



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, CNR-MT, FFT

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants on January 19, 2022 (the “Application”). The Tenants applied as follows:

- For an order that the Landlords comply with the Act, regulation and/or the tenancy agreement
- To dispute a 10 Day Notice to End Tenancy Issued for Unpaid Rent or Utilities dated January 02, 2022 (the “Notice”)
- For more time to dispute the Notice
- To recover the filing fee

The Landlords appeared at the hearing. Nobody appeared at the hearing for the Tenants. The hearing proceeded for 30 minutes. I explained the hearing process to the Landlords. I told the Landlords they are not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The Landlords provided affirmed testimony.

The Landlords sought an Order of Possession based on the Notice as well as a Monetary Order for unpaid rent. The Landlords sought to keep the \$1,000.00 security deposit towards unpaid rent.

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

The Landlords testified that they have not received anything from the Tenants in relation to this matter and that they received the hearing package from the RTB on February 08, 2022.

The Landlords testified that they served their evidence on the Tenants in person on February 12, 2022. The Landlords testified that they provided their evidence on a USB and followed up by text message February 13, 2022 to ensure the Tenants could access the evidence. The text messages are in evidence.

The Tenants were required to serve their evidence on the Landlords pursuant to rules 3.1 and 3.14 of the Rules. I accept the undisputed testimony of the Landlords that they did not receive the Tenants' evidence. Pursuant to rule 3.17 of the Rules, I exclude the Tenants' evidence because I find it would be unfair to consider it when the Landlords did not receive it and could not respond to it at the hearing.

Based on the undisputed testimony of the Landlords and text messages, I find the Tenants were served with the Landlords' evidence in accordance with section 88(a) of the *Residential Tenancy Act* (the "Act") on February 12, 2022. I also find the Landlords complied with rule 3.15 of the Rules in relation to the timing of service.

Pursuant to rule 7.3 of the Rules, I proceeded with the hearing in the absence of the Tenants. The Landlords were given an opportunity to present relevant evidence and make relevant submissions. I have considered the Landlords' documentary evidence and oral testimony. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Are the Tenants entitled to an order that the Landlords comply with the Act, regulation and/or the tenancy agreement?
2. Should the Notice be cancelled?
3. Are the Tenants entitled to more time to dispute the Notice?
4. Are the Tenants entitled to recover the filing fee?
5. Are the Landlords entitled to an Order of Possession based on the Notice?

6. Are the Landlords entitled to recover unpaid rent?

Background and Evidence

A written tenancy agreement is in evidence. The tenancy started November 01, 2016 and is a month-to-month tenancy. Rent is \$2,000.00 per month due on the first day of each month. The Tenants paid a \$1,000.00 security deposit.

The Landlords testified that rent has remained at \$2,000.00 per month throughout the tenancy and that the calculations in evidence are based on this.

The Notice is in evidence. The Notice states that the Tenants failed to pay \$6,229.65 in rent due January 01, 2022 and \$756.56 in utilities following written demand on November 30, 2021. The effective date of the Notice is January 12, 2022.

The Landlords testified that the Notice was served on the Tenants in person on January 02, 2022. The Landlords submitted a Proof of Service.

The Landlords testified that the Tenants owed \$6,229.65 in rent January 01, 2022. The Landlords submitted a rent ledger and monthly statements showing monies owed. Both documents show \$6,986.21 owing January 01, 2022. The Landlords explained that rent and utilities is shown together in the rent ledger and monthly statements and is separate on the Notice. The Landlords testified that the Tenants owed \$756.56 in utilities January 01, 2022.

The Landlords pointed to the monthly statement at page 66 of their evidence showing the payments made after the Notice was issued as follows:

- January 06, 2022 \$1,000.00
- January 12, 2022 \$2,000.00
- January 19, 2022 \$256.56

The Landlords testified that the Tenants did not have authority under the *Act* to withhold rent.

The Landlords testified that \$3,729.65 was outstanding as of the hearing date and outlined the following:

- February 2022 additional \$2,000.00 in rent owing
- Hydro additional \$564.12 owing
- February 01, 2022 \$6,293.77 owing
- February 01, 2022 \$1,000.00 paid
- February 17, 2022 \$1,564.12 paid
- Balance = \$3,729.65

The Landlords sought an Order of Possession effective two days after service on the Tenants.

Analysis

Rule 7.3 of the Rules states:

7.3 Consequences of not attending the hearing

If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

Given the Tenants did not appear at the hearing, the Application is dismissed without leave to re-apply.

I still must consider the validity of the Notice because the Landlords have the onus to prove the Notice pursuant to rule 6.6 of the Rules.

Section 26(1) of the *Act* requires tenants to pay rent in accordance with the tenancy agreement unless they have a right to withhold rent under the *Act*.

Section 46 of the *Act* allows landlords to end a tenancy when tenants fail 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...

Based on the undisputed testimony of the Landlords and written tenancy agreement, I accept that the Tenants are required to pay \$2,000.00 in rent per month by the first day of each month.

Based on the undisputed testimony of the Landlords, I accept that the Tenants did not have authority under the *Act* to withhold rent at any point. There is no evidence before me that the Tenants did have authority under the *Act* to withhold rent at any point. Therefore, I find the Tenants were required to pay \$2,000.00 in rent by the first day of each month pursuant to section 26(1) of the *Act* and that section 46(3) of the *Act* does not apply.

