

## **DECISION**

Dispute Codes      CNR, MNDC, RR, OPR, MNR, MNSD, FF

### Introduction

This was the hearing of applications by the tenants and by the landlord. The hearing was conducted by conference call. The named tenant participated in the hearing. The landlord was represented by its agent and by a legal representative. The owners of the rental property also attended and participated in the hearing.

### Preliminary Matter

The landlord applied at the hearing to amend its claim by reducing the amount claimed from \$3,250.00 to \$1,715.70 and by adding a claim for \$115.70, being an unpaid invoice for garbage/recycling services for 2009. Although the tenants continued to dispute the landlord's claim as amended, they consented to the amendment. I therefore grant the landlord's request and amend the landlord's application accordingly.

### Background and Evidence

The rental property is located on rural land. It consists of a house and out buildings, including a barn on approximately five acres of fenced land. The tenancy began December 1, 2008 for a one year fixed term and thereafter month to month, with rent in the amount of \$1,600.00 due in advance on the first day of each month. The tenants paid a security deposit and pet deposit, each in the amount of \$800.00 on November 20, 2008. According to the tenancy agreement, utilities including electricity, heat and garbage collection were not included in the rent. Although not named as such in the landlord's application for dispute resolution, the written tenancy agreement named as landlord the applicant realty firm as agent for the owners, who were also named in the tenancy agreement.

The landlord issued two Notices to End Tenancy; the first, dated January 25, 2010 is a two month Notice to End Tenancy for landlord's use. The Notice requires the tenants to move out of the rental unit by March 31, 2010. The Notice was given on the ground that the rental unit will be occupied by the landlord.

The second Notice dated February 4, 2010 was a 10 day Notice to End Tenancy for unpaid rent. The 10 day Notice required the tenants to move out by February 14, 2010. The tenant acknowledged receiving both of the Notices. The tenants applied to dispute the Notice for unpaid rent but they have not disputed the Notice given for landlord's use and during the hearing the tenant acknowledged that the tenants have made arrangements to vacate the rental property by March 31, 2010.

In their application for dispute resolution the tenants claimed a rent reduction and a monetary order in the amount of \$1,600.00.

The landlord's claim for a monetary order included a claim for unpaid rent for February, 2010. The tenant acknowledged that she did not pay rent for the month of February. The tenant testified that she withheld February's rent in order: "to get the landlord's attention". The tenants received a \$300.00 rent reduction for December, but their efforts to get the landlord to agree to additional reductions were rebuffed.

In November, 2008 the tenants placed a "Housing wanted" ad on the internet seeking a property with acreage and a barn for four horses. The owners contacted the tenants. The tenants viewed the property. The tenant testified that when they viewed the property the owners told them that the land gets wet and "spongy" during the winter months.

The tenant testified that the rental property was not suitable for horses because the entire pasture portion of the acreage is a wetland marsh floodplain that is under several feet of water from fall until spring, some four to six months, depending on seasonal conditions. The tenants were not aware of the extent of the flooding during the first

winter of their tenancy because the unusually cold and snowy winter concealed the flooding until the spring. The tenants produced statements from the owners of properties that border the rental property wherein they attested to the following with respect to the rental property:

The back of this property, approximately 3 acres fenced, is a catch basin for the surrounding properties and does fill with water every year, resulting in submerged fields for the duration of the wet season; the fall thru the spring months.

One of the neighbours, ML testified on behalf of the tenants. He said that soon after the owners purchased the rental property in 2007, he spoke to the owners and told them that during the rainy season their field turns into a lake. He said that the owners commented, after their first winter on the property, that he was accurate in his description.

The tenants submitted photographs of the rental property. One picture showed a dry field with a bonfire. The others showed the land and the tenants' horses. In several photos there was standing water in the field, apparently one to two feet deep as judged by pictures of the horses standing in the water.

In addition to a \$300.00 rent reduction for November, 2009 and January, February and March, 2010 the tenants claimed payment of the sum of \$400.00 for landscaping performed on the property. With respect to the landscaping bill the tenants submitted an invoice for work done and plants supplied. The tenants are in the landscaping business. They referred to e-mails exchanged between the tenants and the landlord's agent. The e-mails mentioned discussions between the tenants and the owners regarding the tenants' request to make some improvements to the rental property that included creating some terraced flower beds and the limbing of branches as well as the removal of a tree hanging over the house.

The landlord disputed the tenant's testimony that they were not aware that the fields have water in them during the winter months. In her written submission the landlord's agent referred to an e-mail from the tenant wherein she reported that the owner told her: "It gets a bit spongey here, a few inches of water but thats all."

The landlord stated its position on the tenants' claims in the following terms:

The Landlord feels it is not fair of (the tenants) to ask for rent reductions for months of November 2009, January, February and March 2010. The Landlord did reduce the rent in the month of December 2009 in good faith but realized they could not afford to continue financially, nor does the Landlord feel that they should be penalized for what Mother Nature brings us in weather conditions.

(The tenants) own a Landscaping company and got permission from the Landlord to plant some shade loving perennials, plant some shrubs/herbs and to remove some branches impeding sunlight over the tiered garden area. They were also to remove the pine pecker pole hanging close to the house. The agreed invoice total for the above work and material was \$400.

