

DECISION

Dispute Codes OPR MNR MNSD FF
 CNR FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, to keep the security deposit, and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed seeking an Order to cancel the notice to end tenancy for unpaid rent and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents by the Landlord to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on February 11, 2010. Canada Post tracking numbers were provided in the Landlord's testimony.

The Tenant argued that he did not receive notification of the Landlord's Application. During the hearing the Landlord checked the Canada Post website and confirmed that the Tenant was issued a notice to pick up the registered package on February 12, 2010. The Tenant is deemed to have received the hearing package on February 16, 2010, five days after it was mailed in accordance with section 90 of the *Act*.

Service of the hearing documents by the Tenant to the Landlord was done in accordance with section 89 of the *Act*, sent via registered mail on January 11, 2010. Canada Post tracking numbers were provided in the Tenant's evidence. The Landlord confirmed receipt of the hearing package and evidence sent by the Tenant.

Both the Landlord and Tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

Is the Landlord entitled to a) an Order of Possession for unpaid rent, b) a Monetary Order for unpaid rent, and c) an Order to keep the security deposit in partial satisfaction of their claim, under sections 38, 55 and 67, of the *Residential Tenancy Act*?

Is the Tenant entitled to an Order to cancel the notice to end tenancy under section 46 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony was the fixed term tenancy began on April 1, 2009 and upon expiration on September 30, 2009 switched to a month to month tenancy. Rent is payable on the first of each month in the amount of \$850.00 and the Tenant paid a security deposit of \$425.00 on April 30, 2009. The tenancy agreement, section #6, provides for the Landlord to charge a late payment charge of \$25.00 for late payment of rent.

The Landlord testified that when the Tenant failed to pay his January 2010 rent on time a 10 Day Notice to End Tenancy was issued and served to the Tenant on January 4, 2010 with one copy being placed in the Tenant's mailbox and the second copy placed under the Tenant's door.

The Tenant confirmed receipt of the 10 Day Notice to End Tenancy and paid his January rent in full by money order on January 4, 2010. The Tenant confirmed that a second payment of \$25.00 for the late payment fee was paid to the Landlord on a separate cheque. The Tenant filed his application for dispute resolution to cancel this 10 Day Notice on January 8, 2010.

The Landlord confirmed that the Tenant paid \$425.00, a partial amount of the rent, on February 1, 2010. The Landlord then issued another 10 Day Notice to End Tenancy for the balance owing of \$425.00 plus late payment fees on February 2, 2010 and served one copy in the Tenant's mail box and the second copy under the Tenant's door.

The Landlord argued that they wish to proceed with an Order of Possession for as quickly as possible because the Tenant is preventing the Landlord access to show the rental unit to prospective tenants.

The Tenant argued that he is not restricting the Landlord's access to the unit. The Tenant stated that he wanted his security deposit to pay the remainder of his rent owing and that he wrote this on his rent cheque so he feels his rent has been paid in full.

Analysis

All of the testimony and documentary evidence was carefully considered.

I find that in order to justify payment of damages or losses under section 67 of the *Act*, 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.

Landlord's Application

Order of Possession – I do not accept the Tenant's argument that he paid his rent in full when he wrote on his rent cheque to have the balance of his February rent paid by his security deposit. There was no discussion or agreement with the Landlord to use the security deposit as rent and the note written on the Tenant's cheque, as provided in the evidence, simply states "last month's rent for (address of rental unit) (rent-deposit).

I find that the Landlord has met the requirements for the 10 day notice to end tenancy issued February 2, 2010, pursuant to section 46(1) of the *Act*, that the Tenant failed to pay the rent within 5 days after receiving this notice, and that 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 to which the notice relates pursuant to section 46(5) of the *Act*. Based on the aforementioned I hereby approve the Landlord's request for an Order of Possession.

Claim for unpaid rent - The Landlord claims for unpaid rent of \$425.00 for February 2010, pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I find that the Tenant has failed to comply with a standard term of the tenancy agreement which stipulates that rent is due monthly on the first of each month. Therefore I approve the Landlord's claim of \$425.00 of unpaid rent.

Late Payment Fees – The testimony supports that item #6 of the tenancy agreement provides for late payment fees of \$25.00 to be charged to the Tenant in accordance with section 7 of the *Residential Tenancy Regulations*. Based on the aforementioned I find that the Landlord is entitled to \$25.00 for a late payment fee for February 2010.

Filing Fee \$50.00- I find that the Landlord has succeeded with their application and I hereby award recovery of the filing fee.

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 interest, and that the Landlord is entitled to recover the filing fee from the Tenant as follows:

Unpaid Rent for February 2010	\$425.00
Late payment fee for February 2010	25.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the landlord)	\$500.00
Less Security Deposit of \$425.00 plus interest of \$0.00 from April 30, 2009 to February 16, 2010	-425.00
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$75.00

Tenant's Application

The Tenant applied on January 8, 2010, to cancel the 10 Day Notice to End Tenancy for Unpaid Rent that was issued on January 4, 2010. The Tenant complied with the 10 Day Notice to End Tenancy and paid his rent in full on January 4, 2010 thus cancelling the January 4, 2010 Notice and reinstating his tenancy.

The Tenant failed to pay his February 2010 rent in full, as discussed above with the Landlord's application, and was issued a second 10 Day Notice to End Tenancy on February 2, 2010. The Tenant did not file to amend his application to dispute the 10 Day Notice issued on February 2, 2010, therefore the Tenant's application is moot as he complied with the January 4, 2010 Notice and paid his rent in full within the required time.

As the Tenant has not been successful with his application I decline to award him recovery of the filing fee.

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 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 **\$75.00**. The order must be served on the respondent Tenant 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: February 16, 2010.

Dispute Resolution Officer