

DECISION

Dispute Codes OPR MNR MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for an Order of Possession and a Monetary Order for unpaid rent or utilities, for money owed or compensation for damage or loss under the *Act*, and to recover the filing fee from the tenant for the cost of this application.

Both the landlord and tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

Issues(s) to be Decided

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

- Whether the landlord is entitled to an Order of Possession under Section 55 of the *Act* for unpaid rent and breach of the tenancy agreement
- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent and utilities

Background and Evidence

The landlord testified that it was a month to month tenancy which began on November 17, 2008 with rent of \$750.00 payable on the first of each month. The landlord testified that the tenant paid \$400.00 in damage deposit on approximately November 17, 2008.

When asked why the lease agreement, which the landlord submitted into evidence, shows rent payable on the 17th of each month, the landlord testified that he made some

changes on the lease to the 17th but that he had changed it all back to the 1st of each month.

The landlord testified that he served the tenant with the Notice of Dispute Resolution on April 24, 2009 in his home kitchen in the presence of the landlord's wife. When asked approximately what time of day the service took place the landlord stated the he did not know.

The tenant testified that the landlord showed her the Notice of Dispute Resolution on approximately April 23, 2009, but for only a short period of time, so short that she was not able to read it all, and then the landlord took the notice away from the tenant. The tenant stated that she stayed over at her boyfriend's home on April 29, 2009 and returned last night, April 30, 2009, to find that the Notice of today's hearing was slid underneath her door.

The landlord rebutted the tenant's testimony stating that the tenant told the landlord that she was going to leave the Notice of the Dispute Resolution Hearing with the landlord and left it on his kitchen table.

The landlord testified that he served the tenant with a 1 Month Notice to End Tenancy on approximately April 9, 2009 in the landlord's home kitchen with no witnesses present. The landlord stated the he did not know what date for sure or what time of day this service took place.

The tenant testified that the 1 Month Notice to End tenancy was in fact posted on her door on approximately April 9, 2009 and that she was not served this notice in the landlord's kitchen. The tenant testified that when she read this notice it was the first time she was told that smoking in her unit would break the tenancy agreement. The tenant stated that she has smoked in this rental unit from the date of possession and that the landlord even drove her to the store to purchase cigarettes.

During his testimony the landlord stated that he was aware that the tenant was smoking but that he “let her get away with it hoping that things would work out.” When asked when he told the tenant that smoking was an issue, the landlord testified that he did not know when he brought this issue to the tenant’s attention.

The tenant testified that she wasn’t required to pay rent until December 2008 although she took possession on November 17, 2008. The tenant stated that she had a verbal agreement with the landlord that she would move in November 17, 2008, and in exchange for cleaning up the rental unit she wouldn’t begin paying rent until December 2008.

The landlord testified that rent has been paid late every month from the beginning of the tenancy but that the rent is now paid in full. When asked when the rental arrears were paid the landlord stated that he did not know the exact date and that he did not have his receipt book with him. The landlord testified that he did not write “use and occupancy only” on the receipt when he accepted the rental payment.

The tenant testified that she has never been late paying the rent and in fact she has always paid the rent early. The tenant stated that she has receipts which prove that the rent has been paid on time. The tenant read a sample of her receipts stating that March 2009 rent was paid in full on February 18, 2009 and May 2009 rent was paid in full on April 22, 2009.

The tenant testified that she agreed to a lease agreement when she first took possession of the unit but that she only initialled the pages and did not sign the agreement. The tenant stated that rent was \$750.00 per month and that she was required to put the gas bill in her own name. The tenant stated that there was no mention of her being required to pay electricity.

The tenant stated that the landlord took the tenancy agreement away from the tenant in January 2009, telling her that he had to make changes to the agreement and has never

returned a copy of the agreement to her. The tenant stated that the next thing she new the landlord was telling her that she had to pay \$25.00 per month towards electricity effective January 2009. The tenant testified that she paid the landlord a lump sum payment to pay the newly charged electricity bill for the entire year but then the landlord told her in February 2009 that she would have to pay \$100.00 for electricity.

The landlord testified that he issued the 1 Month Notice to End tenancy because he rented the unit to only one person and now there are two people there. The landlord stated that the rental unit is a small cottage, approximately 550 square feet with one bedroom, a bathroom, a kitchen, and living room. The landlord stated that the tenant has her boyfriend there all the time which breaks her lease agreement.

The tenant testified that her boyfriend does not live at the rental unit, that he has his own home and mailing address, that she has not sublet the unit to her boyfriend, and that he is there only 3 to 4 nights a week. She stated that she is a single woman and that by having her boyfriend over during the evenings provides her with security. The tenant stated that her boyfriend has been attending the rental unit every since she moved into the unit in November 2008 and that the landlord has always been aware of this.

The tenant testified that she has never received any written communication or letters from the landlord about late payment of rent or problems with her behaviour or guests at the unit.

The tenant stated that she has not had any problems with the rental unit or landlord, except for the additional electrical charges, until the landlord had some property stolen while he was out of town.