The tenants did not remove the tree (pine pecker pole) near the house and the landlord's agent hired a tree removal company to do this work and remove another small tree at a cost of \$299.25. The tenant testified that the tenants did not remove the tree because they are not qualified to undertake a tree removal and it would have been dangerous for them to attempt it. The tenants submitted an invoice to the landlord in the amount of \$400.00. the invoice was dated August 15, 2009.

The owner, D.S. testified that he met the tenants at the rental property before the tenancy began. He said it should have been apparent to the tenants that there was a "lake" on the property because there is a creek on the property and because the marked change in the type of vegetation in the fields pictured in the tenants' photographs should have alerted them to the fact that the area was subject to flooding. The owner said that he moved to property in the summer of 2007 and when he rented to the tenants he had limited knowledge of the regular winter conditions, having only spent one winter at the property before renting to the tenants.

## Analysis and conclusion

### Landlord's claim:

The *Residential Tenancy Act* obliges tenants to pay rent when due save for very limited exceptions: when a tenant has been granted a rent reduction; when the tenant has an outstanding monetary order or when a tenant is entitled to deduct amounts from rent on account of emergency repairs. None of the exceptions apply to the tenants' withholding of rent for February. They did not have grounds to withhold rent under the *Act*. I therefore dismiss the tenants' application to cancel the Notice to End Tenancy for unpaid rent. I allow the landlord's application for an order for possession. Pursuant to section 55 I grant the landlord an order for possession effective two days after service upon the tenants. This order may be registered in the Supreme Court and enforced as an order of that court.

I find that the landlord is entitled to a monetary order in the amount of \$1,715.70, consisting of February's rent in the amount of \$1,600.00 and the sum of \$115.70 for garbage/recycling fees – I find that this charge is the responsibility of the tenants. The landlord is entitled to recover the \$50.00 filing fee paid for its application, for a total monetary award of \$1,765.70.

### Tenants' claim:

The tenants advertised for a rental property suitable for themselves and their horses. The landlord responded to that advertisement and invited the tenants to view the property. I accept the tenant's evidence that when she inspected the property it was dry and that in response to her inquiry about property the owner said that the portion of the property near the creek "gets a bit spongy here, a few inches of water but that's all."

The tenant submitted evidence from neighbouring property owners attesting to the fact that the fields on the rental property generally are flooded during the winter months. I

accept as well that M. L, the tenant's witness told the owners about the flooding on their property soon after they moved in and that the owner acknowledged that his description was accurate after the first winter. I find that the landlord's description to the tenant of the extent of flooding on the property during her initial inspection was misleading. I accept the tenant's evidence that had she known the extent of flooding on the rental property she would not have rented it.

According to the landlord's submissions, the rental value of the property was fixed at \$1,300.00 if the house alone was rented and \$1,600.00 if the house and land was rented. I find that the tenants had the reasonable expectation that the field would be useful for pasture their horses throughout the tenancy, but due to the extensive flooding on the property they lost the enjoyment of the fields for the months of November, 2009 through to March, 2010. The landlord tacitly acknowledged that fact when it reduced the rent for the month of December. The tenants have limited their claim for loss of use of the fields to the sum of \$300.00 per month, although, on their evidence they have incurred significant additional expenses as a consequence of that flooding. I allow the tenants' claim for a rent reduction for the months of November, January and February, but I do not allow the claim for March. The landlord appropriately has not claimed payment of rent for March because it issued a two month Notice to End Tenancy for landlord's use and the tenants have not paid rent for March. Although the tenancy has ended pursuant to the landlord's 10 day Notice, the landlord has not sought payment of March rent; I find that it would be inequitable to allow the tenant's claim for March in the circumstances.

With respect to the tenants' claim for payment for landscaping, I have reviewed the communications between the parties. The exchange of e-mails shows that the tenants sought permission from the landlord to perform improvements to the rental property with the expectation that the landlord would pay some amount for the tenants' work.

According to the landlord's submission:

The landlord did not agree to pay the tenants \$400.00 for work on the beds alone. The landlord's e-mail to the tenant on 9 June, 2009 shows:

The landlord is asking for an invoice from you for the garden area (plants) and the limbing of trees. I believe you mentioned \$400. Please ensure I receive this invoice.

The evidence shows that the tenants performed work on the garden area and that performed pruning and some tree limbing, however they did not remove the standing pine tree near the house. The landlord submitted an invoice in the sum of \$299.25 for the removal of the tree. The landlord acknowledged that the invoice also covered the removal of another small tree as well.

I find that the landlord agreed to pay the tenants the sum of \$400.00 for the garden work, some pruning and the limbing of trees as well as the removal of the pine tree near the house. The tenants did not remove the tree and the landlords were put to some expense to remove it. The landlord's invoice did not itemize separate charges for the removal of the two trees. I therefore allot one half the invoice charge to the removal of each tree. I allow the tenants' claim for landscaping in the amount of \$250.00 being the \$400.00 claimed, less the sum of \$150.00 for the landlord's cost to remove the pine tree.

The tenants have been awarded \$900.00 compensation and \$250.00 for landscaping. The tenants are entitled to recover the \$50.00 filing fee paid for its application, for a total monetary award of \$1,200.00.

I set off the award to the tenants against the monetary award granted to the landlord. This leaves a net amount due to the landlord of \$565.70. I make no order with respect to the security deposit and I leave the security deposit to be dealt with in accordance with the provisions of the *Residential Tenancy Act*. I grant the landlord an order under section 67 for the balance due of \$565.70. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated: April 9, 2010.

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