evidence from the applicant not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, the last day for the landlords to file and serve evidence as part of their application was March 2, 2020.

This late evidence was not served within the timelines prescribed by rule 3.14 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, the landlords attempted to serve evidence on the tenant after March 2, 2020. As the tenant did not have an opportunity to review the late evidence submitted by the landlord, the admission of this evidence would be prejudicial to the tenant. On this basis I find that there is undue prejudice by admitting the landlord's late evidence. As the tenant was not served with these evidentiary materials in accordance with RTB Rules, the landlord's late evidence that was served after March 2, 2020 will be excluded for the purposes of this hearing.

As both parties confirmed receipt of each other's evidentiary materials, with the exception of the landlords' late evidence, I find that these documents were served in accordance with section 88 of the *Act*.

Issue(s) to be Decided

Should the landlords' 10 Day Notice dated January 7, 2020 be cancelled? If not, are the landlords entitled to an Order of Possession?

Are the landlords entitled to a Monetary Order for Unpaid Rent and Money Owed?

Are the landlords entitled to recover the cost of the filing fee for this application?

Background and Evidence

This tenancy originally began as a fixed-term tenancy on September 1, 2017. After August 31, 2018, the tenancy continued on a month-to-month basis, with monthly rent currently set at \$2,964.00, payable on the first of every month. The tenant paid a security deposit in the amount of \$1,425.00, which the landlords still hold.

The tenant was served with a 10 Day Notice to End Tenancy on January 7, 2020 for failing to pay rent for the months of November 2019 through to January 2020. The tenant filed an application on January 13, 2020 to dispute this 10 Day Notice. The landlords testified that the tenant had provided cheques for November and December

2019, rent, but placed a stop payment on these cheques. The landlords referenced a previous decision dated November 1, 2019 where they were successful in obtaining an Order of Possession pursuant to a 1 Month Notice, but the original decision and Order of Possession were set aside and of no continuing force or effect after a Review Hearing was held on January 2, 2020. The landlords testified that the tenant obtained these results by making false claims and producing false documents. The landlords testified that they did not receive any rent payments for the months of November 2019 through to March 2020, and are seeking a monetary order for unpaid rent as well as the losses included in the table below:

Item	Amount
Unpaid Rent for November 2019	\$2,964.00
Unpaid Rent for December 2019	2,964.00
Unpaid Rent for January 2020	2,964.00
Unpaid Rent for February 2020	2,964.00
Unpaid Rent for March 2020	2,964.00
Cleaning	420.00
Stairwell key (\$100.00, FOBS \$180.00, Parking Pass \$25.00)	305.00
Bailiff services,(deposit, supreme court filing, swearing affidavit)	1,820.00
Total Monetary Order Requested	\$17,365.00

The tenant does not dispute that the post-dated cheques that he had submitted were no longer valid, as his account was frozen and he was unable to access those funds. The tenant, however, disputes the non-payment of the rent for this tenancy, stating that he had sent the landlords electronic payments from a different bank account for November 2019 through to March 2020. The tenant provided in his evidentiary materials payment receipts from his bank account for the payments made on October 31, 2019 for November 2019 rent, November 29, 2019 for December 2019 rent, and December 31, 2019 for January 2020 rent. The payments were sent to the landlord SE's email address. The receipts state that the payments were received. Despite this, the landlords testified that they had never received any of these payments, and provided copies of their bank statements stating that they had never received these payments. The tenant testified that he did not know to provide proof of payments for February 2020 through to March 2020, as he never received the landlords' second 10 Day Notice, and had only submitted evidence to support payment for the months of November 2019 through to January 2020 as indicated in the first 10 Day Notice.

Analysis

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

Section 26 of the *Act* requires that “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.” Although the landlord disputes that the tenant has paid the rent for November through to March 2020, I find that the tenant has provided receipts that support that payment was made for the months of November 2019 through to January 2020. The receipts state that the payments were received. I accept the tenant’s testimony that he was never served with the second 10 Day Notice to End Tenancy, and therefore only submitted proof of payment for the unpaid rent noted on the first 10 Day Notice. In light of the disputed testimony, I find that the tenant has provided sufficient proof of payment to show that he had paid the rent for November 2019, December 2019, and January 2020 before the payments were due.

I find that the tenant has complied with section 26 of the *Act* by paying rent when it was due. Based on these circumstances I am allowing the tenant’s application to cancel the 10 Day Notice dated January 7, 2020, and this tenancy is to continue until ended in accordance with the *Act*.

I dismiss the landlords’ monetary claim for unpaid rent for the months of November 2019 through to January 2020 without leave to reapply as the tenant provided proof that these payments were made. As I am not satisfied that either party provided sufficient evidence for me to make a determination for whether February and March 2020 rent payments were made by the tenant, I dismiss the landlords’ monetary claim for unpaid rent for the months of February and March 2020 with leave to reapply.

The landlords also filed a monetary claim for the cost of cleaning, keys, FOBS, parking pass, and bailiff services. I am not satisfied that the landlords have provided sufficient evidence to support these losses, and accordingly, I also dismiss this portion of their claim with leave to reapply.

As the filing fee is normally awarded to the successful party after a hearing, I dismiss the landlords’ application to recover the filing fee without leave to reapply.

Conclusion

I allow the tenant's application, and the 10 Day Notice dated January 7, 2020 is cancelled. The 10 Day Notice dated January 7, 2020 is of no force or effect. This tenancy is to continue until ended in accordance with the *Act*.

I dismiss the landlords' application to recover the rent for November 2019, December 2019, and January 2020 without leave to reapply.

The landlords' application to recover the filing fee is dismissed without leave to reapply.

The remainder of the landlords' application is dismissed with leave to reapply.

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: March 18, 2020

Residential Tenancy Branch