



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, FF

Introduction

This hearing was convened by way of conference call in repose to the landlord's application for an Order of Possession for unpaid rent; for a Monetary Order for unpaid rent; and to recover the filing fee from the tenants for the cost of this application.

One of the tenants and the landlord's agent attended the conference call hearing, gave sworn testimony and were given the opportunity to give oral testimony. The landlord provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

Issue(s) to be Decided

- Is the landlord entitled to an Order of Possession for unpaid rent?
- Is the landlord entitled to a Monetary Order to recover unpaid rent?

Background and Evidence

Both parties agree that this tenancy started on June 01, 2007 and is now a month to month tenancy. Rent is now \$1,005.00 per month and is due on the first day of each month in advance.

The landlord testifies that the tenants have been repeatedly late paying rent and five notices have been served upon the tenants in 2011. A payment schedule was agreed by the parties in June, 2011 and the tenants did pay the rent arrears in September, 2011. However the tenants also agreed to pay rent on time each month and failed to do so on November 01, 2011. The landlord's agent testifies the tenants only paid \$500.00 towards their rent on November 01, 2011. This left an outstanding balance of \$505.00.

The landlord's agent testifies the tenants were served with another 10 Day Notice to End Tenancy on November 03, 2011. This notice has an effective date of November 16, 2011 and was handed to the tenants in person. The landlord's agent testifies the notice declares that the tenants owe rent of \$1,030.00 however the landlord's agent states this was filled in before she was aware the tenants paid \$500.00.

The landlord's agent testifies the tenants made another \$5.00 payment and another payment of \$260.00 was made on November 08, 2011. The landlord's agent testifies she accepted this rent payment but did not mark the receipt for use and occupancy only.

The landlord's agent testifies the tenants now owe the sum of \$240.00 in unpaid rent and the landlord also seeks to recover a \$25.00 late fee. The landlord's agent testifies the tenants have also failed to pay their rent for December, 2011 of \$1,005.00.

The landlord seeks an Order of Possession due to unpaid rent and seeks to recover their \$50.00 filing fee.

The tenant does not dispute that they owe rent to the landlord and states he and his wife are both students and when they get their student loan in January he will pay the rent for two or three months in advance.

Analysis

I have carefully considered all the evidence before me; when a landlord accepts rent from the tenants after a 10 Day Notice has been given to the tenants, the landlord must provide something in writing to the tenants to inform them that this money has been accepted for use and occupancy only and does not reinstate the tenancy. The landlord agrees that they failed to do this.

Regardless of the fact the tenants did not file an application to dispute the Notice within five days and despite the tenants still owing \$240.00 in unpaid rent; as the landlord did not inform the tenants in writing that they were accepting rent for November, 2011 for use and occupancy only and in accepting this rent it did not cancel the 10 Day Notice and does not reinstate the tenancy; the landlord has in effect reinstated the tenancy. Consequently, as the tenancy has been reinstated the landlord is not entitled to an Order of Possession and this section of his claim is denied.

The landlord has established their claim for unpaid rent of **\$240.00** and is entitled to a Monetary Order to recover this amount from the tenants pursuant to s. 67 of the Act. The landlord has also applied to recover a late fee from the tenants of \$25.00; s. 7(2) of the Residential Tenancy Regulations states a landlord must not charge a late fee unless the tenancy agreement provides for that fee (my Interpretation). I have reviewed the tenancy agreement in place and find the landlord has not included a clause concerning late fees on the tenancy agreement. Consequently, the landlord is not entitled to charge the tenant a fee for late payment of rent and this section of the landlords claim is dismissed without leave to reapply.

The landlord has not applied to recover unpaid rent for December in this application. The landlord is at liberty to serve the tenants with another 10 Day Notice to End Tenancy for Decembers rent if it remains unpaid.

As the landlord has been partially successful with his claim I find the landlord is entitled to recover the **\$50.00** filing fee from the tenants pursuant to s. 72(1) of the Act. A Monetary Order for **\$290.00** has been issued to the landlord.

Conclusion

I HEREBY FIND in favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for **\$290.00**. The Order must be served on the respondents and is enforceable through the Provincial Court as an order of that Court.

The landlord application for an Order of Possession is dismissed with leave to reapply if the tenants fail to pay rent for December after a 10 Day Notice is issued to them..

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: December 07, 2011.

Residential Tenancy Branch