



Dispute Resolution Services

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

DECISION

Dispute Codes:

OPR, MNR, MNDC, MNSD, CNR, 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;
- An order to compensate the tenant for loss of value due to flooding

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

Preliminary Issue

The landlord had submitted late evidence that was received on file and served to the respondent the day before the hearing. However, pursuant to the Residential Tenancy Rules of Procedure, Rule 3.4 requires that, to the extent possible, the applicant must

file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

In this instance I found that the evidence would not be considered as it was received late and was not relevant to the two applications before me. Accordingly, this late evidence was not taken into consideration in the determination of this dispute.

Issues to be decided: Landlord's Application

- Is the landlord entitled to an order of possession for unpaid rent? In order to answer this question it must be determined:
 - Was a valid 10-Day notice to End Tenancy properly served on the tenant?
 - Was there any outstanding rent owed to the landlord by the tenant at the time the Ten-Day Notice to End Tenancy was issued and served?
 - Did the tenant fail to pay the rental arrears within 5 days of receiving the Notice to End Tenancy?
- Has the Landlord established monetary entitlement to compensation for rent still outstanding?
- Is the Landlord entitled to retain the security deposit in partial satisfaction of the monetary claim?

Issues to be decided: Tenant's Application

- Has the tenant proven that the Notice to End Tenancy for Unpaid Rent should be cancelled?
- Has the tenant proven entitlement to be compensated for the damage and losses for which the landlord must be held responsible under the Act?

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 in October, 2008. The landlord acknowledged that the tenant had paid “first and last month’s rent” at the commencement of the tenancy. This would be considered to be a security deposit that was the equivalent of one month rent. In November 2008, the tenant only paid \$750.00 in rent on the basis that the landlord had illegally collected a security deposit that exceeded the amount allowed under the Act by \$750.00 and the tenant was thus entitled to recoup this over-charged amount by reducing the rental payment for November 2008. On December 1, 2008 rent of \$1,500.00 was due and payable but was not paid.

The landlord testified and the evidence confirmed that on December 3, 2008, the landlord issued a Ten-Day Notice to End Tenancy for Unpaid Rent under section 46 of the Act. The rent being claimed on this Notice included the alleged \$750.00 withheld by the tenant for November 2008 and an additional \$1,500.00 arrears owed for the month of December 2008, for the rent that was properly due and payable on December 1, 2008. The landlord testified that the tenant did not pay any portion of the arrears claimed in the Notice. The landlord testified that the tenant also neglected to pay \$1,500.00 rent for January, properly due and payable on January 1, 2009.

The Landlord is claiming compensation for rent owed for December 2008 and January 2009 and has requested an Order of Possession under section 46 of the Act.

The tenant testified that at the time the Notice to End Tenancy was served, the tenant was not in rental arrears for the month of November 2008 in that the tenant was justified in reducing the November rent payment by the amount that was overcharged for the security deposit collected at the start of the tenancy in October 2008. The tenant testified that the rent owed for December was not paid on December 1, 2008 because the landlord refused to accept the rent, insisting that the tenant also pay the \$750.00 outstanding for November 2008 at the same time payment was made for the \$1,500.00 owed for December 2008 rent. The tenant testified that the landlord would not take a partial payment at that time nor after the Notice was issued. The tenant testified that the Notice incorrectly claimed \$2,250.00 and that the landlord was insistent that the whole amount be paid or nothing. The tenant testified that the landlord also refused to accept the tenant’s payment of rent for January 2009 in the amount of \$1,500.00.

Analysis: Landlord's Application: Ten-Day Notice

Based on the testimony and evidence of both parties, I find that the tenant was not in arrears for rent for the month of November 2008. However, I find that the tenant did fail to pay \$1,500.00 rent owed on December 1, 2008 when it was due and at the time the Notice was issued on December 3, 2008, the tenant was clearly in arrears for December rent in the amount of \$1,500.00. Although the tenant testified that the Notice from the landlord demanded the full \$2,250.00 and that the landlord would not accept anything less, I note that the Ten-Day Notice was not issued until December 3, 2008 and by all rights the December rent should have already been paid on December 1, 2008, two days *before* the notice was issued. Failing that, the tenant still had five days after receiving the Notice to pay the arrears actually owed at that time, which was \$1,500.00. I note that the landlord disputed the tenant's allegation that payment was ever offered by the tenant and the landlord denied ever refusing funds from the tenant.

I find that, on a balance of probabilities, it is unlikely that on December 1, 2008 the landlord refused to accept \$1,500.00 rent purportedly offered by the tenant, and then two days later presumably decided to then issue a Notice claiming these same funds. Obviously such a bizarre maneuver would be contrary to logic, as well as detrimental to the landlord's interests. In any case, once the notice was issued there was a five-day window for the tenant to quash the notice by paying the rent for December 2008. Had this been done, I would be compelled under the Act to cancel the Ten-Day Notice.

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 while the tenant did have a right to deduct \$750.00 from the November rent, the tenant did not have a right to deduct any portion of the rent for December 2008. I find that the rent was due and payable on the first day of each month and the tenant failed to pay rent when it was due on December 1, 2008. Accordingly, I find that the Ten-Day Notice to End Tenancy was justified and that there is no justification under the Act to cancel the Notice.

As I have determined that the Notice to End Tenancy shall be upheld, I find that the

portion of the tenant's application relating to the request for an order to cancel the Ten-Day Notice must be dismissed. Accordingly I find that the Ten-Day Notice is still in force with an effective date of December 13, 2008.

Based on the 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 established a monetary claim for rental arrears in the amount of \$3,050, comprised of \$1,500.00 rent for the month of December, 2008, \$1,500.00 rent for the month of January 2009 and the \$50.00 fee paid by the landlord for this application.

Landlord's Application Monetary Claim - Background and Evidence

In addition to a request to cancel the Ten-Day Notice to End Tenancy dated December 3, 2008, the application from the tenant also included a monetary claim in the amount of \$350.00 damages caused by a serious flooding incident that occurred between November 14 and December 3, 2008. The tenant did not submit any evidence such as photos, copies of correspondence nor invoices, in support of this claim.

Landlord's Application Monetary Claim - Analysis

In regards to an applicant's right to claim damages from the another 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 authority to determine the amount or order payment under these circumstances.

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

I find that, while the tenant has submitted a written statement of claim for \$350.00, this request was submitted without sufficient supporting evidence. I find that the claimant has not successfully met even one of the four elements required to justify compensation. Accordingly, I find that, due to insufficient evidence supporting the tenant's monetary claim, this portion of the tenant's application must be dismissed.

Conclusion

Pursuant to section 55(2), I hereby issue an Order of Possession in favour of the Landlord effective two days after service on the tenant. The Order may be filed in the Supreme Court for enforcement.

I find that the landlord has established entitlement in the amount of \$3,050.00. I order that the landlord retain the security deposit and interest of \$752.83 in partial satisfaction of the claim leaving a balance due of \$2,267.17 and I hereby issue a monetary order under section 67 of the *Act* in this amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

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

Dated: January 2009

Dispute Resolution Officer

