

DECISION

Dispute Codes CNR, MNDC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent pursuant to section 46;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord testified that she handed the tenant a copy of the notice to end tenancy on August 9, 2010. The tenant testified that he handed the landlord a copy of his application for dispute resolution on August 12, 2010. Both parties confirmed that they have received these documents and one another's evidence packages. I am satisfied that these documents have been served in accordance with the *Act*.

During the hearing, the landlord asked for an Order of Possession if the tenant's application for cancellation of the notice to end tenancy were dismissed.

Issues(s) to be Decided

Is the tenant entitled to cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent? Is the landlord entitled to an Order of Possession? Is the tenant entitled to a monetary Order? Is the tenant entitled to recover his filing fee for this application from the landlord?

Background and Evidence

This tenancy commenced on October 1, 2002, initially as a one-year fixed term tenancy. This was subsequently converted to a month-to-month tenancy. Present monthly rent is set at \$600.00 plus \$10.00 each month for parking. The landlord testified that she continues to hold the tenant's October 1, 2002 security deposit of \$287.50 plus interest.

The parties entered into evidence a previous decision of a Dispute Resolution Officer (DRO) of March 23, 2010. In that decision, the tenant was successful in obtaining a \$300.00 reduction in his monthly rent in the following terms because the landlord had not taken action to stop the tenant who lived above him (the other tenant) from interfering with the tenant's quiet enjoyment of the rental unit.

...I find and order that the Tenant is entitled to a rent reduction of 50% retroactive to November of 2009, and the rent reduction of 50% will continue until the Landlord has taken action under the Act sufficient to stop the loss of quiet enjoyment of the rental unit by the Tenant.

The equivalent compensation of the Tenant for the past five months, is \$300.00 per month, totalling \$1,550.00 up to the end of March 2010, which includes the \$50.00 filing fee for the Application. The Tenant may recover the compensation by deducting the \$1,550.00 from future rent payments, which includes the reduced rent payments of 50%, as applicable...

In that hearing, the tenant presented evidence that the other tenant kept him awake at night by his frequent noisy opening and closing of his window immediately above the tenant's bedroom, and coughing, gagging and spitting window while he smoked.

At this hearing, the tenant testified that he paid his March rent in full, but withheld \$600 in rent for April and May in accordance with the DRO's binding March 23, 2010 decision. He said that he withheld the remaining \$325.00 June 2010, when he paid \$225.00 in rent. He testified that he advised the landlord's representative on that

occasion that the noise and disturbance from the other tenant continued and that he intended to withhold \$300.00 per month as per the DRO's decision because the noise and disruption continued. The tenant testified that he repeated this statement to those receiving his reduced rental payments in July and August 2010. Since the noise was reducing in August and had abated by September 17, 2010, he said that he paid his September 2010 rent of \$610.00 in full.

The landlord's female representative testified that the tenant paid \$300.00 per month from March through August 2010 and \$610.00 for September 2010. She said that action had been taken to comply with the DRO's March 23, 2010 decision by March 31, 2010. She testified that the landlord complied with the DRO's decision by repairing the window of the other tenant in January 2010. She said that the landlord served the other tenant with a 1 Month Notice to End Tenancy for Cause on March 31, 2010.

The landlord entered into evidence a copy of a second decision of a DRO dated June 2, 2010. In that decision, the DRO cancelled the landlord's March 31, 2010 notice to end tenancy issued to the other tenant.

The landlord's representatives maintained that the tenant's monthly rent was to return to \$600.00 per month (plus the \$10.00 parking charge) as of April 1, 2010. The landlord's female representative said that the landlord issued the 10 Day Notice to End Tenancy for Unpaid Rent to the tenant on August 9, 2010 for \$900.00 in unpaid rent that the landlord maintained was owing from April, May and June 2010. The landlord's male representative said that the tenant had not raised concerns about ongoing noise and loss of quiet enjoyment until August 2010.

Analysis

Tenant's Application to Cancel the Landlord's Notice to End Tenancy

I find that the tenant followed the direction provided by the DRO in her March 23, 2010 decision in reducing his rent by a combined total of \$1,550.00 from April through June 2010. I find no merit in the landlord's assertion that they had complied with the terms of

the DRO's decision in part by repairing the other tenant's window in January 2010. As noted in the following portion of the DRO's March 23, 2010 decision, this repair had clearly occurred before the DRO made her March 23, 2010 decision:

...The Agent further testified that the window in the unit above had wheels installed in January of 2010, in order to cut down the noise of the window...

The landlord's unsuccessful attempt to evict the other tenant does not comply with the DRO's March 23, 2010 decision which allowed the tenant to continue the rent reduction of 50% "until the Landlord has taken action under the Act **sufficient to stop the loss of quiet enjoyment of the rental unit by the Tenant** (emphasis added)." While the landlord did take action to end the tenancy of the other tenant on March 31, 2010, the other tenant applied for dispute resolution regarding the landlord's notice. No decision was made on that application until June 2, 2010. The landlord's representatives confirmed that they did not ask the tenant to offer evidence for that hearing regarding the disruption caused by the other tenant. I find that the tenant was still authorized to reduce his rent by \$300.00 per month until his loss of quiet enjoyment ended.

I accept the tenant's evidence that he continued to suffer a loss of his quiet enjoyment of his rental unit until September 2010. At that time, he paid the full \$610.00 as by then the actions taken by the landlord had been successful in stopping the tenant's loss of quiet enjoyment of the rental unit. I find that the DRO's March 23, 2010 decision was implemented by September 1, 2010, and the tenant was required to pay the full amount of his rent required under his tenancy agreement as of that date.

For these reasons, I allow the tenant's application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent. This Notice to End Tenancy is set aside with the effect that this tenancy shall continue. I do not issue the landlord the requested Order of Possession.

Tenant's Application for a Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof.

The tenant applied for a monetary order of \$300.00 to compensate him for his loss of two day's wages to enable him to prepare and participate in the dispute resolution process. A claim for this type of expense is not allowed under the *Act* and I dismiss the tenant's application for a monetary order.

Filing Fee

The tenant applied for recovery of his filing fee for this application from the landlord. As the tenant has been successful for the most part in this application, I allow him to recover his filing fee by reducing his next scheduled rental payment by \$50.00.

Conclusion

The tenant's application to cancel the landlord's notice to end tenancy is allowed. The Notice to End Tenancy for Unpaid Rent is set aside with the effect that this tenancy shall continue. I issue no Order of Possession to the landlord.

I dismiss the tenant's application for a monetary Order. I direct the tenant to recover his filing fee for this application by reducing his next scheduled rental payment by \$50.00.

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*.