



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards  
Ministry of Housing and Social Development

## **DECISION**

### **Dispute Codes:**

*OPR, OPB, MNR, MNDC, MNSD, CNC, RR, FF.*

### **Introduction**

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*.

The landlord applied for the following:

- An order of possession pursuant to Section 55;
- A monetary order for rent owed, pursuant to Section 67;
- An order to retain all or part of the security deposit pursuant to Section 38;
- A monetary order for the recovery of his filing fee, pursuant to Section 72.

The tenant applied for the following:

- An order to cancel the notice to end tenancy for rent, pursuant to Section 46;
- A monetary order for the cost of emergency repairs and money owed for repairs;
- An order to allow the tenant to reduce rent for repairs.

Both parties attended the hearing and were given full opportunity to present evidence and make submissions. On the basis of the solemnly affirmed evidence presented at the hearing, a decision has been reached.

### **Issues to be decided: Landlord's Application**

- Is the landlord entitled to an order of possession for unpaid rent

- Was the tenant in rental arrears
- Was a 10-Day notice to End Tenancy served on the tenant
- Did the tenant fail to pay the rental arrears within 5 days of receiving the Notice
- Has the Landlord established entitlement to compensation for rent still owed?
- Is the Landlord entitled to retain the security deposit in partial satisfaction of the claim?

#### **Issues to be decided: Tenant's Application**

- Has the tenant proven entitlement to be reimbursed for the cost of emergency repairs?
- Is the tenant entitled to compensation for repair cost through a rent reduction?
- Was there an agreement between the parties that the tenant would be credited the equivalent of two months rent in exchange for repairs made by the tenant?
- Has the tenant otherwise proven entitlement to damages under the Act to be reimbursed for the cost of repairs?

#### **Landlord's Application: Notice to End Tenancy**

#### **Background and Evidence**

Based on the testimony of both parties, the background is as follows. The tenancy started on July 31, 2008. The monthly rent was set at \$2000.00 payable in advance on the first of each month and the tenant submitted post-dated cheques for the months of August 2008 to June 2009. The tenant paid a security deposit in the amount of \$1000.00 by cheque which was evidently returned to the landlord on July 24, 2008 for insufficient funds and finally deposited on August 15, 2008.

The notice to end tenancy for unpaid rent, dated November 15, 2008 was served by the landlord on the tenant on November 15, 2008 by posting it on the tenant's front door.

The tenant applied to cancel the notice on November 17, 2008.

The tenant and landlord each submitted into evidence a separate copy of the tenancy agreement and I note that these two pieces of evidence differed from one another. The parties also submitted a move-in inspection report and copies of email communication between the parties.

The landlord testified that the tenant failed to pay rent of \$2000.00 properly due on November 01, 2008 and \$2000.00 properly due on December 01, 2008. The landlord has submitted into evidence bank statements and copies of rent cheques in support of the landlord's claim. The landlord testified that the tenant did not pay rent, was issued a Notice and failed to satisfy all arrears within the 5 days permitted under the Act.

The tenant testified that at the time the Notice to End Tenancy was served, the tenant was not in rental arrears. The tenant testified that the landlord and tenant had agreed to a provision in the tenancy agreement which provided that the tenant did not have to pay rent for two months. In support of this testimony, the tenant submitted into evidence a copy of a tenancy agreement containing a provision that read "*November and December rent waived*" and "*November/December free rent for improvements*". These statements appeared to be initialled by both parties. The tenant also submitted into evidence a copy of a move-in inspection report containing the notation "*Please return the cheques for November/December. Given 2 mo free rent Nov/Dec for repairs.*" This statement appears to be initialled by both parties.

The landlord testified that no addendum was ever part of the tenancy agreement, nor was the statement included in the move-in inspection report. The landlord testified that the landlord's initials indicated on the tenant's copy of the tenancy agreement and on the move-in inspection report were never placed there by the landlord. The landlord referred to the copy of the tenancy agreement placed into evidence by the landlord that did not feature this particular paragraph. The landlord testified that at the start of the tenancy a draft of the tenancy agreement had been sent to the tenant electronically by email and that the final hardcopy version was signed by the parties.

