



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPU, MNDCL-S, FFL

Introduction

The Landlord seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- an order of possession pursuant to s. 55 after serving a 10-Day Notice to End Tenancy signed on June 17, 2022 (the “10-Day Notice”);
- an order pursuant to s. 67 for monetary compensation; and
- return of his filing fee pursuant to s. 72.

G.Y. appeared as the Landlord. S.V. appeared as the Tenant and was joined by P.K. as her lawyer.

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. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

At the outset of the hearing, I enquired with the Landlord with respect to service of his application materials. He advised that he served the Tenant with some of his application materials on July 19, 2022. At first, I was advised by Tenant’s counsel that the Landlord had not provided her with anything. I enquired how the Tenant knew the application was taking place as she attended with counsel. The Tenant acknowledged receipt of the Notice of Dispute Resolution sometime in July 2022, though could not recall the specific date. I find that the Notice of Dispute Resolution was served in accordance with s. 89(2) of the *Act* and was acknowledged received by the Tenant.

The Landlord provided several tranches of evidence to the Residential Tenancy Branch: the first on July 14 and 15, 2022; the second on November 7, 2022; the third on November 14, 2022; a fourth on November 17, 2022; and a fifth on November 19, 2022.

The Landlord advised that initial evidence was served on July 19, 2022, though acknowledges that later evidence was not served. The Tenant could not recall receiving any evidence. Tenant's counsel advised that she was retained on or about November 7, 2022 and requested that the Landlord serve her with all application materials in advance of today's hearing. The Landlord stated he did not serve counsel as it is his obligation to serve the Tenant. I asked if the Landlord had proof of service regarding the evidence on July 19, 2022 and was told there was a proof of service form in evidence. No such form was provided to the Residential Tenancy Branch.

Rule 3.5 of the Rules of Procedure requires applicants to be prepared to demonstrate service of application materials at the hearing. In this instance, I have specific denial of receipt of the Landlord's evidence and no proof of service of the evidence. Inexplicably, the Landlord failed to forward copies of his evidence to Tenant's counsel in advance of the hearing, despite counsel making the request. Though I accept that the Landlord may be looking at the matter rigidly, as a matter of practical consideration it is prudent to forward it to the other side's lawyer if they ask for it.

In any event, I am unable to find that the Landlord's evidence was served on the conflicting evidence before me. I find it would be procedurally unfair to include the Landlord's evidence as the Tenant did not have an opportunity to review it in advance of the hearing. Accordingly, the Landlord's evidence shall not be included or considered by me.

Tenant's counsel advised having served the Landlord with the Tenant's response materials on November 14, 2022, which the Landlord acknowledged receiving. Based on its acknowledged receipt, I find that pursuant to s. 71(2) of the *Act* the Landlord was sufficiently served with the Tenant's response materials.

Preliminary Issue – Tenant's Adjournment Request

Tenant's counsel requested an adjournment of the matter to provide the Tenant an opportunity to file a cross-application. Written submissions from the Tenant indicate that the intention is for her to file an application for a rent reduction and was provided with an unfiled paper application with the Residential Tenancy Branch, which claims other relief. It was argued that the Tenant had insufficient notice to file her cross-application and that it would be appropriate for the matters to be heard concurrently. The Landlord disputed the adjournment request as the Tenant has had some months of notice of the present application.

I declined to grant the Tenant her adjournment request. The Tenant acknowledges receipt of the Notice of Dispute Resolution for today's hearing in July 2022. She had sufficient time to file a cross-application if she so wished. Further, I find that the request was an attempt to delay this matter. Rule 2.10 of the Rules of Procedure permits applications to be joined, but requires that the remedies sought in each application are similar. None of the claims in the Tenant's draft application are complimentary to the present application other than her application to cancel the 10-Day Notice. However, a claim for more time to dispute the 10-Day Notice, as would need to occur here, would be barred by s. 66(3) as the effective date in the notice has long since passed.

As the Notice of Dispute Resolution was served in accordance with the *Act*, the matter proceeded on the Landlord's application.

