



Dispute Resolution Services

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

Decision

Dispute Codes: MNR, OPR, FF

Introduction

This hearing dealt with the landlord's application for an Order of Possession and a Monetary Order for unpaid rent. The landlord was also seeking to recover the filing fee from the tenant. The tenant did not appear at the hearing. The landlord testified that he served the tenant with the notification of today's hearing in person on January 13, 2009. Having been satisfied the landlord adequately served the tenant with notice of today's hearing, the hearing proceeded without the tenant present.

Issue(s) to be Decided

1. Whether the landlord is entitled to an Order of Possession, and if so, the effective date.
2. Whether the landlord is entitled to a Monetary Order for unpaid rent, and if so, the amount.
3. Award of the filing fee.

Background and Evidence

The landlord testified that the tenancy commenced more than two years ago and that the tenant was required to pay rent of \$550.00 on the 1st day of every month. The landlord testified that he believed the tenant had paid the former landlord a security deposit of \$250.00.

Provided as evidence was a *2 Month Notice to End Tenancy for Landlord's Use of Property* (2 Month Notice) the landlord served upon the tenant on December 9, 2008 with an effective date of February 15, 2009. The landlord testified that the tenant did not pay rent when due on January 1, 2009 and the landlord served the tenant with a *10 Day Notice to End Tenancy for Unpaid Rent* (the 10 Day Notice). The 10 Day Notice had an effective date of January 12, 2009.

Also provided as evidence is a document written by the landlords and signed by the tenant. The document indicates that the parties talked on January 12, 2009 and that an agreement was reached whereby the tenant authorized the landlord to keep his security deposit in lieu of rent for half a month and the tenant would vacate the rental unit February 15, 2009.

During the hearing, the landlord acknowledged that the tenant was entitled to one month's free rent and that the tenant had told the landlords they could keep his security deposit as rent for the half-month owed by the tenant. In making this application for dispute resolution, the landlord was requesting a Monetary Order of \$275.00; however, during the hearing, the landlord verbally requested a Monetary Order for \$550.00. The landlord explained that he was of the belief that the security deposit could not be used as rent.

The landlord requested an Order of Possession be provided with an effective date of February 15, 2009.

Analysis

As explained to the landlord during the hearing, the effective date on the 2 Month Notice does not comply with the Act. As I heard testimony that rent is due on the 1st day of every month and the 2 Month Notice was served on December 9, 2008, the earliest the effective date that could have been on the 2 Month Notice was the last day in February

2009. Where a 2 Month Notice is served, the tenant is entitled to withhold their last month's rent as compensation for having to vacate. In this case, it appears as though the tenant was using the one month's compensation for the rent due for January as that was his last full month of tenancy. Due to the incorrect effective date on the Notice I find that the parties were not clear as to when the tenant could withhold rent for the compensation owed to him.

On January 10, 2009 the landlord filed the Application for Dispute Resolution; however, the document of January 12, 2009 shows to me that the parties resolved the matter of unpaid rent by mutual agreement. I am unclear as to why the landlord has proceeded with this hearing and the landlord appeared confused about the requirements of the Act. It would appear to me that the landlord wishes to not reject or change the agreement reached with the tenant on January 12, 2009.

Upon review of the Notices served upon the tenant and the document signed January 12, 2009 I find, based on the balance of probabilities, that the parties resolved the issue of unpaid rent by way of the tenant's forfeiture of the security deposit and agreement that the tenant would vacate the rental unit by February 15, 2009. I do not find the agreement reached between the parties to violate the Act and I do not have the authority to alter it.

With respect to the security deposit, the parties can mutually agree that the security deposit be used as rent. The document dated January 12, 2009 is not signed by the landlords; however, it appears the landlords drafted the document had it signed by the tenant and it makes reference that it is an Agreement. Therefore, I find that the parties had mutually agreed that the security deposit would be used for rent.

As the landlord was seeking half a month's rent and then increased his monetary request after the hearing commenced, I will not allow the amendment as the tenant

would be prejudiced if I accepted the landlord's request. Rather, I am of the belief that the tenant has not attended this hearing because the landlord had initially requested \$275.00 which could be recovered from the security deposit as the parties agreed on January 12, 2009.

I am satisfied that the landlord is entitled to receive \$275.00 in rent from the tenant and I could grant the landlord's request for a Monetary Order in that amount, however, as explained to the landlord during the hearing, should the tenant not pay the amount, the landlord is authorized to retain the security deposit to pay the Monetary Order, which is essentially what the parties have already agreed to do. Therefore, rather provide the landlord with a Monetary Order, I authorize the landlord to retain the tenant's security deposit for unpaid rent.

Since the landlord requested an Order of Possession for February 15, 2009 which is consistent with the terms of the mutual agreement, I provide the landlord with the Order of Possession effective February 15, 2009.

I do not award the landlord the filing fee paid for this application as I am of the opinion that a large amount of confusion with respect to the unpaid rent was due to the incorrect effective date on the 2 Month Notice.

Conclusion

The landlord has established an entitlement to one-half month's rent and is authorized to retain the tenant's security deposit in satisfaction of that amount. The landlord is provided an Order of Possession for February 15, 2009.

February 11, 2009

Date of Decision

Dispute Resolution Officer