

DECISION AND REASONS

Dispute Codes:

OP, MNR, MNSD, MT, CNR, MNR, MNDC, OLC, ERP, RP, LRE, LAT, RR, FF

Introduction

This reconvened hearing was held as a continuation of the cross-application hearing held on June 17, 2009. During the June 17, 2009 hearing the landlord application was heard, as was the tenant's application requesting more time to cancel a notice to end tenancy and cancellation of a Notice to end tenancy. The landlord was granted an Order of possession and compensation for unpaid rent in the sum of \$3,087.00. A monetary Order was not issued, pending the outcome of the tenant's claim for compensation. The parties were reminded that they continue under oath.

Preliminary Matter

At the start of the reconvened hearing it was determined that portions of the tenant's claim for compensation were no longer required as the tenancy has ended. The tenant's claim will include only those items detailed under the Issues to be Decided section of this decision. All other claims for compensation are dismissed without leave to reapply.

The tenant stated that she had claimed \$5000.00 compensation for both a loss of quiet enjoyment and for harassment; however, the tenant acknowledged that this was not clearly stated during the first hearing or on her application for dispute resolution and that this claim would place her application beyond the \$20,000.00 amount indicated on her application for dispute resolution. The tenant agreed to proceed with a claim for compensation of \$5000.00, encompassing both the loss of quiet enjoyment and harassment.

The evidence submitted by the tenant on May 13, 2009 and the landlord on May 26, 2009 were served within the required time-frames; all other evidence was rejected as late and not considered in determining the outcome of this hearing.

The tenant's application has been amended to include a request for return of the deposit paid under section 38 of the Act.

Issue(s) to be Decided

May the landlord retain the deposit in partial satisfaction of unpaid rent?

Is the tenant entitled to return of the deposit paid?

Is the tenant entitled to costs for emergency repairs?

Is the tenant entitled to compensation for damages and/or loss?

May the tenant reduce rent for repairs, services or facilities agreed upon but not provided?

Is either party entitled to filing fee costs?

The tenant is claiming the following:

Return of deposit paid	950.00
500.00 per month rent reduction	4,000.00 October 2008 – May 2009
Loss of quiet enjoyment/harassment	5,000.00
Emergency electrical repair	218.42
Total	10,168.42

Background and Evidence

The tenant testified that two weeks after she moved into the rental unit she noticed there were sheep being pastured on the property surrounding the house. The tenant stated that she had signed a tenancy agreement that included rent of a house, yard, shop and acreage. The tenant testified that the landlord continued to have sheep on this land, denying her the use of property that she was renting. The tenant moved onto the property in October 2008 and stated she planned on renting the land out as pasture in the spring Of 2009.

The tenant is claiming a loss of use of the pasture and has requested compensation of \$500.00 from October 2008 to May 2009, totaling \$4,000.00.

The landlord testified that the agreement signed between the parties included an addendum that stated the tenant agreed to keep the yard, driveway and gardens of the rental unit neat and clean and made no reference to the tenant having use or care of the surrounding acreage. The landlord testified that the rental rate of \$1,900.00 per month also indicates that the agreement did not include use of the acreage, as the monthly rent charged would have been much higher. The landlord stated that they are currently advertising the rental unit for \$1,900.00 per month for the house, yard, garden and shop only. The landlord testified that when they rent a property that is to be used for livestock a clause is always included in the tenancy agreement that the tenant obtain liability insurance in case of escaped animals. The landlord stated that this clause was not included in the tenancy agreement as the acreage did not form a part of the rental.

The tenant testified that she suffered a loss of quiet enjoyment and experienced harassment inflicted by the previous agent of the landlord. The tenant stated that the landlord's agent continually telephoned her, negatively compared her to previous tenants and berated her. The tenant testified that the landlord's agent also called her place of work under the ruse of an emergency, in order to speak with the tenant. The tenant stated that the landlord was calling her in order to obtain late rent payments and that; as a result, under pressure from the landlord's agent the tenant had given the agent several signed, blank cheques. The tenant stated that she told the agent when the cheques could be cashed. The tenant alleged that the agent filled in the amounts exceeding what was owed by the tenant, resulting in the cheques being returned as NSF. The tenant testified that the landlord agent's demands that she provide these cheques constituted harassment. Later during her testimony the tenant stated that she had a copy of one cheque which could prove the tenant's allegation in relation to the cheques; this was not submitted as evidence.

The tenant stated that when telephoned by the landlord's agent she was called names and that during one incident at the rental property the agent used a profanity against the tenant. The tenant alleges that the constant telephone calls, the name-calling and use of profanity constituted harassment which supports a claim for compensation. The tenant stated that she did not understand what she had done wrong and that her co-tenant felt threatened and harassed. The tenant stated that the landlord's agent called

her previous landlord and asked that she pay the tenant's outstanding rent. The tenant testified that this also contributed to her feeling harassed.