Issues to be Decided

- 1) Is the Landlord entitled to an order of possession?
- 2) Is the Landlord entitled to monetary compensation?
- 3) Is the Landlord entitled to his filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written evidence admitted and considered the oral submissions. However, only the evidence relevant to the issues in dispute will be referenced in this decision.

The Landlord testified that he served the 10-Day Notice by leaving it at the property on June 18, 2022. The Tenant was uncertain when she received the 10-Day Notice. I was provided with a copy of the 10-Day Notice in the Tenant's evidence, indicating that it was issued because the Tenant failed to pay utilities of \$2,540.71 following a demand for their payment on May 13, 2022.

The Landlord advised that utilities were the Tenant's responsibility. I am provided with a copy of the tenancy agreement by the Tenant, which indicates both in the tenancy agreement and in an addendum that the Tenant was responsible for paying the utilities.

The Landlord testified that municipal utilities are in his name, that these services are billed quarterly, and that he paid \$1,376.76 with respect to a February 28, 2022 invoice and \$1,620.87 with respect to a May 31, 2022 invoice. The Landlord testified that he provided a demand by way of text message to the Tenant on May 13, 2022 that these amounts be paid and that the utility statements were provided by way of email on the same date. The Landlord further testified that the tenancy began on November 1, 2021 such that there was a reduction to the first invoice as a portion of the utilities were incurred prior to the Tenant moving into the rental unit. The Landlord denies receipt of payment of the demand amount from the Tenant.

Tenant's counsel advised that the Tenant made payment of \$2,540.71 to the utility provider on June 20, 2022 and I was directed to a portion of the Tenant's banking information evidencing the payment. The Landlord acknowledged that the amount had been credited on his account but argued that the amount was not paid to him directly.

Though the Landlord made no submissions on this point, the Notice of Dispute Resolution lists that he is seeking \$2,540.71 in monetary compensation.

Analysis

The Landlord seeks an order of possession and monetary compensation after issuing a 10-Day Notice for unpaid utilities.

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(6) of the *Act*, a landlord may 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.

Pursuant to s. 46(4) of the *Act*, a tenant has 5-days from received a 10-day notice to end tenancy to either pay the overdue rent or file an application to dispute the notice.

Though the Tenant equivocated on receiving the 10-Day Notice, she clearly received it as she made payment on the amount demanded, which in her evidence was on June 20, 2022. I need not make a finding on when it was received because it is not material

on whether it was served on June 18, 2022 or deemed to have been received on June 21, 2022. Payment was made, as acknowledged by the parties, and I accept the Tenant's documentary evidence that this was done on June 20, 2022.

I would note that Tenant's counsel equivocated on service of the utility statements, despite the Tenant clearly having received the statements by reference to the Tenant's own evidence. It is not possible for the Tenant to have paid the municipal utility service through her online banking if she did not have the municipal account information. I accept that the accounts were in the Landlord's name such that the only means by which the Tenant could have received the account information is from the Landlord. Though not relevant to the present dispute, I found the Tenant was less than forthright in her evidence when it came to admitting uncontentious matters, such as when she received the 10-Day Notice or the utility statements.

I accept that the Tenant should have paid the Landlord directly. However, the amount was paid and it was credited on the account such that it would be applied to future invoices. The Landlord did receive \$2,540.71, albeit indirectly. I appreciate the Landlord's concern on future invoices with the utility provider. However, there is nothing stopping the Landlord from making demand for the full payment from the Tenant on the future invoices upon review of the statement.

I find that the 10-Day Notice is of no force or effect as the amount demanded was paid within 5-days of the Tenant receiving the notice. The Landlord's application for an order of possession pursuant to the 10-Day Notice is dismissed without leave to reapply.

As the Tenant has paid the \$2,540.71, I dismiss the Landlord's claim for monetary compensation for its repayment without leave to reapply.

The Landlord was unsuccessful in his application. I find that he is not entitled to the return of his filing fee. His claim under s. 72 is also dismissed without leave to reapply.

Conclusion

The Landlord's application is dismissed in its entirety 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 21, 2022

Residential Tenancy Branch