



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNRL, FFL, CNR, OLC, FFT

Introduction

This was a cross application hearing that dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

This hearing also dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent, pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The landlord's agent (the "agent"), the landlord's property manager (the "manager") and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Naming of Parties

In both applications for dispute resolution tenants H.C. and W.T. are listed as tenants. Both parties entered into evidence an identical tenancy agreement that was signed by an agent of the landlord and tenant H.C.

W.T. is listed as a tenant in the tenancy agreement but did not sign it. Tenant H.C. testified that they tried to get W.T. to sign the tenancy agreement but he did not. Both the landlord and tenant H.C. testified that W.T. is a tenant.

I find that since W.T. declined to sign the tenancy agreement, he cannot be considered a tenant and cannot be bound by a contract he did not sign. I find that W.T. is an occupant, and not a tenant.

Pursuant to section 64 of the *Act*, amend both applications for dispute resolution to removed W.T. as a tenant.

Preliminary Issue – Vacant Rental Unit

At the outset of the hearing both parties agreed that the tenancy has ended. The tenant testified that she moved out on November 1, 2022 and that W.T. moved out on November 21, 2022.

The tenants' application for cancellation of the Notice and for an order for the landlord to comply with the Act and the landlord's application for an order of possession are moot since the tenancy has ended and the tenant left the rental unit.

Section 62(4)(b) of the Act states an application should be dismissed if the application or part of an application for dispute resolution does not disclose a dispute that may be determined under the Act. I exercise my authority under section 62(4)(b) of the Act to dismiss the tenants' application for cancellation of the Notice and for an order for the landlord to comply with the Act and the landlord's application for an order of possession, without leave to reapply.

As the tenant was not successful in their application for dispute resolution, I find that the tenant is not entitled to recover the \$100.00 filing fee from the landlord.

Preliminary Issue- Service

The tenant testified that she served the landlord with her application for dispute resolution and evidence via registered mail on July 25, 2022. The agent confirmed receipt. I find that the above documents were served in accordance with section 88 and 89 of the *Act*.

The agent testified that the tenant was served with the landlord's application for dispute resolution and evidence via registered mail on August 25, 2022. The landlord entered into evidence a registered mail receipt dated August 25, 2022. The customer receipt for same was also entered into evidence and bears the tenant's name and address. The Canada Post website states that notice cards for the above package were left at the subject rental property on August 26, 2022 and September 1, 2022.

The tenant testified that she did not receive the above package.

Based on the Canada Post receipt and customer receipts entered into evidence I find that the agent has proved that the tenant was served with the landlord's application for dispute resolution and evidence in accordance with section 89 of the *Act*. Based on the Canada Post website I find that notice cards for the above mailing were left at the subject rental property on August 26, 2022 and September 1, 2022. I find, on a balance of probabilities, that the tenant failed to pick up their registered mail. Failure to pick up registered mail does not defeat the deeming provision found in section 90 of the *Act*. Pursuant to section 90 of the *Act*, I find that the tenant was deemed served with the landlord's application for dispute resolution and evidence on August 30, 2022.

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to recover the filing fee for this application from the tenant, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 1, 2018 and has ended. Both parties agree that at the start of this tenancy, rent was set at \$1,000.00 per month and parking was \$15.00 per month. Both parties agree that in October 2021, rent was \$1,035.00 per month, and the tenant paid an additional \$15.00 per month for parking and \$75.00 per month for storage.

The agent testified that the tenant received a reduced rent because she was employed with the landlord company. The agent testified that the tenancy agreement states that when the tenant's employments ends, the rent will increase to the market rate. Term 49 of the tenancy agreement states:

Rent is set at \$1000.00 - employee price

If no longer employed with [the landlord] rent will be adjusted to market value

The landlord initialled the above term, but the tenant did not. I note that both an agent for the landlord and the tenant initialled terms 47-48 which pertain to restrictions on smoking, pets, bbq's and Christmas trees.

The tenant testified that when the tenancy agreement was signed the then agent told her that rent was \$1,300.00 per month and that she was receiving a \$300.00 rent reduction because she was employed by the landlord. The tenant testified that she agreed with everything in the tenancy agreement. Later in the hearing, when questioned as to why term 49 was not initialed, the tenant testified that she did sign term 49 because she did not agree to "market value" because it was unclear what that meant and how much that rent increase would be.

The agent submitted that the tenant's testimony is inconsistent in that she first testified that she agreed to the contents of the tenancy agreement when she signed it and that later in the hearing, she stated that she did not agree with term 49.

The tenant testified that she agreed with rent increasing if the employment ended, but did not agree to an unspecified amount of rent increase.

