



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for accrued rental arrears owed by the tenant in the amount of \$16,500.00, an order to retain the security deposit and interest in partial satisfaction of the claim and reimbursement for the cost of filing.

Despite being served with the Notice of hearing by registered mail, the tenant did not appear.

Preliminary Issue

At the outset of the hearing the landlord confirmed that none of the applicant's evidence was ever served on the respondent because after the Notice of Hearing was served, the tenant had since vacated without leaving a forwarding address.

The Residential Tenancy Rules of Procedure, Rule 3.1, requires that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

If copies of the evidence are not served on the respondent or the applicant as required, this other party would have had no opportunity to review the unseen evidence before the application was heard this fact would violate natural justice and administrative fairness if the evidence was considered for the purpose of the hearing decision.

I note that the Landlord and Tenant Fact Sheet contained in the hearing package makes it clear that “copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible..”

In the case before me, the applicant stated that, although the Notice of Hearing and Application package properly served on the tenant by registered mail to the subject address, the respondent had subsequently moved out and failed to leave any forwarding address. The landlord testified that, as a result of the tenant's actions, the supporting evidence, including copies of communications between the parties, information regarding the tenant's rental payment account and a copy of the tenancy agreement had to be sent to the only address that the landlord had, that being the rental unit, despite the fact that the tenant had vacated.

Section 89 of the Act states that an application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, must be given to one party by another, in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
- (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

Given the above, I found that I must decline to accept or consider any evidence that was not properly served on the other party. However, I found that the

landlord was at liberty to give testimony in respect to the documents in question and this verbal testimony will be considered.

Background and Evidence

The landlord testified that the tenancy began on December 2005 with rent at \$1,000.00 and a security deposit of \$500.00 was paid. The landlord testified that during the tenancy, the tenant suffered a series of financial setbacks including the loss of her job and a motor vehicle accident and the parties had successfully negotiated repayment plans to accommodate the tenant's circumstances.

However, although the tenant made additional payments towards the debt, the arrears continued to grow. According to the landlord, the tenant was awaiting a financial settlement of a legal claim and had made a commitment to pay the arrears in a lump sum when this was settled. The landlord read excerpts from the tenant's emails in which proposals for future payment were made. The landlord testified that, after repeated delays, the tenancy was mutually ended again with promises from the tenant that she would eventually clear up the debt.

The landlord testified that once the tenancy ended, the tenant did not provide a forwarding address or any contact information and she could not be reached thereafter. The landlord stated that they then had no choice but to file their claim for the arrears. The landlord testified that, although the application sets the amount owed at \$16,500.00, detailed financial calculations have since found the actual debt to be \$19,523.09. However, the landlord stated that it is still only seeking the original amount of \$16,500.00 of which the tenant was notified.

Analysis

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. I find that the tenant did not pay the rent when rent was due.

In regards to an Applicant's right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

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

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of a violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being 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 respondent. Once that has been established, the claimant must then provide evidence to verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant made a reasonable attempt to mitigate the damage or losses that were incurred.

In this instance, I accept the landlord's testimony that the rent fell into arrears in violation of the Act and that the landlord suffered a loss as a result. I accept the landlord's explanation that the parties had engaged in various creative payment arrangements to rectify the debt making reasonable attempts to mitigate the losses without terminating the tenancy. I find it reasonable that, based on information provided by the tenant, the landlord anticipated that the tenant's situation would be resolved and at that time the arrears would be cleared up as promised. I find that the landlord had, in good faith, held legal action in abeyance based on that reasonable expectation.

In regards to the amount being claimed, I find that the tenant was fully aware that rental arrears were owed and was notified of the \$16,500.00 being claimed by the landlord. The tenant did not pay these arrears and did not attend nor submit evidence to deny or refute the amount being claimed.

Given the above, I find that the landlord has successfully established a total monetary claim of \$16,600.00 comprised of rental arrears of \$16,500.00 and the \$100.00 fee paid by the landlord for this application. I order that the landlord retain the security deposit and interest of \$517.69 in partial satisfaction of the claim leaving a balance due of \$16,082.31.

Conclusion

I hereby grant a monetary order in favour of the landlord for \$16,082.31. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

July 2010

Date of Decision

Dispute Resolution Officer