

DECISION

Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- cancellation of the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent (10 Day Notice) and an extension of the time limit to dispute the 10 Day Notice under sections 46 and 66 of the Act
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

The hearing also dealt with the Landlord's Application for Dispute Resolution under the Act for:

- an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (10 Day Notice) under sections 46 and 55 of the Act
- a Monetary Order for unpaid rent under section 67 of the Act
- a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement under section 67 of the Act
- authorization to retain all or a portion of the Tenant's security deposit in partial satisfaction of the Monetary Order requested under section 38 of the Act
- authorization to recover the filing fee for this application from the Tenant under section 72 of the Act

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

The Tenant's Notice of Dispute Resolution was served to the Landlord by registered mail, sent on January 5th, 2024. The Tenant provided a tracking number to confirm this service.

The Landlord's Notice of Dispute Resolution was served to the Tenant by registered mail, sent on January 7th, 2024. The Landlord provided a tracking number to confirm this service.

Preliminary Matters

At the outset of the hearing, the Tenant provided his correct legal name. The application has been amended accordingly.

Issues to be Decided

Should the Landlord's 10 Day Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?

Is the Tenant entitled to more time to cancel the Landlord's 10 Day Notice?

Is the Tenant entitled to recover the filing fee for this application from the Landlord?

Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?

Is the Landlord entitled to a Monetary Order for unpaid rent?

Is the Landlord entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?

Is the Landlord entitled to retain all or a portion of the Tenant's security deposit in partial satisfaction of the monetary award requested?

Is the Landlord entitled to recover the filing fee for this application from the Tenant?

Background and Evidence

I have reviewed all evidence, including the testimony of the parties, but will refer only to what I find relevant for my decision.

Evidence was provided showing that this tenancy began on September 1st, 2012. The parties dispute the amount of rent but agreed that rent is due on first day of the month. A security deposit of \$1,900 was paid at the beginning of the tenancy.

The Landlord's agents testified that the current rent is \$3,200, based on an oral agreement in 2016 reducing the rent from that payable under the original tenancy agreement. The Landlord submitted that the Tenant owed in excess of \$11,000 after December's rent was unpaid.

The Tenant HKL testified that he has paid rent in advance, at the request of the Landlord. He testified that the rent has been \$2,500 per month since 2020, when the parties agreed to reduce the rent. HKL submitted a spreadsheet showing payments made, bank records of the transfers to the Landlord, and an unexecuted copy of the alleged 2020 tenancy agreement. HKL testified that the tenancy agreement was prepared by the Landlord's accountant and signed at his office. HKL testified he does not have a signed copy of the agreement. The Tenant's accounting shows the Tenant had a balance of over \$35,000 at the end of 2023.

The Landlord's agents gave testimony of payments and outstanding amounts based on their ledger, a copy of which was not in evidence.

Analysis

Should the Landlord's 10 Day Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?

Is the Tenant entitled to more time to cancel the Landlord's 10 Day Notice?

Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?

Section 46 of the Act states that upon receipt of a 10 Day Notice, the tenant must, within five days, either pay the full amount of the arrears as indicated on the 10 Day Notice or dispute the 10 Day Notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch. If the tenant(s) do not pay the arrears or dispute the 10 Day Notice they are conclusively presumed to have accepted the end of the tenancy under section 46(5).

I find that the 10 Day Notice was deemed served to the Tenant on December 28th, 2023, pursuant to section 90 of the Act, and that the Tenant had until January 2nd, 2024, to dispute the 10 Day Notice or to pay the full amount of the arrears.

The Tenant has applied for dispute resolution requesting more time to cancel a notice to end tenancy. Section 66 of the Act states that the director may extend a time limit established by the Act only in exceptional circumstances. The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end tenancy beyond the effective date of the notice.

The Tenant disputed the Notice on January 4th, 2024. The Tenant stated that the delay in disputing the Notice was due to the holidays and the time necessary to gather and organize evidence. I cannot agree that this amounts to extraordinary circumstances. While the Notice was sent shortly before Christmas, it was deemed received after the statutory holidays of Christmas and Boxing Day. In addition, a tenant may always apply to dispute a notice and provide further evidence later.

The Tenant is therefore conclusively presumed to have accepted the end of the tenancy under section 46(5) on the effective date of the Notice.

For the above reasons, the Tenant's application for cancellation of the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent (10 Day Notice) and an extension of the time limit to dispute the 10 Day Notice under sections 46 and 66 of the Act is dismissed, without leave to reapply.

However, the conclusive presumption under section 46(5) does not relieve the landlord of the obligation to issue a Notice in compliance with the Act. A notice that does not comply with the Act is invalid and of no effect.

Section 46 allows a Landlord to end a tenancy by means of a 10 Day notice only when rent is unpaid after it is due. The Landlord bears the burden of showing that his Notice is valid, and therefore of demonstrating that rent was unpaid when the Notice was given.

When two parties to a dispute provide equally possible accounts of events or circumstances related to a dispute, the party making the claim has responsibility to provide evidence over and above their testimony to prove their claim.

The parties disagree on whether the Tenant has any unpaid rent. The Tenant says he is substantially ahead on rent; the Landlord claims the Tenant is more than \$10,000 in arrears. I find both accounts plausible; both reflect an unusual tenancy, but neither account is significantly more implausible.

While the Landlord's agents testified as to their statement of payments and amounts owing, the Landlord did not provide any documentary evidence to support their accounting of unpaid rent. The Tenant, on the other hand, has provided a ledger showing payments, bank records of those payments, and an unexecuted tenancy agreement substantiating their account of the current rent payable. I note that the bank records of rent payments show payments that are multiples of the amount of monthly rent claimed by the Tenant, not that claimed by the Landlord.

I therefore find that the Landlord has failed to prove, on a balance of probabilities, that the Tenant owed rent at the time the Notice was given.

The Landlord's application for an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) under sections 46 and 55 of the Act is dismissed, without leave to reapply on the basis of the Notice to End Tenancy dated December 23rd, 2023. The Notice to End Tenancy dated December 23rd is cancelled and of no force or effect. This tenancy continues until ended in accordance with the Act.

Is the Landlord entitled to a Monetary Order for unpaid rent?

Is the Landlord entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?

Is the Landlord entitled to retain all or a portion of the Tenant's security deposit in partial satisfaction of the monetary award requested?

As the Landlord has not proven that the Tenant owes any amount, these applications must be dismissed.

Is either party entitled to recover the filing fee for this application from the Landlord?

As neither party successful in this application, the Tenant's and Landlord's applications for authorization to recover the filing fee for their applications from the other party under section 72 of the Act are both dismissed, without leave to reapply.

Conclusion

The Tenant's application for cancellation of the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent (10 Day Notice) and an extension of the time limit to dispute the 10 Day Notice under sections 46 and 66 of the Act is dismissed, without leave to reapply.

The Landlord's application for an Order of Possession based on a 10 Day Notice to End Tenancy is dismissed, without leave to reapply.

The Notice to End Tenancy dated December 23rd, 2023 is cancelled and of no force or effect. This tenancy continues until ended in accordance with the Act.

The Landlord's application for a Monetary Order for unpaid rent under section 67 of the Act is dismissed, with leave to reapply.

The Landlord's application for a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement under section 67 of the Act is dismissed, with leave to reapply.

The Landlord's application to retain the Tenant's security deposit under section 72 of the Act is dismissed, with 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 Act.

Dated: February 28, 2024

Residential Tenancy Branch