

## **DECISION**

Dispute Codes      OPR, OPC, MND, MNR, FF, ET

### Introduction

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

- an Order of Possession pursuant to section 55;
- an early end to this tenancy and an Order of Possession pursuant to section 56;
- a monetary Order for unpaid rent and for damage to the unit, site or property pursuant to section 67; and
- authorization to recover their 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 female landlord (the landlord) testified that the landlords handed the tenant's sister a copy of their application for dispute resolution on or about October 2, 2010, as the tenant refused to come out of his rental unit and accept their application when they tried to give it to him. The tenant confirmed that he received a copy of the landlord's application for dispute resolution on or about October 2, 2010, in the manner described by the landlord. The landlord testified that her husband handed the tenant a 2 Month Notice to End Tenancy for Landlord Use of the Property on June 30, 2010. The landlord testified that her husband handed the tenant a 10 Day Notice to End Tenancy for Unpaid Rent on September 24, 2010. The tenant confirmed receiving these documents in the manner described by the landlord. I am satisfied that all of these documents were served by the landlord to the tenant and that the tenant was prepared to address the landlords' application during this hearing.

Near the commencement of the hearing, the landlord testified that the tenant vacated the rental premises on October 7, 2010. For that reason, she said that the landlords no longer required an Order of Possession or an Early End to this Tenancy and withdrew her applications for these items.

Issues(s) to be Decided

Are the landlords entitled to a monetary Order for unpaid rent? Are the landlords entitled to a monetary Order for damage to the rental unit? Are the landlords entitled to recover their filing fee from the tenant?

Background and Evidence

The tenant occupied these premises on or about December 1, 2009. The landlord testified that monthly rent at that time was set at \$1,300.00, payable at the start of each month. The landlord provided written evidence that no security deposit was required and that first and last month's rent were waived in exchange for the tenant's agreement to paint "the entire inside of the house." The parties agreed that no residential tenancy agreement was prepared or signed for the tenant's occupation of these premises. The parties agreed that the tenant moved into these premises on the basis of an oral rent to own agreement. The landlord testified that the tenant did not do a proper job of painting the house and that the landlords considered the oral rent to own agreement extinguished shortly after the tenant moved in because the tenant failed to comply with the terms of that agreement. Both parties agreed that the tenant did not do all of the work committed to in their agreement.

The landlord maintained that throughout this tenancy the \$1,300.00 monthly payments were for the tenant's rental of the premises. The tenant's counsel entered oral testimony, affirmed by the tenant, that the \$1,300.00 monthly payments were comprised of \$1,082.00 in monthly rent and \$218.00 towards the purchase of the property.

The landlord requested a monetary award of \$4,900.00. The landlord asked for \$1,300.00 in unpaid rent for each of August, September and October 2010. The tenant did not dispute the landlord's assertion that the tenant did not pay rent for these months. The remaining \$1,000.00 in the landlords' application for a monetary award was for the following damage the landlords claimed the tenant caused to the rental premises:

<b>Item</b>	<b>Amount</b>
Damage to Hot Tub Cover	\$400.00
Damage to Front Farm Gate	500.00
Damage to Blinds in Upstairs Bedroom	100.00
<b>Total Monetary Award Requested for Damage to Rental Premises</b>	<b>\$1,000.00</b>

The landlords entered written evidence that at the end of May 2010 they gave verbal notice to the tenant to vacate the rental premises by the end of August 2010. They maintained that the tenant assured them that he would vacate by then but, as they were not certain that he would do so, they issued him a written 2 Month Notice to End Tenancy for Landlord Use of the Property on June 30, 2010. The landlord testified that they planned to move their son into this rental unit. The parties confirmed that the tenant did not apply for dispute resolution regarding that written notice. The landlord said that the tenant did not move out by August 31, 2010, or by September 30, 2010, the subsequent date he said he would vacate. The parties agreed that the tenant vacated the premises on October 7, 2010. The tenant did not apply for dispute resolution regarding the 10 Day Notice to End Tenancy for Unpaid Rent handed to him on September 24, 2010.

The tenant's counsel said that the tenant paid rent for December 1, 2009. She said that the landlord had never reimbursed the tenant for the \$4,000.00 invoice he provided for painting the premises, as part of the rent-to-own agreement. She said that the tenant does not believe the landlords are genuine in their intention to move their son into the rental unit. Since the landlord provided the initial verbal request to move in May 2010 and no family member has moved into these premises, she asked that the tenant be credited with two months of rent. She also requested that the tenant be given credit for eight months of overpayment of rent beyond the \$1,082.00 monthly rental in the oral rent-to-own agreement. This request was for a credit of \$1,744.00 (i.e., 8 months x 218.00 per month = \$1,744.00). She also asked that the tenant be allowed to forego paying rent for one additional month for the landlord's alleged failure to provide proper notice to the tenant.

### Analysis

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 claimant must 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 other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

I dismiss the landlords' claim for a monetary award of \$1,000.00 for damage resulting from this tenancy. The landlords did not conduct either a move-in or move-out condition inspection, nor did they prepare any form of condition inspection report. They provided no photographic evidence nor receipts or estimates. The landlord also testified at the hearing that the landlords were attempting to recover this portion of their claim through their insurance company. The landlords have not provided sufficient evidence to meet their burden of proof for proving their claim regarding damage to the rental premises.

