



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPL, OPC, OPR, MNR, MNSD, FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord for an order of possession, a monetary order for unpaid rent and unpaid utilities, an order to retain the security deposit in partial satisfaction of the claim and to recover the filing fee for the Application.

The Landlord personally served the Tenant with the Application and Notice of Hearing on October 24, 2011. A representative for the Tenant attended the hearing and provided affirmed testimony confirming that the Tenant was personally served with the Notice of Hearing and that he has asked her to represent him at the hearing as he is unable to attend. The Tenant's representative stated that she lives with the Tenant at the rental unit, although she is not on the tenancy agreement. The Tenant's representative stated that the Tenant is in the hospital the date of hearing for surgery as he broke both his wrists on November 10, 2011. I am satisfied that "MN" has the Tenant's authorization to represent him at this hearing and I am satisfied that the Tenant was properly served with the Notice and Application in accordance with the requirements of the Residential Tenancy Act (the "Act").

The Landlord and the Tenant's representative gave affirmed testimony and were provided the opportunity to present evidence orally and in written and documentary form, and make submissions to me.

### Issue(s) to be Decided

Is the Landlord entitled to an order of possession, and if so what is the effective date?

Is the Landlord entitled to a monetary order for unpaid rent, unpaid utilities, and the filing fee and an order to keep all or part of the security deposit?

### Background and Evidence

The parties confirmed that the tenancy commenced on September 01, 2010 with a monthly rent of \$850.00 due on the second day of each month and that the Tenant must pay 1/3 of the utilities. The Landlord submitted a copy of the tenancy agreement as part of his evidence package. The parties confirmed that a security deposit of \$425.00 was

paid when the tenancy commenced. The Tenant has not yet moved out of the rental unit.

The parties agree that three notices had been served and received by the Tenant as follows:

- A Two Month Notice to End Tenancy for Landlord Use, personally served on the Tenant on September 30, 2011.
- A One Month Notice to End Tenancy for Cause, personally served on the Tenant on October 04, 2011.
- A Ten Day Notice to End Tenancy for Unpaid Rent, personally served on the Tenant on November 02, 2011.

The Tenant did not file an Application for Dispute Resolution to dispute any of the Notices.

The Landlord states that he served the Two Month Notice because his son will be moving into the rental unit. The Landlord's son attended the hearing as a witness and confirmed that he will be moving into the rental unit.

The Landlord states that he served the One Month Notice because the Tenant breached material terms of the tenancy agreement, in particular, the agreement not to smoke in the rental unit. The Landlord, his spouse who was assisting him at the hearing, and his son, the witness at the hearing, all testified that the Tenant or his guests have been smoking in the rental unit. The Landlord stated that the house has forced air heating and smoke from the rental unit has been circulating in the air up to the Landlord's residence above the Tenant's basement suite.

The Landlord states that he served the Ten Day Notice on the day the rent was due, November 02, 2011, because the Tenant was refusing to pay rent that day. The Landlord stated that as of the date of the hearing the rent for November is still unpaid.

The Landlord's position is that the Ten Day Notice or in the alternative the One Month Notice should be in effect, and he wishes to withdraw the Two Month Notice. The Landlord is seeking an order of possession and wants the Tenant to move out as soon as possible.

The Landlord's Application requests \$850.00 rent for November 2011 and \$47.00 for utilities. The Landlord states that the \$47.00 is for the Tenant's portion of utilities since September 01, 2011 and that more utilities have come due since the Application which he has not applied for on this Application. The Landlord confirmed that he has copies of all of the utilities bills. The Landlord confirmed that he has not provided any copies of any utility bills with his Application.

The Tenant's representative states that the Tenant disagrees with the Landlord, and that only the Two Month Notice should be in effect. The Tenant's representative

reconfirmed that the Two Month Notice was personally served by the Landlord on the Tenant on September 30<sup>th</sup>. The Tenant's representative stated the Tenant can be out of the rental unit by November 30, 2011 which is move-out date required by the Two Month Notice. The Tenant's representative stated that the Tenant does not owe the Landlord rent for November, as the terms of the Two Month Notice require the Landlord to provide them one month of free rent. The Tenant's representative confirms that the Tenant may owe the Landlord for utilities, but she is not sure of the amount. The Tenant's representative stated that she does not have a copy any utility bill with her at the hearing. The Tenant's representative also stated that she and the Tenant do not smoke in the rental unit, but rather only outside the rental unit and usually in the alley.

