



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: *OPR, MNR, CNR, MNDC, OLC, OPT, FF*

Introduction,

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*. The landlord applied for an order of possession and for a monetary order for unpaid rent and the filing fee. The tenant applied to cancel the notice to end tenancy, for a monetary order for compensation and the filing fee, for an order of possession and for an order seeking landlord's action to comply with the *Act*.

Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

Issues to be decided

Is the landlord entitled to an order of possession and a monetary order for unpaid rent?
Is the tenant entitled to compensation for loss under the *Act* and an order of possession?

Background and Evidence

This tenancy started on August 15, 2011 for a fixed term of one year. The monthly rent was set at \$2,200.00 payable on the first of each month. Prior to moving in, the tenant paid a security deposit of \$1,100.00 plus \$100.00 for a fob deposit. The rental unit consists of an apartment in building complex. The tenant provided the landlord with post dated cheques for rent. A term in the tenancy agreement requires the tenant to pay a penalty of \$100.00 for rent paid after the due date and for returned cheques.

The landlord testified that the tenant was late paying rent a few times and at his request she cashed the rent cheques after the date rent was due. The tenant paid late fees at least once. In March 2012, the tenant's rent cheque was returned for insufficient funds. On March 27, 2012 the landlord served the tenant with a ten day notice to end tenancy by posting the notice on his front door. The landlord also stated that in error the tenant's fob was deactivated that same day.

Later that day, the tenant found himself locked out and contacted the landlord by text message to request access to the building and the rental unit.

The landlord testified that she had the fob reactivated but was not sure of the exact date. The tenant argued that as of the date of this hearing, he did not have access to the rental unit and had been locked out since March 27, 2012.

On April 06, 2012, the parties met outside the building and the tenant requested the police to escort him to the rental unit as he feared that some of his belongings would be missing. The tenant stated that upon gaining entry to the apartment, he found his belongings intact. He repeatedly asked the landlord to reactivate his fob and grant him access to the unit. In response to the tenant's multiple requests for access to the rental unit, the landlord sent text messages as follows:

" You pay me the rent today then you could have access there today"

" Pay me the rent and you won't stay outside"

"That's fine then I have to pay \$50 your dispute fee and make me to let you in but you have to pay me the full rent and that might takes one month and until the court date nobody can make me to let you in"

The tenant testified that he runs his own business doing construction contracts and rented a unit this size because it has a den that he uses for his office. From March 27, 2012, the day he got locked out, he has been unable to use his office, retrieve his mail and access his bike in the parkade. The tenant testified that his business has suffered as he has not had access to his computer, business files, internet, printer etc. He also stated that he has had to spend a lot of time contacting the Residential Tenancy Branch, police and the landlord to resolve the issue and has had no success to date. In addition the tenant stated that he has had to make alternate living arrangements.

During the hearing, the tenant decided that given the above experience, he was going to move out. He requested me to order the landlord to activate his fob immediately to enable him to remove his belongings.

The landlord is claiming rent for March and April 2012 plus \$200.00 for returned cheques. The landlord did not file any evidence to support her claim that her financial institution charged her \$100.00 per returned cheque.

The tenant is claiming \$73.00 per day for 24 days that he has had no access to the rental unit for a total of \$1,752.00. The tenant is also claiming \$50.00 per day for 16 days for loss of income from his business for a total of \$800.00 and \$600.00 for his own time dealing with the Residential Tenancy Branch, police and landlord in his attempts to gain access to the rental unit.

Analysis

Landlord's application:

Based on the documentary evidence and sworn testimony of both parties, I find that the tenant failed to pay rent on March 01, 2012. The landlord served the tenant with a notice to end tenancy and by her own admission agreed that she had had the tenant's fob deactivated. In her written submission she states "*Unfortunately, I got evil this time and took advantage of situation and force him to pay me the rent*".

As explained to the parties during the hearing, the onus or burden of proof is on the party making a claim to prove the claim. When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails.

In this case, the landlord stated that the tenant was given access to the unit at the end of March while the tenant stated that he had no access since March 27 to date. The landlord could not recall the exact date that she had the tenant's fob reactivated. In addition the landlord has no evidence to support her testimony that the tenant was granted access at the end of March. Accordingly, I find that the tenant has not had access to the rental unit since March 27, 2012.

