

DECISION

DISPUTE CODES: MN OP SD

- [1] This hearing dealt with an application by the landlord for an order of possession, a monetary order and an order allowing retention of the security deposit in partial satisfaction of the claim. Both parties attended the hearing and had an opportunity to be heard.
- [2] The facts before me are as follows. On September 16, 2009 the landlord sent the tenant a ten-day Notice to End Tenancy. The Notice was sent by registered mail and the first attempted delivery of the package to the tenant was on September 18th. The tenant claims he was out of town until September 26th and that in any event he did not pick up his registered mail until October 2nd. The Notice specified that the tenant owed \$1,700.00 in rent for the month of September and the tenant paid that amount on October 3rd. As a result, the tenant takes the position that he paid the rent within 5 days of receiving the Notice and that the Notice is therefore void. The landlord however relies on the Act which states that a document served by mail is deemed to be received on the fifth day after mailing. In this case that would mean that the tenant is deemed to have received the Notice on September 21st. These competing arguments require some analysis.
- [3] Residential Tenancy Policy Guideline No. 12 provides that “deemed” service means that the document is presumed to have been served unless there is clear evidence to the contrary. In the present case, Mr. E testified that he had been out of town due to the hospitalization of his young son in Victoria General and could not therefore get his mail until he returned home. I accept this

testimony as 'clear evidence to the contrary' in light of the fact that the Mr. K acknowledged the situation with the tenant's child. However, the tenant's own testimony is that he returned home on September 26th but did not pick up his registered mail until October 2nd.

- [4] Further complicating matters is the fact that September 26th was a Saturday and - assuming the tenant did not arrive home until later in the day – he would have to wait until Monday the 28th to collect his registered mail at the post office.
- [5] Taking all of the above into consideration I find that the tenant may not be deemed to have received the registered mail until Monday, September 28th. This means that the five-day time limit for either disputing the Notice or paying the full amount of the outstanding rent began on September 28th and ended on October 2nd. Since the tenant did not pay the rent until October 3rd, outside the required time frame, and did not dispute the Notice within the five-day period, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice. It bears noting at this point that while the tenant claims he did not receive the Notice until October 2nd (a claim I have rejected due to the deemed service provision in the Act), the tenant was well aware that he had not paid the rent for September and that he might have been at risk of eviction.
- [6] Based on the above facts I find that the landlord is entitled to an order of possession effective two days after service on the tenant. This order may be filed in the Supreme Court and enforced as an order of that Court.

[7] I further find that the landlord has established a total monetary claim of \$1,750.00 comprised of \$1,700.00 in unpaid rent for November and the \$50.00 fee paid by the landlord for this application. I order that the landlord retain the deposit of \$850.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$900.00. This order may be filed in the Small Claims Court and enforced as an order of that Court.