



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNRL-S, FFL

Introduction

This hearing was convened by way of conference call concerning an application made by the landlord seeking an Order of Possession and a monetary order for unpaid rent or utilities; an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of the application.

The landlord was represented at the hearing by an agent who gave affirmed testimony and provided evidentiary material in advance of the hearing. The tenant also attended with an interpreter and gave affirmed testimony, and the interpreter was affirmed to well and truly interpret the proceedings from the English language to the tenant's Native language and from the tenant's Native language to the English language to the best of the interpreter's skill and ability.

During the course of the hearing the tenant indicated that evidence had been uploaded to the Residential Tenancy Branch portal, but that evidence is not visible. The only evidence I have received is a movie, which I cannot view but can hear audio. The landlord's agent contacted the owner during the hearing and was advised that the tenant had provided "some paper." Since the landlord has received some evidence of the tenant but did not provide it to the landlord's agent, I permitted the tenant to upload the evidence to the Residential Tenancy Branch portal after the hearing had concluded.

I now have the tenant's evidentiary material, and all evidence provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Has the landlord established that the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities was issued in accordance with the *Residential Tenancy Act*?
- Has the landlord established a monetary claim as against the tenant for unpaid rent?
- Should the landlord be permitted to keep all or part of the security deposit in full or partial satisfaction of the claim?

Background and Evidence

The landlord's agent testified that this month-to-month tenancy began on July 1, 2021 and the tenant still resides in the rental unit. Rent in the amount of \$1,400.00 is payable on the 1st day of each month. On July 1, 2021 the landlord collected a security deposit from the tenant in the amount of \$700.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a basement suite, and the landlord resides in the upper level of the home. A copy of the tenancy agreement has been provided as evidence for this hearing.

The landlord's agent further testified that on August 2, 2022 the tenant was served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities by registered mail, and a copy has been provided for this hearing. It is dated August 2, 2022 and contains an effective date of vacancy of August 13, 2022 for unpaid rent in the amount of \$1,100.00 that was due on August 1, 2022.

The tenant paid \$1,550.00 for each of the months of June and July, 2022, so the balance due was \$1,100.00 for the month of August. The tenant paid \$850.00, leaving a balance due of \$250.00 for August, 2022. On September 1, 2022 the tenant paid \$1,400.00 as well as \$1,400.00 on November 2, 2022 and December 2, 2022 by e-transfer, so no receipts were issued. The tenant is still in arrears of rent the sum of \$250.00.

The tenant testified that the tenancy began on July 1, 2021 and rent of \$1,400.00 is due on the 1st day of each month, and the tenant paid a security deposit in the amount of \$700.00.

The tenant did not dispute the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities and testified that when the tenant called the Residential Tenancy Branch, the tenant was told to not to dispute it but to continue with the regular monthly rent payments, and the tenant was not aware of the information that he had to dispute it.

In January, 2022 the landlord asked for \$50.00 per month extra, and the tenant paid \$1,450 on January 2, 2022 and onward to May, 2022, which was \$50.00 extra for 5 months. Then the landlord told the tenant that the tenant can pay an additional \$100.00 or vacate the property, so the tenant paid that amount for June and July, 2022.

The tenant didn't want to move out of the rental unit because one of his 3 children is handicapped and had surgery. The tenant agreed to pay extra to prevent having to move out. After paying \$1,550.00 for June and July, the tenant made a new agreement and signed it and gave it to the landlord to sign, but the landlord didn't sign it, and instead gave the notice to end the tenancy. The tenant agrees that he paid \$850.00 for August, 2022 rent on August 9, 2022. The tenant has never paid less than \$1,400.00 except for August, as advised by the Residential Tenancy Branch. Payments were made sometimes on the 1st of the month, and sometimes later, or the e-transfers would time out. No passwords are required for accepting the payments.

The tenant has provided e-transfer documents as follows:

- June 16, 2021 in the amount of \$500.00;
- July 5, 2021 in the amount of \$1,400.00;
- August 3, 2021 in the amount of \$1,400.00;
- September 3, 2021 in the amount of \$1,400.00;
- October 5, 2021 in the amount of \$1,400.00;
- November 2, 2021 in the amount of \$1,400.00;
- \$1,400.00 dated December 3, 2021;
- \$1,430.00 dated January 2, 2022
- \$1,470.00 dated February 2, 2022;
- March 4, 2022 in the amount of \$1,450.00;
- April 1, 2022 in the amount of \$1,450.00;
- May 2, 2022 in the amount of \$1,450.00;
- June 2, 2022 in the amount of \$100.00;
- June 2, 2022 in the amount of \$1,450.00;
- July 2, 2022 in the amount of \$1,550.00;
- August 9, 2022 in the amount of \$850.00;
- September 1, 2022 in the amount of \$1,400.00;

- October 3, 2022 in the amount of \$1,400.00;
- November 2, 2022 in the amount of \$1,400.00.

Analysis

Where a landlord seeks an Order of Possession for unpaid rent, the onus is on the landlord to establish that the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the Notice) was given in accordance with the *Residential Tenancy Act*.

The *Act* also states:

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 [*form and content of notice to end tenancy*].

(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.

I have reviewed the Notice, and I find that it is in the approved form and contains information required by the *Act*.

The law also states that if a tenant pays the rent in full within 5 days of receiving the Notice, the Notice is of no effect. In this case, the rental amount is \$1,400.00 per month. Although the tenant has been late with rent, I am not satisfied that the landlord has established that the tenant owes the landlord \$250.00 as claimed.

I have reviewed all of the evidentiary material, including the e-transfers provided by the tenant and it is clear that the tenant made additional payments totaling \$550.00 from January, 2022 until August, 2022, and the tenant recommenced payments of \$1,400.00 on September 1, 2022. However, the tenant paid \$850.00 on August 9, 2022, reducing the overpayments to \$0. The landlord's evidence contains an accounting of rent due, paid and owing from August 9, 2022 to November 1, 2022, but does not take into account any of the overpayments made prior.

Pursuant to Section 46(3) of the *Act* as set out above, I find that the tenant had the right to deduct the overpayments from the rent. Therefore, the landlord's application for an

Order of Possession cannot succeed; I find that the landlord has not issued the Notice in accordance with the *Act*. The landlord's application is dismissed and the tenancy continues.

With respect to the landlord's monetary claim, as indicated above, I find that the landlord has failed to establish that any rent is owed, and the application is dismissed.

Since the landlord has not been successful with the application, the landlord is not entitled to recovery of the filing fee.

Conclusion

For the reasons set out above, the landlord's application is hereby 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: December 06, 2022

Residential Tenancy Branch