



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FFT

Introduction

The Tenants seek the following relief under the *Residential Tenancy Act* (the “Act”):

- An order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed on April 22, 2022 (the “10-Day Notice”); and
- Return of their filing fee pursuant to s. 72.

T.L. appeared as agent for the Landlord. J.C. appeared as the agent’s assistant.

The Tenants did not attend the hearing, nor did someone appear on their behalf. Pursuant to Rule 7.1 of the Rules of Procedure, the hearing began as scheduled in the Notice of Dispute Resolution. As the Tenants did not attend, the hearing was conducted in their absence as permitted by Rule 7.3 of the Rules of Procedure.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlord’s representatives indicates that they received the Notice of Dispute Resolution from the Tenant by way of email on June 23, 2022. The Landlord advised that they were not served with evidence.

The Landlord argued that email was not an approved form of service. The Landlord did not request an adjournment. During submissions, however, the Landlord’s agent indicated that utility statements were emailed to the Tenants, which indicates that the parties, in practice, do communicate via email.

The Regulations provide that email may be used as a method of service provided the parties agree to doing so beforehand. However, the parties practice shows that the Landlord communicates with the Tenants via email. The Landlord acknowledges receipt of the Notice of Dispute Resolution, attended the hearing, and did not request an adjournment. I find that pursuant to s. 71(2) of the *Act* the Landlord was sufficiently served with the Notice of Dispute Resolution.

As the Landlord denies receipt of the Tenants' evidence, I find that it would be procedurally unfair to the Landlord to include it into evidence and consider it as part of this application. The evidence provided by the Tenants shall not be considered by me as it was not served.

The Landlord provided a copy of the tenancy agreement as its evidence. However, the Landlord's agent confirmed that the Landlord's evidence was not served on the Tenants. As the Landlord did not serve its evidence on the Tenants, I find that it would be procedurally unfair to include the evidence and consider it in these reasons.

Issues to be Decided

- 1) Should the 10-Day Notice be cancelled?
- 2) If not, is the Landlord entitled to an order of possession?
- 3) Is the Landlord entitled to an order for unpaid rent?
- 4) Are the Tenants entitled to the return of their filing fee?

Background and Evidence

The Landlord's representative confirmed the following details with respect to the tenancy:

- The Tenants took occupancy of the rental unit on September 1, 2021.
- Rent of \$2,700.00 is due on the first day of each month.
- The Landlord holds a security deposit of \$1,750.00 in trust for the Tenants.

The Landlord's agent testified the rental unit is part of a residential property in which there are two other rental units, such that the Tenants' rental unit is responsible for 60% of the utilities and the other two rental units were responsible for the remainder. The Landlord's agent testified that this was set out in the tenancy agreement.

The Landlord's agent testified that the 10-Day Notice was served on the Tenants due to the issue of unpaid utilities. I was told the 10-Day Notice was posted to the Tenants door on April 22, 2022. The Landlord's agent testified that the Tenants felt that their hydro was too high and refused to continue paying the hydro.

I enquired whether the Tenants were given written notice of the utility bills prior to the 10-Day Notice being served. The Landlord's representatives indicate that the amount listed in 10-Day Notice corresponds to utilities from January to March 28, 2022. I was further advised that the Landlord emailed the Tenants the utility statement and a demand they pay their portion of hydro bill in either late March or early April 2022.

The Landlord's agent confirmed the Tenants refused to pay this amount. I was advised that the Tenants continue to reside within the rental unit.

Analysis

The Tenants apply to cancel the 10-Day Notice.

Based on the Landlord's evidence, I find that the 10-Day Notice was served on the Tenants in accordance with s. 88 by having it posted to their door on April 22, 2022. Pursuant to s. 90 of the *Act*, I deem that the Tenants received the 10-Day Notice on April 25, 2022.

Pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant. Pursuant to s. 46(4) of the *Act*, a tenant has 5 days from receiving a 10-day notice to end tenancy to either repay the overdue rent or file an application to dispute the notice. When a tenant has filed to dispute a 10-Day Notice, the burden of proving the notice was issued in compliance with the *Act* rests with the landlord.

Section 46(6) of the *Act* permits a landlord to treat unpaid utilities as unpaid rent if:

- a. the tenancy agreement requires the tenant to pay utility charges to the landlord;
and
- b. the utility charges remain unpaid more than 30 days after the landlord provides the tenant with a written demand that they be paid.

In the present instance, the Landlord's representatives testified that the Tenants were given an email in either late March or early April 2022 demanding payment of the utilities. The email covered utilities up until March 28, 2022. The 10-Day Notice was issued on April 22, 2022. Without considering the other aspects of the matter, I find that the Landlord failed to comply with the 30 day demand period imposed by s. 46(6)(b) such that the utilities could not be treated as unpaid rent as set out in the 10-Day Notice. Accordingly, I find that the 10-Day Notice was not properly issued. It is of no force or effect.

I grant the Tenants application and cancel the 10-Day Notice. The tenancy shall continue until it is ended in accordance with the *Act*.

Conclusion

I grant the Tenants' application under s. 46 and cancel the 10-Day Notice. It is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

The Tenants were successful in their application. I find that they are entitled to the return of their filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenants \$100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenants withhold \$100.00 from rent due to the Landlord on **one occasion** in full satisfaction of their filing fee.

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: August 26, 2022

Residential Tenancy Branch