



# 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, 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;
- 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 repair issues
- An order to compel the landlord to make repairs to the unit
- An order to compel the landlord to comply with the Act
- An order to allow the tenant to reduce the rent for repairs, services, or facilities agreed upon but not provided

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?
- 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?
- Should the landlord be ordered to install separate hydro and gas meters for the two units?

### **Background and Evidence**

Based on the testimony of both parties, the background is as follows. The tenancy started on October 25, 2008 with rent set at \$1500.00 per month payable on the 25<sup>th</sup>

day of each month and a security deposit of \$750.00 was paid.

The landlord testified that at the beginning of the tenancy, the parties agreed that the utilities would remain in the landlord's name and the tenant would pay 2/3 of the gas and hydro bills. The landlord had submitted into evidence a copy of the tenancy agreement and although it indicated that utilities were not included, there was no addendum setting out the specific proportion of utilities to be paid. The landlord testified that under the tenancy agreement the tenant owed \$1,500.00 for rent on January 25, 2009. The tenant also owed two-thirds of \$260.74 hydro and two-thirds of \$347.04 gas for which the tenant's total portion for utilities amounted to \$405.20. Copies of these invoices and others were submitted into evidence. The landlord testified that when the tenant failed to pay the rent and utilities, a Ten-Day Notice to End Tenancy was finally issued on February 10, 2009, effective February 20, 2009. The landlord acknowledged that the tenant had not been given a written demand for the utilities indicated on the Notice more than 30 days prior to issuing the Notice. The landlord testified that on March 18, 2009, the tenant paid the rent for January, but that the tenancy was not reinstated and the tenant was issued a receipt for "use and occupancy only". The tenant also paid the rent for February and March as well. The landlord is seeking a monetary order for utilities and an order of possession.

The tenant's testimony confirmed that the tenant did not pay the rent for January when it was due but the tenant eventually paid the rent on March 18, 2009. The tenant testified that the rent was withheld because the landlord demanded over \$1,900.00 which included rent of \$1,500.00 and exorbitant utilities. The tenant testified that the landlord had not given the tenant any documentation for the utilities, nor issued any receipts. The tenant testified that the utilities were a source of concern because of the lack of verification, the fact that the gas was estimated based on past tenant's usage during the previous years and the tenant's suspicion that the occupants in the lower unit were using a larger share of utilities than one-third. The tenant testified that the rent was not paid within the five days of receiving the Notice as the tenant was awaiting the outcome

of this dispute. The tenant stated that once the tenant was advised that the rent should not be withheld and that it still must be paid, the five days had already passed.

The tenant is requesting that the Ten-Day Notice be cancelled and that the landlord also be ordered to install separate meters for the upper and lower units.

### **Analysis:**

A landlord can issue a Notice to End Tenancy for Unpaid Rent or Utilities under section 46 of the Act when rent or utilities are in arrears. The determination to be made is whether the Notice was validly issued under the Act. If so, the landlord's application is for the notice to be enforced with an Order of Possession and a Monetary Order. If not, the tenant is requesting that the Notice be cancelled.

### **Utilities Owed**

In regards to the utility claim, section 46(6) states that a notice based on utilities can be issued only if a tenancy agreement requires the tenant to pay utility charges to the landlord, and the utility charges are unpaid more than 30 days after the tenant receives a written demand for payment of them. If the above conditions are met then a landlord would be permitted to treat unpaid utility charges as unpaid rent and give notice on this basis. I find that the agreement merely indicates that utilities are not included in the rent but fails to specify what the tenant is required to do or pay in regards to utilities.

In regards to the landlord's position that there was a verbal agreement for the tenant to pay two-thirds of the utilities, I note that section 1 of the Act, *Definitions*, does not exclude verbal terms and in fact it 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...."

(my emphasis)

However, 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)

By their nature, disputed verbal terms are not clear and are often impossible for a third party to interpret. I am not prepared to find the verbal utility arrangement to be an enforceable term in the tenancy agreement between these two parties, particularly when other remaining tenancy terms are documented in writing in the agreement.

I find that the portion of the landlord's monetary claim relating to utilities must be dismissed. However, the Ten Day Notice to End Tenancy was not based solely on utilities owed and was also based on unpaid rent.

#### Rental Arrears

I find that there is no dispute of the fact that the tenant owed arrears for one month rent that was due on January 25, 2009. Payment of the rent within five days of receiving the Notice would have served to automatically cancel the Notice. In this instance the debt was not paid within five days but was paid in full by March 18, 2009. However, payment was accepted by the landlord for use and occupancy only. Therefore the Ten-Day Notice still remained in effect. I find that the Notice for unpaid rent was supported under the Act and section 46 of the Act was fully met. Although there are no outstanding rental arrears, the Ten-Day Notice cannot be cancelled. Based on the testimony and evidence of both parties, I find that the landlord is entitled to an Order of Possession.

#### Tenant's Application

Given the above, I find that the tenant's request to cancel the Ten-Day Notice has no merit and must be dismissed.

In regards to the portion of the tenant's application for an order to compel the landlord to install separate utility meters for each unit, I find that there is no basis or authority under the Act to make an order of this nature. I find that this portion of the tenant's application must therefore be dismissed.

### **Conclusion**

I hereby issue an Order of Possession in favour of the landlord effective two days after service on the tenant. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I find that the landlord is entitled to be reimbursed for the \$50.00 cost of filing this application. I order that the landlord retain this amount from the security deposit and interest of \$752.83 leaving a balance \$702.83 which must be returned to the tenant or otherwise dealt with in compliance with section 38 of the Act.

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

Dated:

March 2009

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Dispute Resolution Officer