



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes OPB, OPU, MNRL – S, LRE, LAT, OLC

Introduction

This hearing had been set to deal with three applications that had been joined together by the Residential Tenancy Branch. The landlord made two of the applications. The tenant(s) filed the third application.

Only the landlord appeared at the hearing. The landlord was affirmed. The landlord testified that he is not the owner of the property but that acts as the property manager on behalf of the owner who resides out of the country. A property manager who exercises the rights and responsibilities concerning with respect to a tenancy on behalf of the owner is a “landlord” by definition under the section 1 of the Act. Therefore, I have referred to the property manager as the “landlord” in this decision.

The landlord had applied for an Order of Possession based on the end of the fixed term. The landlord subsequently applied for an Order of Possession based on unpaid rent and/or utilities. The landlord had also included a claim to recover unpaid rent and utilities. The tenant requested orders for the landlord to comply with the Act, regulations or tenancy agreement; authorization to change the locks; and, orders to suspend or restrict the landlord’s right to enter the rental unit.

Since there was no appearance on part of the tenant, I explored service of the hearing materials on the tenant. The landlord testified that his two proceeding packages were served by giving them to a woman who answered the door of the rental unit and stated she resided in the rental unit. The landlord testified that he served the materials within the three day time limit for doing so, as instructed by the Residential Tenancy Branch. The landlord stated that he wife had taken photographs of him doing so.

I accepted the tenant was sufficiently served in a manner that complies with section 89(2)(c) the Act. Section 89(2)(c) permits a landlord to give a proceeding package to an

adult person who apparently resides at the rental unit with the tenant where the application pertains to an Order of Possession. Accordingly, I continue to consider the landlord's applications for an Order of Possession but I do not consider the landlord's monetary claims since a monetary claim must be served in a manner that complies with section 89(1) of the Act. The landlord's monetary claim against the tenant is dismissed with leave to reapply.

As for the tenant's application, the landlord testified that he was not served with the tenant's proceeding package. I dismiss the tenant's application since I was not satisfied it was served. I dismiss the tenant's application without leave as I have found the tenancy to be at an end for reasons provided in this decision and the remedies sought by the tenant are moot where a tenancy is over.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession based on:
 - a. the end of the fixed term of the tenancy agreement; or
 - b. due to unpaid rent or utilities?

Background and Evidence

The landlord submitted a copy of the written tenancy agreement that provides for the following terms, in part:

- the tenancy started on May 1, 2022
- the monthly rent is \$1000.00 due on the first day of every month
- the tenant paid a security deposit of \$500.00
- the tenancy has was for a fixed term set to expire on October 30, 2022
- at the end of the tenancy the tenant is required to vacate the rental unit for the following stated reason: "owner will move back"

In the landlord's first Application for Dispute Resolution, the landlord requested an Order of Possession based on the end of the fixed term clause. During the hearing, the landlord testified that the owner of the property is his friend and that the owner has resided out of the country for the past 7 years and his friend is not returning to Canada.

In the landlord's second Application for Dispute Resolution the landlord requested an Order of Possession for unpaid rent and utilities. In support of this request, the landlord

provide a copy of a 10 day Notice to End Tenancy for Unpaid rent or Utilities ("10 Day Notice") dated December 2, 2022 with an effective date of December 12, 2022.

The landlord testified that he served the 10 Day Notice by giving it to a woman who stated she resides in the rental unit on December 2, 2022 and the landlord's wife took a photograph of the landlord serving the 10 Day Notice.

The 10 Day Notice indicates the tenant failed to pay rent of \$2000.00 that was due on October 1, 2022 and December 1, 2022; however, the Applications for Dispute Resolution that were filed by the landlord indicate the landlord was claiming unpaid rent for the month of November 2022 and for "three months" when he filed the second application in January 2023. I found the 10 Day Notice inconsistent with the Applications for Dispute Resolution and I instructed the landlord to check his records during the hearing to confirm rent payments received from the tenant.

The landlord testified that he has a receipt book and the receipt book shows the last month the tenant paid rent was for September 2022 by way of partial payments. The landlord also testified that he may have received e-transfers from the tenant and in checking for e-transfers he found a payment of \$800.00 on October 10, 2022 and that the tenant had made an unauthorized deduction of \$200.00 for a fridge.

Documentary evidence provided for my review included a copy of the tenancy agreement and the 10 Day Notice.

Analysis

Upon consideration of the unopposed evidence before me, I provide the following findings and reasons.

Since 2017 when the Act was amended, the only reason a landlord may include a vacate clause is where the owner intends to move into the rental unit at the end of the fixed term tenancy. As for the landlord's request for an Order of Possession based on the end of the fixed term, I deny that request as it was evident in speaking with the landlord that the owner did not and does not intend to reside in the rental unit and I find the vacate clause to be unenforceable.

I proceed to consider whether the landlord is entitled to an Order of Possession due to unpaid rent and/or utilities.

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent. I was not provided any evidence to suggest the tenant has a lawful right to withhold rent from the landlord.

Where a tenant does not pay rent the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent. When a tenant receives a 10 Day Notice the tenant has five days to pay the outstanding rent to nullify the 10 Day Notice or the tenant has five days to dispute the 10 Day Notice by filing an Application for Dispute Resolution. If a tenant does not pay the outstanding rent or dispute the 10 Day Notice within five days then, pursuant to section 46(5) of the Act, the tenant is conclusively presumed to have accepted the tenancy will end and must vacate the rental unit by the effective date of the 10 Day Notice.

I accept the unopposed evidence before me that the tenant was required to pay rent of \$1000.00 on the first day of every month. It appears the landlord considered the payment made on October 10, 2022 to satisfy rent for November 2022 when the landlord served the 10 Day Notice on December 2, 2022, leaving unpaid rent for October 2022 and December 2022 unpaid.

I also accept that the tenant was duly served with the 10 Day Notice when it was given to an adult woman who apparently resides in the rental unit with the tenant as permitted under section 88(e) of the Act. Upon receiving the 10 Day Notice, the tenant had five days to either pay the outstanding rent or file to dispute the 10 Day Notice. The tenant did neither and I find the tenancy ended on the effective date of December 12, 2022. Therefore, I find the landlord is entitled to regain possession of the rental unit and I provide the landlord with an Order of Possession effective two (2) days after service.

Conclusion

The landlord is provided an Order of Possession due to unpaid rent effective two (2) days after service.

The landlord's monetary claim is dismissed with leave.

The tenant's application is dismissed without leave.

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: March 30, 2023

Residential Tenancy Branch