



Dispute Resolution Services

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

Decision

Dispute Codes:

<u>OPC</u>	Order of Possession based on one-month Notice for Cause
<u>MNR</u>	Monetary Order for Rent Owed
<u>MNSD</u>	The Return of the Security Deposit
<u>MNDC</u>	Money Owed or Compensation for Damage or Loss
<u>FF</u>	Recover the Filing Fee for this Application from the Respondent

Introduction

The hearing was re-convened from the original date of December 22, 2008 to deal with an application by the landlord for an Order of Possession based on a One-Month Notice for Cause. The hearing was also re-convened to hear an application by the tenant to obtain an Order to cancel the One-Month Notice for Cause dated November 27 2008 and effective January 31, 2009, to dispute an additional rent increase, to obtain a monetary order for money owed or compensation for damage or loss under the Act, to obtain an order to compel the landlord to comply with the Act and requesting reimbursement for the cost of filing this application.

Issues to be Decided for the Landlord's Application.

The issues to be determined based on the testimony and the evidence are:

- Whether the tenancy can be ended based on the landlord's One Month Notice to end Tenancy for Cause issued under section 47 of the Act.

Issues to be Decided for the Tenant's Application

The tenant was seeking to cancel the One-Month Notice for Cause, to dispute an additional rent increase, compensation for damaged or loss to property, reimbursement for over-paid rent and a rent reduction for loss of services or facilities during the tenancy. In addition, the tenant was seeking an order to compel the landlord to comply with the Act

The issues to be determined based on the testimony and the evidence are:

- Was the One-Month Order of Possession issued by the landlord warranted or should it be cancelled and the tenancy preserved?
- Has the Tenant proven that the landlord imposed an illegal rent increase in excess of that permitted under the Act and regulation?
- Should the landlord be ordered to comply with the Act?
- Whether or not the tenant is entitled to a reduction in rent based on the landlord's restriction of, or failure to provide, services and facilities that were included in rent as part of the agreement.
- Whether the tenant is entitled to monetary compensation under section 67 of the *Act* for loss of rent and damages. This determination is dependant upon answers to the following questions:
 - Has the tenant submitted proof that the specific amounts being claimed are validly owed by the landlord to this tenant?
 - Has the tenant submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the *Act* by establishing, on a balance of probabilities:

- that the costs were incurred due to the actions of the landlord in violation of the Act or Agreement by the landlord
- proof by the tenant that the actual amount or value being claimed is justified
- proof that the tenant made reasonable effort to minimize the damages under section 7(2) of the Act

The landlord had the burden of proof to show that ending the Tenancy for Cause was warranted. The tenant had the burden of proof to establish that the rent was illegally increased, that the landlord was in violation of the Act and should be ordered to comply, that services and facilities that were supposed to be part of the agreement were restricted or not provided and that this caused a reduced value of the tenancy. The tenant also had the onus to prove that compensation for damages was owed by the landlord to the tenant.

Preliminary Matter

The original hearing was convened on December 22, 2008 but was adjourned to be heard today. Additional evidence was submitted between December 22, 2008 and the commencement of this hearing and served on the other party. On the question of accepting this additional evidence, it was determined that this evidence would be added to the existing evidence and considered as well.

Background and Evidence – Landlord's Application

The landlord testified that the tenancy began in November 2007 and that the parties entered into a verbal tenancy agreement with rent set at \$650.00 per month with \$50.00 agreed to by the parties as a flat rate for utilities which included hydro, heat, water and garbage. The landlord pointed out that the copy of the advertisement submitted into evidence confirmed that the rent was \$650.00 and did not state that cable or utilities were included in the \$650.00 rent. The landlord testified that the tenant agreed to pay

\$50.00 for utilities and after the tenancy commenced, the tenant was also permitted to freely access cable services that were available on site, but were not arranged for nor paid for by the landlord so long as those services were available.. The landlord testified that that a security deposit was paid by the tenants in the amount of \$325.00. The landlord testified that during the tenancy several issues arose where the landlord felt the tenant was violating the agreement. The landlord testified that it was intended that parking existed on site for one car and that there was street parking available for any other vehicles. However, the tenant moved other vehicles onto the property, some of which were unlicensed and in disrepair and at one point the tenant had up to five vehicles on the site and that this damaged part of the lawn and caused a hazard. The landlord testified that conversations were held regarding the vehicle problem, but no specific warning letter was issued before the One-Month Notice to End Tenancy. The landlord testified that the vehicles have since been removed.

