

DECISION

Dispute Codes OPR MNR MNSD FF

Introduction

This was a reconvened hearing which dealt with an Application for Dispute Resolution by the Landlord seeking an Order for Possession for unpaid rent, and a Monetary Order for unpaid rent, to keep the security deposit, and to recover the cost of the filing fee from the Tenant's for this application. The landlord originally applied through the direct request process which, upon review, was scheduled for a conference call hearing in accordance with section 74 of the *Residential Tenancy Act*.

Service of the conference call hearing documents was done in person on February 3, 2010 at 10:00 a.m., when the landlord hand delivered the Notice of a Dispute Resolution Hearing to the female Tenant at the rental unit, in the presence of a witness.

The Landlord appeared, gave affirmed testimony, was provided the opportunity to present his evidence orally, in written and documentary form.

The Tenants did not attend the hearing despite being served the hearing documents on February 3, 2010, in accordance with the Act.

Issues(s) to be Decided

Is the Landlord entitled to an Order of Possession for unpaid rent under section 55 of the *Residential Tenancy Act*?

Is the Landlord entitled to a Monetary Order a) for unpaid rent, and b) to keep the security deposit under sections 38 and 67 of the *Residential Tenancy Act*?

Background and Evidence

The month to month tenancy agreement began on September 1, 2009. Rent is payable on the first of each month in the amount of \$700.00 and the Tenant's paid a security deposit of \$350.00 on September 1, 2009.

The Landlord testified that the Tenants are continuously behind in their rent payments and that he served the female Tenant with a 10 Day Notice to End Tenancy for unpaid rent, in person on December 31, 2009 at 10:30 a.m. in the presence of a witness.

The Landlord argued that the Tenants have told him they want to stay in the rental unit however they fail to pay their rent on time. The Landlord stated that after issuing the 10 Day Notice to End Tenancy he has accepted the following rent payments from the Tenants: \$120.00 January 2010, \$100.00 February 3, 2010, \$200.00 February 13, 2010, \$190.00 February 19, 2010, \$200.00 February 28, 2010, and \$250.00 March 6, 2010.

The Landlord testified that he knew the 10 Day Notice to End Tenancy was voided after taking the rent payments. The Landlord confirmed that he has not issued the Tenants receipts for these rent payments listing "use and occupancy only" nor has he issued another notice to end the tenancy since December 31, 2009.

Analysis

All of the testimony and evidence was carefully considered.

The evidence supports that the Landlord continued to accept payments from the Tenants towards rent, after the 10 Day Notice to End Tenancy was issued on December 31, 2009; the Landlord did not issue the Tenants receipts for these payments for "use and occupancy only"; and the Landlord knew that by accepting these payments as rent he would void the 10 Day Notice to end Tenancy.

Based on the aforementioned I find that the Landlord initiated an implied waiver of the 10 Day Notice to End Tenancy whereby his actions of accepting payment from the Tenants as rent, and not for use and occupancy only, has encouraged the Tenants to continue making payments of rent which has changed their position to their detriment. Therefore the 10 Day Notice to End Tenancy is hereby cancelled and of no force or effect.

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

Conclusion

The 10 Day Notice to End Tenancy issued December 31, 2009 is hereby cancelled and is of no force or effect.

The Landlord's application is hereby dismissed, without 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: March 15, 2010.

Dispute Resolution Officer