

DECISION

Dispute Codes OPR MND MNR MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order of Possession for unpaid rent, a Monetary Order for unpaid rent or utilities, to keep all or part of the security deposit, and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents, by the Landlord, were served by the Landlord to the Tenant via registered mail. The Tenant confirmed receipt of the hearing package.

The Landlord, the Tenant, and the Tenant's wife appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

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 or utilities, and b) to keep all or part of the security deposit, under sections 38, and 67 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony included the Tenant occupied rental unit # 308 from approximately May 1, 2000, then moved into unit # 205 approximately May 1, 2004, and then moved into unit # 320 on November 1, 2008 for which the monthly rent was payable on the first of each month in the amount of \$650.00.

Neither party could speak to the specifics of each tenancy mentioned above or the actual date or amount of the security deposits paid by the Tenant. I requested the Landlord to fax me copies of all of the tenancy agreements and a copy of the Tenant ledger after the hearing. I explained to both parties that these additional documents will be attached to my written decision to ensure the principals of natural justice were upheld. Both parties were in agreement to my request for the additional documents.

The Landlord testified that during the past years the Tenant and his spouse have struggled with some medical and financial issues during which the Landlord worked with the Tenant by offering payment plans and smaller units at a lower rent. On October 27, 2008 the Tenant had rental arrears totalling \$4,115.00 at which time the Landlord had been granted an Order of Possession for unpaid rent. The Landlord chose not to enforce the Order of Possession in 2008 and offered the Tenant to move into unit #320 effective November 1, 2008 at which time the two parties entered into a written agreement whereby the Tenant would pay the Landlord \$900.00 per month which was comprised of \$650.00 rent and \$250.00 to be put towards the Tenant's rental arrears.

The Landlord argued that when the Tenant failed to pay the rent a 10 Day Notice to End Tenancy was issued on January 19, 2010, for \$7,233.00 of unpaid rent and was served to the Tenant personally.

The Tenant testified and confirmed that he entered into the written agreement of October 27, 2008 and that they moved into unit # 320 as of November 1, 2008. The Tenant confirmed that he has not been working and has not been paying his rent or the rental arrears regularly.

The Tenant argued that he has made the following payments towards rent since being issued the 10 Day Notice to End Tenancy: \$650.00 in January 2010, \$700.00 in February 2010, and \$700.00 for April 2010. The Tenant confirmed he has received receipts for all payments after receiving the Notice and that all of the receipts have "use and occupancy only" written on them. The Tenant argued that he had a verbal agreement with the Landlord that if he paid the Landlord \$700.00 on the same day he received the 10 Day Notice then the tenancy would be reinstated.

The Landlord testified that he did not make a verbal agreement with the Tenant to reinstate the tenancy and confirmed the payments were accepted for use and occupancy only. The Landlord stated that he was seeking an Order of Possession for as soon as possible and a monetary order for the unpaid rent and filing fee.

Analysis

All of the testimony and documentary evidence was carefully considered.

A 19 page fax was received from the Landlord, as requested, on April 7, 2010, at 2:30 p.m. for which a copy is attached to this decision. Upon review of the additional evidence I find the following:

Unit #308 – The tenancy was from May 1, 2000 to April 30, 2004. A security deposit of \$350.00 and a key deposit of \$100.00 were paid and after agreed deductions a \$70.23 refund was issued to the Tenant on June 15, 2004.

Unit #205 – The tenancy was from May 1, 2004 to October 31, 2008. Rent had been increased on two occasions during the tenancy with the final rent being \$1,000.00 per month. The Tenant paid a security deposit of \$470.00 April 30, 2004. I note that the Landlord's ledger lists a security deposit of \$450.00 however the tenancy agreement lists \$470.00 which is the amount I will consider for this decision.

The Tenant failed to pay rent, in full, between June 1, 2008 and October 22, 2008 making only three payments as follows: \$435.00 August 27, 2008; \$500.00 October 6, 2008; and was charged the \$50.00 filing fee on October 22, 2008 leaving an outstanding balance of rent due of \$4,115.00.

Unit #305 – No new written tenancy agreement was issued however the Tenant occupied this unit on November 1, 2008; the Tenant made sporadic payments of rent and failed to pay anything in August 1, 2009 and December 1, 2009; no additional payments were made until after the 10 Day Notice to End Tenancy was issued on January 19, 2010.

I find that in order to justify payment of damages or losses under section 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant Landlord pursuant to section 7.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the Tenant.

In the case of verbal agreements, I find that where verbal terms are clear and both the Landlord and Tenant agree on the interpretation, there is no reason why such terms cannot be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes as they arise. Based on the aforementioned and in the presence of disputed testimony I find the tenancy was not reinstated when the Tenant made a payment towards rent on January 28, 2010.

Order of Possession I find that the Landlord has met the requirements for the 10 day notice to end tenancy pursuant to section 46(1) of the *Act*, that the Tenant failed to pay the rent or apply to dispute the Notice within 5 days after receiving this Notice, and that the Tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit to which the notice relates pursuant to section 46(5) of the *Act*. Therefore I approve the Landlord's request for an Order of Possession.

Claim for unpaid rent. The Landlord claims for unpaid rent up to March 1, 2010 in the amount of \$7,183.00, pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I find that the tenant has failed to comply with a standard term of the tenancy agreement which stipulates that rent is due monthly on the first of each month.

After reviewing the evidence I find the Landlord has proven that he attempted to mitigate his losses when entering into the payment agreement with Tenant and offering the Tenant a smaller rental unit at a lower monthly rent. I note that if the Landlord chooses not to enforce the Orders issued with this decision one may view that choice as

a failure to mitigate the current losses. Based on the aforementioned I find that the Landlord has proven his claim for damage or loss, as listed above, and I hereby approve his claim of unpaid rent in the amount of \$7,183.00.

Filing Fee \$100.00. I find that the Landlord has succeeded with his claim and I hereby award recovery of the filing fee from the Tenant.

Claim to keep all or part of security deposit. I find that the Landlord's claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenant's security deposit of \$470.00 plus interest of \$16.65 from April 30, 2004.

Monetary Order – I find that the Landlord is entitled to a monetary claim as follows:

Rental arrears up to March 1, 2010	\$7,183.00
Filing fee	100.00
Subtotal (Monetary Order in favor of the landlord)	\$7,283.00
Less Security Deposit of \$470.00 plus interest of \$16.65	-486.65
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$6,796.35

Conclusion

I HEREBY FIND that the Landlord is entitled to an Order of Possession effective **two days after service on the Tenant**. This order must be served on the Respondent Tenant and may be filed in the Supreme Court and enforced as an order of that Court.

I HEREBY FIND in favor of the Landlord's monetary claim. A copy of the Landlord's decision will be accompanied by a Monetary Order for **\$6,796.35**. The order must be served on the Respondent Tenant and is enforceable through the Provincial Court 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: April 08, 2010.

Dispute Resolution Officer