The landlord testified that the tenant had also taken over the front deck, when the intention was that it be shared with the landlord. The landlord testified that when the tenant fastened a blue tarp to the front of the residence to shelter the deck, this created holes in the exterior which damaged the house. The landlord testified that the tenant was told to remove the tarp which was done. However, the tenant then, without permission, proceeded to construct a canvas-covered framework over the other side of the deck which looked unsightly and caused water damage to the house from the run-off. The landlord supplied photos showing the structure. The landlord testified that when the landlord attempted to inspect the deck, the tenant ordered the landlord off the property and acted in a threatening manner. The landlord acknowledged that the landlord did not issue a written notice 24 hours in advance as required under the Act when a landlord wasn't access. The landlord testified that he felt that this requirement did not apply to an inspection of the exterior, particularly as the portion of the deck that held the canvas structure was supposed to be the landlord's half of the deck. The landlord testified that garbage was left on the property and the tenant did not clean this up. The landlord testified that the landlord attempted to put a written tenancy in place at

the tenant's encouragement and drew up an agreement. The landlord testified that the tenant was given a choice to sign the new agreement or leave. The landlord testified that the tenant refused all communication because of the tenant's continued refusal to comply with the tenancy agreement. The landlord testified that the existing cable service was later disconnected from the site by the communications company, but that this had nothing to do with the landlord and would not have impacted the tenancy agreement in any way. On December 9, 2008, the landlord issued a warning to the tenants about items stored on the deck. The following day, on December 10, 2008, the landlord filed for dispute resolution.

The landlord also testified that the tenant failed to pay rent for the month of January 2009 and that this amount should be ordered to be paid.

After the landlord's testimony, the tenant stated that, although the tenant still disputed the One-Month Notice to End Tenancy for Cause, the tenant was now in the process of moving out and vacating the unit based on a Two-Month Notice to End Tenancy for Landlord's Use that was apparently issued and served on the tenant by the landlord. The tenant testified that rent for January was not owed because of the tenant's entitlement to be reimbursed the equivalent of one-month's rent under section 51 of the Act. This document was not in evidence, nor did the landlord's application refer to a Two-Month Notice to End Tenancy for Landlord's Use and I made no findings regarding the Two-Month Notice or any matters that may flow from any Notice issued under section 49 of the Act.

Analysis – Landlord's Application

Based on the fact that the tenant had virtually already vacated the unit by the time the hearing was held, I find that there was no need to make a determination of whether or not the One-Month Notice to End Tenancy for Cause was justified under the Act. In any case, I find that the landlord's application for an order of possession is granted effective January 31, 2009.

In regards to the landlord's request for an order for payment of rent owed by the tenant, I find that this is a matter that cannot be determined during these proceedings. This application by the landlord was only for an Order of Possession under section 55 based on the One-Month Notice issued for Cause. It was not an application that included a monetary claim for damages or rent owed under section 67. That being said, the landlord is always at liberty to make a separate application in future to claim this and any other damage or loss claims as the landlord sees fit to do. If the landlord decides to pursue this avenue, I encourage both parties to contact the Residential Tenancy Branch to obtain information and advice.

During these proceedings the tenant provided the tenant's current forwarding address and the landlord was given the opportunity to write it down. Therefore I find that the forwarding address of the tenants has been provided in writing to the landlord as of the date of this decision and I also find that this is the correct address for future service of documents

Background and Evidence – Tenant's Application

As the ending of the tenancy has already been determined effective January 31, 2009, I find that the portion of the tenant's application pertaining to the request for an order that the landlord comply with the Act and an order for reduced rental rate need not be determined and these portions of the tenant's application is dismissed.

