Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

OPR, MNR, MNDC, MNSD, CNR, RR, AS, 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 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 his 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;
- An order to compensate the tenant for damages and loss of value
- An order to reduce rent for repairs, services or facilities agreed upon but not provided
- An order to allow the tenant to sublet the fixed term agreement as permission was unreasonably withheld.

Both parties attended the hearing and were given an opportunity to present evidence..

Issues to be decided: Landlord's Application

- Is the landlord entitled to an order of possession for unpaid rent?
    - Was a valid 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 owed?
- Is the Landlord entitled to the security deposit in partial satisfaction of the claim?

Issues to be decided: Tenant's Application

- Has the tenant proven that the Notice to End Tenancy should be cancelled?
- Has the tenant proven entitlement to be compensated for the damage and losses for which the landlord must be held responsible under the Act?
- Has the tenant established that the rent should be reduced due to services and facilities agreed-upon but not provided
- Is the tenant entitled to an order permitting the tenant to sublet the tenancy?

Preliminary Issue

Evidence had been submitted by the landlord to the file received on January 28, 2010. However, it was confirmed by the landlord that, due to a misunderstanding of the process, this evidence had only been submitted to the Dispute Resolution file without serving it to the other party. Rule 4.1 of the Residential Tenancy Branch Rules of Procedure requires the respondent to serve the applicant with any documents upon which the respondent intends to rely at the hearing and this must be done within 5 days of the hearing. I note that the *Landlord and Tenant Fact Sheet* contained in the hearing package makes it clear that "*copies of all evidence from both the applicant and the respondent and/or written notice of evidence* ***must be served on each other*** *and received by RTB as soon as possible*.." I find that any consideration of the evidence submitted was not served on the other party as required under the Act, would be unfairly prejudicial. Therefore, it was determined that the landlord would only be permitted to present verbal testimony on the evidence in question.

Background and Evidence: Notice to End Tenancy

Based on the testimony of both parties, the background is as follows. The fixed-term tenancy started on November 1, 2009 with rent set at $2,000.00 per month and $1,000.00 security deposit paid . The tenant was permitted to move in a week early in exchange for cleaning the unit pursuant to a tenancy addendum signed by the parties. A copy of the

addendum and tenancy agreement was in evidence.

The landlord testified that the tenant failed to pay $2,000.00 rent for the month of December 2009 and did not pay rent $2,000.00 rent owed on January 1, 2010. A Ten-Day Notice was issued on January 19, 2010 and served in person to the tenant on January 20, 2010. The landlord testified that the tenant paid the $4,000.00 arrears for December and January around February 5, 2010. The landlord advised that the funds were accepted by the landlord for use and occupancy of the unit, but did not reinstate the tenancy. The landlord testified that the tenant had attempted to convince the landlord to sign a written statement dated January 28, 2010, agreeing to accept the payment and withdraw the Ten-Day Notice, which the landlord refused. The landlord testified that, by then the tenant owed $2,000.00 for the month of February 2010. The landlord is seeking an Order of Possession and $2,000.00 monetary compensation and the filing fee.

The tenant did not dispute that the tenant was in rental arrears at the time that the Ten-Day Notice was issued and did not dispute that the outstanding balance was not paid within five days of receiving the notice. The tenant pointed out that the landlord made application for dispute resolution on January 25, 2010 which was prior to the five-day deadline during by the tenant had the right to pay the arrears to cancel the notice. The tenant held the position that the landlord filed prematurely and that the notice should therefore not be enforced.

Analysis: Notice to End Tenancy

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. In this instance, the tenant had failed to pay the rent when it was due.

Section 46 of the Act states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice. However, the Act provides that, within 5 days after receiving a notice under this section, the tenant may either pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution. If a tenant who has received a Ten-Day Notice to End Tenancy for Unpaid Rent does not pay rent or make an application for dispute resolution then the tenant is conclusively presumed to have accepted that the tenancy ends on the

effective date of the notice, and must vacate the rental unit by that date.

I find that although the tenant made application to dispute the Notice within five days, the Notice was not cancelled as the tenant did not act to cancel it by paying the rental arrears within five days. In other words, regardless of when the landlord made its own application for the dispute resolution, the Ten-Day Notice was still in effect.

A mediated discussion ensued and the parties agreed that an Order of Possession effective February 28, 2010 would be issued to the landlord. The landlord agreed not to pursue damages for loss of rent beyond February 2010 under the fixed term tenancy. However, the landlord was still seeking monetary compensation of $2,000.00 for rent owed for February and I find that the landlord is entitled to $2,000.00 rent for the month of February 2010.

