



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, MNR, MNSD, MNDC, FF, O

Introduction

This hearing was convened by way of conference call in response to an application made by the landlord for an Order of Possession for breach of an agreement; for a monetary order for unpaid rent or utilities; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of this application.

One of the landlords and an agent for the tenant attended the conference call hearing and gave affirmed testimony. The landlord also provided evidence in advance of the hearing. All evidence and testimony provided have been reviewed and are considered in this Decision.

The tenant's agent testified that the tenant is very ill with influenza and is not able to attend the conference call hearing. The agent assured me that the tenant has authorized the agent to testify and represent the tenant at this hearing. The landlord opposed an adjournment. In the circumstances, since the landlord is applying for an Order of Possession, I find that it would be prejudicial to the landlord to adjourn the hearing, and I permitted the agent to testify on behalf of the tenant.

Issue(s) to be Decided

Are the landlords entitled to an Order of Possession for the tenant's breach of an agreement with the landlords?

Are the landlords entitled to a monetary order for unpaid rent or utilities?

Are the landlords entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Are the landlords entitled to retain the security deposit or pet damage deposit in full or partial satisfaction of the claim?

Background and Evidence

The landlord testified that this month-to-month tenancy began on June 1, 2011, although the landlord allowed the tenant to move in a few days earlier. The tenant still resides in the rental unit. Rent in the amount of \$500.00 per month is payable in advance on the 1st day of each month. On May 27, 2011, the landlord collected a security deposit from the tenant in the amount of \$250.00, and the tenant was required to pay a pet damage deposit of \$250.00 but did not pay the pet damage deposit.

On June 1, 2011, days after moving into the rental unit, the tenant gave the landlord written notice to vacate the rental unit effective July 1, 2011, but the tenant did not move. A copy of the notice was provided by the landlord in advance of the hearing. The tenant advised the landlord that the tenant would move on August 1, 2011 instead and promised to pay rent for the month of August in instalments.

The tenant did not pay rent for the month of July, 2011, but paid the landlord \$200.00 on August 5, 2011 and \$150.00 on August 15, 2011 for the month of August, leaving a balance due of \$500.00 for July and \$150.00 for August.

The landlord did not serve the tenant with a notice to end the tenancy for unpaid rent or for breach of an agreement to pay rent and move out, but relies on the tenant's notice to end the tenancy. The landlord asks for an Order of Possession and a monetary order in the amount of \$1,150.00, and recovery of the \$50.00 filing fee for the cost of this application.

The tenant's agent testified that the tenant paid \$250.00 for July and \$350.00 for August, but the landlord did not issue receipts for those cash payments. The agent further testified that the tenant is moving out of the rental unit on October 1, 2011.

Analysis

With respect to the landlord's application for an Order of Possession for breach of an agreement, I refer to Residential Tenancy Policy Guideline 11 – Amendment and Withdrawal of Notices, which states as follows:

“A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only;
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.”

In other words, parties can only withdraw a notice to end tenancy with the consent of the other party. However, if the landlord collects rent for a period after the effective date of the notice to end the tenancy, the landlord, as in this case, has not shown that the intent is to have the tenant vacate the rental unit. The landlord testified that a portion of rent was collected for the month of August, 2011. Further testimony is that the landlord did not issue a receipt to the tenant that had clearly marked on it, “For Use and Occupancy Only,” and has thereby effectively reinstated the tenancy.

If there are arrears of rent, the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. The tenant will then have 5 days to pay the rent in full or apply for dispute resolution disputing the notice. If the tenant does neither, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, which must be 10 days after issuing the notice and must move out by that date. If the tenant pays the rent within the 5 day period, the notice is of no effect.

The landlord’s testimony about the amount of rent paid or not paid is not consistent with the testimony of the tenant’s agent. Where a claim is disputed, the onus is on the claiming party to prove the claim however I am concerned whether or not the tenant’s agent has direct knowledge of the amount of arrears. I accept the evidence of both parties that the tenant is in arrears of rent, however, the amount of such arrears may be increased. If the tenant intends to move from the rental unit on October 1, 2011, the tenant will also be liable to pay October’s rent because the tenant has not provided the landlord with 1 month’s written notice. Further, the *Act* states that notice given by a tenant must be given to the landlord before the day rent is payable. Therefore, if rent is payable on October 1, 2011, the tenant must give one month’s notice by no later than September 30, 2011 to move out on October 31, 2011.

I further find that all matters pertinent to this tenancy ought to be heard and dealt with at one hearing. Therefore, I dismiss the landlord’s claims, with leave to reapply for the

monetary order and for the order permitting the landlord to keep all or part of the security deposit in partial satisfaction of the landlord's claim.

Further, I suggest the landlord provide the tenant with receipts for all rents paid in cash as required by the *Residential Tenancy Act*, for past and future rents paid.

Conclusion

For the reasons set out above, the landlord's application for an Order of Possession for breach of an agreement is hereby dismissed without leave to reapply.

The landlord's application for a monetary order for unpaid rent or utilities is hereby dismissed with leave to reapply.

The landlord's application for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit is hereby dismissed with leave to reapply.

The landlord's application for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation, or tenancy agreement is hereby dismissed with leave to reapply.

Since the landlord has not been successful with the claim before me, I decline to order that the landlord recover the filing fee for the cost of this application from the tenant.

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: September 27, 2011.

Residential Tenancy Branch