

DECISION

Dispute Codes OPR MNR FF
 CNR FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlords and the Tenants.

The Landlords filed seeking an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, and to recover the cost of the filing fee from the Tenants for this application.

The Tenants filed seeking an Order to cancel the 10 Day Notice to End Tenancy for unpaid rent and to recover the cost of the filing fee from the Landlords for this application.

Service of the hearing documents by the Landlords to the Tenants was done in accordance with section 89 of the *Act*, sent via registered mail on July 21, 2010. The Tenants confirmed receipt of the hearing package and evidence sent by the Landlord.

Service of the hearing documents by the Tenants to the Landlords was done in accordance with section 89 of the *Act*, sent via registered mail on July 16, 2010. The Landlords confirmed receipt of the hearing package and evidence sent by the Tenants

The Landlords and Tenants appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

Are the Landlords entitled to an Order of Possession under section 55 of the *Residential Tenancy Act*?

Are the Landlords entitled to a Monetary Order under sections 67 and 72 of the *Residential Tenancy Act*?

If not, are the Tenants entitled to an Order to cancel the Notice to End Tenancy under section 46 of the *Residential Tenancy Act*?

Background and Evidence

At the Onset of the hearing the Tenants stated they submitted two pages of evidence to the Residential Tenancy Branch which consisted of a copy of the 10 Day Notice to End Tenancy and a copy of a letter the Tenants were sent from the Lawyer of the Mortgage Company who holds the mortgage on the rental unit. The Tenants stated the staff at the Residential Tenancy Branch photocopied their evidence and placed it in their file.

The undisputed testimony was the tenancy agreement was effective January 1, 2008 for a month to month tenancy. Rent is payable on the first of each month in the amount of \$1,500.00 and no security or pet deposit was paid by the Tenants.

Landlords' testimony

The Landlords' testimony confirmed they are seeking an Order of Possession and a Monetary Order for the accumulated unpaid rent of \$5,250.00 plus the \$100.00 filing fee. The Tenants normally paid their rent by electronic on-line transfer into the Landlords' bank account however the May 1, 2010 rent was not paid. Approximately one week into May 2010 the Tenants transferred \$750.00 to the Landlords which left a remaining balance due of \$750.00.

A 10 Day Notice to End Tenancy for Unpaid Rent was posted to the Tenants door on July 10, 2010 for \$3,750.00 of unpaid rent that was due July 1, 2010. (\$750.00 for May 2010 + \$1500.00 June 1, 2010 + \$1500.00 July 1, 2010)

The Tenants failed to make any further payments until August 5, 2010 when an electronic transfer was received in the Landlords bank account. At that time the Landlords contacted the Tenants and thanked them for their payment, asked when they could expect the remaining unpaid rent, and why the Tenants' wrote on the payment that it was for August 2010 rent. The Tenants confirmed they were not paying anything further and argued that they made previous rent payments to the lawyer. The Tenants stated they were waiting for the outcome of their dispute resolution hearing at which point the Landlords confirmed they would be proceeding with their hearing.

The Landlords' mortgage fell behind as they were having problems collecting the rent. A letter was couriered to the Tenants from the mortgagor's lawyer dated May 28, 2010 informing the Tenants to pay future rent to the Lawyer. A second letter was couriered to the Tenants, dated July 19, 2010, which followed up on a previous phone call between the Lawyer and the Tenants and confirmed that the mortgage payments were now current and all rent was to be paid to the Landlords.

Tenants' testimony

The Tenants confirmed they paid \$750.00 for May 2010 rent and that they failed to pay the remaining amount because they were having financial troubles.

They confirmed they received the May 28, 2010 letter from the lawyer and that this letter was not sent from the Lawyer until June 1, 2010 as marked on the envelope. The second letter dated July 19, 2010 was received shortly after a telephone conversation between a female at the lawyer's office and one of the Tenants.

