

DECISION

Dispute Codes OPR MNR MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord to obtain an Order of Possession and a Monetary Order for unpaid rent, to keep all or part of the security deposit and to recover the filing fee for this application from the tenant.

Service of the hearing documents, by the landlord to the tenant, was done in accordance with section 89 of the *Act*, sent via registered mail on March 20, 2009. Mail receipt numbers were provided in the landlord's documentary evidence. The tenant was deemed to be served the hearing documents on March 25, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Both the landlord and tenant appeared, acknowledged receipt of evidence submitted by the other, 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
- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent and to recover the filing fee from the tenant

Background and Evidence

The tenancy was a month to month tenancy which began on August 15, 2006 with rent of \$1340.00 payable on the first of each month. The tenant paid a security deposit of

\$650.00 on August 4, 2006. The tenant vacated the rental unit by February 28, 2009.

The landlord has withdrawn her application for an Order of Possession as the tenant has vacated the rental unit.

The tenant testified that she did not receive a copy of the landlord's evidence and that the registered mail sent by the landlord consisted of the notice of dispute resolution and a copy of the landlord's application for dispute resolution. The landlord confirmed that she did not send copies of the evidence to the tenant.

The landlord testified that the tenant's February 2009 rent cheque bounced and that she was notified of this some time during the week of February 11, 2009. The landlord stated that she issued the tenant a 10 day notice to end tenancy on approximately February 19, 2009 and posted it to the tenant's door. The landlord stated that she could not be certain of the date she posted the 10 day notice to end tenancy as her copy of the 10 day notice to end tenancy was not dated. The landlord advised that the date to vacate the rental unit listed on her copy of the 10 day notice to end tenancy was February 29, 2009.

The tenant testified that she found the 10 day notice to end tenancy on her door on approximately February 19, 2009 and that her February 2009 rent payment did not clear the bank. The tenant stated that her child support payment did not come through so she did not have enough money to pay the rent. The tenant advised that the landlord contacted her to attend a meeting to discuss payment options.

The landlord stated that she had a meeting with the tenant and her ex-husband where the tenant confirmed that she was not able to pay the rent, that the tenant would not agree to any payment options put forth by the landlord, that the tenant would be moving out by the end of the month to a rental unit just down the street, and that the landlord tried to get the tenant to sign a document assigning the damage deposit to the landlord but the tenant refused.

The tenant stated that the landlord discussed the move out cleaning list with the tenant, during their meeting, and that the landlord told the tenant that if she cleaned the rental unit she would not have to worry about getting the carpets steam cleaned as the landlord would have their regular steam cleaning guy come in to do the carpets.

The landlord has submitted a monetary claim to recover costs for carpet cleaning and cleaning the rental unit. The landlord testified that the rental unit was left un-cleaned, that the landlord had to clean and wipe out cupboards, clean the fridge, clean the stove, and do a cleaning of the bathrooms. The landlord contents that it took her a full week, 40 hours, to clean the rental unit.

When asked why she waited 12 days to arrange the carpet cleaning the landlord advised that they did renovations to the rental unit, that they installed new flooring and painted the entire rental unit so they did not want to clean the carpets until they were finished their work.

The landlord testified that she did not conduct a move-in inspection report nor did she conduct a move-out inspection report but that she made several attempts to contact the tenant, after the tenant vacated the rental unit, leaving numerous messages to try and schedule a move out inspection but that the tenant failed to return any of the landlord's calls.

The landlord testified that the tenant conducted a "mid-night move" whereby the tenant moved out of the rental unit over a course of three or four days in the middle of the night. When asked how the landlord new the tenant vacated the rental unit the landlord advised that the neighbours told the landlord that the tenant had moved out and that when she entered the unit she found that the keys were left on the kitchen counter.

