



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNR-MT, FFT

Introduction

This hearing was scheduled to deal with two Applications for Dispute Resolution filed by the tenant at 11:00 a.m. on this date, via teleconference call. The tenant applied for cancellation of a One Month Notice to End Tenancy for Cause dated June 2, 2021 ("1 Month Notice") and cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated August 9, 2021 ("10 Day Notice").

The landlord appeared for the hearing; however, the tenant did not appear despite leaving the teleconference call open at least 15 minutes to give the tenant sufficient opportunity to appear.

The landlord was affirmed and ordered to not make an audio recording of the proceeding.

Preliminary and Procedural Matters

1. Service of hearing materials

As for service of hearing materials, the landlord testified the tenant did not serve her with his proceeding packages. Rather, when the landlord contacted the Residential Tenancy Branch (RTB) she was informed the tenant had filed to dispute the notices to end tenancy and the RTB provided the landlord with a copy of the Notice of Dispute Resolution Proceeding. Despite the tenant's failure to serve the landlord, the landlord stated she wished to proceed and she was prepared to demonstrate the notices to end tenancy should be upheld. As such, I deemed the landlord sufficiently served pursuant to the authority afforded me under section 71 of the Act.

The landlord testified that she prepared an evidence package in support of the 1 Month Notice and 10 Day Notice and sent it to the tenant on September 21, 2021 via registered mail. The landlord provided a tracking number for Xpresspost as proof of service and I have recorded it on the cover page of this decision. I was satisfied the tenant was served with the landlord's evidence package and I admitted the landlord's evidence for consideration in making this decision.

2. Naming of tenant applicant(s)

The tenant identified a co-tenant on his application; however, this other person is not identified as a tenant on the tenancy agreement or on any of the notices to end tenancy. The landlord testified the other person named as an applicant was an occupant of the rental unit but not a tenant. Accordingly, I amended the style of cause to remove the other named applicant as I am unsatisfied this other person has standing as a tenant.

3. Tenant's request for extension to dispute the 10 Day Notice

In filing his Application for Dispute Resolution, the tenant submitted that he received the 10 Day Notice on August 9, 2021, in person. A tenant in receipt of a 10 Day Notice has five days after receiving a 10 Day Notice to dispute the 10 Day Notice, which would require the tenant to file his dispute by August 14, 2021. The tenant submitted an Application for Dispute Resolution to dispute the 10 Day Notice on August 16, 2021 and paid the filing fee on August 17, 2021. The date the filing fee is paid is the date an Application for Dispute Resolution is considered filed pursuant to Rule 2.6 of the Rules of Procedure. As such, I find the tenant filed to dispute the 10 Day Notice on August 17, 2021 which is after the five day filing deadline.

Section 66 of the Act provides that the a filing deadline may be extended in "exceptional circumstances" only. On the Application for Dispute Resolution the tenant indicates that it was filed late because he thought he had an agreement with the landlord concerning the late payment of rent. The tenant uploaded two images of text messages exchanged between the parties on an unknown date. Nevertheless, the text messages show the tenant requested the landlord allow him more time to pay the rent and the landlord clearly stated that was not an option. I find the tenant's evidence does not demonstrate an agreement with the landlord that rent could be paid later and I am unsatisfied an extension is warranted. Therefore, I dismiss the tenant's request for an extension to dispute the 10 Day Notice and having found the tenant filed this Application for Dispute Resolution outside of the time limit for doing so I dismiss the tenant's request for cancellation of the 10 Day Notice.

Section 55(1) and (1.1) of the Act provide as follows:

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 [*form and content of notice to end tenancy*], and

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

(1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 [*landlord's notice: non-payment of rent*], and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

[My emphasis underlined]

Having dismissed the tenant's application to cancel the 10 Day Notice, I proceed to consider whether an Order of Possession and Monetary Order should be issued to the landlord pursuant to section 55(1) and (1.1) of the Act.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession for unpaid rent under section 55(1) of the Act? If not, is the landlord entitled to an Order of Possession for cause?
2. Is the landlord entitled to a Monetary Order for unpaid rent under section 55(1.1) of the Act?

Background and Evidence

Pursuant to a written tenancy agreement, the tenancy started in September 2019 and the landlord collected a security deposit of \$1000.00 and a pet damage deposit of \$1000.00. The tenant was required to pay rent of \$2000.00 on the first day of every month.

The landlord issued the 1 Month Notice on June 2, 2021 and posted it to the rental unit door. The 1 Month Notice has a stated effective date of July 2, 2021 and indicates the reason for ending the tenancy is because the tenant is repeatedly late paying rent. The tenant filed to dispute the 1 Month Notice within the time limit for doing so, on June 7, 2021.

