



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

OPR, MNR, MNDC, MNSD, CNR, RR, LRE, 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 and for damages to the suite, 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 no hot water for a period of time
- To suspend or set conditions on the landlord's right to enter the rental unit

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?
- Has the landlord established that the tenant caused damage to the suite which was not repaired by the tenant prior to vacating?
- 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 for which the landlord must be held responsible under the Act?

Preliminary Issue

At the outset of the hearing the tenant advised that he was in the process of vacating the unit. Therefore, the portion of the tenant's application requesting that the Notice be cancelled is dismissed and the landlord will be granted an Order of Possession.

Given the above, the portion of the tenant's application requesting an order that the landlord's access to enter the unit be restricted is no longer an issue of dispute and is also therefore dismissed.

Background and Evidence: Landlord's Claim for Unpaid Rent

Based on the testimony of both parties, the background is as follows. The fixed-term tenancy started in March 7, 2009 and was to convert to month-to-month after February 29,

2010. The rent was set at \$1,150.00 per month with security deposit of \$575.00. The landlord had submitted into evidence a copy of the tenancy agreement, a chronology of events by date, 2 copies of Ten-Day Notices to End Tenancy for Unpaid Rent issued June 2, 2009 and July 14, 2009, copies of invoices for renovations, appliances, repairs and utilities, a copy of the move-in inspection report and proof of service. The landlord acknowledged that there was an intermittent problem with the hot water in the kitchen and that after several unsuccessful attempts to address the problem the tenant was advised in a letter dated May 7, 2009 that the tenant's rent would be rebated by \$100.00 per month from the move-in date and until the problem was fixed. A copy of this communication was submitted into evidence. The landlord testified that the hot water situation was finally rectified by June 25, 2009.

The landlord testified that the tenant did not pay the rent due on June 1, 2009 and that a Ten-Day Notice to End Tenancy for Unpaid rent was issued and served on the tenant. The landlord testified that the tenant still did not pay rent for July and a second Ten-Day Notice was issued on July 14, 2009. Since that time, the tenant has not paid rent. The landlord is claiming \$1,150.00 rent owed for June 2009, \$1,150.00 rent owed for July 2009, \$1,150.00 rent owed for August 2009, and \$575.00 rent owed for Use and Occupation for the first half of September along, with \$575.00 loss of rent for the remainder of the month of September 2009. The landlord was also claiming payment of utilities owed in the amount of \$29.55.

The tenant acknowledged that rent was not paid for June, July, August and September 2009. The tenant admitted that the rent was withheld due to the problems with the tenancy. However, the tenant stated that there is no dispute over the utilities owed.

Background and Evidence: Landlord's Claim for Damages

In addition to the \$4,600.00 rent and loss of rent being claimed, the landlord's application included a claim for compensation for damage caused by the tenant to the glass in the patio windows. The landlord acknowledged that the glass was chipped, but took the position that it was fully functional and that the tenant had broken it in violation of the Act and should be required to pay for the repair bill of \$430.50.

The tenant disputed the claim, pointing out that the chip had weakened the glass and that, in fact, the already damaged pane of glass posed a serious safety risk to the tenant and

guests.

Background and Evidence: Tenant's Claim for Damages

The tenant testified that from the time the tenancy started there was an ongoing concern with hot water in the kitchen which was reported to the landlord. However this persisted despite repeated efforts by various plumbers. The tenant testified that the tenant found it impossible to enjoy their suite because it made using the kitchen facilities virtually impossible. The tenant testified that for a time the tenant tried to work around the lack of hot water by using paper plates but this did not resolve the need to wash out the pots and pans. The tenant testified that the situation prevented at-home entertaining of friends and forced the tenant to dine out for four months, thereby depleting the tenant's savings. The tenant testified that it was finally discovered that the source of the problem was due to the breakdown of an earlier repair from years past in which the epoxy coating applied to the water pipes was flaking off and clogging the passage of water to the kitchen faucet. In addition to the other concerns, the tenant was mortified by the possibility that this substance may have detrimental health effects.

The tenant testified that the landlord did offer a rent abatement of \$100.00 for the months of March, April and May 2009, but perceived that this was to be an interim measure with a promise made by the landlord to relocate the tenant into a different unit. However, no action was taken to accomplish a move.

The tenant testified that, this was the reason that the rent was withheld. The tenant stated that no application was made to file for dispute resolution early on because the tenant was not aware that this was an option, and took matters into their own hands. The tenant believes that the deprivation of hot water would warrant a rent abatement of \$300.00 per month for the months of March, April, May and June 2009 for a total abatement of \$1,200.00 for that period.

The landlord testified that the hot water problem was intermittent and that every effort was made to resolve the problem until it was fixed. The landlord testified that the tenant had agreed that the amount of abatement of \$100.00 per month retroactive to the start of the tenancy was fair and the landlord believed that this payment put the matter to rest. In regards to the tenant's allegation that the landlord had reneged on the promise to relocate

the tenant, the landlord testified that relocating was determined to be not the best solution as the problem was not isolated to the one suite. In any case, the matter was finally rectified and the landlord stated that there was no justification for the tenant's actions in withholding the rent. The landlord testified that the tenant's claim of \$300.00 per month was excessive.