Based on the undisputed testimony of the Landlords, rent ledger and monthly statement at page 66 of the Landlords' materials, I accept that the Tenants had failed to pay \$6,229.65 in rent by January 01, 2022 as required. Given the Tenants failed to pay rent as required, the Landlords were entitled to serve them with the Notice pursuant to section 46(1) of the *Act*.

Based on the undisputed testimony of the Landlords and Proof of Service, I accept that the Notice was served on the Tenants in accordance with section 88(a) of the *Act* on January 02, 2022.

I have reviewed the Notice and find it complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*.

The Tenants had five days from receipt of the Notice on January 02, 2022 to pay the outstanding rent in full or dispute the Notice pursuant to section 46(4) of the *Act*.

Based on the undisputed testimony of the Landlords and monthly statement at page 66 of the Landlords' materials, I accept that the Tenants only paid \$1,000.00 towards the outstanding rent by January 07, 2022. Given the Tenants only paid part of the outstanding rent, the Notice was not cancelled pursuant to section 46(4)(a) of the *Act*.

The Tenants disputed the Notice January 19, 2022, well past the five day deadline. The Tenants sought more time to dispute the Notice; however, the Tenants did not appear at the hearing to provide a basis to grant them more time to dispute the Notice pursuant to section 66(1) of the *Act*. Nor did the Tenants provide any valid basis for extending the time in the Application. As well, section 66(3) of the *Act* states:

(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.

Here, the effective date of the Notice was January 12, 2022 and therefore I could not extend the deadline to dispute the Notice to January 19, 2022.

In the circumstances, I find the Tenants failed to pay the outstanding rent in full or dispute the Notice by January 07, 2022 and therefore section 46(5) of the *Act* applies and the Tenants are conclusively presumed to have accepted that the tenancy ended January 12, 2022, the effective date of the Notice. The Tenants were required pursuant to section 46(5)(b) of the *Act* to vacate the rental unit by January 12, 2022.

Given the above, I find the Notice valid.

Section 55 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 [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.

The Landlords are entitled to an Order of Possession pursuant to section 55(1) of the *Act*. I issue the Landlords an Order of Possession effective two days after service on the Tenants.

Policy Guideline 3 addresses section 55(1.1) of the *Act* and states in part (page 3):

E. Determining when a tenancy has ended for the purposes of section 55 (1.1) of the RTA (s. 48 (1.1) of the MHPTA)

Under section 55(1.1) of the RTA (section 48(1.1) of the MHPTA), the director must grant a landlord an order requiring the tenant to pay the unpaid rent if the following conditions are met:

- the tenant has disputed a notice to end tenancy issued by the landlord for unpaid rent under section 46 of the RTA (section 39 of the MHPTA);
- the notice to end tenancy complies with section 52 of the RTA (section 45 of the MHPTA); and
- the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

This provision allows a landlord to obtain a monetary order for unpaid rent without having to file their own application. Under the legislation, the requirement to pay rent flows from the tenancy agreement. Unpaid rent is money that is due and owing during the tenancy.

Compensation for overholding under section 57 of the RTA (section 50 of the MHPTA) is not considered rent since overholding only occurs after a tenancy has ended. Compensation due to a loss of rent resulting from the tenant ending the tenancy early or by leaving the rental unit or manufactured home site in an unrentable condition is also not considered unpaid rent. The loss arises after and because of the tenancy ending. If a landlord is seeking such compensation, they must make a separate application for dispute resolution and give proper notice to the tenant in accordance with the provisions of the legislation. The director cannot make an order for this type of compensation under section 55(1.1) of the RTA (section 48(1.1) of the MHPTA).

To determine whether an amount owing is for unpaid rent and must be ordered at the hearing, the director must make a finding about when the tenancy ends or ended.

If the tenant has vacated or abandoned the rental unit prior to the date of the dispute resolution hearing, the date the tenancy ended is the date that the tenant vacated or abandoned the rental unit. Only rent owing up until this date would constitute unpaid rent for the purpose of section 55(1.1) of the RTA (section 48(1.1) of the MHPTA).

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).**

(emphasis added)

Pursuant to Policy Guideline 3, the Landlords are only entitled to rent owing up until January 12, 2022, when the tenancy ended, pursuant to section 55(1.1) of the *Act*. I calculate the outstanding rent as follows:

\$6,229.65 in rent owing when the Notice was issued January 02, 2022

\$756.56 in utilities owing when the Notice was issued January 02, 2022

Total of \$6,986.21 owing when the Notice was issued January 02, 2022

Minus \$2,000.00 in rent owing for January of 2022 because the tenancy ended January 12, 2022

= \$4,986.21

Plus 12 days of rent for January of 2022 because the tenancy ended January 12, 2022 ($\$2,000.00 / 31 = \64.51 per day $\times 12 = \$774.12$)

= \$5,760.33

Minus all payments made since the Notice was issued because payments go towards the first amounts that came due:

- January 06, 2022 \$1,000.00
- January 12, 2022 \$2,000.00
- January 19, 2022 \$256.56
- February 01, 2022 \$1,000.00
- February 17, 2022 \$1,564.12

At this point, the Tenants have paid a total of \$5,820.68 which covers rent owing up until January 12, 2022.

It is open to the Landlords to file an Application for Dispute Resolution seeking overholding compensation or loss of rent from the Tenants; however, this cannot be awarded pursuant to section 55(1.1) of the *Act*.

Conclusion

The Landlords are entitled to an Order of Possession effective two days after service on the Tenants. This Order must be served on the Tenants and, if the Tenants do not comply with this Order, it may be filed and enforced in the Supreme Court 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: February 25, 2022

Residential Tenancy Branch