Both parties agree that the tenant's employment ended in October of 2021. The agent testified that in November of 2021 the tenant was sent a letter informing the tenant that her rent would increase to \$1,650.00 effective March 1, 2022. The landlord entered into evidence a letter to the tenant dated November 22, 2021 which states:

...Please understand that once no longer employed with [the landlord] you are no longer eligible for employee discounts such as reduced rent and cable at no charge in partner with [redacted]. As your release date was October 15th we would like to offer you a grace period of 4.5 months before raising your rent to market value. Effective March 1, 2022 the rent on [the subject rental property] will increase from \$1035.00 to \$1,650.00.....

The tenant testified that she never agreed to such a large increase and that the landlord never defined what "market rent" meant.

The agent testified that market rent for other three bedroom units, like the one occupied by the tenant actually rent for \$2,100.00; though, the tenant's unit is not as updated as rental units renting for \$2,100.00. The agent testified that the landlord was being considerate only raising the tenant's rent to \$1,650.00.

Both parties agree that from March to August 2022 the tenant paid \$1,140.00 per month comprised as follows:

- Rent: \$1035.00,
- Storage: \$75.00
- Parking: \$15.00

The landlord's application seeks the difference in the "market value" rent of \$1,650.00 and the rent paid by the tenant from March 2022 to July 2022.

The landlord testified that the tenant has not paid any rent for the period of September 2022 to November 2022. The tenant testified that she paid rent in full for September and October 2022 via bank draft and that for November 2022, she paid \$500.00 via bank draft and authorized the landlord to retain her security deposit in the amount of \$500.00 leaving only a small amount owing. Neither party provided any documentary evidence

pertaining to rent payments made or not made from September 2022 to November 2022. Both parties testified that they could provide evidence to support their position.

Analysis

I find that term 49 does not provide a set amount that the tenant's rent would be increased if the tenant's employment ended and does not provide a formula for determining what market rent for the subject rental property is. I find that term 49 of the tenancy agreement is too vague to be enforced as advanced by the landlord and is therefore void.

The landlord did not provide any documentary or testimonial evidence regarding how the "market rate" rent of \$1,650.00 was arrived at and has not otherwise proved that \$1,650.00 for the subject rental property is market rent.

I find that even if term 49 of the tenancy agreement were specific enough to be enforced, the landlord has not proved, on a balance of probabilities that \$1,650.00 is market rate for the subject rental property. Pursuant to section 67 of the *Act* and Residential Tenancy Policy Guideline #16, in order to be successful in a monetary claim, the claimant must prove the value of their alleged loss. As the landlord has not proved the "market value" for the subject rental property, the landlord has failed to prove their alleged loss of rent and so their claim fails.

I dismiss, without leave to reapply, the landlord's claim for unpaid rent from March 2022 to July 2022, because both parties agree that rent of \$1,035.00 was paid by the tenant for those months. As term 49 of the tenancy agreement is void, I find that the rental rate of the subject rental property from March 2021 to November 2022 was \$1,035.00 per month. As rent was paid in full, the tenant does not owe the landlord any money for unpaid rent from March to July, 2022.

Additionally, I am not satisfied that the tenant agreed to term 49 as it was not initialled by the tenant and other neighbouring sections were. I find that the totality of the evidence before me renders term 49 of the tenancy agreement null and void. I find that the "inconsistency" pointed out by the agent regarding the tenant's testimony on term 49, is more in the nature of expanding their position and is not a direct contradiction.

Section 55(1.1) of the *Act* states that if the tenant's application to cancel the Notice is dismissed and the Notice complies with section 52 of the *Act*, the landlord is entitled to a monetary order for all unpaid rent.

Upon review of the Notice, I find that it meets the form and content requirements of section 52 of the *Act*.

As I have determined that rent for August 2022 was \$1,035.00 per month and both parties agree that the tenant paid \$1,035.00 in rent for August 2022, I find that the landlord is not entitled to a monetary order for unpaid rent under section 55(1.1) of the *Act* for August 2022's rent.

As neither party has submitted documentary evidence pertaining to rent from September to November 2022 and the testimony of the parties is discordant, I find that I am not able to fairly adjudicate that claim. I therefore make no finding under section 55(1.1) of the *Act* regarding what rent was or was not paid from September 2022 to November 2022 and grant the landlord leave to reapply for the aforementioned rent. In any future hearing, the parties may submit evidence to support their respective positions.

As the landlord was not successful in the landlord's application for dispute resolution for unpaid rent from March to July 2022, I find that the landlord is not entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*.

Conclusion

The tenant's application is dismissed without leave to reapply.

The landlord's application is dismissed without leave to reapply.

The landlord has leave to apply for unpaid rent from September 2022 to November 2022.

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: December 16, 2022

Residential Tenancy Branch