The tenant testified that \$900.00 of the \$1,200.00 claim for damages and reimbursement was based on the tenant's over payment of rent of \$50.00 per month over 18 months during the tenancy. The tenant testified that the rent for the unit was advertised as being \$650.00 and referred to the copy of the advertisement in evidence. The tenant testified that there was no mention in the advertisement that utilities would be charged in addition to rent. The tenant testified that when the tenancy was being established, the landlord verbally requested an extra \$50.00 at the start of the tenancy for utilities and the tenant agreed to "help out" by paying an extra \$50.00 during the

“winter months” only. The tenant testified that, however, the landlord later insisted on receiving \$650.00 plus the extra \$50.00 totaling \$700.00 every month. The tenant testified that the tenant did not agree to this, but paid it for the duration of the tenancy because the tenant did not know about a tenant’s rights under the Act. The tenant was asking for compensation for the overcharged rent for 18 months at \$50.00 per month.

The tenant stated that the remainder of the monetary claim related to a claim for compensation for damages to some of the tenant’s possessions and the devaluation of the tenancy due to poor maintenance, mold and the landlord’s withdrawal of services and facilities that were supposed to be part of the rent.

The tenant testified that there were numerous deficiencies and provided photographic evidence of alleged problems with the unit that included ant infestation, damaged stove, mold, water seepage, siding problems, growth of moss, malfunctioning fan, poor installation and finish of plumbing fixtures and the landlord’s failure to keep the driveway clear of snow. . The tenant testified that the mold problem was caused by the landlord’s neglect and the substandard structure of the building and that the tenant incurred losses for which the landlord should be held accountable.

In regards to the loss of cable, the tenant’s position is that provision of cable was part of the rent and that the tenant should be compensated for the termination of this service.

The tenant also testified that since the tenancy was now ending, there was a concern that the landlord would not refund the tenant’s security deposit and felt that this should be so ordered.

In regards to the agreed-upon rent, the landlord had testified that the parties both agreed to \$650.00 for rent and the flat rate of \$50.00 for utilities. In regards to any claim of damages for mold, the landlord argued that it was the tenant that damaged the building and created conditions that facilitated mold growth. The landlord remarked that the landlord was out of the country for a long while and returned to find serious problems with the tenant’s treatment of the unit. Moreover, the landlord testified that the

landlord was not able to investigate the condition of the unit due to being denied access by the tenant

Tenant's Application – Analysis

Claim for Overpaid Rent

I note that the tenant's claim of overpayment of rent hinged partly on purported verbal terms in the unwritten tenancy agreement and partly on the wording of the advertisement published to find a tenant for the unit.

I find as a fact that, while a rental advertisement may help to clarify some discrepancies, it is not the same thing as a binding tenancy agreement. In any case, I find that the advertisement is silent on the subject of utilities and it is clear from the testimony of both participants that, at the time the tenancy commenced, or shortly thereafter, the parties had some more detailed discussion about utilities and other issues during the negotiation process. I find that the parties verbally defined the specific tenancy terms and apparently reaching an agreement acceptable to both parties.

Section 62(1) of the Act gives a Dispute Resolution Officer the authority to determine disputes in relation to which the director has accepted an application for dispute resolution, and any matters related to that dispute that arise under this Act or a tenancy agreement. The dispute about whether or not the \$650.00 rent included utilities is a matter that has arisen under the tenancy agreement, not the Act.

However, I find it impossible to determine exactly what tenancy terms were agreed upon by these participants back in 2007.

Section 13, of the Act, places the responsibility for a written tenancy agreement onto the Landlord, stating that a landlord must prepare in writing every tenancy agreement entered into on or after January 1, 2004 and within 21 days after a landlord and tenant enter into a tenancy agreement, the landlord must give the tenant a copy of the agreement.