The landlord pointed out that this is the version that the landlord had submitted into evidence. The landlord's contention was that the tenant had altered the electronic draft

of the agreement and is misrepresenting this document as the original tenancy agreement. Moreover the landlord pointed out that the post-dated cheques submitted by the tenant had included cheques for the months of November and December 2008.

In regards to the tenant's evidence relating to the move-in inspection report, the landlord testified that the landlord's copy of the move-in inspection report submitted by evidence does not contain any statement about returning the cheques for November and December. The landlord testified that the tenant's version of the move-in inspection report appears to have been altered with correction fluid.

### **Analysis: Landlord's Application: Ten-Day Notice**

Based on the testimony and evidence of both parties, I find that the tenant did not pay rent for the month of November 2008 and December 2008. However as the tenant's position is that, pursuant to a purported provision in the tenancy agreement signed by the parties, rent was not owed for these two months, a determination must be made regarding whether the tenant's copy of the tenancy agreement or the landlord's copy of the tenancy agreement is accepted. Based on the sworn testimony of both parties, I make the following findings:

I find that, on a balance of probabilities, it is highly unlikely that when the tenancy agreement was signed, the landlord had agreed to grant the tenant two months of free rent for November and December 2008. First, the tenancy started on July 31, 2008 and the tenant gave the landlord post dated rent cheques at that time, including cheques for November and December 2008. This would appear to contradict the tenant's claim that the landlord had agreed from the outset to waive rent due and payable for these months. Secondly, I note that all amendments made to the tenancy agreement are in the tenant's handwriting and that the tenant's copy of the move-in inspection report contains obvious corrections made after-the-fact. I note that the electronic copy of the tenancy agreement has the landlord and tenant's initials at the bottom of each page and I accept the landlord's contention that the initials near the above-mentioned sentences do not match the landlord's verified initials at the bottom of each page.

I also take notice of the fact that the copies of the email communications submitted into evidence by the tenant differed in the body of the messages from those placed in

evidence by the landlord. In making a determination of which had been fraudulently altered, I noted that communications that the tenant has purported came from the landlord, feature a misspelling of the name of the Landlord's spouse which, as it happens, is the same misspelling used by the tenant in the tenant's application.

Accordingly I accept the landlord's evidence and find that the rent was not waived for the month of November and December 2008 in exchange for the completion of improvements or repairs to the rental unit by the tenant. Accordingly, I find that the tenant owed the rent to the landlord and failed to pay this rent.

Section 26(1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this 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. I find that as the tenant did not have a right to deduct any portion of the rent, the rent was due and payable on the first day of each month and the tenant failed to pay rent when it was due.

As I have determined that the Notice to End Tenancy shall be upheld, I find that this portion of the tenant's application must be dismissed. The Ten Day Notice to End Tenancy is not cancelled and is still in force.

Based on the testimony and evidence before me, I find that the tenant was served with a Notice to End Tenancy for Unpaid Rent. The tenant has not paid the outstanding rent and, therefore, the landlord is entitled to an Order of Possession under the Act. I find that the landlord has also established a monetary claim for rental arrears in the amount of \$4,000.00 comprised of \$2,000.00 rent for the month of November, 2008 and \$2,000.00 rent for the month of December 2008.

### **Monetary Claims**

#### **Tenant's application - Background and Evidence**

The tenant has submitted an invoice indicating that he paid \$4569.88 for repairs and painting and that the landlord agreed to pay the tenant for the work and this took the form of two months free rent in the amount of \$4000.00.

The landlord testified that the tenant decided that he did not like the colour of the paint

inside the suite and requested the landlord's permission to change it. The landlord agreed to allow the tenant to paint the suite white, but did not make any commitment to pay for the job nor to credit the costs from the tenant's rent. The landlord stated that the tenant did not previously ask to be compensated and is doing so now, after having been served the notice to end tenancy. The tenant did not lead any evidence relating to the claim for emergency repairs.

