

## **DECISION**

**Dispute Codes**      CNC, OPC, MNR, MNSD, FF

### **Introduction**

This hearing was convened by way of conference call to deal with the tenant's application to cancel a notice to end tenancy for cause, as well as the landlords' application for an Order of Possession for cause, a monetary order for unpaid rent or utilities, to keep all or part of the security deposit, and to recover the filing fee from the tenant for the cost of this application.

The parties and witnesses each gave affirmed evidence and the parties were permitted to cross examine each other and the witnesses on their testimony.

### **Issues(s) to be Decided**

Is the tenant entitled to an order cancelling a notice to end tenancy for cause?

Is the landlords' application for an Order of Possession for cause justified?

Are the landlords entitled to a monetary order for unpaid rent or utilities?

Are the landlords entitled to an order permitting them to keep all or part of the security deposit in partial satisfaction of their claim?

### **Background and Evidence**

This month-to-month tenancy began on November 1, 2009 and the tenant still resides in the rental premises. Rent in the amount of \$800.00 is payable on the 1<sup>st</sup> of each month, and currently rent for the month of April, 2010 is outstanding. The tenant paid a security deposit in the amount of \$400.00 on November 5, 2009.

The rented unit is a basement suite in a house with tenants residing in the upper unit of the house. The landlords are siblings and do not reside on the property.

The tenant testified that on January 23, 2010 she received a letter from the landlords stating that they wanted to list the house for sale, and accepted rent for the month of February. They then told her they were going to renovate in mid-March because it was an illegal suite. She then received a 1 Month Notice to End Tenancy for Cause, which was personally served on the tenant on April 1, 2010. A copy of that notice was provided as evidence in advance of the hearing, and states that the tenant has allowed an unreasonable number of occupants in the unit and that the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. The notice is dated February 25, 2010 and shows an expected move out date of April 1, 2010.

The landlords testified that the upstairs tenants are an elderly couple and have been residing there for about 5 years. They were asked to interview this tenant before she moved in, and they approved this tenant on behalf of the landlords, which was to ensure that the tenants upstairs were happy with the choice of tenants in the basement suite.

The female tenant in the upper unit is allergic to cigarette smoke, and once this tenant moved in, the upstairs tenants put towels under the door that separates the 2 units because she has had respiratory problems since this tenant moved in. One of the landlords testified that she has smelled cigarette smoke in the doorway of the unit, however, she has not been inside. She further testified that she has witnessed other people in the suite on 3 occasions, and that the upstairs tenant complained that there was noise coming from the lower unit late into the night several times per week. The tenants upstairs further complained that this tenant has been doing laundry for other people, using up all the hot water. They told the landlord that someone has been smoking marihuana in the lower unit, as well as cigarettes, and complained about noise.

The landlord further testified that the tenant was late for rent and utilities in February, 2010 and then the rent cheque for the month of March was returned N.S.F. At that point, she served the tenant personally with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. The next day, the tenant put the money into the landlords' account. One of the landlords talked to the tenant on December 16 and told her that the landlords

wanted to list the house for sale, and gave her a letter dated December 18, 2009. A copy of the letter was provided as evidence in advance of the hearing, which states that they require the tenant to vacate the suite by February 1, 2010. The tenant testified that she did not receive the letter until January 23, 2010. The tenant put a stop-payment on the February rent cheque, but later deposited the rent money into the landlords' account.

When the landlord spoke with the tenant, she asked if the tenant had found a place to live for March 1, and she replied that she had not. The landlord served the 1 Month Notice to End Tenancy for Cause on February 25, 2010 with an expected move-out date of April 1, 2010.

On March 12, 2010, the landlords sent an email to the tenant, a copy of which was provided in advance of the hearing, which states an apology for the notice to end tenancy in December, 2009, and mentions a contentious situation between this tenant and the tenants in the upper unit. It further offers an equivalent of one month's rent, being \$800.00 if the tenant would agree to move out of the suite by March 31, 2010. The tenant stated that she no longer has a computer at home and didn't receive the email.

The tenant argues that she has never, nor have her guests ever smoked inside the suite. She testified that her grandkids visit, and she has allergies as well, and no one has smoked anything in that unit. As for the noise, the tenant stated that there is no noise in the evenings, and perhaps the tenants in the upper unit hear her TV at night. She further testified that no one has resided in that unit besides her and her St. Bernard. She also testified that the tenant in the upper unit backed into her friend's car and then yelled at the tenant. She felt she did not deserve to be yelled at; the guest had parked on her side of the driveway and was not blocking the vehicle of the upstairs tenant. She also does not agree with any of the reasons for ending the tenancy that the landlords or upper tenants allege.

The tenant called a witness who also testified that no one else was residing in that suite, and no one smokes in the house. The witness is a smoker and always smokes on the

grass in front of the garage. The witness further testified that the tenant always picks up after her dog, does not have parties in the unit, and she has never been rude to the other tenants. The witness has seen the tenant get upset after being yelled at by the tenant downstairs, but keeps it to herself.

The parties mutually agreed, before the end of the hearing, to end the tenancy effective May 31, 2010, and that the landlords will have an Order of Possession effective that date.

### **Analysis**

Due to the settlement of the parties, the only decision left for me to make is with respect to the application by the landlords for a monetary order for unpaid rent, and for an order permitting the landlord to retain the security deposit in partial satisfaction of the claim.

The tenant did not dispute the fact that she still owed rent for the month of April, 2010.

I find, however that the landlords' application to retain the security deposit is premature. The *Residential Tenancy Act* states that:

**38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

The landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

It is important that the landlord comply with Section 35 of the *Act* with respect to the condition inspection at the end of the tenancy, and with Section 38 as it relates to the security deposit.

### **Conclusion**

Due to the settlement reached by the parties, I hereby dismiss the tenant's application without leave to reapply and I grant an Order of Possession in favour of the landlords effective May 31, 2010 at 1:00 p.m.

The landlord's application for a monetary order for unpaid rent or utilities is hereby dismissed with leave to reapply if the rent for the months of April and May, 2010 remain unpaid.

I direct that the landlords deal with the security deposit in accordance with Section 38 of the *Residential Tenancy Act*.

Since the parties have settled, I decline to award an order that the landlords recover the filing fee from the tenant for the cost of this application.

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 27, 2010.

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Dispute Resolution Officer