Analysis: Landlord's Application: Claim for Rent and Utilities

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 the Act to deduct a portion of the rent. In this instance, I find nothing in the Act that would permit the tenant to withhold rent.

Based on the testimony and evidence of both parties, I find that the tenant was in arrears of \$2,300.00 for rent for the months of June and July 2009 at the time that the Notice was issued. I find as a fact that the tenant also failed to pay rent due on August 1, 2009 in the amount of \$1,150.00. I find that the tenant also owes rent for half of the month of September 2009 in the amount of \$575.00. The total amount of the landlord's entitlement for rent is \$4,025. I find that the tenant has acknowledged owing \$29.55 for utilities and the landlord is entitled to this amount.

Analysis: Monetary Claims for Damages and Loss

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 the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant 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 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 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. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred

In regards to the landlord's claim for reimbursement for the broken glass, I find that under section 32 both the landlord and the tenant are responsible for repairs depending on the circumstances. Section 32(1) states that a landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 32(2) and 32(3) requires a tenant to maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

However, section 32(4) specifically states that a tenant is not required to make repairs for reasonable wear and tear.

I find that the landlord would likely be noncompliant with a landlord's obligation under section 32(1)(a) by not replacing a large pane of glass that was already compromised with a chip. While it is true that there is no way to know whether or not the endurance of the glass was affected, a potential risk should not be ignored. In regards to whether the damage

resulted from a violation of the Act by the tenant, I find that the shattering of the pane could possibly be the result of normal wear and tear, given its fragile condition. Damage resulting from wear and tear is not the tenant's responsibility under the Act, nor would it be considered as a violation of the Act. Therefore, I find that the landlord's claim fails to meet element 2 of the test for damages. Moreover, even it was found to be in violation of the Act, assigning a value to previously damaged glass would prove to be a challenge to meet criteria of element 3 of the test. Accordingly, I find that the landlord's claim for compensation of \$430.50 must be dismissed.

In regards to the tenant's monetary claim for loss of value to the tenancy due to the persistent lack of hot water in the kitchen, I find that the landlord has not complied with the Act in two respects.

Under section 27 (1) A landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation. Furthermore, section 28 states that a tenant is entitled to quiet enjoyment of the suite including, but not limited to, rights to freedom from unreasonable disturbance.

While I find that the landlord did not ignore the problem and took measures to get to the bottom of it, I accept the tenant's testimony that the lack of hot water in the kitchen continued to be a problem far beyond a reasonable period, whether or not this was the fault of the landlord. I find that the tenant was deprived of an essential service which actually served to significantly interfere with the tenant's quality of life. It is clear that the tenant did suffer a loss and the tenant valued the loss at \$300.00 per month. This represents approximately 26% of the rent. I find that the fact that the tenant readily accepted the \$100.00 rent reduction does not necessarily signify that the tenant found the amount offered by the landlord to be totally satisfactory. I find that it is clear that the tenant was still disgruntled by virtue of the fact that the tenant made the unfortunate choice to express this sentiment by wrongfully withholding the rent.

In this regard, I find that the tenant's claim meets elements 1, 2 and 3 of the test for damages. However, I find that by not pursuing the correct avenue to address the dispute through an application for dispute resolution early on, the tenant was remiss. Failing to take reasonable steps to minimize the loss is not in compliance with section 7(2) of the Act.

Therefore, I find that the tenant's entitlement is reduced to 23% and that a rent reduction of \$265.00 per month for the months of March, April, May and June 2009 for a total of \$1,060.00 is warranted. As the landlord has already rebated \$300.00, I find that the tenant's entitlement stands at \$760.00.

Conclusion

Based on the evidence before me, I find that the landlord has established a total monetary claim of \$4,079.55 comprised of \$4,025 rental arrears, \$29.55 for utilities and \$25.00 as a portion of the filing fee paid for this application.

Based on the evidence before me, I also find that the tenant has established a total monetary claim of \$760.00 in compensation for loss of value to the tenancy, in addition to the \$300.00 already previously granted by the landlord.

Pursuant to my authority under section 72 of the Act, I order that the landlord's monetary award be set off by what is owed to the tenant, leaving \$3,319.55 in favour of the landlord.

I order that the landlord retain the security deposit and interest of \$575.00 in partial satisfaction of the claim leaving a balance due of \$2,744.55. I hereby issue a monetary order under section 67 of the *Act* in this amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

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.

The remainder of the tenant's application is hereby dismissed in its entirety, without leave to reapply and the remainder of the landlord's application is hereby dismissed in its entirety, without leave to reapply.

Dated: September 2009

Dispute Resolution Officer