

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, an 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 22, 2009 the Landlord served each Tenant with the Notice of Direct Request Proceeding in person at the rental unit. Based on the written submissions of the Landlord, I find that the Tenants have 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 keep all or part of the security deposit and to recover the cost of the filing fee, 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 each Tenant;
- A copy of a residential tenancy agreement which was signed by the parties on February 28, 2007 for a fixed term tenancy beginning April 01, 2007 and

switching to a month to month tenancy after September 31, 2007 (written as noted on the agreement) for the monthly rent of \$975.00 due on 1st of the month and a deposit of \$487.50 was paid on or before February 28, 2007; and

- A copy of a notice of rent increase effective April 1, 2008 raising the rent from 975.00 to \$1,011.00; and
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent which was issued on, November 2, 2009 with an effective vacancy date of November 13, 2009 due to \$1,733.00 in unpaid rent.

Documentary evidence filed by the landlord indicates that the Tenants were served a 10 Day Notice to End Tenancy for Unpaid Rent when it was posted to the Tenants' door on November 2, 2009 at 12 noon in the presence of a witness. The Tenants are deemed to have received the 10 Day Notice on November 5, 2009, three days after it was posted to the door in accordance with section 90 of the Act.

Analysis

Order of Possession - I have reviewed all documentary evidence and accept that the Tenants have been served with notice to end tenancy as declared by the Landlord. The notice is deemed to have been received by the Tenants on November 5, 2009 and the effective date of the notice is November 15, 2009 pursuant to section 90 of the *Act*. I accept the evidence before me that the Tenants have failed to pay the rent owed in full within the 5 days granted under section 46 (4) of the *Act*.

I note that the Landlord has included a late payment fee on the 10 Day Notice and must advise the Landlord that late payment fees do not constitute rent and should not be listed on a 10 Day Notice, that being said I do not find that the notice was invalid as a result of this amount being included.

Based on the foregoing, I find that the Tenants are conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the effective date of the Notice and I approve the Landlord's request for an Order of Possession.

Monetary Claim – I find that the Landlord has listed \$1,708.00 (\$660 for balance owing for October and \$1048 for November 2009) for unpaid rent, on his application for dispute resolution, the 10 Day Notice to End Tenancy and notes on the application that the Tenant has failed to pay her rent in the of \$1,733 (\$1,708 plus \$25 late fee), however the monthly rent amount based on the evidence and notice of rent increase is \$1,011.00 not \$1,048.00 as claimed for November 2009 rent.

The Landlord did not provide evidence to substantiate that the monthly rent for November 2009 is \$1,048.00. Based on the aforementioned contradictory information, I find that the Landlord's monetary claim does not meet the criteria to be reviewed through a direct request process and hereby dismiss the Landlord's monetary claim with leave to reapply.

Filing fee - \$50.00. I find that the Landlord has partially succeeded with his claim and that he should recover the filing fee from the Tenants.

Monetary Order – I find that the Landlord is entitled to recover the filing fee from the Tenants and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit plus interest.

Filing fee	50.00
Subtotal (Monetary Order in favor of the landlord)	\$50.00
Less Security Deposit of \$487.50 plus interest of \$13.56 (February 28, 2007 to December 10, 2009)	-501.06
Balance of Security Deposit and Interest Held in Trust	\$451.06

The balance of the Tenants' security deposit is to be administered in accordance with Section 38 of the *Residential Tenancy Act*.

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 Tenants and may be filed in the Supreme Court and enforced as an order of that Court.

I HEREBY DISMISS the Landlord's monetary claim, with leave to reapply.

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 10, 2009.

Dispute Resolution Officer