Background and Evidence: Tenants' Monetary Claim

The tenant testified that when they moved in during the last week of October 2009, they set about doing the extensive clean-up of the unit as agreed. The tenant testified that upon discovery that the over-stove fan was infused with grease which the tenant felt was a health and safety issue, this problem was immediately reported to the landlord. The tenant testified that on November 2, 2009 or thereabouts, the landlord's appliance repairman removed the fan and it was cleaned and replaced by November 6, 2009. In the meantime, the tenant was deprived of the use of the stove and therefore, according to the tenant, it was necessary to eat out. The tenant was claiming reimbursement of $75.00 per day for 14 days. In support of this claim, the tenant submitted four receipts dated October 25, October 27, November 2, and November 10, 2009 totalling $94.00.

The landlord testified that the landlord acted as soon as the deficiency was reported to restore the fan by having a professional remove it on December 1, 2009, and re-install it as soon as possible. The landlord stated that the fan was not a hazard and the stove was used without incident by the previous tenants. The landlord testified that the unit offered a regular oven, a convection oven and a microwave that could be utilized for food preparation for the interim. The landlord disagreed with the tenant's claim for reimbursement of take-out meals.

The tenant testified that it was reported to the landlord on October 24, 2009, that the washing machine was not functioning properly and the landlord sent a repairman to fix it on November 2, 2009. However, the machine was still broken and the repairman returned to

remove the motor which evidently required new parts. According to the tenant, although the motor was replaced the seal was not properly installed and the washer leaked until the repairman finally fixed it on December 21, 2009. The tenant submitted a photograph dated December 19, 2009 which the tenant testified showed water leaking onto some clothing items on the floor in front of the machine. The tenant was seeking compensation for laundry costs calculated at $5.00 per load for 9 loads per week for eight weeks. The total claim for laundry expenses was $360.00. No receipts were submitted.

The landlord disputed the tenant's testimony that the washer was out of commission for two months and testified that the final bill from the repairman came in on November 19, 2009 and included the cost of the replacement seal. The landlord stated that it had no knowledge of any service calls during the month of December 2009 and no complaints from the tenant were received after November 19, 2009. The landlord also did not agree with the alleged costs claimed for laundry expenses.

The tenant testified that in mid-November it was discovered that the gas dryer was also in need of service because of an odour problem. The tenant testified that when the landlord was notified the landlord refused to have the appliance looked at and told the tenant to "*do it yourself*". According to the tenant, both tenants then proceeded to disassemble the dryer to clean it out finding mouse droppings and lint. The tenant is claiming compensation for labour at the rate of $25.00 per hour for each of the two tenants for four hours totalling $200.00.

The landlord disputed the claim on the basis that the landlord was never informed of any problems with the dryer and would not have authorized the tenant to do any work nor charge any fees if this ever was reported.

The tenant testified that during the tenancy they were unable to use two of the showers because of a problem with the seals. The tenant testified that the landlord was aware of the problem but refused to take care of it. The tenant claimed $100.00 for loss of facilities.

Analysis: Tenant's Monetary Claims for Damages and Loss

In regards to an Applicant's right to claim damages from the another party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the

authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

Both parties agreed that there was a period of approximately two weeks or less during which stove fan was being serviced. I find that section 32 (1) states that a landlord must provide and maintain residential property in a state of decoration and repair that

> (a) complies with the health, safety and housing standards required by law, and
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> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

I find that the landlord would likely be noncompliant with a landlord's obligation under section 32(1)(a) if the landlord refused to respond to a tenant's complaint within a reasonable time. In this instance, I find that the landlord did take action to address the fan problem when reported by the tenant within a reasonable amount of time and succeeded in restoring the fan as soon as feasible. As there was no substantive violation of the Act by the landlord, I find that element 2 of the test for damages has not been met. In addition the tenant did not provide sufficient proof of the expenditure of $75.00 per day and also had an obligation to mitigate the loss by using the other available appliances and therefore elements 3 and 4 of the test for damages have not been not been sufficiently met.

That being said, there is the allegation that the value of the tenancy was reduced by no use of the fan and the stove for approximately 2 weeks and for the purpose of determining whether a rent abatement was warranted, the loss of this particular item in relation to the value of the tenancy must be assessed. I find that, while the temporary deprivation of a stove would have created inconvenience for the tenant, the tenant was still required to act reasonably to minimize the loss under section 7(b) of the Act. In this instance, I accept that there were other appliances including a regular oven and convection oven and microwave already in the unit to assist with cooking. Moreover, I find that the tenant could possibly have obtained or used existing small appliances such as an electric hot plate, kettle or frying pan, that would have been less costly than eating out. I also note that in determining the claim, the tenant did not account for a deduction off of the restaurant costs an estimated amount representing what the grocery items would have cost otherwise. Given all of the factors discussed above, I find that the tenant would be entitled to be compensated $70.00 per week for a total amount of $140.00.