The parties agree that the tenant did not pay any rent for August, September or October 2010. However, they disagree as to whether the oral rent to own agreement that they both confirmed formed the basis for the tenant's original occupancy of the premises was still in place for the three months in question.

At some point between the commencement of the oral rent to own agreement and the landlords' notice to end tenancy for unpaid rent in September 2010, the oral rent to own agreement appears to have been extinguished. However, neither party provided sufficient evidence as to when this occurred or any documentation to support the assertions they made regarding the nature of the tenant's occupancy of the premises. The landlord maintained that the oral rent to own agreement was extinguished shortly after the tenant occupied the premises in December 2009. However, the landlord was unable to point to any specific document confirming that the oral rent to own agreement

ended in December 2009 and a standard residential tenancy agreement took its place. The landlord admitted that no written residential tenancy agreement was created for this tenancy. The landlord also questioned the tenant's ability to purchase the property, given the tenant's filing for bankruptcy in January 2010.

The tenant's counsel provided her own oral testimony regarding her understanding of the rent to own agreement between the parties. She said that she understood that the tenant's \$1,300.00 payments were comprised of \$1,082.00 for monthly rent and \$218.00 per month towards the rent to own provision of the parties' agreement. The landlord disputed these figures. Although the tenant testified that everything his lawyer said was accurate and correct, I give less weight to his counsel's third person account of the nature of the oral rent to own agreement than if he had provided direct testimony regarding this matter himself.

The tenant continued to pay \$1,300.00 to the landlord until July 2010. The tenant did not produce anything, other than oral testimony, to confirm that the rent to own agreement was still in place when the landlords issued the notices to end tenancy. The tenant did not apply for dispute resolution when the landlords served the tenant with notice to end tenancy for unpaid rent of \$1,300.00 that was due on September 1, 2010.

Subsections 51(1) and (1.1) of the *Act* allow a tenant who receives a notice to end tenancy for landlord use of the property under section 49 of the *Act* to withhold the last month's rent from the landlord. In this case, this allowed the tenant to withhold the rent payment for August 2010. In their written evidence, the landlords agreed that they were initially not asking for rent for August 2010, because they had issued the notice to end tenancy for landlord use of the property. Even though the tenant did not end up vacating the premises until October 7, 2010, this has no bearing on the tenant's entitlement to one month's free rent for the month of August 2010. As such, I dismiss the landlord's application for unpaid rent for August 2010.

I allow the landlord a monetary award for unpaid rent for September 2010. The tenant did not vacate the premises by the August 31, 2010 date required in the June 30, 2010 notice to end tenancy for landlord use of the property. I allow the landlord's application for a monetary award of \$1,300.00 for September 2010.

As the landlords' stated purpose for issuing the June 30, 2010 notice was for use of the premises by their son, the landlords bear responsibility for demonstrating that they suffered a loss for October 2010. They have not presented evidence of financial loss for the entire month of October 2010 resulting from the tenant's overholding of the rental premises that month. For that reason, I accept the request from the tenant's counsel that the landlord's monetary award for October 2010 be limited to a pro-rated amount of rent for the first seven days of October 2010 before the tenant vacated the premises. In accordance with section 57 of the *Act*, I grant a monetary award of \$293.55 (i.e.,  $\$1,300.00 \times 7/31 = \$293.55$ ) for the tenant's overholding of the rental premises for October 2010.

I reject the request from the tenant's counsel that the tenant be given credit for eight months of "overpaid" rent at \$218.00 per month. The tenant did not apply for dispute resolution seeking a monetary award and did not raise this issue until the hearing. The tenant's counsel said that she may be pursuing the tenant's assertion that the landlord failed to comply with the terms of the oral rent to own agreement through the court system. Based on the limited oral testimony presented, it appears to me that the tenant's request for eight months of credit from the rent to own agreement would be more appropriately addressed through the court system.

I reject the request from the tenant's counsel that the tenant be granted credit for two months of rent due to the landlord's failure to use the property for the purpose intended within six months of notifying the tenant. The 2 Month Notice to End Tenancy for Landlord Use was not given until June 30, 2010. The tenant did not vacate the premises by the August 31, 2010 effective date identified in that notice. I do not accept that the tenant is entitled to an offset of the landlord's monetary award under section

51(2) of the *Act* for double the monthly rent as a reasonable period of time has not elapsed since the tenant vacated the rental premises. I also note that the tenant has not made an application for a monetary award for this item.

As the landlords have been partially successful in their application, I allow them to recover their filing fee for their application from the tenant. I add this to the amount of the monetary Order as set out below.

### Conclusion

I grant the landlords a monetary Order in the amount of \$1,643.55 for unpaid rent for September 2010, the tenant's overholding in October 2010, and recovery of the landlords' filing fee. I dismiss the landlords' application for damage to the rental premises.

The landlords are provided with these Orders in the above terms and the tenant must be served with a copy of these Orders as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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*.