The landlord issued a 10 Day Notice on August 9, 2021 and served it to the tenant in person. The 10 Day Notice has a stated effective date of August 19, 2021 and indicates rent of \$2000.00 was outstanding as of August 1, 2021. The tenant paid the landlord \$900.00 via etransfer on August 16, 2021 and \$1100.00 via etransfer on August 17, 2021. Upon receiving payment, the landlord communicated to the tenant via text message or Facebook Messenger that the landlord was accepting the payments for use and occupancy only. The tenant filed to dispute the 10 Day Notice on August 17, 2021.

The landlord testified that the tenant did not vacate the rental unit and has not paid any monies for use and occupancy for the months of September 2021 or October 2021. The landlord seeks to regain possession of the rental unit as soon as possible and recover the loss of rent from the tenant.

Documentary evidence for this proceeding included a copy of the 1 Month Notice, the 10 Day Notice, a spreadsheet showing when rent payments were received, and a bank statements to shown when rent payments were received.

Analysis

Section 55 (1) and (1.1) of the Act provide that a landlord may be entitled to an Order of Possession under a tenant's Application for Dispute Resolution to dispute a notice to end tenancy and a Monetary Order for unpaid rent under a tenant's application to dispute a 10 Day Notice, as follows:

- 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 *[form and content of notice to end tenancy]*, and
 - (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

(1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 [*landlord's notice: non-payment of rent*], and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

In this case, I have reviewed the 10 Day Notice and I find it complies with the form and content requirements of the Act. From the evidence before me, including that appearing on the tenant's Application for Dispute Resolution and the landlord's testimony, I am satisfied that the tenant was served with the 10 Day Notice on August 9, 2021.

Pursuant to section 46(5) of the Act, a tenant in receipt of a 10 Day Notice is required to either pay the outstanding rent within five days of receiving a 10 Day Notice to nullify the 10 Day Notice or file an Application for Dispute Resolution to dispute the 10 Day Notice within five days, otherwise the tenant is conclusively presumed to have accepted the tenancy will end on the effective date of the 10 Day Notice. In this case, I find the tenant paid the outstanding rental arrears in full on August 17, 2021 and filed to dispute the 10 Day Notice on August 17, 2021, which is outside of the five day deadline for doing so. The tenant did not satisfy me that an "exceptional circumstance" prevented him from filing his Application for Dispute Resolution to dispute the 10 Day Notice within the time limit for doing so. Accordingly, I find the tenant conclusively presumed to have accepted that the tenancy would end on August 19, 2021 and I find the tenancy ended on the effective date of August 19, 2021. I dismissed the tenant's application for cancellation of the 10 Day Notice and I find the landlord entitled to an Order of Possession under section 55(1) of the Act.

Having found the landlord is entitled to an Order of Possession based on the 10 Day Notice, I find it unnecessary and moot to further consider the 1 Month Notice.

The landlord stated the tenant continues to hold possession of the rental unit and has not paid any further monies for his continued use and occupancy. Therefore, I provide the landlord with an Order of Possession effective two (2) days after service.

As for providing the landlord a Monetary Order for rent under section 55(1.1) of the Act, I had indicated to the landlord during the hearing that I would consider awarding the landlord unpaid rent to October 5, 2021. However, upon further deliberation and in review of Residential Tenancy Branch Policy Guideline 3: *Claims for Rent and Damages for Loss of Rent* I find the landlord not entitled to a Monetary Order for unpaid rent with this decision. In circumstances where the tenant files to dispute the 10 Day

Notice late and an extension is not granted, such as in this case, the policy guideline provides, in part:

Under section 46(5) of the RTA (section 39(5) of the MHPTA), a tenant is conclusively presumed to have accepted the tenancy ends on the effective date of the notice if they do not pay the rent or make their application for dispute resolution within 5 days after receiving the notice to end tenancy. If the tenant submits their application late and the director does not extend the time limit under section 66 of the RTA (section 59 of the MHPTA), then the tenancy ended on the effective date of the notice to end tenancy. Only rent owing up until the effective date of the notice to end tenancy would constitute unpaid rent for the purpose of section 55 (1.1) of the RTA (section 48 (1.1) of the MHPTA).

[My emphasis underlined]

For reasons already provided above, I have found the tenant conclusively presumed to have accepted the end of the tenancy in failing to pay the rent or file to dispute the 10 Day Notice within five days of receiving the 10 Day Notice and an extension was not granted. As such, the tenancy ended on the effective date of the 10 Day Notice, or August 19, 2021 and the outstanding rent had been satisfied by that date so no outstanding rent was owing as of August 19, 2021. The landlord's loss of rent for September 2021 onwards, may be pursued by way of the landlord filing a Landlord's Application for Dispute Resolution.

Conclusion

The landlord is provided an Order of Possession effective two (2) days after service.

The outstanding rent indicated on 10 Day Notice dated August 9, 2021 had been satisfied by the effective date of August 19, 2021 and I do not provide the landlord with a Monetary Order for unpaid rent. Any loss of rent incurred for the month of September 2021 onwards may be pursued by way of a Landlord's Application for Dispute Resolution.

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 05, 2021

Residential Tenancy Branch