



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNR**

Introduction

This hearing dealt with an application by the tenants pursuant to the Residential Tenancy Act ("the Act") for orders as follows:

- cancellation of the landlord's 10 Day Notice to End Tenancy pursuant to section 46

Landlord DH appeared with a witness DH, and tenant JF appeared for himself. All parties were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses.

The parties confirmed they were not recording the hearing pursuant to RTB Rules of Procedure 6.11. The parties were affirmed.

The tenant confirmed receipt of the 10 Day Notice to End Tenancy ("10 Day Notice") dated October 3, 2022, effective October 13, 2022. Pursuant to section 88 of the Act the tenant is found to have been served with this notice in accordance with the Act.

The landlord confirmed receipt of tenant's dispute notice and materials in support of the application. I therefore find the landlord was served in accordance with sections 88 and 89 of the Act.

The landlord stated that they served the tenant with their materials responsive to the tenant's application by posting them on the door of the rental unit on November 4, 2022. The tenant did not dispute receipt of the landlord's materials. Therefore, I find that service is in accordance with section 89 of the Act.

Issue(s) to be Decided

1. Is the 10 Day Notice valid and enforceable against the tenant? If so, is the landlord entitled to an order of possession?

Background and Evidence

The tenancy commenced October 28, 2021, for a fixed term ending October 31, 2022. Rent is \$4,200.00 per month due the first day of the month and a security deposit of \$3,800.00 is held in trust by the landlords. Upon questioning the landlord confirmed that the entire \$3,800.00 is a security deposit. The tenant still occupies the rental unit.

The landlord stated that the tenant started to get behind in his rent payments in January 2022. They attempted to work with the tenant and allowed him to make several smaller rent payments over several months. Often the tenant would make more than one rent payment per month. After several months of the tenant failing to pay the entire amount of rent and to make up the rent arrears, they served the 10 Day Notice on the tenant on October 3, 2022.

The 10 Day Notice served stated that the tenant was in arrears on rent in the amount of \$7,500.00. The landlord stated that amount was incorrect, and it the tenant owed more than \$7,500.00. They provided the tenant with an amended amount owing; however, the amended document was not produced in evidence. The landlord also stated that the unpaid rent amounts included a \$50.00 per month late fee charge.

The landlord also provided a monetary order worksheet showing the amounts of rent paid by the tenant from January 2022 to the current date and also showing the amounts of rent owed. They included the \$50.00 late fee per month for later rent. The landlord points to an addendum to the tenancy agreement signed by the tenant that included the charge of the \$50.00 late fee per month. The landlord stated that the total amount of rent owed by the tenant to date is \$12,900.00 plus \$550.00 in late fees for a total of \$13,450.00.

The tenant agreed that he was in arrears in rent payments on October 3, 2022, when he received the 10 Day Notice. He stated that it was because he had lost some contracts through work. He wanted to mediate with the landlords and continue to work out paying the rent arrears in order to continue to support his family.

Analysis

RTB Rules of Procedure 6.6 states, "The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in

some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy." In this case, the landlord has the burden of proving the validity of the 10 Day Notice served on the tenant.

Under the Act the landlord was entitled to collect a security deposit from the tenant of \$2,100.00, half of the \$4,200.00 per month rent. The landlord collected \$3,800.00 for a security deposit. Section 19 of the Act states:

19 (1)A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.

(2)If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

The tenant was therefore entitled to withhold \$1,700.00 in rent payments.

Section 46 of the Act allows the landlord to issue a notice to end tenancy for unpaid rent and utilities.

Rent is defined in section 1 of the Act as:

"rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

- (a)a security deposit;
- (b)a pet damage deposit;
- (c)a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

The Act allows for fees to be prescribed in the regulations including fees for late rent. However, the Act is clear that the definition of rent does not include fees prescribed

under Section 97(2)(k), which include fees for late rent. Therefore, late fees cannot be included as rent owing.

Section 52 of the Act requires a notice to end tenancy to comply with certain requirements:

52 In order to be effective, a notice to end a tenancy must be in writing and must

- (a) be signed and dated by the landlord or tenant giving the notice,
- (b) give the address of the rental unit,
- (c) state the effective date of the notice,
- (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy,
- (d.1) for a notice under [section 45.1](#) [*tenant's notice: family violence or long-term care*], be accompanied by a statement made in accordance with [section 45.2](#) [*confirmation of eligibility*], and
- (e) when given by a landlord, be in the approved form.

In this case the grounds stated were that the tenant was in arrears on his rent of \$7,500.00. The landlord has the onus to establish the grounds.

The tenant agrees he was in arrears on rent on October 3, 2022. However the tenant may allowed deduct the amount of the overpayment on the security deposit. The landlord's calculations for the amount of unpaid rent also includes late fees that are not rent under the Act. The landlord has included different amounts in evidence of rent owing and the amounts owing are for different dates. I find the landlord has failed to satisfy their onus that the tenant owed more rent on October 3, 2022 than he was entitled to withhold due to the overpayment on the security deposit, and the late fees the landlord has included in their calculations.

I therefore grant the tenant's application to cancel the 10 Day Notice.

Conclusion

The 10 Day Notice is cancelled. The tenancy shall continue until it is ended in accordance with the Act. I order that the tenant is to put \$1,700.00 towards rent from his overpayment of the security deposit and the landlord is entitled to hold the remaining \$2,100.00 in trust as a security deposit.

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 29, 2022

Residential Tenancy Branch