Since the tenant did occupy the unit in March, I find that the landlord is entitled to prorated rent from March 01 to March 27, at which time the access ended. Accordingly the landlord is entitled to **\$1,844.96**. Since the tenant has not lived in the unit for the month of April, the landlord is not entitled to rent for April.

Section 7 of the *Residential Tenancy Regulation* states that a landlord may charge a service fee charged by a financial institution to the landlord for the return of a tenant's cheque. In this case, I find that charging the tenant \$100.00 for a returned cheque is excessive. Since the landlord has not filed any evidence to support the quantum of her claim, I dismiss the landlord's claim for an additional \$200.00 for returned cheques.

Since the landlord has proven only a relatively small portion of her claim, she must bear the cost of filing her own application.

Tenant's application:

Section 31(1) of the *Residential Tenancy Act* states that a landlord must not change locks or other means of access to the rental unit unless the tenant agrees to the change and the landlord provides the tenant with new keys or other means of access.

In this case, I find that the landlord deactivated the fob, thereby denying the tenant access to the rental unit. I further find that the landlord refused to activate the tenant's fob until he paid rent. Since the tenant was denied access to the rental unit, I find that the tenant was required to make other living arrangements and also suffered a loss of income from being denied access to his office.

Residential Tenancy Policy Guideline #6 deals with a tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. At common law, the covenant of quiet enjoyment "promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy."

Every tenancy agreement contains an implied covenant of quiet enjoyment. A covenant for quiet enjoyment may be spelled out in the tenancy agreement; however a written provision setting out the terms in the tenancy agreement pertaining to the provision of quiet enjoyment cannot be used to remove any of the rights of a tenant established under the Legislation. If no written provision exists, common law protects the renter from substantial interference with the enjoyment of the premises for all usual purposes.

In order to prove an action for a breach of the covenant of quiet enjoyment, the tenant has to show that there has been a substantial interference with the ordinary and lawful enjoyment of the premises, by the landlord's actions. Such interference might include refusing the tenant access to all or parts of the rental premises.

In this case, I find that by denying the tenant access to the rental unit, the tenant's right to quiet enjoyment was breached and therefore I find it appropriate to award the tenant compensation for the inconvenience and loss of income he suffered as a result of being locked out of the rental unit.

The tenant stated that his friend helped him out with accommodation and therefore he did not file any receipts to determine the cost he incurred for accommodation. *Residential Tenancy Policy Guideline #16* states that an arbitrator may award "nominal damages" which are a minimal award. These damages may be awarded where there has been no significant loss, but they are an affirmation that there has been an infraction of a legal right. Accordingly I award the tenant \$50.00 per day for 24 days towards accommodation for a total of **\$1,200.00**.

I also find that on a balance of probabilities, it is more likely than not that without access to his office, the tenant suffered a loss of income. Accordingly, I award the tenant his claim of **\$800.00**.

The legislation does not permit me to award any litigation related costs other than the filing fee. Therefore, I find that the tenant is not entitled to his claim of \$600.00 for time spent dealing with this issue. Since the tenant has proven a major portion of his claim, he is also entitled to the recovery of the filing fee of **\$50.00**.

Overall the landlord has established a claim of \$1,844.96 and the tenant has established a claim of \$2,050.00. I will use the offsetting provisions of section 72 of the *Act* to grant the tenant a monetary order in the amount of \$205.04. I grant the tenant an order under section 67 of the *Residential Tenancy Act* for the amount of \$205.04. This order may be filed in the Small Claims Court and enforced as an order of that Court.

The landlord was ordered during the hearing to allow the tenant access to the unit as of the date of this hearing (April 19, 2012)

Conclusion

I grant the tenant a monetary order in the amount of **\$205.04**.

I order the landlord to allow the tenant immediate access to the rental unit.

The tenant must retrieve his belongs and vacate the rental unit within five days of gaining access to the rental unit.

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: April 19, 2012.

Residential Tenancy Branch