



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

OPR, MNR, MNDC, MNSD, CNR, FF.

Introduction

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*.

The landlord applied for the following:

- An order of possession pursuant to Section 55;
- A monetary order for rent owed and damages, pursuant to Section 67;
- An order to retain all or part of the security deposit pursuant to Section 38;
- A monetary order for the recovery of the filing fee, pursuant to Section 72.

The tenant applied for the following:

- An order to cancel the notice to end tenancy for rent, pursuant to Section 46;

Both parties attended the hearing and were given an opportunity to present evidence and make submissions. On the basis of the evidence presented at the hearing, a decision has been reached.

Tenant's Cross Application

Preliminary matter: Request for more time to Section 46 Dispute Notice

The tenant was seeking to cancel the Ten-Day Notice to end Tenancy for Unpaid Rent and has requested an extension in the 5-day deadline allowed for filing to dispute the Ten-Day Notice. Section 46(4) states that a tenant receiving a Ten-Day Notice to End Tenancy for Unpaid Rent must either dispute the Notice or pay the rent within 5 days of receiving it, otherwise there will be a conclusive presumption that the tenant has accepted that the tenancy is ending and that the tenant must move out on the date

shown on the Notice.

In this instance the tenant received the Notice on December 4, 2009 and had 5 days expiring on December 10, 2009 in which to dispute the Notice. However, the tenant made an application on January 4, 2009 which was beyond the five days allowed. The tenant stated that the reason for filing beyond the five-day period permitted under section 46 was that he was awaiting the possible resolution of the dispute with the landlord and hoped to negotiate a settlement.

Section 66 (1) does allow the dispute resolution officer to extend a time limit established by this Act, but only in *exceptional circumstances*.

The word "exceptional" means that an ordinary reason for failing to comply with a specified time limit, such as: "*not being aware of the rules*", "*not feeling well*" or "*forgetting*", would not qualify as exceptional circumstances that would support an extension of the deadline. Examples of what might possibly be considered "exceptional" circumstances, depending on the facts presented at the hearing could include: the party was incapacitated and hospitalized at all material times along with supporting evidence such as a letter, on hospital letterhead, stating the dates during which the party was hospitalized and indicating that the party's condition prevented their contacting another person to act on their behalf.

The criteria which would be considered by an arbitrator in making a determination in regards to the existence of exceptional circumstances would include establishing whether or not the party wilfully failed to comply with the relevant time limit, genuinely intended to comply with the relevant time limit and took reasonable and appropriate steps to do so as soon as possible, whether or not it was the party's own fault for missing the deadline and whether or not the application has any merit .

In this instance I find that the tenant's stated reasons for making the application beyond the five-day time limit, would not be considered as exceptional. Accordingly, I make no findings on the tenant's application not the tenant's evidence and I find that the tenant's application must be dismissed.

Landlord's Application: Issues to be decided:

Is the landlord entitled to an order of possession for unpaid rent? In order to answer this question it must be determined:

- Was a 10-Day notice to End Tenancy properly served on the tenant?
- Was there any outstanding rent owed to the landlord by the tenant at the time the Ten-Day Notice to End Tenancy was issued and served?
- Did the tenant fail to pay the rental arrears within 5 days of receiving the Notice to End Tenancy?
- Has the Landlord established monetary entitlement to compensation for rent and utilities still outstanding?
- Is the Landlord entitled to retain the security deposit in partial satisfaction of the monetary claim?

Background and Evidence

Based on the testimony of both parties, the background is as follows. The tenancy started in June 8, 2008. The landlord acknowledged that the tenant had paid a security deposit of \$450.00 at the commencement of the tenancy. According to the landlord, in December 2009, the tenant failed to pay the \$900.00 rent due and the \$150.00 utilities owed and a Ten-Day Notice was issued to the tenant on December 2, 2009. The tenant did not vacate and did not pay the rent owed, and also failed to pay \$900.00 rent for the month of January 2010 and the utilities of \$150.00 owed for January 2010.

The landlord testified that the tenant was in rental arrears of \$1,800.00 and \$300.00 for utilities. The landlord submitted into evidence a copy of the tenancy agreement showing that rent was due on the first day of the month and \$150.00 flat rate for utilities was due on the 15th of each month. Also in evidence was a copy of the Ten-Day Notice. The landlord was seeking a monetary order and order of possession based on the notice.

The tenant acknowledged not paying rent when it was due and stated that the basis stemmed from the landlord's failure to comply with the Act in several respects.

Analysis: Ten-Day Notice

Based on the testimony and evidence of both parties, I find that the tenant was in arrears for \$900.00 rent for the month of December 2009 and January 2010. Section 26 of the Act provides that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

A tenant cannot withhold rent for any reason except in very specific serious emergency situations. Section 33 of the Act allows a tenant to deduct the cost of urgent repairs that the tenant paid out-of-pocket to address an emergency. However, the tenant would need to prove that it related to a genuine emergency (and the tenant had made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs and following those attempts, the tenant has given the landlord reasonable time to make the repairs.

In this instance, I find that there was not an emergency and that the tenant did not pay out-of-pocket for any repairs. In fact I find that the tenant withheld the rent in violation of the Act. The tenant had five days to pay to cancel the Ten-Day Notice and did not do so. Accordingly, I find that the Ten-Day Notice to End Tenancy was justified and that there is no justification under the Act to cancel the Notice.

In regards to the \$300.00 being claimed for utilities, I find that the tenant was not in arrears at the time the Ten-Day Notice was issued. I draw attention to section 46 (6) which states that if a tenancy agreement requires the tenant to pay utility charges to the landlord, and the utility charges are **unpaid more than 30 days after the tenant is given a written demand for payment** of them, then the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section. I find that on the Ten-Day Notice form dated December 2, 2009, incorrectly indicated that \$150.00 was owed for utilities for December 2009. In any case, I find that if the landlord wanted to make a claim for the utilities owed as rent in the application, the landlord was required to issue a written demand. This would have to have occurred after December 15, 2009, if the utilities remained unpaid. I find that the landlord did not sufficiently prove that a written demand for the utility payment was made at least 30 days before including this debt as arrears on the Ten-Day Notice. Accordingly I find that this portion of the

claim must be dismissed.

Based on the evidence before me, I find that the tenant was served with a Notice to End Tenancy for Unpaid Rent. The tenant has not paid the outstanding rent and, therefore, the landlord is entitled to an Order of Possession under the Act.

I find that the landlord has established a monetary claim in the amount of \$1,850.00. comprised of \$900.00 for the month of December, 2009 and \$900.00 rent for the month of January 2010 and the \$50.00 fee paid by the landlord for this application.

Conclusion

Pursuant to section 55(2), I hereby issue an Order of Possession in favour of the Landlord effective two days after service on the tenant. The Order may be filed in the Supreme Court for enforcement.

I find that the landlord has established entitlement in the amount of \$1,850.00. I order that the landlord retain the security deposit and interest of \$453.82 in partial satisfaction of the claim leaving a balance due of \$1,396.18 and I hereby issue a monetary order under section 67 of the *Act* in this amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

The tenant's application to have the notice cancelled is hereby dismissed, without leave to reapply.

Dated: January 2010

Dispute Resolution Officer