The landlord confirmed that his tractor was stolen out of his shed sometime between March 23 and April 3, 2009 while he was out of the Country. The landlord did not

dispute anything the tenant said and added that her boyfriend caused an altercation which involved calling the police when the tenant first moved into the rental unit.

Analysis

I find that in this case, in order to justify issuing an Order of Possession under section 55 of the *Act*, the burden of proof is on the landlord to prove that the notice of dispute resolution was served to the tenant in accordance with the *Act*, that the notice to end tenancy was issued in compliance with the *Act*, that the tenant has repeatedly paid rent late, that the tenant has breached the tenancy agreement by smoking, and that the landlord has not reinstated the tenancy agreement.

I find that the landlord's credibility is hard to assess. On one hand he tells me that he issued the tenant a tenancy agreement yet on the other hand he tells me he is looking at an original agreement during his testimony, but he submitted another original into documentary evidence. The landlord also stated that he wrote the tenant letters yet he submitted the original letters he referred to into documentary evidence.

When I first asked the landlord information specific to service of the notice of hearing documents and the 1 month notice to end tenancy, the landlord became upset and then could not answer questions related to the service of such documents.

After the tenant provided her testimony the landlord did not dispute her testimony and only added that there was one instance of a problem with the tenant's boyfriend when she first moved into the rental unit.

The purpose of serving documents under the *Act* is to notify the person being served of their breach and notification of their rights under the *Act* in response. The landlord is seeking to end the tenancy due to this breach; however, I find that the landlord has failed to prove how service was conducted to the tenant of the Notice of Dispute

Resolution. Based on the foregoing I dismiss the landlord's application without leave to reapply.

The landlord testified that rent has been paid in full. I find that by accepting payment of the rental arrears and the May 2009 rent the landlord has reinstated the tenancy agreement.

I find that the landlord is in contravention of section 13(1) of the *Residential Tenancy Act* which stipulates that a landlord must prepare in writing a tenancy agreement that complies with section 13(2) of the *Act* and the landlord must provide the tenant with a copy of the agreement. I hereby order the landlord to issue a new tenancy agreement that complies with the *Act*, that stipulates rent payable on the 1st of each month in the amount of \$750.00, that rent payments began effective December 1, 2008, that a security deposit in the amount of \$375.00 was paid on November 17, 2008, and that electricity is included in the \$750.00 rent payment, that the landlord and tenant both sign this agreement and that the landlord gives a copy of this agreement to the tenant for her records, in compliance with the *Act*.

By implementing charges for electricity after the tenancy began in November 2008, I find that the landlord has contravened section 14 of the *Residential Tenancy Act* by making changes to a tenancy agreement without the agreement of both parties. Although the tenant has paid some of the additional electrical utilities, this does not constitute her acceptance to these charges and I hereby order the landlord to refund the tenant any monies paid to the landlord for electricity.

I find that the landlord is in contravention of section 19 of the *Residential Tenancy Act* which stipulates that a landlord may not accept a security deposit that is greater than the equivalent of $\frac{1}{2}$ of one month's rent. In this instance the landlord should have only charged \$375.00 for a security deposit and not \$400.00. As a result the tenant has overpaid her security deposit by \$25.00 and I hereby order the tenant to apply this overpayment to her June 2009 rent by reducing her rental payment by \$25.00.

A “**tenancy agreement**” means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, actions and use of the rental unit such as smoking in the rental unit, and includes a licence to occupy a rental unit. I find that based on the above definition, oral terms contained in, or form part of, tenancy agreements and may still be recognized and enforced.

Both the landlord and tenant testified that the tenant has been allowed to smoke in the rental unit since the onset of the tenancy. I find that this entitlement to smoke is an oral, expressed, or implied right of the tenant, which based on the above definition, can still be recognized and enforced, so I do not find that smoking in the rental unit is considered a breach of the tenancy agreement.

The tenant has testified that she has not entered into a lease or sublet agreement with her boyfriend and that in fact he is a guest of hers that stays overnight three to four times per week. The landlord has not provided any evidence to support his claim that the tenant has assigned or sublet the rental unit to her boyfriend and so I dismiss the landlord’s claim.

As the landlord has not been successful in his application I dismiss his request to recover the cost of the filing fee.

Conclusion

I HEREBY DISMISS the landlord’s application for an Order of Possession and for a Monetary Order without leave to reapply.

I HEREBY ORDER the landlord to issue a written tenancy agreement, that meets the requirements of section 13 of the *Residential Tenancy Act*, which stipulates rent of \$750.00 payable on the 1st of each month, that electricity is included in the rent, and that a security deposit of \$375.00 was paid on November 17, 2008. A copy of the signed agreement is to be given to the tenant for her records.

I HEREBY ORDER the tenant to reduce her June 1, 2009 rent by \$25.00, the amount overpaid in the original security deposit.

I HEREBY ORDER the tenant to reduce her June 1, 2009 rent by the amount equal to the amount the tenant has paid the landlord for electricity bills since January 2009.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: May 01, 2009.

Dispute Resolution Officer