

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 in partial satisfaction of the claim, 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 December 04, 2009 the Landlord served the Tenant with the Notice of Direct Request Proceeding in person at the rental unit, in the presence of a witness. 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 keep all or part of 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 August 17, 2009 for a fixed term tenancy beginning September 1, 2009 which will automatically renew for another year fixed term after August 31, 2010 for the monthly rent of \$850.00.00 due on last day of the month and a deposit of \$425.00 was paid on or before August 17, 2009; and
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent which was issued on, November 17, 2009 with an effective vacancy date of November 28, 2009 due to \$1,380.00 in unpaid rent; and
- A notation that the \$1,380.00 listed as unpaid rent on the 10 Day Notice to End Tenancy is comprised of \$350.00 unpaid rent for October 2009, \$850.00 unpaid rent for November 2009, \$180.00 in late payment fees and bank charges.

Documentary evidence filed by the Landlord indicates that the Tenant was served the 10 Day Notice to End Tenancy for Unpaid Rent personally at the rental unit on November 17, 2009 at 10:00 p.m. in the presence of a witness.

Analysis

Order of Possession - I have reviewed all documentary evidence and accept that the Tenant has been served with notice to end tenancy as declared by the Landlord. The notice is deemed to have been received by the Tenant on November 17, 2009 and the effective date of the notice is November 27, 2009 pursuant to section 90 of the *Act*. I accept the evidence before me that the Tenant has failed to pay the rent owed in full within the 5 days granted under section 46 (4) of the *Act*.

Based on the foregoing, I find that the Tenant is conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the effective date of the Notice.

The 10 Day Notice to End Tenancy was issued listing "You have failed to pay rent in the amount of \$1,380.00." I note that the monthly rent payable is \$850.00 and that based

on the Landlord's statement the 10 Day Notice to End Tenancy should have been issued with the amount of \$1,200.00 as the rent which was not paid and due on November 1, 2009. The evidence provided by the Landlord supports that the difference of \$180.00 was the Landlord's charge for a Late Payment Fees and Bank Fees. The late payment fees and bank fees did not come into effect until after November 1, 2009 when the rent was deemed to be late and these fees are not considered rent.

Late Payment Fee – 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 and bank fees do not fall under “non-payment” of rent and they cannot be considered in a direct request proceeding. Based on the aforementioned I hereby dismiss the Landlord's claim of \$180.00 for late payment fees and bank fees, without leave to reapply.

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 Tenant's security deposit, and that the Landlord is entitled to recover the filing fee from the Tenant as follows:

Unpaid Rent of \$350.00 for October 2009 and \$850.00 for November 2009	\$1,200.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the landlord)	\$1,250.00
Less Security Deposit of \$425.00 plus interest of \$0.00	- 425.00
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$825.00

Conclusion

I HEREBY FIND that the Landlord is entitled to an Order of Possession effective **two days after service on the Tenant**. This order must be served on the Respondent Tenant 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 \$825.00. The order must be served on the respondent 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: December 17, 2009.

Dispute Resolution Officer