



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Introduction

This hearing dealt with the tenants' Application for Dispute Resolution (Application) under the *Residential Tenancy Act* (the "Act") filed on October 3, 2013, for:

- cancellation of the landlords' 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) issued under section 46 of the Act;
- cancellation of the landlords' Two Month Notice to End Tenancy for Landlord's Use of Property (Two Month Notice) issued under section 49 of the Act;
- compensation for monetary loss or other money owed; and
- authorization to recover the filing fee for this application from the landlords under section 72 of the Act.

This hearing also dealt with the landlords' Application under the Act filed on October 11, 2023, for:

- enforcement of the 10 Day Notice under sections 46 and 55 of the Act;
- recovery of unpaid rent under sections 7, 26, and 67 of the Act; and
- authorization to recover the filing fee for this application from the tenants under section 72 of the Act.

Tenants M.R. and J.R. attended the hearing for the tenants.

Agents J.B. and S.D. attended the hearing for the landlords.

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

The parties acknowledged service of each others Proceeding Packages and raised no concerns regarding service. I therefore find the parties duly served with the Proceeding Packages in accordance with the Act. The hearing of both Applications therefore proceeded as scheduled.

Service of Evidence

The tenants acknowledged service of the landlords' evidence in person on October 30, 2023. As a result, and as this date complies with the evidence service timelines set out in the Residential Tenancy Branch Rules of Procedure (Rules of Procedure), I therefore find the tenants duly served with the landlords' documentary evidence and I accept it for consideration.

However, the agents denied receipt of any documentary evidence from the tenants, stating that the landlords only received the Proceeding Package. The tenants stated that they submitted their evidence to the Residential Tenancy Branch (Branch), and did not know they needed to also serve it on the landlords.

The Proceeding Package emailed to the tenants by the Branch on October 10, 2023, states on page two that the Rules of Procedure apply, and provides a hyperlink to the Rules of Procedure. Rules 3.5 and 3.16 state that at the hearing, the parties must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent to their application was served with all evidence as required by the Act and the Rules of Procedure. Rule 3.14 of the Rules of Procedure states that documentary and digital evidence that is intended to be relied on at the hearing by the applicant must be received by the respondent and the Branch not less than 14 days before the hearing. Rule 3.15 of the Rules of procedure states that the respondent must ensure evidence that they intend to rely on at the hearing is served on the applicant(s) and submitted to the Branch as soon as possible, and must be received by the applicant and the Branch not less than seven days before the hearing.

Further to the above, the tenants were emailed an evidence service reminder on October 24, 2023, which provided them with information on evidence service requirements and deadlines.

The ability to know the case against you is fundamental to the dispute resolution process. I therefore find that it would be a breach of the Act, the Rules of Procedure, and the principles of administrative fairness, as well as unreasonably prejudicial to the landlords, to accept the tenants' documentary evidence for consideration. I have therefore not considered it in making this decision.

Issues to be Decided

Are the tenants entitled to cancellation of the landlords' 10 Day Notice issued under section 46 of the Act? If not, are the landlords entitled to an Order of Possession under section 55 of the Act?

Are the landlords entitled to recovery of unpaid rent under sections 7, 26, and 67 of the Act?

Are the tenants entitled to cancellation of the landlords' Two Month Notice issued under section 49 of the Act?

Are the tenants entitled to compensation for monetary loss or other money owed?

Are the parties entitled to recovery of their respective filing fees under section 72 of the Act?

Background and Evidence

The parties agreed that rent in the amount of \$1,800.00 was due under the tenancy agreement on the first day of each month, and that an \$850.00 security deposit was paid at the start of the tenancy in 2018, which the landlords still hold in trust.

The parties agreed that the tenants were personally served with a Two Month Notice on September 30, 2023, which they disputed on October 3, 2023. The Two Month Notice is signed and dated September 30, 2023, has an effective date of November 30, 2023, and states that the tenancy is being ended because the child of the landlord or the child of the landlord's spouse intends to occupy the rental unit.

The parties agreed that no rent was paid by the tenants for October of 2023, and that the tenants vacated the rental unit on October 31, 2023. They also agreed no compensation under section 51(1) of the Act has been paid by the landlords to the tenants.

The agents stated that when rent was not paid as required on October 1, 2023, the 10 Day Notice was drafted and personally served on the tenants on October 2, 2023. The tenants acknowledged personal receipt on that date, and disputed the 10 Day Notice on October 3, 2023. The 10 Day Notice is signed and dated October 2, 2023, has an effective date of October 12, 2023, and states that the tenancy is being ended because the tenants failed to pay the \$1,800.00 in rent due on October 1, 2023.

