



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

OPR, MNR, MNDC, MNSD, CNR

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 accrued rental arrears, 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 money owed and damages

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

Preliminary Issue

Late Evidence from Landlord

The tenant raised the issue and objected to the late submission of the landlord's evidence which was received by the tenant on April 9, 2009.

Residential Tenancy Dispute Resolution Rules of Procedure require that copies of any documents, photographs, video or audio tape evidence, upon which the applicant intends to rely that are not available to be filed with the application at time of filing, be received by the Residential Tenancy Branch and served on the respondent as soon as

possible, and at least (5) days before the dispute resolution proceeding as those days are defined the “Definitions” part of the Rules of Procedure. If the time between the filing of the application and the date of the dispute resolution proceeding is too brief to allow the five (5) day requirement of a) to be met, then the evidence must be received by the Residential Tenancy Branch and served on the respondent at least two (2) days before the dispute resolution proceeding.

The tenant pointed out that by definition, in calculating time expressed in the rules of procedure and the Act as “at least” a number of days, then one must exclude the first and last day. For material served on an office or place of business, weekends and statutory holidays are also not included.

After the tenant filed an application on March 6, 2009, the tenant’s latest evidence was submitted on April 2, 2009 and was also served on the landlord. The landlord responded to the tenant’s April 2, 2009 evidence serving rebuttal evidence on the tenant on April 9, 2009.

Excluding the day of service , April 9, and excluding the day of the hearing, April 14, I find that the tenant was served with this rebuttal evidence three days prior to the hearing. I find that although the tenant had the material in hand and could reference it during the hearing, the tenant was not served in sufficient time under the Act and Rules of Procedure. Therefore I find that the documentary evidence received on April 9, 2009 would not be considered. However I find that other evidence from the landlord was received well within the timelines permitted. This includes the following written evidence received on March 18, 2009:

- A copy of the Ten-Day Notice to End Tenancy for Unpaid Rent dated March 2, 2009;
- A copy of the tenant ledger showing the payment history as of March 2, 2009
- A copy of a letter from the landlord to the tenant dated March 2, 2009
- Copies of receipts for two recent payments by the tenant of \$400.00 each.

Verbal testimony given by the landlord relating to the material contained in the evidence

package would also to be considered.

Landlord's Representative

The tenant also made an objection in regards to the landlord's representative, and expressed concerns about the landlord having retained counsel to represent it. The tenant requested an adjournment for additional preparation on this basis. Rule 8.3 of the Residential Tenancy Rules of procedure provides that a party to a dispute resolution proceeding may be represented by an agent or a lawyer and may be assisted by an advocate, an interpreter, or any other person whose assistance the party requires in order to make his or her presentation. I found that there was no valid basis for the tenant's objection and no reason that would justify adjourning this matter.

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

including, money owed to the tenant by the landlord, a rental abatement for loss of quiet enjoyment and the landlord's failure to repair the unit in violation of the Act?

Landlord's Application: Notice to End Tenancy

Background and Evidence

The tenancy began in June 2001 and the tenant paid a deposit of \$500.00 at that time.

A hearing was originally held on February 10, 2009 on the landlord's application to end the tenancy based on Notices to End Tenancy for Unpaid Rent dated December 2, 2008 and January 3, 2008, under file number ###. The tenant did not attend that hearing and made a request for review consideration. The review consideration decision rendered on February 25, 2009 was in the tenant's favour as the Dispute Resolution Officer found that the tenant was not served the notices to end tenancy nor the hearing package and application. The Dispute Resolution officer granted a review hearing to consider the landlord's application. However, for some reason, this hearing was never scheduled.

Meanwhile, it appears that the tenancy was reinstated by the landlord and tenant. However, the landlord issued a new Ten-Day Notice to End Tenancy for Unpaid Rent on March 2, 2009. On March 6, 2009 the tenant filed an application to dispute the Notice and on March 13, 2009 the landlord then filed a cross application seeking an order of possession and a monetary order against the tenant.

