

DECISION

Dispute Codes OPR MNR MNSD FF

Introduction

This hearing proceeded by way of Direct Request Proceeding, pursuant to section 55(4) of the Act, and dealt with an Application for Dispute Resolution by the Landlord for an Order of Possession, a Monetary Order, to retain the security deposit, and to recover the cost of the filing fee from the Tenant for this application.

The Landlord submitted a signed Proof of Service of the Notice of Direct Request Proceeding which declares that on November 17, 2009 the Landlord served the Tenant with the Notice of Direct Request Proceeding via registered mail. Canada Post Receipt numbers were submitted in the Landlord's documentary evidence. The Tenant is deemed to be served the hearing documents on November 22, 2009, the fifth day after they were mailed pursuant to section 90 of the *Residential Tenancy Act*. Based on the written submissions of the Landlord, I find that the Tenant has been served with the Dispute Resolution Direct Request Proceeding documents.

Issue(s) to be Decided

The issues to be decided are whether the Landlord is entitled to an Order of Possession for unpaid rent; to a Monetary Order for unpaid rent; to retain the security deposit, and to recover the filing fee from the Tenant for the cost of the Application for Dispute Resolution, pursuant to sections 38, 46, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The Landlord submitted the following evidentiary material:

- A copy of the Proof of Service of the Notice of Direct Proceeding for the Tenant;
- A copy of a residential tenancy agreement which was signed by both parties on September 29, 2009 for a fixed term tenancy beginning October 1, 2009 and set to expire on October 1, 2010, for the monthly rent of \$775.00 due on 1st of the month; and

- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent which was issued on November 6, 2009 with an effective vacancy date of November 16, 2009 due to \$850.00 in unpaid rent that was due on November 6, 2009.

Documentary evidence filed by the Landlord indicates that the Tenant was served a 10 Day Notice to End Tenancy for Unpaid Rent by posting the notice on the Tenant's door on November 6, 2009 at 10:50 p.m. in the presence of a Witness.

Analysis

The landlord submitted a copy of the 10 Day Notice which indicates that rent of \$850.00 was due on November 6, 2009 however the tenancy agreement stipulates that rent is due on the 1st of each month in the amount of \$775.00. The Landlord noted on their application for dispute resolution that rent of \$775.00 was outstanding plus \$75.00 in late fees however there is no explanation noted on the 10 Day Notice to End Tenancy which was issued on November 6, 2009.

The Direct Request Proceeding is convened under Section 55(4) of the *Residential Tenancy Act* which stipulates that the director may grant an Order of Possession and an Order in relation to the non-payment of rent without holding a hearing. I find that late payment fees do not fall under "non-payment" of rent and they cannot be considered in a direct request proceeding nor can they be listed on a 10 Day Notice to End Tenancy. Based on the aforementioned I hereby dismiss the Landlord's claim of \$75.00 for late payment fees, without leave to reapply.

The purpose of serving documents under the *Act* is to notify the person being served of their breach and notification of their rights under the *Act* in response. The landlord is seeking to end the tenancy due to this breach; however, the landlord has the burden of proving that the tenant was served with a correct 10 day Notice to End Tenancy. The 10 Day Notice to End Tenancy that the Landlord submitted has an incorrect amount listed as rent owing, (\$850.00) and shows that this amount was due on November 6, 2009 when it was due on the 1st of the month in accordance with the tenancy agreement.

In the presence of an incorrect 10 Day Notice to End Tenancy, I find that the Landlord has failed to establish that the Tenant has been properly advised of the alleged breach.

Based on the above I find that this application does not meet the requirements for the Direct Request process and I hereby dismiss the Landlord's application without leave to reapply.

Conclusion

I HEREBY DISMISS the Landlord's application, without leave to reapply.

The 10 Day Notice to End Tenancy issued on November 6, 2009 is hereby cancelled and of no force or effect.

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: December 01, 2009.

Dispute Resolution Officer