



Dispute Resolution Services

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

DECISION

Dispute Codes:

OPR, MNR, CNR, RR, RP, 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;

The tenant applied for the following:

- An order to cancel the notice to end tenancy for rent
- An order to compel the landlord to make repairs
- An order to compensate the tenant for loss of value to the unit and repairs
- Reimbursement for the cost of filing

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.

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?

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 through a rent reduction for the damage and losses for which the landlord is responsible under the Act?
- Should the landlord be ordered to complete repairs to the unit?

Background and Evidence

Based on the testimony of both parties, the background is as follows. The tenancy started in November, 2008. The rent was set at \$1,500.00 plus utilities and the tenant had paid \$750.00 security deposit. No written tenancy agreement was signed. In January 2009, the tenant did not pay the rent or the utilities. The tenant also failed to pay rent for the month of February 2009.

On January 7, 2009 the landlord issued a Ten-Day Notice to End Tenancy for Unpaid Rent under section 46 of the Act effective January 20, 2009. The rent being claimed on this Notice was \$1,700.00 which represented \$1,500.00 rent and \$200.00 utilities. The landlord was also claiming an additional \$1,500.00 unpaid rent and \$200.00 utilities now owed for the month of February 2009. The landlord testified that the tenant did not pay any portion of the arrears claimed in the Notice which are now being claimed and has requested an Order of Possession under section 55 of the Act.

The tenant acknowledged that no rent was paid for January 2009 or for February 2009. The tenant felt that she had a valid reason to hold back the rent because the unit did not

have any heat and the landlord refused to repair the furnace. The tenant stated that this occurred from the start of the tenancy at the end of November 2008 and the tenant testified that, based on advice given by the Residential Tenancy Branch, she decided to withhold the rent and make an application for dispute resolution.

In addition to the problem with heat, the tenant testified about several other issues that the tenant thought should impact the amount of rent rightfully owed, including a damaged toilet seat replaced by the tenant, for which she was seeking reimbursement.

According to the tenant, when the parties agreed to this tenancy, the landlord had indicated that the use of the yard and the garage were included. The tenant testified that she based this conclusion on the fact that the landlord gestured towards the backyard and the garages and stated, here is the yard and the garage. The tenant testified that, while she knew that another tenant occupied the lower suite, she was shocked to later discover that the garage was actually rented to other occupants who also used part of the yard to enter and exit the property, leaving the gate ajar. The tenant testified that her rent of \$1,500.00 should therefore be lowered by \$350.00 per month to reflect the loss of use of the garage that was supposed to be part of the tenancy and the loss of parking. The tenant testified that she expected to be able to park her car in the garage but found that it had to be parked on the street. The tenant testified that the rent should be lowered a further \$150.00 by the loss of exclusive use of the yard since the occupants of the garage had to access their unit via the pathway through the yard and they used the lower portion of the yard..

The tenant testified that she didn't pay any portion of the rent for January or February because she didn't know how much she should be paying and was waiting for the outcome of the dispute resolution hearing. The tenant also did not agree with excessive utility charges of \$200.00 per month.

Analysis: End of Tenancy

The landlord was seeking an Order of Possession based on the Ten-Day Notice to End Tenancy for Unpaid Rent dated January 7, 2009. The tenant's application is requesting that the notice be cancelled as the rent was not paid due to emergency repairs of the heating system.

Section 33 of the Act deals with situations where a emergency repairs are required and the landlord has repeatedly refused to fix the problem. This refers to repairs that are, urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, including the primary heating system. A tenant may have emergency repairs made but only when all of the following conditions are met: emergency, the tenant has made at least 2 attempts to contact the landlord emergency repairs and has given the landlord reasonable time to make the repairs.

A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant claims reimbursement and gives the landlord a written account accompanied by a receipt for each amount claimed. This would not apply to amounts claimed by a tenant where it is found that the tenant made the repairs before one or more of the conditions described above were met, or when the tenant has not provided the account and receipts for the repairs. Once all of the above conditions are met and if the landlord does not reimburse a tenant as required, it is only then that the tenant may deduct the amount spent on emergency repairs from rent.

