

## **DECISION**

Dispute Codes      OPR MNR MNSD FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord seeking an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, to keep the security deposit in partial satisfaction of their claim, and to recover the cost of the filing fee from the Tenants.

Service of the hearing documents was done in accordance with section 89 of the *Act*, sent via registered mail to each Tenant on July 22, 2010. The Canada Post tracking numbers were provided in the Landlord's evidence. The Tenants are deemed to be served the hearing documents on July 27, 2010, the fifth day after they were mailed as per section 90(a) of the *Act*.

The Landlord appeared, gave affirmed testimony, was provided the opportunity to present her evidence orally, in writing, and in documentary form. The Tenants did not appear despite being served notice of the hearing in accordance with the *Act*.

### Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession under section 55 of the *Residential Tenancy Act*?

Is the Landlord entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

### Background and Evidence

The Tenants took occupancy of the rental unit on May 20, 2010 and entered into a written fixed term tenancy agreement effective June 1, 2010 which is set to switch to a month to month tenancy after November 30, 2010. Rent is payable on the first of each month in the amount of \$995.00 and the Tenants paid a security deposit of \$497.50 on May 20, 2010.

The Landlord provided testimony of how the Tenants have failed to pay their rent on time from the start of the tenancy. She provided the following chronological listing of events:

June 1, 2010 Rent	\$995.00
June 1, 2010 Cheque	(995.00)
June, 2010 Cheque NSF	995.00
June 2010, NSF Charges added to account	20.00
June 9, 2010 Cheque payment from Tenants	(1,015.00)
June 22, 2010 Cheque returned NSF	1,015.00
June 22, 2010 NSF Charges added to account	20.00
June 22, 2010 Late payment fees added to account	20.00

June 23, 2010 - 10 Day Notice to End Tenancy issued and served personally to the male Tenant.

June 25, 2010 – Payment in Cash from Tenants	(870.00)
Receipt issued for “use and occupancy only”	

July 1, 2010 – Rent	995.00
July 9, 2010 – Late payment fees added to account	20.00
July 23, 2010 – Payment in Cash from Tenants	(750.00)
No record of receipt issued	

August 1, 2010 – Rent	995.00
August 7, 2010 – Late payment fees	20.00
September 1, 2010 – Rent	995.00
September 7, 2010 – late payment fees	<u>20.00</u>

<b>Balance Due as of September 14, 2010</b>	<b><u>\$2,480.00</u></b>
---	--------------------------

The Landlord confirmed that section 7 of the tenancy agreement provided charges of \$20.00 for returned cheque fees and late payment fees. She stated that she had attempted to contact the Tenants to discuss payment options of their overdue account but they never answered their phone so she would leave messages to request them to contact her. She confirmed that her last contact with the Tenants was June 25, 2010 which is when the Male Tenant told her he was awaiting payment from WCB and that he would pay his account when that payment was received. The Landlord did not want to have to evict a young family and was hoping to be able to work out payment arrangements with them if she could get in touch with them.

The Landlord confirmed that the Resident Manager did not issue a receipt for the cash payment received July 23, 2010. To the Landlord's knowledge the Resident Manager has not made an attempt to approach the Tenants to discuss the rental arrears as he

did not want to stir the pot so he has not bothered them. She was told that the last conversation between the Resident Manager and the male Tenant took place sometime after July 23, 2010 when the male Tenant told the Resident Manager “try and get us out of here.”

The Landlord is seeking an Order of Possession and a Monetary Order for \$2,480.00 in rental arrears plus recovery of the filing fee.

### Analysis

All of the testimony and documentary evidence was carefully considered.

**Order of Possession** – 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.

In these circumstances the Landlord was able to accept rent for the period up to July 3, 2010 without waiving the 10 Day Notice to End Tenancy which equals an amount of \$1,153.13. (\$1,055.00 due as of June 23, 2010 plus 3 days rent for July 3 x 32.71)

If the Landlord accepts rent for the period after the effective date of the Notice to End Tenancy, the intention of the parties will be in issue. In these circumstances the Landlord had accepted rent of \$870.00 + \$750.00 = \$1,620.00, which exceeds the amount that was due by July 3, 2010. The Landlord did not issue a receipt for “use and occupancy only” for the July 23, 2010 payment therefore they waived the 10 Day Notice to End Tenancy and reinstated the tenancy. As the tenancy has been reinstated I dismiss the Landlord’s request for an Order of Possession.

**Claim for unpaid rent** – 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 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.

The Landlord claims for an accumulated balance of unpaid rent, late fees, and NSF charges totaling \$2,480.00 from June 1, 2010 to September 7, 2010, pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due and Section

7 of the Regulation which provides for late payment and NSF fees as long as they are listed in the tenancy agreement. The Landlord confirmed the late fees and NSF fees were provided in section 7 of the tenancy agreement. Based on the aforementioned I find that the Tenants have failed to comply with a standard term of the tenancy agreement which stipulates that rent is due monthly on the first of each month. Therefore I approve the Landlord's request for a Monetary Order in the amount of \$2,480.00.

The Landlord has partially succeeded with their application therefore I award recovery of the \$50.00 filing fee.

**Monetary Order** – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit as follows:

Accumulated unpaid rent, late fees and NSF charges	\$2,480.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the Landlord)	<b>\$2,530.00</b>
Less Security Deposit of \$497.50 plus interest of \$0.00	-497.50
<b>TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD</b>	<b>\$2,032.50</b>

### **Conclusion**

The 10 Day Notice to End Tenancy issued June 23, 2010, is hereby cancelled and is of no force or effect.

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 **\$2,032.50**. The order must be served on the respondent Tenants 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: September 14, 2010.

---

Dispute Resolution Officer