### **Analysis Tenant's Application – Monetary Claim**

In regards to an Applicant's right to claim damages from the other party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7. It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

#### **Test For Damage and Loss Claims**

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred

The tenant has submitted an invoice indicating that he paid \$4569.88 for repairs and painting and is claiming compensation under the tenancy agreement. The tenant's position is that the rent for the months of November and December should be waived to repay the tenant for this work. However, I have already found that the parties did not make any enforceable agreement which waived or credited rent for the month of November and December 2008. In the alternative, if the tenant is claiming damages against the landlord for incurring these costs, I find that there is no basis under the Act, nor any agreement between the parties to grant this compensation. I find that the evidence and testimony provided by the tenant does not satisfy all elements of the test for damages outlined above.

In fact, the landlord testified that the tenant had requested the landlord's permission to change the colour of the suite and that the landlord had willingly agreed to allow the tenant to paint the suite white. However, according to the landlord, no verbal or written commitment was made by the landlord to pay for the job. The landlord testified that prior to having been served with the Notice to end the Tenancy; the tenant did not ask to be compensated and is doing so now as a tactic to defend against the Notice.

I find that there is insufficient evidence to support the tenant's monetary claim for damages and find that this portion of the tenant's application must be dismissed.

### **Landlord's Application - Background and Evidence**

In addition to the Order of Possession, the landlord was seeking a monetary order for rent owed and other damages. The landlord testified that the tenant still owes rent and late fees for the months of November and December 2008 and the landlord is therefore seeking monetary compensation. The landlord has also applied to retain the security deposit in partial satisfaction of the claim.

The landlord testified that additional costs were incurred by the landlord due to the tenant's violation of the tenant's responsibilities under the Act and tenancy agreement, resulting in fines against the landlord. The landlord submitted into evidence letters of complaint about the tenant from an occupant of another suite in the building. The landlord testified that the management company had written letters to the landlord regarding noise complaints and other violations which resulted in a total of \$200.00 in fines.

The tenant testified that the tenant should not be responsible for the costs incurred as the management company has no proof that the tenant committed the violations.

The landlord's monetary claims are as follows:

1.	Rent for November	\$2000.00
2.	Rent for December	\$2000.00
3.	Late fees for August - December	\$140.00
4.	NSF fees for security deposit, September and November rent	\$105.00
5.	Violation fines imposed by the strata	\$200.00
	Total	\$4445.00

### **Analysis Landlord's Monetary Claims**

Pursuant to Section 7 (1) (d) of the *Residential Tenancy Regulations*, the Landlord may charge an administration fee of not more than \$25.00 for late payment of rent and may charge a service fee charged by a financial institution for the return of a tenant's cheque. Hence the landlord is entitled to \$100.00 for four incidents of late fees and \$105.00 for the returned cheques.

Based on the sworn testimony of both parties, I accept the landlord's evidence in respect of the claim. I find that the landlord is entitled to \$4405.00 and is also entitled to the recovery of his filing fee in the amount of \$50.00. I order that the landlord retain the



security deposit and interest of \$1005.08 in partial satisfaction of the claim and I grant the landlord an order under section 67 of the *Residential Tenancy Act* for the balance due of \$3449.92. This order may be filed in the Small Claims Court and enforced as an order of that Court.

### **Conclusion**

Pursuant to section 55(2), I hereby issue an Order of Possession in favour of the Landlord effective on or before 1:00pm on January 15, 2008. The Order may be filed in the Supreme Court for enforcement.

I grant the landlord an order under section 67 of the *Residential Tenancy Act* in the amount of **\$3449.92**. This order may be filed in the Small Claims Court and enforced as an order of that Court.

The tenant's application is dismissed in its entirety, without leave to reapply.

Dated December 16, 2008.

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