The landlord testified that the tenant fell into arrears on the rent and never succeeded in catching up on the rent owed to the landlord. The testimony was supported by the witness. The landlord testified that from June 2008 until March 2009 the tenant had accrued a debt of \$4,100.00. The landlord was seeking a monetary order and Order of Possession based on the Notice issued on March 2, 2009.

The tenant testified that the landlord's records are not accurate and that payments were made for which the landlord refused to give a receipt. The tenant furnished a copy of a money order for a payment made on March 9, 2009 that was not shown on the tenant's March 2, 2009 account statement initially submitted into evidence by the landlord. The

tenant testified that a past agreement had been made with the landlord permitting the tenant to do repairs on the unit in exchange for credit towards the rent and that the tenant had done renovations worth \$2,000.00 to the fire escape in the summer of 2007 and \$300.00 for prep work on the bathroom in October 2007. The tenant's position was that the value of the work done in 2007 should have been credited towards, and applied to, unpaid rent owed for November 2008 and December 2008. The tenant's explanation for why this matter had not been disputed at an earlier date was that they had built a trust relationship between the tenant and the landlord over the past nine years. The tenant also testified that the landlord had agreed to compensate him for lost wages when he felt it necessary to remain on site during renovations.

The landlord disputed that any work-for-rent arrangement or promise of compensation was ever made.

Analysis: Landlord's Application: Ten-Day Notice

Based on the testimony and evidence of both parties, I find that the tenant was in arrears for rent. Even if I accepted that there was some kind of verbal agreement to reimburse the tenant through a rent-credit-for-repair-work arrangement, the work-for-rent credits would not be sufficient to satisfy the amount of arrears indicated on the tenant's rental statement. I do not accept the tenant's testimony that the landlord or any agent of the landlord agreed to reimburse him for lost wages when he missed work to remain on site to monitor the landlord's contractors.

I find that, on a balance of probabilities, it is likely that there was rent owed by the tenant to the landlord. In any case, once the Ten-Day Notice was issued there was a five-day window for the tenant to quash the notice by paying all of the rental arrears. Had this been done, the Ten-Day Notice would have automatically been cancelled.

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. Monetary claims by the tenant against the landlord do not serve to erase rent owed or to justify non-payment of rent. I find that this tenant's rent was due and payable on the first day of each month and the tenant failed to pay rent when it was

due. 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 issued by the landlord.

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.

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.

In regards to the landlord's claim for the amount of rental arrears owed, I note that the landlord has kept an accounting of rent payments made by the tenant. However, I find that the landlord's records are not consistent with the tenant's evidence. For example, the tenant supplied an original carbon of a money order dated August 1, 2008 made out to the landlord, for \$500.00, while the statement of accounts initially submitted into evidence by the landlord with the landlord's application, shows that no payment was made in August 2008.

I find that I am unable to determine the amount of rent actually owed by this tenant to the landlord and I am not prepared to issue a monetary order when the data is not abundantly clear. However, I am able to find that the landlord is entitled to retain the security deposit paid by the tenant in partial satisfaction of rental arrears.

Tenant's Application for Monetary Compensation

Background and Evidence

The tenant has made monetary claims including compensation for repair work done, loss of peaceful enjoyment and loss of facilities due to disrepair by the landlord. The tenant testified that he is owed \$2,000.00 for work done in regards to a fire escape in 2007 and that the reason he never demanded payment as he believed this would eventually be credited towards rent owed. The tenant stated that he is also owed \$300.00 for preparation work done on the bathroom. The tenant testified that he was deprived of the use of his bathroom and his shower for a period of time enduring hardship and also that renovations by the landlord were disruptive. The tenant testified

that the landlord had failed to address some needed repairs such as leaking from the bathroom ceiling, and growth of mildew. The tenant is claiming \$1,000.00 for the loss of value to his tenancy.

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, and that it happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
2. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
3. 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.

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 claims, this portion of the tenant's application must be dismissed.

Conclusion

Pursuant to section 55 and based on the Notice to End Tenancy , 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's monetary entitlement would at least justify retention of the tenant's security deposit, and I order that the landlord retain this. I dismiss the remainder of the landlord's monetary claim without leave. .

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

Dated: DT

Dispute Resolution Officer