In regards to the washer, I find that both parties agreed that repairs were required and were commenced on November 2, 2009. However, there is a dispute about when the repairs were finally completed, which the landlord stated occurred prior to November 19 and the tenant contended did not occur until December 21, 2009. The tenant relied on evidence submitted consisting of a date shown on a dated photograph that allegedly shows water still leaking from the machine on December 19, 2009. I find that while the tenant went to some length to document the leak, the tenant failed submit any evidence to confirm that the landlord was ever notified after November of the continuing problem with the machine. There was no explanation as to why the final repair of the seal, which was relatively minor would have been delayed for over a month, particularly without the tenant taking some action by sending a written complaint to the landlord. There was also no explanation as to why the final bill from the repair company only included charges up to November 19, 2009.

Given the above, I can only find proof that the tenant was deprived of the washer for a period of at least one month. In regards to the costs being claimed for damages, I find that the tenant has failed to meet element 2 and 3 of the test for damages. However, I find that due to the lack of a washer for a period of one month, the value of the tenancy was reduced by 10% and I find that this would amount to entitlement for compensation of $200.00.

In regards to the claim for compensation for the labour to repair the dryer, I find that the tenant has not succeeded in meeting any of the four elements of the test for damages. There was insufficient proof to support that the appliance was broken. There were also no copies of any written communications from the landlord authorizing the tenant to do the repairs and inadequate verification by the tenant of the costs being claimed. Accordingly, this portion of the tenant's application is dismissed.

In regards to the missing rubber seals on the doors of two of the showers in the unit, I find that the tenant was inconvenienced by being unable to use the defective stalls which apparently leaked water. However, I accept the landlord's testimony that, had the tenant made the landlord aware and requested a repair, it would have been attended to without delay. I find that in order to reasonably fulfill the obligation under section 7(2) of the Act to mitigate the losses incurred by the shower problem, the tenant should have notified the landlord in writing during the first month. Accordingly, I find that the compensation for the loss of value to the facilities would be restricted to one month and I set this at $30.00.

In regards to the tenant's claim for compensation due to an evident rodent problem, I find that, under the Act, a landlord is responsible for pest control issues once they are reported. The normal process would be for the tenant to advise the landlord verbally and if no action was taken, to then submit a written complaint and if the landlord still ignored the problem, the tenant would be at liberty to make an application for dispute resolution for an order to compel the landlord to act, or for compensation for the period of time during which the landlord knew about the issue and still refused to address it in a timely manner. I find that the landlord would not be in violation of the Act until the matter was properly brought forth. In this instance, the tenant was alleging a long-term problem with mice that was evidently present from the beginning of the tenancy. Although the tenant submitted photographic evidence proving that there was an infestation, no evidence was submitted to verify that the tenant followed a reasonable course of action to ensure that the landlord was aware of the problem and the tenant's expectation that it must be resolved by the landlord. As I can find no violation of the Act in this situation the claim fails element two of the test for damages and therefore I find that this portion of the tenant's application must be dismissed.

In regards to the request in the tenant's application that the landlord be ordered o allow the tenant to assign the tenancy, I find that the issue of subletting was not pertinent to the

monetary claims and as the tenancy is ending this matter was moot.

Conclusion

Based on the evidence before me, I find that the landlord has established a total monetary claim of $2,050.00 comprised of $2,000.00 rental arrears, and $50.00 reimbursement for the filing fee paid for this application.

Based on the evidence before me, I also find that the tenant has established a total monetary claim of $370.00 comprised of $140.00 for two weeks loss of the stove, $200.00 for the loss of use of the washer and $30.00 for being unable to use two of the showers.

Pursuant to my authority under section 72 of the Act, I order that the landlord's monetary award be set off by what is owed to the tenant, leaving $1,680.00 in favour of the landlord.

I order that the landlord retain the security deposit of $1,000.00 in partial satisfaction of the claim leaving a balance due of $680.00. 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.

I hereby issue an Order of Possession in favour of the landlord effective February 28, 2010. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

The remainder of the tenant's application is hereby dismissed in its entirety, without leave to reapply.

Dated: February 2010

Dispute Resolution Officer