The tenants argued that they had a right under the Act to deduct October 2023 rent as they were served with the Two Month Notice and planned to vacate the rental unit at the end of October. The agents disagreed, stating that the tenants never provided proper notice under section 50 of the Act to end their tenancy earlier than November 30, 2023. They also argued that the tenants were only entitled to withhold the last months rent, which would be November 2023, not October of 2023. The tenants therefore sought cancellation of the 10 Day Notice and the agents sought its enforcement and recovery of the \$1,800.00 in unpaid rent for October of 2023. The agents stated that there was no loss of rent for November of 2023, as the child of the landlord or the child of the landlord's spouse moved into the rental unit.

The tenants sought the return of their security deposit, however, the parties agreed that as of the date of the hearing, the tenants had not yet provided a forwarding address to the landlords in writing.

Finally, the tenants also sought \$2,000.00 in costs incurred to move. They argued that the Two Month Notice was not served in good faith, and stated that they moved out of the rental unit on October 31, 2023, rather than waiting for the hearing as they have a young child and did not want to risk having to move in winter. The agents argued that no moving costs are owed as both the Two Month Notice and the 10 Day Notice were properly served in good faith. They stated that as there was no breach of the Act by the landlords, there can be no compensation owed to the tenants.

Both parties sought recovery of their respective filing fees.

Analysis

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

Are the tenants entitled to cancellation of the landlords' 10 Day Notice issued under section 46 of the Act? If not, are the landlords entitled to an Order of Possession under section 55 of the Act?

The parties agreed that the 10 Day Notice was personally served on the tenants on October 2, 2023. The 10 Day Notice was disputed by the tenants on October 3, 2023, which is within the time limit set out under section 46(4) of the Act. As a result, I find that the conclusive presumption provision of section 46(5) of the Act does not apply.

Having reviewed the 10 Day Notice, I am satisfied that it complies with section 52 of the Act. Although the tenants stated that they believed that they had a right to withhold the rent under section 51(1) of the Act, I do not find that to be the case. Although the parties agreed that the tenants were personally served with a Two Month Notice on September 30, 2023, the effective date of that notice was November 30, 2023. As a result, I find that November of 2023 was the last month of the tenancy. Under section 51(1.1) of the Act, tenants who have been served with a Two Month Notice are only entitled to withhold the last months rent. As a result, I find that the tenants were therefore not entitled to withhold October 2023 rent in its entirety.

If the tenants wished to end their tenancy earlier than November 30, 2023, they had two options:

1. Pay the full rent on October 1, 2023, as required under their tenancy agreement, then upon giving proper written notice to end their tenancy under section 50(1), obtain a refund of partial rent paid for the period after the effective date of their notice, pursuant to section 51(2) of the Act; or
2. Give the landlords proper written notice to end their tenancy early under section 50(1)(a) of the Act, and pay the landlords on or before October 1, 2023, the amount of rent due in October up to and including the effective date of their early notice.

The tenants did neither. As a result, I find that they were not entitled to either end their tenancy on October 31, 2023, or to withhold any amount of rent for October 2023. The tenants neither paid the \$1,800.00 in rent owed for October as set out on the 10 Day Notice, nor had a valid reason under the Act to withhold it. Having reviewed the 10 Day Notice, I am also satisfied that it complies with section 52 of the Act. I therefore find that the 10 Day Notice is valid, and I dismiss the tenants' Application seeking its cancellation without leave to reapply.

Based on the above, I find that the tenancy ended on the effective date of the 10 Day Notice, October 12, 2023, and that the tenants therefore overheld the rental unit until October 31, 2023, when they vacated.

As the parties agreed that the tenants vacated the rental unit on October 31, 2023, and the agents agreed that the landlords have possession of the rental unit, I have not granted an Order of Possession to the landlords under section 55 of the Act.

Are the landlords entitled to recovery of unpaid rent under sections 7, 26, and 67 of the Act?

Section 26 of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether the landlord complies with the Act, the regulations, or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Under sections 7 and 67 of the Act, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. In this case, to prove a loss, the landlords must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the Act, regulation, or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlords followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

During the hearing the tenants stated that they thought they could withhold October 2023 rent as they were served with the Two Month Notice. Section 51(1) of the Act states that a tenant who receives a notice to end a tenancy under section 49 of the Act is entitled to receive from the landlord on or before the effective date of the landlord's notice, an amount that is the equivalent of one month's rent payable under the tenancy agreement. The parties agreed that rent was \$1,800.00 per month and that on September 30, 2023, the tenants received by way of personal service, the Two Month Notice. As a result, I find that the tenants were entitled to One Month's compensation in the amount of \$1,800.00 on or before November 30, 2023, pursuant to sections 51(1), 62(2) and 62(3) of the Act, regardless of whether the tenancy subsequently ended due to the Two Month Notice.