The tenant testified that she did not move out during the late evening but that she did conduct the move during the late afternoon, early evening. The tenant stated that she worked full-time to support herself, two children aged 13 years and 7 years, and that she didn't get home from work until after 5:00 p.m., which is when she conducted the move out.

The tenant testified the landlord told the tenant during their meeting to discuss payment arrangements, that the landlord told the tenant that she was going to be out of town at her cabin and told the tenant she didn't need to clean the carpets, as they had their guy to clean them, and then instructed the tenant to leave the keys on the kitchen counter.

The tenant testified that she never received a request from the landlord to conduct a move out inspection and that the landlord new the tenant moved just down the street as the landlord had the tenant's forwarding address since their meeting which took place a couple of days after the 10 day notice to end tenancy was issued. The tenant stated that she had left some of her possessions with neighbours in the complex and that she was around for several days picking up her possessions, stopped into her old rental unit to see the renovations going on, but that she never saw the landlord in the rental unit cleaning. The tenant contends that she was in and around the complex on several occasions so she could have conducted an inspection if asked.

The tenant stated that she had lived in the complex for almost three years and that her children and she still had friends in the complex so she made every effort to leave the rental unit clean so that there would be no harsh words about her after she left.

The tenant's witness testified that he assisted the tenant in moving her possession on two days mid to late afternoon and that they stopped moving articles around 7:00 p.m. in the evening as it was already dark. The witness stated that while he was loading up the tenant's possessions with another male the tenant was inside the rental unit cleaning. The witness stated that he saw the tenant washing down walls, cleaning the

kitchen, cleaning the bathroom, and that he remembered the smell of bleach inside the rental unit.

When asked directly, the landlord confirmed that she was out of town from mid afternoon on Friday February 27, 2009 returning late Sunday March 1, 2009.

The landlord responded to the tenant's testimony by stating that there was urine and "poo" left in the toilets that the landlord was required to clean and that it took her a full week to clean the rental unit.

Analysis

The landlord has withdrawn her application for an Order of Possession as the tenant has vacated the rental unit.

In regards to an Applicant's right to claim damages from the Respondent, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, 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 the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under sections 33 and 67 of the *Act*, the Applicant tenant would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7. 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 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 landlord 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.

A significant factor in my considerations is the credibility of the landlord. I am required to consider the landlord's evidence not on the basis of whether her testimony "carried the conviction of the truth", but rather to assess her evidence against its consistency with the probabilities that surround the preponderance of the conditions before me. I find that the landlord contradicted her own testimony during the hearing and left out information about her availability during the time the tenant was to vacate the rental unit.

I find that the landlord has contravened section 3.1 of the *Residential Tenancy Branch Rules of Procedure* which stipulates that the applicant must serve each respondent with copies of the notice of dispute resolution proceeding, a copy of the dispute resolution information package provided by the Residential Tenancy Branch, the details of any monetary claim being made, and copies of all evidence.

I find that the landlord is in contravention of section 35 of the *Act* and that she has failed to prove that she provided two opportunities to meet with the tenant for a walk through inspection. Based on the foregoing the landlord has forfeited her right to claim damages against the security deposit pursuant to sections 24 and 36 of the *Act*.

The tenant has admittedly failed to pay the February 2009 rent and as a result is in contravention of section 26 of the *Act*. Based on the foregoing I find in favour of the landlord's request for a monetary claim for unpaid rent of \$1,340.00 to be offset against the security deposit of \$650.00 plus interest of \$21.05.

As the landlord was only partially successful in her claim, I can not find in favour her request to recover the filing fee.

Monetary Order – I find that the landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the tenant's security deposit as follows:

Unpaid Rent for February 2009	\$1,340.00
Less Security Deposit of \$650.00 plus interest of \$21.05	- 671.05
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$668.95

Conclusion

I HEREBY FIND in favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for \$668.95. The order must be served on the respondent and is enforceable through the Provincial Court and enforced as an order of that Court.

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 07, 2009.

Dispute Resolution Officer