

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, MT, CNR, OLC, ERP, RP, PSF, LRE, RR, FF, O

Introduction

This hearing dealt with cross applications. The landlord applied for an Order of Possession for unpaid rent; a Monetary Order for unpaid rent and damage or loss under the Act, Regulations or tenancy agreement; authorization to retain the security deposit; and, recovery of the filing fee. The tenants applied for more time to make this application; to cancel the Notice to End Tenancy for Unpaid Rent; for Orders to make the landlord comply with the Act, Regulations or tenancy agreement, make repairs and emergency repairs, to provides services or facilities, to suspend or set conditions upon the landlord's right to enter the rental unit; for authorization to reduce rent for repairs, services or facilities agreed upon but not provided; recovery of the filing fee and other issues. Both parties appeared at the hearing and were provided the opportunity to be heard. The parties confirmed that their respective evidence packages were served upon the other party.

Issues(s) to be Decided

1. Has the landlord established an entitlement to end the tenancy for unpaid rent and obtain an Order of Possession?
2. Has the landlord established an entitlement to a Monetary Order for unpaid rent and loss of rent? If so, the amount?
3. Have the tenants provided sufficient grounds to establish the Notice should be cancelled?
4. Have the tenants established an entitlement to monetary compensation from the landlord for damage or loss under the Act, regulations or tenancy agreement? If so, the amount?
5. Are Orders to the landlord required?
6. Are the tenants entitled to reduce future rent payable?

7. Retention of the security deposit.
8. Award of the filing fee.

Background and Evidence

The parties provided undisputed evidence as follows. The month-to-month tenancy commenced June 1, 2009; however, the tenants were provided access to the rental unit approximately one week prior. The tenants are required to pay rent of \$1,100.00 on the 1st day of every month and paid a \$550.00 security deposit on May 15, 2009. The tenants paid rent by cash and cheque; however, cheques were always returned for insufficient funds. The landlord did not provide the tenants receipts when cash was taken from the tenants. The landlord recorded payments received from the tenants in a book. The tenants recorded payments on a calendar. The landlord issued a *10 Day Notice to End Tenancy for Unpaid Rent* (the Notice) dated February 18, 2010 which indicated \$4,980.00 was outstanding as of February 1, 2010. The tenants disputed this Notice on March 1, 2010.

The landlord claimed that he posted the Notice on the tenants' door on February 18, 2010 by taping it to the door. The tenants claimed they found the Notice taped to the door on February 26, 2010. In filing an application for dispute resolution on March 1, 2010 and asked for more time to make their application to dispute the Notice.

The landlord is requesting recovery of unpaid rent in the amount of \$6,080.00 including the month of March 2010. The landlord had provided late evidence including a schedule of rent owing and payments received. The schedule indicates that several cheques were returned for insufficient funds. The tenants acknowledged that several cheques were returned for insufficient funds but alleged that the landlord's ledger does not reflect all of the cash payments they made. I proceeded to take verbal testimony from both parties as to the rent payments made, that I summarize as follows:

<u>Month</u>	<u>Monthly rent</u>	<u>Payments per Landlord</u>	<u>Payments per Tenants</u>
July 2009	\$ 1,100.00	Nil	\$ 1,100.00 cash
August 2009	\$ 1,100.00	\$ 1,205.00 cash	\$ 1,200.00 cash
September 2009	\$ 1,100.00	\$ 400.00 cash \$ 700.00 cash	\$ 400.00 cash \$ 700.00 cash
October 2009	\$ 1,100.00	Nil	\$ 400.00 cash \$ 700.00 cash
November 2009	\$ 1,100.00	Nil	\$ 500.00 cash \$ 600.00 cash
December 2009	\$ 1,100.00	\$ 340.00 cash \$ 200.00 cash	\$ 340.00 cash \$ 200.00 cash \$ 260.00 cash
January 2010	\$ 1,100.00	\$ 440.00 cash \$ 300.00 cash	\$ 440.00 cash \$ 300.00 cash \$ 360.00 cash
February 2010	\$ 1,100.00	\$ 240.00 cash	\$ 240.00 cash
March 2010	\$ 1,100.00	Nil	Nil
TOTAL PAYABLE/PAID	\$ 11,000.00	\$ 4,860.00	\$ 8,840.00
RENT OWING		\$ 6,140.00	\$ 2,160.00

The tenants acknowledged that there was rent owing to the landlord when the landlord issued the 10 Day Notice and that they did not pay the landlord any monies after receiving the February 18, 2010 Notice; however, the amount of the rental arrears was in dispute. Upon enquiry, the tenants claimed to have received funds from WCB and paid rent from those funds in cash. I note that the tenants did not state that the amount of rent identified on the 10 Day Notice was incorrect or that the tenants had made more payments than the landlord had recorded when the tenant's made the application for

dispute resolution. Rather, the primary focus of the tenant's application was the condition of the rental property.

