



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, CNR, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution.

The Landlord is seeking to end the tenancy, based on a 10 Day Notice to End Tenancy for Unpaid Rent, a monetary order for unpaid rent and damages to the rental unit, and to recover the filing fee.

The Tenant is seeking to cancel the Notice to End Tenancy for Unpaid Rent.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form and to cross-examine the other party, and make submissions to me.

On a procedural note, the Landlord also applied to end the tenancy due to an alleged breach of an agreement, but had not issued the Tenant a 1 Month Notice to End Tenancy for Landlord's Cause. Therefore I dismiss that portion of the Landlord's claim.

On a procedural note, the Tenant indicated that she had earlier filed for dispute resolution on an unrelated issue, which is scheduled for hearing on May 9, 2011, and submitted evidence which is pertinent to that hearing. I declined to review this evidence as irrelevant to the present case.

Issue(s) to be Decided

Is the Landlord entitled to an order of possession to the rental unit and to obtain a monetary order?

Is the Tenant entitled to an order cancelling the Notice to End Tenancy?

Background and Evidence

The tenancy agreement indicates that this tenancy began on August 1, 2010, on a month to month basis, that monthly rent was \$1,325.00, which included \$50.00 for monthly parking, and a security deposit in the amount of \$637.50 was paid on August 12, 2010. I heard undisputed testimony the Tenant later decided not to use the assigned parking and her monthly rent was reduced to \$1,275.00.

I heard undisputed testimony that this tenancy was ending on January 31, 2011, pursuant to the Tenant's notice, and that a move out inspection has previously been scheduled by the parties for January 31, 2011.

The Landlord issued a 10 day Notice to End Tenancy for Unpaid Rent (the "Notice") on January 4, 2011, in person, for an effective move out date of January 14, 2011.

The Landlord submitted into evidence the tenancy agreement, the Notice, proof of service of the Notice, and a statement listing of her claim for loss or damage under the *Residential Tenancy Act* (the "Act"), as follows:

January 2011 Rent	\$1,275.00
Net Loss of 2 months parking revenue	\$100.00
Move out fee charged by strata	\$50.00
Retain security deposit for damages	\$637.50
Filing fee	\$50.00
TOTAL	\$2,112.50

In support of her claim, I heard testimony from the Landlord that as of the day of the hearing, the Tenant had not paid the January 2011 rent, that she suffered a loss of \$100.00 in parking stall revenue as the Tenant declined to accept the parking stall after the original agreement, and that the Tenant damaged the rental unit and has not cleaned the carpet or the rental unit.

The relevant evidence submitted by the Tenant included a copy of the front and back of a rent cheque for January 2011, in the amount \$1,275.00, indicating her account was debited by this amount on January 13, 2011.

In support of her claim and defence of the Landlord's Application, I heard testimony from the Tenant that she normally pays the rent by placing a cheque in her mailbox for the Landlord to collect, but that she was out of town in December, so she mailed the January rent from Alberta on December 22, 2010.

The Tenant testified that she was surprised to receive the Landlord's Notice for unpaid rent as she thought the rent was paid, leading her to view her bank account online. The Tenant testified that the cheque written to the Landlord appeared online as being paid and that her account was debited in the amount of \$1,275.00.

In response, the Landlord testified that she had never seen the Tenant's rent cheque for January until the Tenant submitted the same into evidence and that the rent for January remained unpaid.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Due to the Landlord's statement that she has never seen the January 2011 rent cheque and the Tenant's evidence that this cheque had been paid by her bank, at the conclusion of the hearing, I allowed the Tenant a 24 hour period for her bank to identify the party receiving the funds, with the instruction that any documentation also be immediately served on the Landlord.

The response received in that time frame from the Tenant's bank stated that the funds had cleared the bank, but that an investigation can take up to 30 days and the Landlord would be required to sign a declaration with the bank.

I am unable to leave my decision open for an extra 30 days for a bank investigation and I have no authority to order the Landlord to sign a bank declaration. Therefore I am compelled to consider the evidence before me submitted prior to the hearing and find as follows:

Landlord's Application

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss, in this case the Landlord, has the burden of proof to establish their claim on the civil standard, as follows:

First proof that the damage or loss exists, **secondly**, that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement, **thirdly**, to establish the actual amount required to compensate for the claimed loss or to repair the damage, and **lastly** proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

In the circumstances before me, the Landlord was not obligated to provide receipts for rent payments made by cheque. Therefore it would be difficult to otherwise prove she did not receive the funds.

In an attempt to establish the rent was paid, the Tenant supplied evidence through a downloaded copy of the cancelled January rent cheque; however the Landlord testified that she had never seen or received the cheque. I find that both parties presented credible testimony and I accept the Tenant had funds removed from her bank account. However with the evidence before me, I am not satisfied that the Landlord received the cheque. In reaching this conclusion, I am persuaded by the inconsistency between the

Tenant's testimony and evidence. The Tenant testified that she mailed by regular mail the January rent cheque from out of town on December 22, 2010, yet the date of the cheque as filled in by the Tenant was January 10, 2011, which is after she received the Notice. By placing her cheque in the mail, the Tenant is unable to verify the receipt of the mail by the Landlord.

I am further persuaded by the lack of bank information on the back of the cheque regarding the processing of the payment and by the Tenant's lack of a complete bank statement.

Therefore, on a balance of probabilities, I therefore find the Landlord submitted sufficient evidence that she has not been paid rent for January 2011, and I **grant** her claim of \$1,275.00 for unpaid rent. However, due to the circumstances noted above, the Tenant is granted **leave to re-apply** in the event she is able to submit additional proof that the Landlord received the funds.

The Landlord submitted insufficient proof that she lost two months' parking stall revenue and I **dismiss** her claim for \$100.00 without leave to re-apply.

The Landlord submitted insufficient proof that she has incurred a \$50.00 move out fee charged by the strata and I **dismiss** her claim for \$50.00, with leave to re-apply for future consideration should the Landlord be charged this amount.

I find the Landlord's claim to retain the security deposit is premature as the tenancy has not yet ended and therefore she is unable to establish any damage, if any, caused by the Tenant. I therefore **dismiss** her claim to retain the security deposit, with leave to re-apply.

I find the Landlord has been mostly successful with her Application and therefore I award her the filing fee for this Application.

I find that the Landlord has established a total monetary claim of **\$1,325.00** comprised of unpaid rent of \$1,275.00 and the \$50.00 fee paid by the Landlord for this application.

I order that the Landlord retain the security deposit of **\$637.50** in partial satisfaction of the claim and I grant the Landlord an order under section 67 for the balance due of **\$687.50**.

This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Tenant's Application

I find the tenancy is ending as of the day of the Decision and there is no need to consider the Tenant's Application to cancel the 10 Day Notice to End Tenancy for Unpaid Rent. I therefore dismiss her Application.

Conclusion

The Landlord is granted a monetary order for \$687.50.

The Tenant's Application is dismissed as the tenancy is ending on January 31, 2011.

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: January 31, 2011.

Residential Tenancy Branch