

DECISION

Dispute Codes OPR MNR MNSD FF
 CNR OLC FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, to keep the security deposit and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed seeking an Order to cancel the notice to end tenancy for unpaid rent, to obtain an Order to have the Landlord comply with the Act, regulation, or tenancy agreement, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents by the Landlord to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on March 24, 2010. The package was unclaimed by the Tenant however the Tenant is deemed to be served the hearing package on March 29, 2010, in accordance with section 90 of the *Act*.

Service of the hearing documents by the Tenant to the Landlord was done in accordance with section 89 of the *Act*, sent via registered mail on March 25, 2010. The Landlord confirmed receipt of the hearing package.

The Tenant confirmed receipt of the Landlord's evidence and stated that his evidence was placed on the door at unit 505 which is not the Landlord's address. The Landlord confirmed that they did not receive evidence from the Tenant.

The Landlord, Agent, Property Manager, and the Tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(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 for unpaid rent and to keep the security deposit under sections 67 and 72 of the *Residential Tenancy Act*?

Is the Tenant entitled to an Order to cancel the notice to end tenancy under section 46 of the *Residential Tenancy Act*?

Is the Tenant entitled to an Order to have the Landlord comply with the Act, regulation or tenancy agreement under section 62 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed facts were the tenancy agreement was effective on December 1, 2009 for a fixed term tenancy scheduled to switch over to a month to month tenancy after November 30, 2010. The Tenant was allowed to move into the rental unit early sometime around mid November 2009. Rent is payable on the first of each month in the amount of \$2,250.00 and the Tenant paid a security deposit of \$1,125.00 on November 1, 2009. Although the tenancy agreement lists a pet deposit of \$750.00 was to be paid by January 1, 2010, the Tenant did not pay the security deposit as he argued that he did not have a pet.

The Landlord testified that when the Tenant's March 2010 rent cheque was returned NSF a 10 Day Notice for unpaid rent was issued. The Landlord confirmed that the Tenant is still occupying the rental unit and currently has three months of rent outstanding as follows: March 1, 2010 \$2,250.00; April 1, 2010 \$2,250.00; and May 1, 2010 \$2,250.00.

The Agent testified she served the Tenant, in person, with a copy of the 10 Day Notice to End Tenancy, on March 16, 2010 at 9:40 p.m., in the presence of a witness and as supported by the documentary evidence. The Tenant confirmed receipt of the 10 Day Notice.

The Tenant argued that his wallet was stolen in March 2010 which contained post dated cheques for the Agent for his rent and this is why he could not pay his rent in March 2010. The Tenant then argued that he has not paid his rent for April 2010 and May 2010 because he did not receive keys he had requested at the onset of the tenancy.

The Tenant then stated that because of communication problems he was experiencing with the Agent he was choosing to deal directly with the Landlord; however the Tenant did not have proper contact information for the Landlord so he was having difficulties communication with him.

The Tenant testified and confirmed that he is still occupying the rental unit and that he has not paid the last three months of rent.

Analysis

The Tenant confirmed that he did not deliver copies of his evidence to the Landlord which is in contravention of section 4.1 of the *Residential Tenancy Branch Rules of Procedure*. Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the applicant/respondent Landlord has not received copies of the Tenant's evidence I find that the Tenant's evidence cannot be considered in my decision. I did however consider the Tenant's testimony.

Landlord's Application

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.

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 within 5 days after receiving this Notice, and the Tenant continues to fail to pay his rent, in contravention of section 26 of the *Act* which states that a Tenant must pay rent when it is due in accordance with the tenancy agreement. Therefore I approve the Landlord's request for an Order of Possession pursuant to section 55 of the *Act*.

Claim for unpaid rent. The Landlord claims for unpaid rent of \$4,500.00 at \$2,250.00 per month for March 2010 and April 2010, 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. The Landlord testified that he would also like to claim the \$2,250.00 of unpaid rent for May 2010.

After reviewing the evidence I find the Landlord has proven his claim for damage or loss, as listed above, in the amount of \$5,625.00 which consists of \$2,250.00 for each month of March 2010 and April 2010 plus \$1,125.00 for ½ of the month May 2010 (2 x \$2,250.00 + \$1,125.00).

Having awarded the Landlord an Order of Possession effective two days upon service, I have limited the Landlord's monetary award to half of the month of May 2010 rent because the Landlord has a duty to mitigate his losses, under the Act, and he must attempt to re-rent the unit as soon as possible. If the Landlord suffers a further loss of rent for May 2010, he is at liberty to apply to recover said loss at a future date.

Filing Fee \$50.00. 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 \$1,125.00 plus interest of \$0.00.

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

Unpaid Rent for March 2010 and April 2010 (2 x \$2,250.00)	\$4,500.00
Unpaid Rent for May 2010 (1/2 x \$2,250.00)	1,125.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the landlord)	\$5,675.00
Less Security Deposit of \$1,125.00 plus interest of \$0.00	-1,125.00
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$4,550.00

Tenant's Application

Having granted the Landlord an Order of Possession this tenancy will end and therefore the Tenant's application is mute. Therefore, I hereby dismiss the Tenant's application.

As the Tenant's application has been dismissed, I decline to award the Tenant recovery of the filing fee.

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 **\$4,550.00**. The order must be served on the Respondent Tenant and is enforceable through the Provincial Court as an order of that Court.

I HEREBY DISMISS the Tenant's application, without 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: May 06, 2010.

Dispute Resolution Officer