In making the tenants' application, the tenants are seeking compensation of \$4,654.00 from the landlord for the following items:

Lack of laundry facilities	\$47/week x 32 weeks	\$ 1,504.00
Loss of water and time to fix hot water line	3 days without water + time to fix water line	150.00
TOTAL CLAIM		\$ 4,654.00

The tenants also alleged in subsequent documentation and verbal testimony that :

- The landlord had promised to repair the deck and provide laundry facilities in the first month of their tenancy;
- Rodents and raccoons were residing in the roof and the landlord did not remedy this situation;
- The landlord's son uttered threats to tenant over the telephone and the landlord frequently arrived at the rental unit unannounced;
- The basement suite was rented out with utilities included yet the tenants pay for all of the hydro and gas bills;
- There are birds' nests and bee hives in the gutters that the landlord failed to remove;
- Receipts were not given for cash rent payments;
- The back yard was unusable for 3 months due to garbage and overgrown vegetation;

In response to the tenants' assertions, the landlord responded as follows:

- No promises had been made to the tenants for a deck repair or the provision of laundry facilities;
- The landlord had agreed to permit the tenant to deduct payment for an exterminator from the rent payment but the tenant did not hire the exterminator;

- The landlord's son denied threats were made against the tenant; rather, the landlord was only trying to inform the tenants to pay rent or move out;
- It was agreed that the tenants were only required to pay 60% of the hydro and gas bills in recognition of the utilities consumed by the basement suite occupants; however, the tenants have not provided the landlord with copies of the bills to determine the portion refundable to the tenants;
- Receipts were to be given when a full month of rent had been paid;
- The tenants indicated the back yard would be acceptable for use for their dog and the tenants had use of the front yard during those 3 months before the backyard was cleaned up;
- The landlord acknowledges that the tenant assisted in repairing the hot water line and had agreed to deduct \$50.00 from rent for his effort; however, the landlord also pointed out that an old fridge was recycled for a \$35.00 buyback credit given to the tenants.

As evidence for the hearing, the tenants provided photographs of the residential property. Both parties provided a copy of the 10 Day Notice issued February 18, 2010. The landlord provided a copy of the tenancy agreement, a sketch of the deck and copies of a 10 Day Notice issued January 12, 2010 and March 1, 2010.

After some discussion about a tenant's obligation to pay rent when due, the landlord agreed to permit the tenants possession of the rental unit until Sunday, March 15, 2010. The tenants indicated they would vacate the rental unit by that time.

Analysis

Landlord's application

Under section 26 of the Act, a tenant is required to pay rent in accordance with the terms of the tenancy agreement and is not permitted to withhold rent without the legal right to do so. A legal right may include the landlord's consent for deduction;

authorization from a dispute resolution officer or expenditures incurred to make an “emergency repair”, as defined by the Act.

Where a tenant fails to pay rent when due, the landlord may serve the tenant with a 10 Day Notice for Unpaid Rent. Upon receipt of the 10 Day Notice, the tenant must pay the outstanding rent or dispute the Notice within five days. In this case, the date the Notice was served is in dispute; however, if I give the benefit of the doubt to the tenants and find that the Notice was received on February 26, 2010 then the tenants disputed the Notice within five days. Where a Notice is disputed, the tenant must be able to show that the tenants do not owe the landlord rent or had some other legal right to withhold rent.

Upon hearing from the parties, I am satisfied that the tenants owed the landlord rent when the Notice was issued, that they did not pay all of the rent owed to the landlord within five days of receiving the Notice and the tenants did not establish that they had the legal right to withhold the rent owed. Therefore, I find the tenancy has ended for the tenant’s failure to pay rent and the landlord is entitled to regain possession of the rental unit. The landlord is provided with an Order of Possession to serve upon the tenants in the event the tenants do not vacate the rental unit by March 15, 2010.

With respect to the rent owed by the tenants, I found both parties provided inconsistent testimony and did not provide as much documentary evidence as was available to them. For instance, the landlord claimed that the tenant wrote several NSF cheques yet the landlord did not provide copies of documentation to support that. However, the tenants acknowledged several cheques were returned and the landlord did provide a copy of a 10 Day Notice to End Tenancy issued January 12, 2010 that was not disputed by the tenants.

I accept the tenants’ position that the landlord failed to provide receipts for cash payments made and that the landlord is required under the Act to provide the tenants a

receipt every time a cash payment is made. However, I did not find that a failure to provide receipts was a basis to conclude that the tenants did not owe the landlord rent.

As the parties were informed during the hearing, the burden to prove rent was paid is that of the tenant since a landlord cannot be expected to prove something he did not receive. The tenants' claim they paid the landlord more often than the landlord acknowledged in the landlord's ledger; however, the tenant did not provide any documentation to support his contention that he was receiving WCB benefits and paying his rent with those funds. Nor did the tenant provide a copy of the calendar he allegedly recorded payments on. Finally, I found it unusual that the tenants made no statements that they had in fact paid rent or that the amount of rent was in dispute when they filed their application for dispute resolution and subsequent documentation but focused on the condition of the rental property. I find it more likely than not that the tenants withheld rent were trying to justify it by pointing to the condition of the rental property.

