



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNR, PSF, OLC, FFT

Introduction

The Tenants seek the following relief under the *Residential Tenancy Act* (the “Act”):

- an order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed on March 10, 2023 (the “10-Day Notice”);
- an order pursuant to ss. 27 and 62 that the Landlord provide services or facilities required by the tenancy agreement or law;
- an order pursuant to s. 62 that the landlord comply with the Act, Regulations, and/or the tenancy agreement;
- return of the filing fee pursuant to s. 72.

H.K. and C.K. appeared as the Tenants. B.G. appeared as the Landlord and was joined by his spouse, K.G..

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other’s application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other’s application materials.

Preliminary Issue – Tenants' Claims

Rule 2.3 of the Rules of Procedure require claims in an application to be related to one another. Where they are not sufficiently related, I may dismiss portions of the application that are unrelated. Hearings before the Residential Tenancy Branch are generally scheduled for one-hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

In this instance, the primary issue is whether the 10-Day Notice is enforceable or not. Indeed, the two other claims that the Landlord comply with the *Act* or provide services or facilities would only be relevant if the tenancy were to continue should the 10-Day Notice be cancelled.

Accordingly, I find that the Tenants' claims under ss. 27 and 62 (Landlord to provide services and facilities) and 62 (Landlord to comply with the *Act*) of the *Act* are not sufficiently related to the question of the enforceability of the 10-Day Notice. These claims are dismissed. Depending on whether the tenancy continues or not, they may be dismissed with or without leave to reapply.

The hearing proceeded strictly on the issue of the enforceability of the 10-Day Notice.

Issues to be Decided

- 1) Is the 10-Day Notice enforceable?
- 2) If so, is the Landlord entitled to an order of possession and order for unpaid rent?
- 3) Are the Tenants entitled to their filing fee?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenants moved into the rental unit on February 1, 2021.
- A security deposit and pet damage deposit of \$1,400.00 each was paid by the Tenants.

I am provided with a copy of the tenancy agreement. The tenancy agreement lists two other individuals, A.A. and K.A., as co-tenants. The parties explain that A.A. and K.A. moved out of the rental unit in September 2022. As per the tenancy agreement, rent of \$2,800.00 is due on the first of each month.

Pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant. Pursuant to s. 46(4) of the *Act*, a tenant has 5-days from receiving a 10-day notice to end tenancy to either pay the overdue rent or file an application to dispute the notice. If a tenant files to dispute the notice, the burden of proving it was issued in compliance with s. 46 of the *Act* rests with the respondent landlord.

The Landlord advises that the 10-Day Notice was personally served on the Tenants on March 10, 2023. The Tenants confirm receipt of the 10-Day Notice on March 10, 2023. I find that the 10-Day Notice was served in accordance with s. 88 of the *Act*.

I am provided a copy of the 10-Day Notice by the parties. It lists that the Tenants failed to pay rent of \$8,400.00 as of March 10, 2023. According to the Landlord, the Tenants have been short on their rent payments in the amount of \$1,600.00 from September 2022 to date.

The Tenants indicate that prior to September 2022 they rented the whole property, which is a single detached home, with A.A. and K.A.. The Tenants tell me that there is a separate suite downstairs in which their former co-tenants resided, though in practice the Tenants and their co-tenants treated the house as a single rental unit and did not keep the suites separated.

The Tenants tell me that their portion of the rent with their co-tenants was paid in the amount of \$1,200.00 and that they have continued to pay this, including an increase of \$50.00, over the relevant period. The Tenants' evidence includes an audio recording with an individual I am told is the Landlord's father and that the father collected rent from the Tenants. The Landlord's father is heard confirming with the Tenants that they paid their rent in the new amount of \$1,250.00.

I am advised by the Tenants that the Landlord gave them the option to continue to rent the lower suite after the co-tenants moved out. The Tenants say they did not agree to doing so and that the Landlord arranged to rent the lower suite to new tenants. H.K.

advises that the Landlord arranged for the prospective tenants to attend the property and that she would show the lower suite on behalf of the Landlord. It is unclear when the lower suite was rented to new tenants, though the parties do confirm that someone else is living there now. The Tenants tell me they had to procure a lock for the door separating the two suites.

The Landlord argued that the tenancy agreement lists rent of \$2,800.00 is owed and the Tenants have not been paying such that he is short on rent. Policy Guideline #13 provides guidance with respect to the rights and responsibilities of co-tenants, specifying the co-tenants are jointly and severally responsible for paying rent when it is due. In general, when a co-tenant moves out of the rental unit, the remaining co-tenant continues to pay rent in full as per the tenancy agreement.

The issue with this guidance is and the Landlord's argument is that, strictly speaking, the Tenants are no longer renting the rental unit as set out in the tenancy agreement. There is no dispute that the original tenancy agreement was for the whole house and rent for the whole house was \$2,800.00. However, this fundamentally changed after September 2022. After this point, the Tenants no longer had access or use of the lower suite as they declined to take on the whole property as requested by the Landlord. Indeed, a new tenant was secured for the lower suite. The Landlord, by his conduct, accepted the new arrangement. He found the new tenant. He had H.K. facilitate viewings. He accepted rent from the Tenants in the lower amount. The Landlord could have insisted the Tenants continue to pay the \$2,800.00 and keep the whole house, in which case the Tenants would have been responsible for doing so. However, he did not do this.

I find that the parties conduct has fundamentally altered the terms of the tenancy such that it is, for all intents and purposes, an entirely new tenancy agreement. The Tenants are no longer renting the whole property, rather they are renting the upper suite with new tenants in the lower suite. Based on the audio recording, I accept the Tenants have been paying \$1,250.00 to the Landlord. At no point was I told the Landlord accepted rent for use and occupancy only. I further note that the 10-Day Notice was issued in March 2023, over 6 months after the co-tenants moved out and the Tenants paid the lesser amount. I find that by implication, the parties entered into a new tenancy agreement in September 2022 by which the Tenants would pay \$1,250.00 to the Landlord on the first of each month for the upper suite at the residential property.

Given this finding, I find that the 10-Day Notice was improperly issued. It is hereby cancelled and is of no force or effect.

Conclusion

The 10-Day Notice is hereby cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

As the tenancy continues, the Tenants' claims under ss. 27 and 62 (Landlord to provide services and facilities) and 62 (Landlord to comply with the *Act*) of the *Act* are dismissed with leave to reapply.

The Tenants were successful in their application. I find they are entitled to their filing fee. I order pursuant to s. 72(1) of the *Act* that the Landlord pay the Tenants' filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenants withhold \$100.00 from rent owed to the Landlord on **one occasion** in full satisfaction of their filing fee.

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: April 20, 2023

Residential Tenancy Branch