



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **LL: FFL, OPR-DR, MNR-DR**
 TT: CNR, PSF

Introduction

This hearing dealt with applications from both the landlords and tenants pursuant to the *Residential Tenancy Act* (the “Act”).

The landlords applied for:

- An order of possession pursuant to section 55;
- A monetary award for unpaid rent pursuant to section 67; and
- Authorization to recover the filing fee from the tenants pursuant to section 72.

The tenants applied for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the “10 Day Notice”) pursuant to section 46; and
- an order to the landlord to provide services or facilities required by law pursuant to section 65.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord KG attended, assisted by an interpreter, and confirmed they were authorized to represent both named applicants. The tenant TG attended and confirmed they represented both of the named tenants.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

At the outset of the hearing the tenants withdrew their application in its entirety.

Issue(s) to be Decided

Are the landlords entitled to an Order of Possession?

Are the landlords entitled to a monetary award as claimed?

Are the landlords entitled to recover their filing fee from the tenants?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This periodic tenancy began on November 1, 2019. The monthly rent is \$1,975.00 payable on the first of each month. A security deposit of \$987.00 was collected at the start of the tenancy and is still held by the landlord.

The tenants failed to pay rent for the months of June and July 2021 and the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent dated July 5, 2021 indicating an arrear of \$3,950.00. The tenant confirmed receipt of the notice and had filed an application to dispute the notice on July 8, 2021. The tenants withdrew their application to dispute the notice at the start of this hearing.

The parties agree that the tenants have made subsequent payments against the arrear. The parties agree that as at the date of the hearing there is a rental arrear of \$3,950.00 arising from unpaid rent for June and November 2021. The landlord confirmed that full rent payment was accepted for August through October 2021 and that they have not issued a receipt indicating payments were accepted for use and occupancy only.

The tenant testified that they have been informed by their spouse, the co-tenant that they have entered into an agreement to reinstate the tenancy and pay the balance of the arrear in accordance with a payment plan. The tenant said they are not aware of

the particulars of the agreement nor did they provide any documentary evidence or correspondence between the parties to support their position.

The landlord testified that they are unaware of any such agreement being made by their spouse, the co-landlord.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for unpaid rent, the tenant may, within five days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

In the present case the tenants initially filed an application for dispute resolution and subsequently withdrew their application. The tenants submit that the parties have entered into an agreement to allow the tenancy to continue.

I find insufficient evidence to support the tenant's testimony. I find that the vague reference to an agreement between individuals who were not present at the hearing, not recorded in writing and without cogent details or a description of the details of the agreement to be unpersuasive and fails to meet any evidentiary onus. I find the tenant's testimony to be unconvincing, unpersuasive and ultimately fails to establish that the landlords have expressly waived the 10 Day Notice.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a notice to End Tenancy:

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting

rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

In the present circumstances while I find insufficient evidence to find that the landlord has expressly waived the 10 Day Notice, I do find sufficient evidence to support that there has been an implied waiver of the notice.

The parties confirmed that the tenants have made full payments of rent for August through October 2021 since the 10 Day Notice was issued and that they have paid \$1,975.00 towards the arrear noted on the notice. The evidence of the parties is that the landlords accepted these payments and did not issue written receipts, correspondence or other documentation that these payments were accepted for use and occupancy only and did not reinstate the tenancy.

While there is insufficient evidence that there was an agreement between the parties, the parties were clear in their testimony that there has been ongoing communication. It would be reasonable to expect that there would be some communication or notation that the monthly rent payments were only accepted for “use and occupancy” and the landlords were not waiving their right to seek an Order if this were their intention.

I further find that there appears to be little coordination or communication not simply between the parties but between the respective co-landlords and the co-tenants. When one co-landlord accepts monthly rent payments and engages in ongoing negotiation while the other proceeds with seeking an Order to end the tenancy confusion and ambiguity naturally arise.

I find, on a balance of probabilities that the ambiguity in the landlords’ conduct amounts to a waiver of the landlords’ right to seek an Order of Possession.

I find that the landlords waived their right to pursue an Order of Possession. I find that the landlords reinstated this tenancy by accepting full rent payments from the tenants for August, September and October 2021, after the effective date of the 10 Day Notice without specifying that the payments were accepted for use and occupancy only.

Accordingly, I dismiss this portion of the landlords’ application.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

I accept the undisputed evidence of the parties that the monthly rent for this tenancy is \$1,975.00 and that there is an arrear of \$3,950.00 as at November 5, 2021 the date of the hearing. I therefore issue a monetary award in the landlords' favour in that amount.

As the landlords were not wholly successful in their application I decline to issue an order allowing them to recover their filing fee from the tenants.

Conclusion

The tenants' application is withdrawn in its entirety and dismissed without leave to reapply.

I issue a monetary order in the landlords' favour in the amount of \$3,950.00. The tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The balance of the landlords' application is dismissed without 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: November 5, 2021

Residential Tenancy Branch