

DECISION

Dispute Codes OPR MNR MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord seeking an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, to keep the security deposit in partial satisfaction of their claim, and to recover the cost of the filing fee from the Tenants.

Service of the hearing documents was done in accordance with section 89 of the *Act*, sent via registered mail on September 18, 2009 and then the amended application was served to the Tenants in person by the Landlord on September 22, 2009. The Canada Post tracking number was provided in the Landlord's documentary evidence.

The Landlord appeared, gave affirmed testimony, was provided the opportunity to present her evidence orally, in writing, and in documentary form.

All of the testimony and documentary evidence was carefully considered.

Issue(s) to be Decided

Is the Landlord entitled to Orders under sections 38, 55, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The tenancy is a month to month term commencing on October 1, 2007. The Tenants paid a security deposit in the amount of \$455.00 on September 27, 2007 and rent in the amount of \$943.00 is due on the first of each month.

The Landlord testified that when the Tenants failed to pay rent for September 2009 a 10 Day Notice to End Tenancy was issued on September 2, 2009 and posted to the Tenant's door, by the Landlord, on September 2, 2009.

The Landlord stated that the Tenants have made payments towards their rent as follows: September 3, 2009 \$100.00; September 11, 2009 \$500.00; September 19, 2009 \$413.00; October 6, 2009 \$440.00; October 8, 2009 \$250.00; October 21, 2009 \$273.00; and November 3, 2009 \$300.00. The Landlord testified that for each payment listed a receipt was issued to the Tenant's stating for "use and occupancy only".

The Landlord has requested an Order of Possession and a Monetary Order for the current outstanding rent which is \$643.00 plus the \$20.00 late fee for November 2009. The Landlord testified that the Tenants paid her for the \$50.00 filing fee on September 19, 2009 so she is no longer seeking to recover the cost of the filing fee from the Tenants.

Analysis

I find that in order to justify payment of damages or losses under section 67 of the *Act*, the Applicant Landlord 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.

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 Tenants.

Order of Possession - I find that the Landlord has met the requirements for the 10 day notice to end tenancy pursuant to section 46(1) of the *Act*, that the Tenants failed to pay the rent in full within 5 days after receiving this notice, and that the Tenants are conclusively presumed to have accepted that the tenancy ends on the effective date of

the notice and must vacate the rental unit to which the notice relates pursuant to section 46(5) of the *Act*.

Claim for unpaid rent - The Landlord claims for unpaid rent of \$643.00 for November 2009, pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I find that the Tenant has failed to comply with a material term of the tenancy agreement which stipulates that rent is due monthly on the first of each month.

I note that the tenancy agreement provides for the Landlord to charge a \$20.00 late payment fee in accordance with section 7 of *Residential Tenancy Regulations*, therefore I approve the Landlord's claim of \$20.00 late payment fees.

Claim to keep all or part of security deposit. I find that the Landlord's claim meets the criteria under section 72(2)(b) of the *Act* and order the monetary claim to be offset against the Tenants' security deposit of \$455.00 plus interest of \$8.65.

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 Tenants' security deposit as follows:

Unpaid Rent for November 2009	\$643.00
Late Payment Fee	20.00
Sub total (Monetary Order in favor of the landlord)	\$663.00
Less Security Deposit of \$455.00 plus interest of \$8.65 from September 27, 2007 to November 4, 2009	-463.65
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$199.35

Conclusion

I HEREBY FIND that the Landlord is entitled to an Order of Possession effective **two days after service on the Tenants**. This order must be served on the Respondent Tenants and may be filed in the Supreme Court and enforced as an order of that Court.

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 \$199.35. The order must be served on the respondent Tenants and is enforceable through the Provincial Court 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: November 04, 2009.

Dispute Resolution Officer