Based on the balance of probabilities, I prefer the landlord's evidence of rent payments to that of the tenants. Since I have considered that the landlord issued an undisputed 10 Day Notice in January 2010 in determining the landlord has provided more evidence of rent being unpaid, I have based my award to the landlord upon the 10 Day Notice issued in January 2010. The 10 Day Notice issued in January 2010 indicates that \$3,620.00 was outstanding as of January 12, 2010. It is unclear to me how the amount of unpaid rent that appears on the February 18, 2010 Notice was \$1,360.00 higher than the amount appearing on the January 2010 Notice when the monthly rent is only \$1,100.00. Therefore, I find the landlord entitled to recover unpaid rent and loss of rent as follows:

As per January 2010 Notice to End Tenancy	\$ 3,620.00
Plus: February 2010 rent	1,100.00
Plus: March 2010 rent	<u>1,100.00</u>
Total rent owed the landlord	\$ 5,820.00

As the landlord was largely successful in this application, I award the filing fee to the landlord and I authorize the landlord to retain the tenants' security deposit in partial satisfaction of the rent owed the landlord.

Tenants' application

Under the Act, a landlord must provide services or facilities agreed upon in the tenancy agreement and if such facilities are restricted or terminated, the tenant is entitled to compensation for the loss in value of the tenancy. With respect to the laundry facilities, since the parties were in dispute as to what was agreed upon, I have reviewed the tenancy agreement provided as evidence by the landlord. The tenancy agreement does not indicate that laundry facilities are to be provided to the tenants. Therefore, I do not find the tenants established that a service or facilities was agreed upon and not provided.

I award the tenants \$100.00 for the loss of an essential service (water) for three days and \$50.00 as agreed by the landlord for compensation for the tenant's assistance in fixing the water line.

Under section 7 of the Act, any party that makes an application for monetary compensation against the other party must show that they did whatever was reasonable to minimize their damage or loss. Where repairs are required to a rental property, the tenant should notify the landlord of the repair. If an inadequate response is received the tenant should notify the landlord of the repair required in writing and if that does not result in satisfactory action, the tenant may request repair orders by filing an application for dispute resolution. The tenants requested repairs in filing this application – approximately 10 months after their tenancy began. However, in the absence of written request for repairs or a previous request for repair orders, I do not find the tenants made very reasonable effort to have the repairs performed and I do not find the tenant's entitled to compensation for the 10 months they did not take sufficient action to minimize their damage or loss. Had the tenancy continued I would have likely granted

repair orders; however, since the tenancy has ended I do not order the landlord to make any repairs.

Where a landlord attends a property to post notices or attempt to collect rent owing, such attendance is not harassment. While threats may be considered harassment, I did not find sufficient evidence of threats made by or on behalf of the landlord. I did not find sufficient evidence that the landlord has illegally entered the rental unit and I do not set conditions upon the landlord. However, until the tenants have vacated or legally been removed from the rental unit; the landlord must abide by the landlord's restricted right to enter the rental unit as provided under section 29 of the Act.

As the tenancy has ended I dismiss the remainder of the tenants' requests for Orders for compliance, to provide services or facilities, or authorization to reduce future rent payable. The landlord is informed that is a severe violation of the Act to restrict or terminate any services or facilities while the tenants are still in possession of the rental unit.

With respect to utility bills, I find the parties were in agreement that the gas and hydro bills should be split and that the landlord is responsible for compensating the tenants 40% of the hydro and gas bills incurred in the tenants' names. However, I am also satisfied that the tenants have not yet provided the landlord copies of the utility bills. Since the tenants did not supply copies of the bills with this dispute, I cannot make a specific award to the tenants. Rather, **I ORDER the landlord to reduce the enclosed Monetary Order by 40% of the gas and hydro bills given to the landlord by the tenants** for which bills are in the tenants' names and show the service address as the rental unit.

Summary

The landlord has been awarded \$5,820.00 for unpaid rent, plus \$100.00 for the filing fee and is entitled to retain the tenants' security deposit of \$550.00. The tenants have been awarded \$150.00 for loss of an essential service and the tenant's assistance in making

the repair. I offset the tenants' award against the amount owed the landlord and provide the landlord with a Monetary Order in the net amount of: \$5,220.00 [$\$5,820.00 + 100.00 - 550.00 - 150.00$]. If the tenants provide the landlord with copies of hydro and gas bills incurred in their names for service at the rental unit, the landlord is ORDERED to reduce the Monetary Order by 40% of those bills provided.

The landlord must serve the Monetary Order upon the tenants and may enforce the Monetary Order by filing it in Provincial Court (Small Claims).

Conclusion

The tenancy has ended and the landlord has been provided an Order of Possession effective two (2) days after service upon the tenants. The landlord was largely successful in his request for unpaid rent and the tenants were partially successful in establishing a monetary claim against the landlord. The landlord has been authorized to retain the tenants' security deposit and is provided a Monetary Order for the balance of \$5,220.00. The Monetary Order must be reduced by 40% of hydro and gas bills provided to the landlord by the tenants.

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 11, 2010.

Dispute Resolution Officer