I find that although the Landlord did not comply with the above section of the Act, oral terms contained in verbal tenancy agreements may still be recognized and enforced. In fact, section 1 of the Act, defines “tenancy agreement” as follows:

“tenancy agreement” means an agreement, **whether written or oral**, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

On the subject of whether or not terms of a tenancy agreement can be enforced, Section 6(3) of the Act states:

A term of a tenancy agreement is not enforceable if

- the term is inconsistent with this Act or the regulations,
- the term is unconscionable, or
- **the term is not expressed in a manner that clearly communicates the rights and obligations under it.**

(my emphasis)

In the case of verbal agreements, I find that when oral terms are clear and when both the Landlord and Tenant fully agree on the interpretation, there is no reason why such terms can't be enforced. However, when the parties are in dispute about what was initially agreed-upon, then these verbal terms by their nature are virtually impossible for a third party to interpret for the purpose of resolving a dispute that has arisen.

Moreover, it is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof. In other words, the applicant, in this case the tenant, has the onus of establishing during these proceedings that the tenant's position is supported by evidence and that the monetary claim is justified. The

tenant's verbal testimony and the verbal interpretation of the advertisement were disputed by the other party and the tenant was unable to provide any further support to overcome the challenge. When conflicting and disputed verbal testimony is presented as the only evidence, then the party who bears the burden of proof will not likely prevail.

For this reason, I am not prepared to interpret what terms were agreed-upon nor whether either party fulfilled the tenancy terms. Accordingly, I find that the portion of the tenant's application relating to over-payment of rent must be dismissed.

In regards to the landlord's attempt to unilaterally impose a written tenancy agreement on the tenants during the tenancy, requiring that the tenants choose either to sign the agreement or vacate, I find that this action contravened section 14 of the Act and is also not permitted pursuant to section 44 of the Act. The tenants were not required to sign the agreement drafted by the landlord, nor did the landlord have any authority under the Act to end the tenancy on that basis.

Analysis – Compensation for Damage and Loss of Value

In regards to the tenant's claim for damages and loss, 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.

As mentioned, 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

The problem that this test presented for the claimant was proving that the criteria in element 2 and element 3 of the test had been met. It is not enough to merely show that damage or loss occurred. The claimant must prove fault or establish a specific violation of the Act or agreement on the part of the landlord.

I note that while the claimant alleged that the landlord was responsible for violating the Act by causing, or failing to address, the problems, the tenant did not provide independent evidence as to the source of mould growth and did not prove that the alleged maintenance problems were ever brought to the attention of the landlord and that the landlord then refused to act. Therefore I find that element 2 of the test for damages has not been met. Moreover, although the tenant has indicated damages and loss of \$300.00, there was no evidence supporting the amount of the a loss or expenditure. I find that element 3 of the test for damages has not been met. I also note that the tenant had many concerns that were in existence for a long period of time, some dating to the beginning of the tenancy. However, the tenant conceded that the tenant did not previously make an application for dispute resolution to force the landlord to address the problems. I find that in claiming compensation for what was alleged to be long-standing deficiencies and alleged violations of the landlord's responsibilities under the Act the tenant has not met element 4 of the test for damages by acting in a timely manner to minimize the loss and damage claim.

Accordingly, I find that the tenant's claim for damages and loss is not supported and this portion of the tenant's application must be dismissed.

Finally, in regards to the tenant's claim for the return of the security deposit, I find that this claim is premature. This is a matter that must be dealt with pursuant to section 38 of the Act and I make no findings in regards to the tenant's future rights or entitlement in regards to the return of the tenant's security deposit of \$325.00. The parties are encouraged to follow the Act in regards to their reciprocal rights and obligations relating to the return of the tenant's security deposit and should seek guidance if necessary on this subject.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled an order of possession effective January 31, 2009 and I hereby issue this order. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

Based on the testimony and evidence presented during these proceedings, I find that the tenant's application is not supported and I hereby dismiss the tenant's application in its entirety without leave. However, the tenant is at liberty to make an application for the return of the tenant's security deposit if this is deemed by the tenant to be necessary in future.

Date of Decision: January 2009

Dispute Resolution Officer