

## **DECISION**

**Dispute Codes:** OPR and MNR

### **Introduction**

This hearing was conducted as a Direct Request Proceeding, pursuant to section 55(4) of the *Residential Tenancy Act* (the “Act”), and dealt with an Application for Dispute Resolution by the landlord for an Order of Possession and a Monetary Order.

The landlord submitted a signed Proof of Service of the Notice of Direct Request Proceeding which declares that, the landlord served the tenant with the Notice of Direct Request Proceeding by registered mail sent on July 21, 2011.

Based on the written submission of the landlord, I find that the tenant has been served with the Direct Request Proceeding documents.

### **Issue(s) to be Decided**

The issues to be decided are whether the landlord is entitled to an Order of Possession for unpaid rent and a Monetary Order for the unpaid rent.

### **Background and Evidence**

The landlord submitted the following evidentiary material:

- A copy of the Proof of Service of the Notices of Direct Proceeding for the tenant;
- A copy of a residential tenancy agreement which was signed by the parties on September 17, 2010 indicating a monthly rent of \$650 due on the first day of the

month and recording payment of a security deposit of \$325 on September 17, 2011;

- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent which was served by posting on the tenant's door on July 6, 2011.

Documentary evidence filed by the landlord indicates that the tenant had a rent shortfall of \$326.37 at the time the notice to end tenancy was served.

However, I note that the landlord's evidence includes a statement of utilities owing and indicating exactly \$326.37 owed by the subject tenant. The statement has a hand written note that states, "emailed to tenant payment to upper 6/30 follow up bsmt tenant for payment."

I note, also, that the rental agreement includes provision for the tenant's rent to be paid by direct deposit.

## **Analysis**

Section 46(6) of the Act states that, if a tenant is responsible for payment of utilities as is the case with the subject tenancy, a landlord may treat unpaid utilities as unpaid rent if they remain unpaid 30 days after the landlord has issued a written demand for payment.

In the present application, as the sum cited in the Notice to End Tenancy and in the landlord's Application is precisely the same amount as in the evidence of unpaid utilities and as I have no evidence a 30-day written demand for payment, and as rent appears to be paid by automatic deposit, I find on the preponderance of evidence that the Notice to End Tenancy pertains to unpaid utilities.

In the absence of a the written demand 30 days prior to the Notice to End Tenancy, I find that the Notice to End Tenancy was premature and must be set aside.

Therefore, this application is dismissed without leave to reapply. If utilities or rent remain unpaid, the landlord may issue another Notice to End Tenancy.

**Conclusion**

The application is dismissed without leave to reapply as the preponderance of evidence indicates that it is based on a premature Notice to End Tenancy for unpaid utilities.

August 3, 2011.