Despite the above, I find that the tenants were not entitled under the Act to withhold October 2023 rent, as set out above. Section 51(1.1) of the Act states that a tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent. I find that November 2023 was the last month under the tenancy agreement, not October 2023. If the tenants wished to end their tenancy earlier than November 30, 2023, and withhold any rent for October of 2023, they were required to comply with section 50(1) of the Act. Section 50(1) of the Act states that they were required to give at least 10 days written notice to end their tenancy earlier than November 30, 2023, and to pay rent up to and including the effective date of their own notice. The tenants acknowledged doing neither.

As a result, I find that they were not entitled to withhold October 2023 rent. As the parties agreed that rent was \$1,800.00, I therefore grant the landlords' application seeking recovery of this amount. However, the parties agreed that the tenants were not provided with the required compensation under section 51(1) of the Act. Pursuant to section 51(1), 62(2), 62(3), and 67 of the Act, I therefore award the tenants recovery of this amount.

The agents stated that the landlord suffered no loss of rent for November of 2023, as their child occupied the rental unit. As a result, I find that the amount owed to the landlords for October rent is offset by the amount owed to the tenants for statutory

compensation under section 51(1) of the Act. Therefore, neither party is awarded any compensation.

Are the tenants entitled to cancellation of the landlords' Two Month Notice issued under section 49 of the Act?

I have already found above that the 10 Day Notice dated October 2, 2023, was valid and enforceable, and that the tenancy ended on the effective date of the 10 Day Notice as a result. As the effective date of the 10 Day Notice, October 12, 2023, is over one and a half months prior to the effective date of the Two Month Notice, I therefore find that the tenancy ended due to the 10 Day Notice, and not the Two Month Notice. Effectively, the subsequently issued 10 Day Notice overrode the previously issued Two Month Notice, when the tenants failed to pay rent as required under the Act.

As the tenancy has already ended as set out above due to the 10 Day Notice, and the matter of possession is moot, I therefore dismiss the tenants' application seeking cancellation of the Two Month Notice without leave to reapply.

Are the tenants entitled to compensation for monetary loss or other money owed?

The tenants sought the return of their \$850.00 security deposit. However, the agents stated that the tenants have not yet provided the landlords with their forwarding address in writing, and the tenants agreed. As a result, I find that the tenants' request for the return of their security deposit under section 38 of the Act is premature. I therefore dismiss it with leave to reapply after they have provided their forwarding address to the landlords in writing. This is not an extension to the time limit set out in section 39 of the Act.

The tenants also sought \$2,000.00 in moving expenses as they believe they were improperly evicted. Under sections 7 and 67 of the Act, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. In this case, to prove a loss, the tenants must satisfy the following four elements on a balance of probabilities:

5. Proof that the damage or loss exists;
6. Proof that the damage or loss occurred due to the actions or neglect of the landlords in violation of the Act, regulation, or tenancy agreement;
7. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
8. Proof that the tenants followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

I appreciate the tenants' belief that the Two Month Notice was not served in good faith. However, rather than wait for the hearing so that I could determine whether the Two

Month Notice was valid, in which case the tenants may not have needed to move, the tenants chose not to pay their rent as required, resulting in the issuance of a valid 10 Day Notice and the end of the tenancy. As a result, I find that the tenancy ended because the tenants were served with a valid 10 Day Notice. Even if the tenant's had not been served with a valid 10 Day Notice, which they were, the tenants still chose to vacate the rental unit instead of waiting for the hearing on the validity of either notice. As a result, I find that even if I had not found that the tenancy ended on October 12, 2023, due to the 10 Day Notice, I would nevertheless have found that the tenants voluntarily vacated the rental unit, either of their own volition or in acceptance of one or both of the notices to end tenancy.

Based on the above, I am therefore not satisfied that the end of the tenancy, or the moving costs subsequently incurred by the tenants, are the result of a breach of the Act, regulation, or tenancy agreement by the landlords. I therefore dismiss the tenants' claim for recovery of these costs without leave to reapply.

Are the parties entitled to recovery of their respective filing fees under section 72 of the Act?

As the tenants were not successful in any of their claims, I decline to grant them recovery of their filing fee. As the landlords were successful in their claim for recovery of unpaid rent, I grant them recovery of their filing fee pursuant to section 72(1) of the Act. Pursuant to section 72(2)(b) of the Act, the landlord may therefore withhold \$100.00 from the tenants' \$850.00 security deposit and interest. The remaining balance of which must be dealt with in accordance with the Act.

Conclusion

The tenants' Application is dismissed, without leave to reapply, except for their claim for recovery of the security deposit. The tenants have leave to reapply for the return of their security deposit, if needed, once they have provided their forwarding address to the landlords in writing. This is not an extension to the time limit set out in section 39 of the Act.

The landlords are permitted to retain \$100.00 from the tenants' \$850.00 security deposit. The remaining balance, and any interest owed, must be dealt with in accordance with the Act.

This decision is made on authority delegated to me by the Director of the Branch under Section 9.1(1) of Act.

Dated: November 15, 2023

Residential Tenancy Branch