



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR / OPC FFL

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the “**Act**”). The landlord’s for:

- an order of possession for cause pursuant to section 55; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

And the tenant’s application to cancel the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent (the “**10-Day Notice**”) pursuant to section 46.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 11:20 am in order to enable the tenant to call into this teleconference hearing scheduled for 11:00 am. The landlord and the co-owner of the residential property (“**LN**”) attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord, LN, and I were the only ones who had called into this teleconference.

The landlord testified that the landlord served the tenant personally with the notice of dispute resolution form and supporting evidence package on June 9, 2021. The landlord testified that the tenant served him with his notice of dispute resolution form in person on June 11, 2021. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue – 10-Day Notice

At the outset of the hearing, the landlord advised me that he never served a 10-day notice to end tenancy for non-payment of rent on the tenant. He speculated that the tenant intended to dispute the one month notice to end tenancy for cause (the “**One-Month Notice**”) which forms the basis for the landlord’s application for an order of possession. As the tenant did not attend the hearing, I cannot be certain as to the tenant’s intention. However, the landlord’s hypothesis seems reasonable.

As the landlord denies ever serving a 10-day notice to end tenancy, there is no harm in me order that the 10-Day Notice be cancelled. The landlord bears the evidentiary

burden to prove the validity of such a notice, and, but denying its existence, he has failed to do so. Accordingly, in the event the 10-Day Notice exists (which the landlord denied), I order that is cancelled and of no force or effect.

Additionally, in the event that the tenant did mean to dispute the validity of the One-Month Notice, as opposed to the 10-Day Notice, when he made his application, I will consider the tenant to have made an application to dispute the One-Month Notice to have been disputed on the same day as the tenant made the dispute to the 10-Day Notice.

Issues to be Decided

Is the landlord entitled to:

- 1) an order of possession; and
- 2) recover the filing fee?

Is the tenant entitled to an order cancelling the One-Month Notice?

Background and Evidence

While I have considered the documentary evidence and the testimony of the landlord and LN, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The parties entered into a written tenancy agreement starting May 15, 2021. Monthly rent is \$1,895 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$947.50, which the landlord continues to hold in trust for the tenant.

The landlord testified that the tenant is habitually late in paying his rent. He testified that the tenant paid rent late as follows:

- September 2020 rent paid on September 3, 2020
- October 2020 rent paid on October 2, 2020
- November 2020 rent paid on November 2, 2020
- February 2021 rent paid on February 2, 2021
- March 2021 rent paid on March 2, 2021
- April 2021 rent paid on April 3, 2021
- May 2021 rent paid on May 3, 2021

The tenant paid rent via e-transfer. The landlord provided screenshots of text messages he received automatically from the tenant each time the tenant made an e-transfer. These text messages show the tenant to pay paid monthly rent after the first of the month for the months listed above. In February, April, and May 2021, the tenant's text message indicating an etransfer was made was immediately preceded by a text message from the landlord reminding him that his rent was due.

The landlord testified that neither he nor LN had ever told the tenant that he was permitted to pay rent after the first of the month.

On May 14, 2021, the landlord posted the One-Month Notice on the door of the rental unit. The One-Month Notice specified an effective date of June 30, 2021. It listed the reason for ending the tenancy as “tenant is repeatedly late paying rent”. It listed the dates as the dates the tenant paid rent late.

The tenant made his application on May 27, 2021.

Analysis

The tenancy agreement requires the tenant to pay rent on the first day of each month. I accept the landlord’s uncontroverted testimony, which is supported by documentary evidence, that the tenant paid rent late in September, October, and November 2020, as well as February, March, April, and May 2021.

I accept his testimony that he never indicated to the tenant that it was acceptable that the tenant pay rent after the date it was due. The reminder text messages that the landlord sent the tenant prompting him to pay rent, support this assertion.

Section 47 of the Act, in part, states:

Landlord's notice: cause

47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

[...]

(b) the tenant is repeatedly late paying rent;

[...]

(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.

For the purposes of section 47(4) and (5), as stated above, I consider the tenant’s application to cancel the 10-Day Notice to constitute an application to cancel the One-Month Notice. The tenant filed this application on May 27, 2021. The One-Month Notice was posted on the door of the rental unit on May 14, 2021. Section 90 of the Act states that the documents posted in this way are deemed to have been served three days later. As such, I find the tenant disputed the One-Month Notice within 10 days of being

served with it. Section 47(5) of the Act does not therefore apply. The One-Month Notice must be assessed on its merits.

Residential Tenancy Branch Policy Guideline 38 states:

The Residential Tenancy Act [...] provide[s] that a landlord may end a tenancy where the tenant is repeatedly late paying rent.

Three late payments are the minimum number sufficient to justify a notice under these provisions.

It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late.

A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.

The tenant paid rent late in seven of the nine months preceding the issuance of the One-Month Notice. This more than satisfies the “three late payment” requirement set out in Policy Guideline 38.

Additionally, the landlord issued the One-Month Notice in the same month that he received the final late payment (May 2021). I find that the landlord acted in a timely matter by doing so. I do not find that the landlord waived his right to be paid on the 1st of each month, as the landlord repeatedly demanded payment of rent within a day of it becoming overdue. As such, I find that the One-Month Notice was validly issued.

I have reviewed the One-Month Notice and find that it complies with the form and content requirements set out at section 52 of the Act.

As such, pursuant to section 55 of the Act, I order let the tenant provide the landlord with making possession of the rental unit within two days of being served with this decision and the attached order by the landlord.

Pursuant to section 72 of the Act, as the landlord has been successful in the application, he may recover the filing fee from the tenant. The landlord may retain \$100 of the security deposit in satisfaction of this amount.

Conclusion

Pursuant to section 55 of the Act, I order that the tenant deliver vacant possession of the rental unit to the landlord within two days of being served with a copy of this decision and attached order(s) by the landlord.

I order the landlord to serve a copy of this decision and attached order on the tenant as soon as reasonably possible upon receipt of it from the RTB.

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: September 24, 2021

Residential Tenancy Branch