



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes

Tenant: CNR

Landlord: MNSD, MNDC, OPR, MNR, FF

Introduction

This hearing dealt with Cross Applications for Dispute Resolution.

The Tenant applied to cancel a 10 Day Notice to End Tenancy ("the Notice") issued by the Landlord

The Landlord applied for an order of possession for unpaid rent, a monetary order, an order to retain the security deposit and to recover the filing fee for the Application.

Two Agents for the Landlord and the Tenant appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

Is the Tenant entitled to an Order cancelling the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent?

Has the Tenant breached the Act or tenancy agreement, entitling the Landlord to an Order of Possession and for monetary relief?

Background and Evidence

This tenancy started on June 1, 2010, on a fixed term basis with an expiry date of May 31, 2011. Monthly rent is \$1,275.00, payable on or before the 1st day of each month and a security deposit in the amount of \$675.50 was paid on May 3, 2010. Additionally

on or before the tenancy began, the Landlord collected the amount of \$1,275.00, for the last month's rent. I note there was an Agreement signed by the parties stating this amount would not be held as a security deposit and was a credit listed on the Tenant's account, to be put towards the last month's rent of this tenancy.

Pursuant to the rules of procedure for the Act, the Landlord proceeded first in the hearing and testified as to why the Tenant had been served a 10 Day Notice to End Tenancy.

The Agents for the Landlord testified that the additional month's rent paid in May 2010, pursuant to the "Last Month's Rent Agreement" was charged for any tenant who could not supply a credit reference, was not a security deposit, was not collecting interest, was a credit on the Tenant's ledger and would be applied toward the last month's rent upon legal written notice.

The Agents for the Landlord testified that they served the Tenant a 10 day Notice to End Tenancy on September 2, 2010, by posting it on the door. The Notice stated the Tenant owed \$975.00. I note that the Tenant filed his application for dispute resolution on September 3, 2010, within the five day time frame in accordance with the Act.

The Agents for the Landlord testified that the Notice was issued because the Tenant had not paid rent for the month of September, explaining that they denied the Tenant's request of to apply the one month advanced rent toward the September rent. The Agents for the Landlord testified that the Tenant did make a payment of \$300.00 in September and paid \$1,020.00 for October 2010.

The Agents for the Landlord testified that the current amount of unpaid rent is \$1,410.00, which includes the filing fee and late fees assessed against the Tenant.

The Tenant gave affirmed testimony and submitted evidence stating that he spoke with the Landlord a week before the September rent was due, asking that the additional month's rent he paid at the beginning of the tenancy be applied towards the September rent. The Tenant testified that he thought he could use this amount when needed as it was a month's rent paid in advance. The Tenant testified that he did not understand the meaning of the "Last Month's Rent Agreement" and stated he did not receive a copy of it until he asked to apply the extra month to September.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

RTB Policy Guideline #29 (Security Deposits) states:

*"The Residential Tenancy Act permits a landlord to collect a security deposit.... The Act contains a definition of "security deposit," which also contains exclusions. As a result of the definition of a security deposit in the RTA and the regulations, the following payments by a tenant, or monies received by a landlord, **irrespective** of any agreement between a landlord or a tenant would be, in form part of, a security deposit:*

- *The last month's rent*
- *.....*

The RTA requires that a security deposit must not exceed one-half of one month's rent. If one or more of the above payments, together with other monies paid, exceed one-half of one month's rent then the remedies afforded by the Act would be available to a tenant. In addition, the Act provides that a landlord who contravenes these provisions commits an offence and is liable, on conviction, to a fine of not more than \$5,000.00."
[emphasis added]

I specifically reject the Landlord's contention that the collection of an additional month's rent under the "Last Month's Rent Agreement" is something other than a security deposit and permissible under the Act. The Agents for the Landlord testified that additional month's rent was a credit on the Tenant's account, making the issuance of the Notice even more unconscionable.

I therefore find that the Landlord is in direct contravention of the Act by collecting from the Tenant more than one-half of one month's rent at the beginning of the tenancy and holding this amount for the end of the tenancy. At the very least, the Landlord collected rent not yet due, which is also in direct contravention of the Act.

The Tenant, under section 19 of the Act, is allowed to deduct the overpayment from rent or otherwise recover the overpayment. The Tenant testified, and the Agents for the Landlord confirmed, that he requested the overpayment of rent be applied to the September 2010 rent and the Landlord refused.

Based on these findings, I find that the Tenant did not owe rent for the month of September 2010; therefore, I find that the 10 Day Notice to End Tenancy issued in

this matter is not valid and I order it to be cancelled. The Notice is of no force or effect and the tenancy will continue until ended in accordance with the Act.

Further, I **dismiss** the Landlord's application.

I further find the Tenant is current in his rent and parking fees through the month of October, 2010.

Lastly, because the Tenant was successful, I also allow the Tenant the **\$50.00** filing fee for the Application, and allow him to **deduct** this amount from the November 1, 2010, payment of rent.

Conclusion

The Landlord's 10 Day Notice to End Tenancy is not valid and not supported by the evidence, therefore, the Tenant is granted an order dismissing the Notice to End Tenancy.

The Landlord's Application is dismissed.

The Tenant is allowed to deduct the \$50.00 filing fee from the next monthly rental payment.

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: October 15, 2010.

Dispute Resolution Officer