

DECISION

Dispute Codes OPR, OPC, MNR, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent and utilities, to recover the filing fee for this proceeding and to keep the Tenants' security deposit and pet damage deposit in payment of those amounts.

Issues(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?
2. Are there arrears of rent and utilities and if so, how much?
3. Is the Landlord entitled to keep the Tenants' security deposit and pet damage deposit?

Background and Evidence

This month to month tenancy started on November 17, 2009. Rent is \$1,100.00 per month payable in advance on the 1st day of each month. The Parties agree that the Tenants paid a security deposit of \$550.00 at the beginning of the tenancy. The Landlord said the Tenants also paid a pet deposit of \$500.00 at the beginning of the tenancy, however the Tenants claim this was paid on February 18, 2010.

The Landlord said that the Tenants did not pay rent for December 2009 when it was due and as a result, on December 23, 2009, he served the Tenants in person with a 10 Day Notice to End Tenancy for Unpaid Rent. The Tenants said they paid the \$800.00 in overdue rent on December 23, 2009. The Landlord said the overdue rent was paid on December 31, 2009. Both parties claimed to have a receipt for this payment, however neither party provided a copy of their receipt as evidence at the hearing.

The Landlord also said that the Tenants did not pay rent for January 2010 when it was due and as a result, on January 8, 2010, the Landlord served the Tenants in person with a 10 Day Notice to End Tenancy for Unpaid rent. The Parties agree that on January 20, 2010, the Tenants paid \$1,430.00, \$730.00 of which was in payment of the overdue rent for January 2010. The Tenants claim that \$500.00 was in payment of the pet deposit and the balance of \$200.00 was a pre-payment of February 2010 rent. The Landlord claims that all but \$200.00 was in payment of overdue rent and that he returned \$200.00 to the Tenants because he believed they made an overpayment. The Tenants further claimed that on February 18, 2010 when they paid the Landlord the balance of their February 2010 rent, he took back the 10 Day Notice dated January 8, 2010 and told them they could stay. The Tenants also argued that they made emergency repairs to the rental unit and were therefore entitled to withhold any rent that would have been due on the 1st of each month.

The Landlord denied that he withdrew the 10 Day Notices and said he relies on payment of the rent on the 1st of each month because that is when the mortgage is due. Both parties agree that as of February 28, 2010, the Tenants have no rent arrears. The Landlord claimed however that the Tenants owe approximately \$170.00 for municipal utilities. The Landlord said he tried to give a copy of the utility bill to one of the Tenants but he became violent. Consequently, the Landlord said his lawyer sent the bill by mail to the Tenants but he did not know when.

Analysis

In his application, the Landlord said he wanted to end the tenancy because one of the Tenants was physically and verbally violent. Section 47 of the Act says that a Landlord may end a tenancy for cause but he must first serve the Tenant with a One Month Notice to End Tenancy for Cause which sets out the grounds for ending the tenancy. Section 56 of the Act says that a Landlord may also end a tenancy early (for similar reasons) without the having to serve the Tenant with a One Month Notice to End Tenancy if there are urgent circumstances. The Landlord admitted that he did not serve the Tenants with a One Month Notice to End Tenancy for Cause and I find that he did not apply for an early end to the tenancy under s. 56 of the Act. Consequently, the Landlord is not entitled to an Order of Possession for this reason until he either serves the Tenants with a One Month Notice or applies for an early end to the tenancy.

Section 46(4) of the Act states that **within 5 days of receiving** a Notice to End Tenancy for Unpaid Rent or Utilities, a Tenant must either pay the overdue rent or apply for dispute resolution. If a Tenant fails to do either of these things, then under section 46(5) of the Act, they are conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice and they must vacate the rental unit at that time. The Tenants did not apply for dispute resolution to cancel either of the 10 Day Notices dated December 23, 2009 and January 8, 2010. Despite the Tenants' further claim that they made emergency repairs, they filed no evidence at the hearing in support of that claim.

Despite the fact that the Tenants did not apply to cancel the 10 Day Notices, there is a presumption that when a Landlord accepts overdue rent after the effective date of a Notice to End Tenancy that he has reinstated the tenancy. In order to rebut this presumption, a Landlord is required to give a Tenant a receipt for payment received after the effective date stating that it is **"for use and occupancy only."** Although the Landlord did not submit any of his receipts as evidence at the hearing, he admitted that he did not put on those receipts that the payment was accepted for use and occupancy only. The effective date of the Notice dated December 23, 2009 was January 2, 2010. Consequently, in accepting a rent payment on January 20, 2010, I find that the Landlord agreed to reinstate the tenancy and agreed not to enforce that Notice. Similarly, the effective date of the Notice dated January 8, 2010 was January 18, 2010. I find that in

accepting a rent payment on February 18, 2010, the Landlord agreed not to enforce that Notice.

Although the Landlord argued that his act of applying for Dispute Resolution on January 18, 2010 is evidence that he did not agree to reinstate the tenancy, I find that the application was filed prior to the Landlord receiving the late payments of rent. Consequently, I find that this argument is not sufficient to overcome the presumption that the Landlord reinstated the tenancy by accepting rent payments after the effective dates of the two 10 Day Notices.

Section 46(6) of the Act says that unpaid utility payments are not considered overdue until 30 days after a demand for payment has been made to the Tenant for them. In this case there is insufficient evidence as to when the Tenants were given a copy of the municipal utility bill. Consequently, I cannot conclude that utilities are overdue and as a result, this part of the Landlord's claim is dismissed with leave to reapply. As there is also no evidence of overdue rent, the Landlord's application to keep the Tenants' security deposit and pet damage deposit is also dismissed with leave to reapply. As the Landlord has been unsuccessful in this matter, his application to recover the filing fee for this proceeding is also dismissed without leave to reapply.

Conclusion

The 10 Day Notices to End Tenancy for Unpaid Rent dated December 23, 2009 and January 8, 2010 are cancelled and the tenancy will continue. The Landlord's applications for unpaid rent and to recover the filing fee for this proceeding are dismissed. The Landlord's application for unpaid utilities and to keep the Tenants' security deposit and pet damage deposit is dismissed with 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 01, 2010.

Dispute Resolution Officer