

DECISION

Dispute Codes MNDC, MNSD, OLC, O

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenants for a Monetary Order for money owed or compensation for loss or damage under the *Act*, regulation or tenancy agreement, an Order for the return of the security deposit and an Order for the landlord to comply with the *Act* and other issues.

First of all it is my decision that I will not deal with all the issues that the applicant has put on the application for the return of the security deposit as the tenants still reside at the rental unit or for an Order for the landlord to comply with the *Act* as it is not relevant to this claim.

I therefore will deal with The Monetary Order for money owed or compensation for loss or damage under the *Act* and I dismiss the remaining unrelated disputes with liberty to re-apply for the security deposit only.

The tenant served the landlord by registered mail on February 10, 2010 with a copy of the Application and Notice of Hearing. I find that the landlord was properly served pursuant to s. 89 of the *Act* with notice of this hearing.

The female tenant and her witness appeared and the landlord and his agent appeared. Both Parties gave affirmed testimony, were provided the opportunity to present their evidence orally, in written form, documentary form, to cross-examine the other party, and make submissions to me. On the basis of the solemnly affirmed evidence presented at the hearing I have determined:

Preliminary Matters

The female tenant testifies that she thought she had disputed the One Month Notice. The tenant seeks to amend her application to dispute this Notice.

Issues(s) to be Decided

Is the tenant entitled to a Monetary Order for money owed or compensation for damage or loss for the over payment of rent from February 2009?

Background and Evidence

This tenancy started on February 10, 2009. This is a month to month tenancy and rent is \$735.00 per month and is due on the first of each month. The tenants paid a security deposit of \$367.50 on February 10, 2009.

The landlord testifies that the tenants were repeatedly late paying their rent and in April 2009 the tenants only paid \$600.00 of the rent. The landlord claims that the tenants were late in April, May and August, 2009 the landlord attempted to work with the tenants at these times and did not issues them with a 10 Day Notice for unpaid rent. The landlord claims the tenant only paid \$600.00 of the rent for April, 2009. The landlord claims that rent was late again in October and November, 2009 and two 10 Day Notices to End Tenancy were issued. The tenant paid these overdue rents within five days. The landlord claims the rent was late again in December, 2009 and on December 02, 2009 another 10 Day Notice was issued to the tenants.

The landlord served the tenants with a One Month Notice to End Tenancy for cause on January 29, 2010. The reasons given on this Notice are a) the tenants are repeatedly late paying rent; b) the rental unit/site must be vacated to comply with a government order. The landlord requests an Order of Possession based on the one Month Notice which the tenant has not disputed.

The tenant testifies that she has made many attempts to pay her rent on the day it is due but the landlord is not available for her to pay the rent. The tenant claims she has sent numerous e-mails, left text messages and voice mails requesting the landlord to contact her about the rent so she can pay it. The tenant testifies that when she moved into the rental unit on February 10, 2009 she paid for the whole of the month of February. She was told by the landlords' manager at the time that she could pay her rent on the 10th of each month or the landlord would give her

back the 10 days over payment. She claims the landlord did not give her back the overpayment of rent for February so she assumed that she could continue to pay her rent on the 10th of each month. Therefore the rent has not been late for the months the landlord states. The tenant claims the landlord was not in the country and they did not sign the tenancy agreement until July, 2009 and it was backdated to February, 2009.

The tenant claims that she has not seen a Government Order stating the rental unit must be vacated and disputes this reason given on the One Month Notice.

The landlord argues that he is not aware of any agreement where the tenant could pay the rent on the 10th of the month. He argues that the tenancy agreement clearly states that rent is due on the first of each month. He states that he comes to collect the rent from the tenants on the first of each month on three separate times throughout the day. The tenants are either not home or do not answer the door when he comes. He argues that the tenant only attempts to chase the landlord to pay the rent when she has been issued with a 10 Day Notice to End Tenancy. The landlord states that he has now accepted rent payments for use and occupancy only since the One Month Notice was issued.

The landlord states that he has not been issued with a government order for the unit to be vacated but as it is an illegal suite he is attempting to comply with a verbal request from the City to turn the property into one unit. They have to remove the stove and all cooking facilities and a dividing wall in order to comply with the city regulations about illegal suites.

The tenants witness testifies that she saw the tenants' brother give the landlords manager an envelope with the rent cash in for April, 2009. She testifies that she did not see how much money was in the envelope but did see the landlords' manager give the tenants' brother a receipt. This receipt has not been produced in evidence. The tenants witness also states she has seen the tenant pay rent on one occasion on March 01, 2010. The witness states she has been with the tenant when she has tried to find the landlord to pay the rent. The witness was unsure of the dates this occurred.

The landlord cross examined the tenants witness and asked the witness where she was standing when the April rent was given to the landlords' manager. The witness states she was within eye sight at the side of the back stairs on April 01, 2009.

Analysis

I have carefully considered all the evidence before me, including the affirmed evidence of both parties and the witness; at the outset of the hearing the tenant asked to amend her application to include the section to cancel the Notice to End Tenancy. However, I find the tenants were two days late in filing their application I also find that in order to grant them an amendment at this time would result in prejudice to the other party. The landlord also objected to an amendment. Consequently, the tenants request to amend the application was refused.

I find therefore that the tenants have not disputed the One Month Notice to End Tenancy dated January 29, 2010. This notice states that the tenants have 10 days to file an application to dispute the notice. The tenants should have disputed the notice by February 08, 2010. The tenants filed an application on February 10, 2010 and failed to check the box to cancel the Notice to End Tenancy.

Based on the foregoing, I find that the tenants are conclusively presumed, under section 47(5) of the *Act*, to have accepted that the tenancy ended on the effective date of the Notice and grant the landlord an order of possession pursuant to section 55(3).

With regard to the tenants application for a Monetary Order for money owed or compensation for damage or loss; I find the tenant overpaid her rent for February, 2009. The tenant paid for the whole month of February and they did not move into the rental unit until February 10, 2009 and the date on the tenancy agreement states that the tenancy starts on February 10, 2009. Therefore, I find the tenants are entitled to recover the amount of **\$262.50** for the 10 days of overpaid rent pursuant to section 67 of the *Act*. The landlord argues that the tenants owe \$135.00 for rent in April 2009; however, as the landlord has not made an application himself he is not entitled to a monetary award at this hearing.

Conclusion

I HEREBY FIND in partial favor of the tenants monetary claim. A copy of the tenant's decision will be accompanied by a Monetary Order for **\$262.50**. The order must be served on the landlord and is enforceable through the Provincial Court as an order of that Court.

The One Month Notice to End Tenancy for Cause will remain in force and effect.

I HEREBY ISSUE an Order of Possession in favour of the landlord effective **two days** after service on the tenant. This order must be served on the tenants and may be filed in the Supreme Court and enforced 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: March 29, 2010.

Dispute Resolution Officer