



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNSD FF
 CNR FF

Preliminary Issues

At the outset of the hearing the Tenant requested that this proceeding be postponed until next Wednesday, (which is February 29, 2012), because his lawyer requested more time to compile some information.

I asked the Tenant who his lawyer was, at which time he stumbled with saying a corporate name. I asked him to tell me his lawyer's name to which he responded with the first name "Brad" and upon further questioning he was not able to provide me with his lawyer's full name or telephone number.

Upon receiving the Tenant's request for an Adjournment I considered the following criteria as outlined in rule # 6.4 of the *Residential Tenancy Branch Rules of Procedure*:

- a) **the oral or written submissions of the parties**; in this case the Tenant was not able to provide the name of his alleged lawyer nor did he provide evidence to prove he had in fact retained the services of legal counsel; and
- b) **whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose]**; I note that the Tenants' application indicates they were disputing the amount of rent that is owed and therefore acknowledged that there is rent outstanding; therefore having the presence of legal counsel would not change the fact that the Tenants have not paid their rent in full; and
- c) **whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding**; this hearing was convened to hear both the Tenant's application and the Landlord's application so the Tenant ought to have been prepared to have his dispute heard at the scheduled hearing or proven that he had retained legal counsel and that legal counsel requested an adjournment; and
- d) **the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment**; the Tenant made no prior effort to provide evidence in support of his application and he later affirmed that he would be moving out at the end of the month which indicates he requested the adjournment to the last day of the month to buy more time in the rental unit; and

e) **the possible prejudice to each party**; allowing this matter to be delayed until next week would prejudice the Landlord from regaining possession of his property in accordance with his rights under the *Residential Tenancy Act*.

As per the aforementioned, I declined the Tenant's oral request for an adjournment and the hearing proceeded as scheduled.

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 pet and security deposits, 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 and to recover of the cost of the filing fee from the Landlord for this application.

The parties appeared at the teleconference hearing. During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Have the Tenants breached the *Residential Tenancy Act*, regulation, and/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 and pursuant to sections 55 and 67 of the *Residential Tenancy Act*?
3. Have the Tenants met the burden of proof to have the 10 Day Notice to End Tenancy set aside?
4. Have the Tenants met the burden of proof to dispute the amount of rent that is owing to the Landlord?

Background and Evidence

The parties agreed they entered into a fixed term tenancy agreement that began July 1, 2011 and is set to switch to a month to month tenancy after July 1, 2012. Rent is

payable on the first of each month in the amount of \$2,900.00 and on June 18, 2011 the Tenants paid \$1,450.00 as the security deposit plus \$500.00 as the pet deposit.

The Landlord affirmed that he personally served the male Tenant with copies of his application for dispute resolution during a meeting at a local home building store. He then served the Landlord's daughter with copies of the evidence on February 16, 2012. The Landlord confirmed receipt of the Tenants' application for dispute resolution.

The Tenant first denied receiving the Landlord's hearing documents and then changed his testimony to confirm receipt. He confirmed he has three daughters who reside with them at the rental unit and the one whom the Landlord served the evidence too is 19 years of age. The Tenant then stated he would not provide any further testimony as per instructions received from his lawyer. I acknowledged his statement and advised this hearing would be proceeding even if he chose not to provide testimony.

The Landlord advised the Tenants last paid they rent in full on September 1, 2011. He confirmed that he received no payments towards rent during October 2011 or November 2011 and then received three payments in December 2011 totaling \$3,545.00 (\$2445.00 Dec. 2, 2011, \$500.00 Dec. 7, 2011, and \$600.00 on Dec. 24, 2011) as supported by the invoices he provided in his evidence. He stated that these invoices were written by the Tenant which he signed and kept one copy when he received each payment.

The Tenant confirmed the three receipts were written by him and provided to the Landlord each time he made a payment towards rent. He refused to answer my question about why he has not paid his rent when it was due.

Then at 9:46 a.m. the Tenant disconnected from the hearing. He signed back into the hearing at 9:47 a.m. and stated he was calling in on a pay phone. I explained to the Tenant that during his absence the Landlord requested an order of possession and monetary order and asked if I could fax my decision and orders to his personal fax number.

The Tenant refused to provide any further testimony and stated that they were moving out at the end of the month so he was not concerned about what my decision would be.

Analysis

After careful consideration of the aforementioned, I find that each party has been sufficiently served notice of today's proceeding in accordance with section 89 of the

Residential Tenancy Act. I further find that the Tenants have been sufficiently served copies of the Landlord's evidence in accordance with section 88(e) of the *Residential Tenancy Act* which provides that evidence documents may be left at the person's residence with an adult who apparently resides with the person.

Tenant's Application

Where a tenant(s) is served a 10 Day Notice the tenant has five days to pay the outstanding rent to nullify the Notice or the tenant has five days to dispute the Notice by filing an Application for Dispute Resolution.

In this case the Tenants filed an Application for Dispute Resolution to have the Notice cancelled or set aside. A party who makes an application has the burden to prove their claim and therefore the Tenant has the burden to prove he has paid his rent in accordance with the Act, regulation or tenancy agreement.

Section 26 of the Act provides that a Tenant must pay rent when it is due in accordance with the tenancy agreement. In this case rent is payable on the first of each month in the amount of \$2,900.00.

The Tenants have not submitted documentary evidence in support of their application and the male Tenant appeared at the hearing refusing to provide testimony about whether he has paid his rent or not. The Tenant did however confirm he had written the receipts the Landlord provided in evidence and that those were the rent payments he had made in December 2011. Therefore, based on the aforementioned and on a balance of probabilities I find the Tenants have not paid their rent in full, in breach of section 26 of the Act, and I accordingly dismiss their application.

The Tenants have not been successful with their application and therefore they must bear the burden of the cost of their application.

Section 55 of the Act provides that an Order of Possession must be provided to a Landlord if a Tenant's request to dispute a Notice to End Tenancy is dismissed and the Landlord makes an oral request for an Order of Possession during the scheduled hearing. Accordingly I approve the Landlord's request for an Order of Possession.

Landlord's Application

The Landlord claims for the accumulated unpaid rent for October 1, 2011, November 2011, December 2011, January 2012, and February 2012 less the \$3,545.00 received

in December 2011, for a total amount of **\$10,955.00** (5 x \$2,900.00 - \$3,545.00) pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I accept the Landlord's evidence which included a copy of the 10 Day Notice, a copy of the tenancy agreement, and copies of receipts for payments made by the Tenants in December 2011; and 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. Accordingly I award the Landlord a monetary claim in the amount of **\$10,955.00** for unpaid rent up to February 2012.

The Landlord has been successful with his application; therefore I award recovery of the **\$100.00** filing fee.

Monetary Order – I find that the Landlord is 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 and pet deposits plus interest as follows:

Unpaid Rent	\$10,955.00
Filing Fee	<u>100.00</u>
SUBTOTAL	\$11,055.00
LESS: Security Deposit \$1,450.00+ Interest 0.00	-1,450.00
LESS: Pet Deposit \$500.00+ Interest 0.00	<u>- 500.00</u>
Offset amount due to the Landlord	<u>\$9,105.00</u>

Conclusion

The Tenant's application is HEREBY DISMISSED, without leave to reapply.

I HEREBY FIND that the Landlord is entitled to an Order of Possession effective **two days after service on the Tenants**. This Order is legally binding and must be served upon the Respondent Tenants.

A copy of the Landlord's decision will be accompanied by a Monetary Order for **\$9,105.00**. This Order is legally binding and must be served on the Tenants.

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 23, 2012.

Residential Tenancy Branch