In this instance, I find that the tenant did not meet the conditions nor pay for any repairs and the tenant was not entitled to reduce or withhold rent. In any case, I note that no rent was paid for either January or February despite the fact that the tenant did not spend any money whatsoever on emergency repairs.

I find that the Ten-Day Notice received by the tenant on January 7, 2009 included specific instructions warning that the tenant is not entitled to withhold rent. In fact, there is no provision under the Act that would allow a tenant to withhold rent under the circumstances applicable to this situation and I reject the tenant's testimony that the tenant took this action on the advice of an Information Officer at the RTB.

Based on the testimony and evidence of both parties, I find that the tenant was in arrears for rent owed to the landlord.

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.

As it has been determined that the tenant did not have a right to deduct any portion of the rent and was served with a valid Notice to End Tenancy for Unpaid Rent, I find that the landlord is entitled to an Order of Possession under the Act. The portion of the tenant's application relating to the request for an order to cancel the Ten-Day Notice is hereby dismissed without leave to reapply.

Analysis – Landlord's Monetary Claim

In addition to obtaining an Order of Possession, the application from the landlord also included a monetary claim for rent owed for January and February 2009 in the amount of \$3,000.00. Given my findings above, I find that the landlord is owed \$3,000.00 for rental arrears under the tenancy agreement.

In regards to the claim for \$400.00 for utilities, the tenant acknowledged that utilities are owed but disputed the amount. I find that the evidence on this matter consisted of disputed verbal testimony from both parties, being that there was no written tenancy agreement. On the subject of whether or not terms of a tenancy agreement can be enforced, Section 6(3)(c) of the Act states that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it.

With verbal agreements, I find that when both agree, there is no reason why such terms can't be enforced. However, when there is conflicting testimony about what was agreed-upon, then verbal terms are almost impossible to interpret for the purpose of resolving a dispute. For this reason, I find that the landlord is only entitled to an estimated amount of \$200.00 for utilities representing \$100.00 for November/December 2008 and \$100.00 for January/February 2009.

Tenant'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 that being the tenant, 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 landlord.

The tenant has claimed that the tenancy was devalued by having no heat, no garage, no parking and less yard space than promised and the tenant is asking to be compensated.

In regards to the claim of no heat, which the tenant testified was a problem for the entire tenancy despite being reported to the landlord verbally and in writing, I find that the

tenant did not provide copies of any communications to the landlord on this subject. I find that the landlord's testimony disputed the tenant's allegations arguing that the heating problem was immediately fixed by the landlord's son as soon as it was reported in December 2008. I find that this claim by the tenant failed to satisfy all elements of the test for damages and loss and I find that this portion of the tenant's claim must therefore be dismissed.

In regards to the tenant's claim for a rent reduction of \$300.00 per month for December, January and February totalling \$900.00 for the failure to provide the garage as part of the tenancy, I find that tenant had not proven that such a term was ever agreed-upon by both parties and note that it is unlikely that the landlord would have voluntarily offered to provide a facility that was not available at the time. In any case, the tenant failed to satisfy the test for damages and therefore the claim for \$900.00 rent reduction is dismissed.

In regards to the tenant's claim for loss of parking in the amount of \$50.00 per month totalling \$150.00, I find that that, based on the tenant's testimony, there was access to parking on the street. I find that this claim does not satisfy the test for damages or loss and must be dismissed.

In regards to the loss of part of the yard, for which the claim was \$150.00 per month totalling \$450.00, I find that this must also be dismissed. Although both parties agreed that the tenancy did include the use of the yard, the testimony supports a finding that the landlord never restricted the tenant from using the yard and therefore the claimant has not successfully met even one of the four elements required to warrant 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 total monetary entitlement of \$3,150.00 comprised of \$1,500.00 rental arrears for the month of January 2009, \$1,500.00 rent owed for February 2009, \$100.00 utilities for part of November 2008 and all of December 2008, \$100.00 utilities owed for all of January 2009 and part of February 2009 and the \$50.00 fee paid by the landlord for this application. I order that the landlord retain the security deposit and interest of \$751.88 in partial satisfaction of the claim leaving a balance due of \$2,398.12 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: February , 2009

Dispute Resolution Officer