### Analysis

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

The Ten Day Notice to End Tenancy by the Landlord was not served in accordance with section 46 of the Act, as it was served on the day rent is due which in this tenancy is the second of the month. Section 46 of the Act states that such a Notice must be served after the day on which rent is due, as a result November 03, 2011 was the earliest the Landlord could have served a Ten Day Notice to End Tenancy for unpaid rent for November 2011. I find that the Ten Day Notice to End Tenancy is not valid and must be dismissed.

As I have determined that the Ten Day Notice to End Tenancy is not valid, I must consider the validity of the One Month Notice to End Tenancy and the Two Month Notice to End Tenancy. The Two Month Notice to End Tenancy was served on September 30, 2011 and the One Month Notice was served several days later on October 04, 2011. As the service of these Notices was personal service on the Tenant the correct move out date for both Notices is December 01, 2011, based on the rent being due on the second day, of each month, and on the requirements of section 47 and 49 of the Act.

The Landlord indicates that he wishes to use the One Month Notice to End Tenancy rather than the Two Month Notice to End Tenancy. The Act and Policy do not allow a Landlord to withdraw a Notice unless there is consent of the Tenant. Residential Tenancy Policy Guideline 11, Amendment and Withdrawal of Notices, states:

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.

I find that the Tenant has not consented to the Landlord's request to withdraw the Two Month Notice. I find that the Two Month Notice was the first Notice served on the Tenant, that it is a valid Notice, that it was properly served on the Tenant, and that the Tenant did not apply for dispute resolution of the Notice within the timeframe required by the Act. I dismiss the Landlord's request that the One Month Notice replace the Two Month Notice. As the Two Month Notice is in effect, the Tenant must move out on or before 1:00 P.M. on December 01, 2011, and the order of possession is granted to the Landlord.

The Landlord has claimed \$47.00 in utilities on the Application, however he has failed to provide any evidence in the form of a utility bill to confirm the amount owed by the Tenant. The Tenant's representative was not able to confirm what amount of utilities are owed to the Landlord. Due to a lack of evidence as to quantum, I am unable to allow the Landlord's claim for \$47.00 in utilities and I dismiss the Landlord's request for a monetary order for this amount.

The Landlord is claiming unpaid rent for November 2011. Section 51(1) of the Act requires that the Landlord must provide to the Tenant an amount equivalent to one month's rent on or before the end date of the Two Month Notice. I find that the Tenant is in arrears for November 2011 rent and this is not disputed. However, due to the requirements of section 51(1) of the Act, I order that the Landlord is not required to pay one month's rent to the Tenant for their last month of rent, as the Tenant has failed to pay the last month of rent to the Landlord. As a result, there is no money to be paid by the Tenant to the Landlord for November's rent and the Landlord's request for a monetary order for this amount is dismissed.

As the Landlord has partially succeeded in his Application and an order of possession is granted to the Landlord, I find that the Landlord is entitled to recover the \$50.00 fee for this proceeding from the \$425.00 security he currently holds.

I order that the Landlord retain \$50.00 from the security deposit in full satisfaction of the filing fee paid for this Application. The balance of the security deposit must be dealt with in accordance with the Act.

### Conclusion

I find that the Landlord is entitled to an order of possession **effective at 1:00 P.M. December 01, 2011**. This order may be filed in the Supreme Court and enforced as an order of that Court.

I order that the Landlord retain \$50.00 from the security deposit in full satisfaction of the filing fee paid for this Application. The balance of the security deposit must be dealt with in accordance with the Act.

The order accompanies the Landlord's copy of this decision. .

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: November 17, 2011.

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Residential Tenancy Branch