

Re Hearing Decision

Dispute Codes:

MND, MNSD, FF

Introduction

This is a re-hearing on the landlord's Direct Request application considered on September X, 2009 requesting an Order of Possession and Monetary Order. The landlord was successful and was awarded an Order of Possession effective two days on service based on the Ten-Day Notice dated September 5, 2009. The tenant made application for Review Consideration and in a decision dated October X, 2009, the tenant's request was granted.. The landlord's Order of Possession dated September X, 2009 was ordered to be set aside and a rehearing was ordered. In the Review Consideration decision, the tenant was instructed that "*The Tenant must serve upon the landlord a copy of this Review Decision and the attached Notice of Hearing within three (3) days of receiving this Review Decision*". The landlord testified that he was not served by the tenant, but had received a copy of the Review Consideration Decision sent to him by Dispute Resolution Officer (DRO) advising that a rehearing was granted.

The tenant did not appear and the landlord advised that the tenant had moved out.

Issue(s) to be Decided

The issue to be determined based on the testimony and the evidence is: how much monetary compensation is the landlord validly entitled to under section 67 of the *Act* .

Preliminary Matter

The landlord had submitted additional evidence that was not included in the original application and was seeking to amend the application to increase the amount being claimed to include costs of bailiff services and damages for a total claim of \$8,652.65.

An application for monetary compensation is covered by section 67 of the Act and a claim for costs and damages is substantially different than the claim for rent owed pursuant to a Ten-Day Notice under section 46 of the Act upon which the original application was based..

Rule 2.5 of the *Residential Tenancy Rules of Procedure* does permit amending an application but imposes the following criteria:

- The applicant may amend the application without consent if the dispute resolution proceeding has not yet commenced. If applications have not been served on any respondents, the applicant must submit an amended copy to the Residential Tenancy Branch and serve the amended application.
- If the application has been served, and all requirements can be met to serve each respondent with an amended copy at least seven (7) days before the dispute resolution proceeding, the applicant may be permitted to file a revised application with the Residential Tenancy Branch. A copy of the revised application must be served on each respondent at least five (5) days before the scheduled date for dispute resolution proceeding.
- The application will not be amended where it would result in prejudice to the other party. If the amendment is allowed, the arbitrator may adjourn the hearing to allow the respondent time to respond to the amended application.

I find that, based on the landlord's testimony, the tenant was not served with Notice of the amended application. Therefore, allowing this amendment sought during the hearing and the additional evidence that was not served on the tenant, would be a violation of the rules of procedure. Moreover, a unilateral amendment would be contrary to the principle of natural justice being that it would prejudice the respondent who had no knowledge of, nor notice of, the new monetary claims. In fact, I find that the only way that this application could ever be amended would be through an

adjournment of the proceedings to allow service to the tenant. However, I find that the criteria justifying the granting of an adjournment has not been met.

Given the above, I am not able to hear, nor consider evidence regarding, further additional monetary claims put forth by the landlord during these proceedings, other than those specified on the landlord's application.

However, the landlord is at liberty to make a subsequent application against the tenant seeking monetary compensation for loss of rent, damages or other costs and losses, pursuant to section 67 of the Residential Tenancy Act.

Background and Evidence

The Dispute Resolution Officer presiding at the original hearing found that the tenancy was to end and issued an Order of Possession effective 2 days on service which, according to the landlord, was served on the tenant in person on September 23, 2009 and the tenant subsequently left on October 2, 2009. Therefore, I find that the issue of possession has been fully resolved.

The application showed that the landlord was requesting \$1,095.00. The landlord testified that rent of \$1,985.00 for September 2009 was actually owed. Evidence submitted by the landlord indicated that on September 25, 2009, the tenant paid the landlord \$1,985.00 for use and occupation of the unit. Although the debt was paid, the tenancy was not reinstated.

Analysis

The original application was a Direct Application by the landlord with all of the landlord's evidence attached. The tenant had subsequently requested a review consideration for a re-hearing based on fraud and this rehearing had been granted. However, the tenant did not show up, despite being notified and the rehearing proceeded in his absence.

I find that, at the time the Ten-Day Notice was issued by the landlord on September 5, 2009, the tenant owed \$1,985.00 in rental arrears for the month of September 2009. I

find that on September 25, 2009, the tenant paid all arrears in full and was therefore entitled to “use and occupation” to legally reside in the unit until the end of September 2009. However, this did not reinstate the tenancy but permitted the tenant to live on sit until October 1, 2009. I find that the tenant was guilty of over-holding the unit after September 30, 2009 and remained in possession of the unit until October 2, 2009 when the writ was executed by the bailiff. Under the Act, the tenant must pay rent for those two days.

Based on the above, I find that the landlord is entitled to monetary compensation in the amount of \$180.52 comprised of \$65.26 pro-rated rent for one day for October 1, 2009, \$65.26 pro-rated rent for one day for October 2, 2009 during which the tenant was in wrongful possession of the unit and \$50.00 fee paid for this application.

Conclusion

I hereby order the landlord to retain **\$180.52** from the \$972.50 security deposit leaving a remaining balance of \$791.98 security deposit and \$100.00 pet damage deposit still being held in trust for the tenant. The deposits must be administered in accordance with section 38 of the Act when, or if, the tenant provides a written forwarding address to the landlord in writing.

This decision replaces the previous decision issued on September 23, 2009.

November, 2009

Date of Decision

Dispute Resolution Officer