The Tenants stated they did not pay anything towards rent until they spoke to someone at the Residential Tenancy Branch after which they paid \$1,500.00 on August 5, 2010. I asked the Tenants why they did not pay the full outstanding balance owed for rent for which they argued they did not know who to pay. The female Tenant read the July 19, 2010 letter to me which informed the Tenants that the mortgage had been caught up to date and that all rent payments were to be paid directly to the Landlords. The Tenants confirmed they made no attempt to clarify who was to be paid the outstanding rent because they were awaiting the outcome of today's hearing.

In closing, the Landlords responded to the Tenants testimony, that if the Lawyers first letter was not sent until June 1, 2010 then the Tenants would not have received it until after June 1, 2010 rent was due and that the Tenants were still required to pay the balance of May 2010 rent and all of June 2010 rent to the Landlords. The Landlords are seeking an Order of Possession effective as soon as possible.

Analysis

All of the testimony and documentary evidence was carefully considered.

I do not accept the Tenants argument that the staff at the *Residential Tenancy Branch* photocopied their evidence. The staff at the Branch do not have the opportunity to photocopy evidence and I note that the Tenants' file is clearly document that the Tenants were advised on the requirements of providing evidence.

The evidence supports the Tenants have failed to pay \$750.00 for June, and \$1500.00 for each of the July, August, and September 2010 for a balance owing of \$5,250.00, in violation of Section 26 of the Act which states that a tenant must pay rent when it is due.

A Notice to End Tenancy can be waived and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises

when a landlord has accepted rent from a tenant after the Notice to End Tenancy has been served. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End Tenancy, no question of "waiver" can arise as the landlord is entitled to that rent. When a payment is received, after the issuance of a Notice, it is applied to the oldest balance due working towards the most recent amount due. That being said a Tenant cannot stipulate that their payment is for the current month when there is rent outstanding from a previous month.

In these circumstances the Landlord was able to accept rent payments being applied to the outstanding amount for the period up to July 23, 2010, without waiving the 10 Day Notice to End Tenancy. The Notice was posted to the Tenants' door on July 10, 2010 and is deemed to be received on July 13, 2010, three days after being posted, and the effective date is July 23, 2010, in accordance with Section 90 of the Act. In consideration of the Lawyer's letter, the Landlord was entitled to collect rent of \$2,250.00 for the period between May 01, 2010 and June 1, 2010, without waiving the Notice. The Landlords collected \$1500.00 on August 5, 2010 which was applied to the outstanding balance of May, 2010 and half of June's rent.

Both parties were clear on their intentions of proceeding with Dispute Resolution so there was no doubt about the other party's intentions.

The July 19, 2010 letter issued from the mortgagor's lawyer clearly indicates to the Tenants that the mortgage has been caught up and "all" rent is to be paid to the Landlords. I do not accept the Tenants' argument that they did not know who to pay the outstanding rent. Had this been the case and the Tenants truly wanted to pay the outstanding rent, they would have made an attempt to clarify the situation with the lawyer's office.

Based on the aforementioned I find the Tenants have failed to provide sufficient evidence to support cancelling the 10 Day Notice to End Tenancy. Conversely, I find the Landlords have provided sufficient evidence that the Tenants have continued to occupy the rental unit without paying the full rent in accordance with the tenancy agreement and the *Residential Tenancy Act*. Therefore I hereby approve the Landlord's request for an Order of Possession.

As the Tenants have not succeeded with their application, I decline to award recovery of their filing fee.

As the Landlords have been successful with their application, I award recovery of the \$100.00 filing fee.

I find that the Landlords are entitled to a monetary claim as follows:

Unpaid Rent for June 2010	\$750.00
Unpaid Rent for July, August, and September 2010 (3 x \$1500.00)	4,500.00
Filing fee	<u>100.00</u>
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORDS	\$5,350.00

Conclusion

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

I HEREBY FIND in favor of the Landlords' monetary claim. A copy of the Landlords' decision will be accompanied by a Monetary Order for \$5,350.00. The order must be served on the Respondent Tenants and is enforceable through the Provincial Court as

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: September 03, 2010.

Dispute Resolution Officer