



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes OPR MNR MNSD MNDC FF
CNR

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenants.

The Landlord filed seeking an Order of Possession for unpaid rent and a Monetary Order for unpaid rent, to keep all or part of the security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenants for this application.

The Tenants filed seeking an Order to cancel the notice to end tenancy for unpaid rent.

The parties appeared at the teleconference hearing, gave affirmed testimony, confirmed receipt of the hearing documents and evidence provided by the other, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Have the Tenants breached the *Residential Tenancy Act*, regulation or tenancy agreement?
2. If so, has the Landlord met the burden of proof to obtain an Order of Possession and a Monetary Order as a result of that breach?
3. Have the Tenants met the burden of proof to have the Notice to End Tenancy set aside?

Background and Evidence

The female Tenant entered into a month to month tenancy agreement effective July 8, 2010 which was amended October 1, 2010 to add the other Tenant. Rent is payable on the first of each month in the amount of \$1,200.00 and the Tenant paid a security

deposit of \$550.00 on June 29, 2010.

The Landlords testified that when January 1, 2011 rent was not paid a 10 Day notice to End Tenancy was posted to the Tenants' door on January 6, 2011. No rent has been received for January 2011 or February 2011. The Landlord is seeking the two month's rent, plus \$25.00 late fees for each month, plus the cost of the \$50.00 filing fee. The Landlord could not point me to the section in the tenancy agreement that provides a late payment fee.

The Landlords are seeking an Order of Possession for as soon as possible and requested to have the decision and orders faxed to them.

The Tenant confirmed they have not paid January and February 2011 and requested more time in the unit so they could find a new place to move to.

Analysis

All of the testimony and documentary evidence was carefully considered.

Landlord's Application

I find that in order to justify payment of damages under sections 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. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the Landlord, bears the burden of proof and the evidence furnished by the Applicant Landlord must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement
3. Verification of the Actual amount required to compensate for loss or to rectify the damage
4. Proof that the claimant followed section 7(2) of the *Act* by doing whatever is reasonable to minimize the damage or loss

In regards to the Landlords' right to claim damages from the Tenants, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, the non-complying

landlord or tenant must compensate the other for damage or loss that results. Section 67 of the *Act* grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

Order of Possession – Section 46 of the *Act* provides that a Landlord may issue a 10 Day Notice to End Tenancy if the tenant fails to pay the rent. The evidence supports the Notice was posted to the Tenants' door on January 6, 2011, which is deemed to have been received by the Tenants three days later on January 9, 2011, pursuant to section 90 of the *Act*. The Tenants did not pay their rent in full within five days of receiving the Notice. Therefore I find the Landlords have met the burden of proof and I approve their request for an Order of Possession.

Claim for unpaid rent. The Landlord claims for unpaid rent of \$2,400.00 for January 2011 and February 2011 (2 x \$1,200.00), pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. 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. I find that the Landlord has proven the test for loss as listed above and I hereby approve their claim for unpaid rent.

Late Payment Fees. Section 7 of the regulation states that a landlord may charge a non-refundable late payment fee as long as the tenancy agreement provides for that fee. There is insufficient evidence to support there is a provision in the tenancy agreement to charge for late payment fees; therefore I dismiss the Landlords' claim of \$50.00 for late payment fees, without leave to reapply.

Filing Fee \$50.00- The Landlords have succeeded with their application; therefore I award recovery of the filing fee.

Monetary Order – I find that the Landlords are 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:

Unpaid Rent for January 1, 2011 and February 1, 2011 (2 x \$1200)	\$2,400.00
Subtotal (Monetary Order in favor of the Landlord)	\$2,450.00
Less Security Deposit of \$550.00plus interest of \$0.00	-550.00
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$1,900.00

Tenant's Application

I have upheld the 10 Day Notice to End Tenancy and awarded the Landlord a Monetary Order and Order of Possession; therefore the Tenant's application to cancel the Notice is now moot and is hereby dismissed, without leave to reapply.

Conclusion

Landlords' Application

The Landlord's decision will be accompanied by an Order of Possession effective 2 Days upon service to the Tenants. This Order must be served upon the Tenants and may be filed in Supreme Court and enforced as an Order of that Court.

A copy of the Landlords' decision will be accompanied by a Monetary Order for **\$1,900.00**. The order must be served on the Tenants and is enforceable through the Provincial Court as an order of that Court.

Tenants' Application

The Tenant's application is HEREBY DISMISSED, without 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*.

Dated: February 03, 2011.

Residential Tenancy Branch