

DECISION

Dispute Codes OPR, FF

Introduction

The landlord's original application pursuant to the *Residential Tenancy Act* (the *Act*) was for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- a monetary order for damage to the rental unit pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenants pursuant to section 72.

The tenants did not attend this hearing. The landlord attended the hearing with his daughter who assisted him with the translation of the proceedings and presented evidence on his behalf. The landlord and his daughter were given a full opportunity to be heard, to present evidence and to make submissions. The landlord testified that he sent the tenants a 10 Day Notice to End Tenancy for Unpaid Rent by registered letter on October 3, 2010. He provided a copy of the Canada Post Tracking Number to confirm his mailing of this document. The landlord testified that he sent the tenant a copy of his application for dispute resolution hearing package by registered mail on October 15, 2010. He provided a Canada Post Tracking Number to confirm this mailing. He said that the tenants did not accept his registered letters and these have been returned to him by Canada Post. I am satisfied that the landlord has served these documents to the tenants in accordance with the *Act*.

The landlord testified that he received a direct deposit rent payment for this rental unit in his bank account for the entire October 2010 rent on October 18, 2010. The landlord said that one of the tenants indicated at that time that he wanted to continue living in the

rental premises. The landlord said that he told him that he could only continue to do so if he paid the November 2010 rent on time. The landlord said that he has still not received the tenants' November 2010 rent.

The landlord withdrew all monetary aspects of this matter, except for his application for recovery of his filing fee. He did so because he has not served the tenants with a notice to end tenancy based on the tenants' non-payment of rent for November 2010. He also said that he did not know how much damage had been caused by the tenants. He said that he will make any application for damage to the premises after he has a full opportunity to review the state of the rental unit after he gains possession of the unit.

Issues(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent for October 2010? Is the landlord entitled to recover her filing fee from the tenants?

Background and Evidence

The landlord entered into written evidence a copy of the six-month fixed term tenancy agreement the tenants signed when they moved into the rental unit on April 1, 2010. Monthly rent was set at \$950.00, payable on the first of each month. The landlord testified that the tenancy agreement was for a fixed term that was to expire on October 1, 2010. However, neither party initialled the required portion of the tenancy agreement indicating that the tenants were to vacate the rental premises by October 1, if no new agreement were reached. The landlord continues to hold the tenants' \$425.00 security deposit.

The landlord testified that he issued the 10 Day Notice to End Tenancy after the tenants failed to pay their October rent on time.

Analysis

The tenants failed to pay the October 2010 rent within five days of being deemed to have received the 10 Day Notice to End Tenancy. The tenants have not made

application pursuant to section 46(4) of the *Act* within five days of receiving the 10 Day Notice. In accordance with section 46(5) of the *Act*, the tenants' failure to take either of these actions within five days would have led to the end of their tenancy on the effective date of the notice.

The landlord accepted the tenants' October 18, 2010 rent payment without notifying them that he did so for use and occupancy only. The landlord told the tenant that he could continue to live there as long as he paid the rent on time, starting in November 2010. On this basis, I find that the previous fixed term tenancy was continued as a month-to-month tenancy by the actions of the parties. I dismiss the landlord's application for an Order of Possession based on the October 2, 2010, 10 Day Notice to End Tenancy for Unpaid Rent.

As the landlord was unsuccessful in this application, I find that the landlord should bear the cost of filing his application.

Conclusion

I dismiss the landlord's application for an Order of Possession and his application to recover his filing fee from the tenants. I accept the landlord's withdrawal of all other portions of this application with leave to reapply.

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*.