The landlord testified that she did speak with the previous agent for the landlord and that the agent indicated she had called the tenant on a number of occasions in order to obtain rent payments that were late. The landlord submitted copies of calendar notes kept by the agent which indicate the tenant had provided several NSF rent cheques and that numerous attempts were made, some successful, to reach the tenant in order to discuss rent payments. The landlord testified that they do make repeated calls to a tenant when rent is not paid as they are responsible to the landlords, who expect management companies such as theirs to ensure payments are made on time. The landlord stated that the calls should not be negative or degrading but that she had no evidence that the calls had been derogatory in nature. The landlord stated that the previous agent may have telephoned out of frustration with the tenant and that it appears action by the landlord under the Act should have occurred earlier. The landlord pointed out that there is an absence of any witness testimony to the harassment alleged by the tenant.

The landlord stated that the tenant's previous landlord was called in error, as this individual has the same last name as an occupant who lived with the tenant. The landlord stated that they would not have called the previous landlord to request payment and that this was simply an error.

The tenant claimed \$218.42 for costs incurred to repair an electrical problem. During the hearing the landlord agreed to provide the tenant with compensation for that cost.

Analysis

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 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 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. Once that has been established, the tenant must then provide evidence that can verify the actual monetary amount of the

loss or damage. Finally it must be proven that the tenant did everything possible to address the situation and to mitigate the damage or losses that were incurred

In relation to the tenant's claim of compensation for loss of use of the acreage, I find that the claim is not supported by the evidence before me. The tenancy addendum does not reference the use of the acreage; only the yard, gardens, a shop and house. Further, the tenant offered no evidence of any correspondence that occurred with the landlord immediately upon her becoming aware of this alleged breach of her tenancy agreement.

Section 7(2) of the Act requires parties to do whatever is reasonable to minimize a potential loss. The absence of any effort by the tenant at the start of her tenancy to correct the understanding in relation to the acreage, followed by the tenant's claim for rent abatement of \$500.00 per month for an eight month period of time, fails to demonstrate intent by the tenant to mitigate the loss she is claiming. I have also placed weight on the landlord's testimony that the rent for a home including acreage would have greater value than the monthly rent that was charged to the tenant. Therefore, the tenant's claim for compensation for loss and use of the acreage is dismissed without leave to reapply.

Frequent and ongoing interference by the landlord may form a basis for a claim of a breach of the covenant of quiet enjoyment and every tenancy includes an implied covenant of quiet enjoyment. Harassment is defined in the Dictionary of Canadian Law as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome". As such, what is commonly referred to as harassment of a tenant by a landlord may well constitute a breach of the covenant of quiet enjoyment. There are a number of other definitions; however all reflect the element of ongoing or repeated activity by the harasser.

The tenant found the repeated calls from the landlord's agent a form of harassment and unwelcome; however, I find the landlord's testimony that repeated calls to a tenant that may occur when the tenant fails to pay rent when it is due, not to be unreasonable. If the landlord's agent did swear at the tenant I fail to find that this would constitute harassment and view this allegation, if it did occur, as something that could be upsetting to the tenant. I find that the landlord agent's repeated telephone calls to the tenant and the one call to the individual she thought was the occupant of the house fail to constitute an intent to harass.

I have determined that the telephone calls to the tenant were made as the result of a frustrated landlord attempting to obtain the rent owed. I do not find that these calls were vexatious or constituted on-going interference; but that the calls were made in the hope of having the tenant pay her rent. I find that the landlord was, in fact, making efforts to obtain rent from the tenant so that the tenant would not be evicted. The tenant has failed to provide any verification of a loss suffered or damages incurred that support the claim for compensation.

The tenant has acknowledged that she was not paying her rent when it was due and her allegation that the landlord's agent coerced the tenant into giving the agent signed blank cheques is not supported by any evidence. I have also given no weight to the tenant's testimony that she could have supplied a copy of one of the suspect cheques as

evidence. Therefore; I dismiss that the tenant's claim for compensation for loss of quiet enjoyment and harassment.

The landlord has agreed to compensate the tenant for emergency repairs in the sum of \$218.42.

As the landlord and tenant claims are each partially successful I find that neither party is entitled to filing fee costs from the other.

The landlord may retain the deposit of \$750.00 plus current interest of 3.04 in partial satisfaction of the landlord's claim.

The interim decision issued on June 17, 2009 determined that the landlord is entitled to compensation for unpaid rent in the sum of \$3,087.00.

Conclusion

The tenant's claim for compensation for loss of the use of the acreage surrounding her rental property is dismissed without leave to reapply.

The tenant's claim for compensation in the sum of \$5000.00 for harassment and loss of quiet enjoyment is dismissed without leave to reapply.

The landlord has agreed to provide the tenant with compensation for emergency electrical repairs in the sum of \$218.42.

My interim decision issued on June 17, 2009 found the landlord was entitled to compensation for non-payment of rent in the sum of \$3,087.00.

I find that the landlord has established a total monetary claim of \$3,087.00 comprised of unpaid rent. I find that the tenant has established a monetary claim in the sum of \$218.42.

Section 72(2) allows a dispute resolution officer to set-off amounts owed by a landlord to a tenant. I order that the landlord retain the deposit and interest of \$753.04 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$2,115.54. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Dated June 17, 2009.

Dispute Resolution Officer