



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR O MNR FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order of Possession for unpaid rent or utilities, other reasons, and a Monetary Order for unpaid rent or utilities and to recover the cost of the filing fee from the Tenant for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally and to respond to each other's testimony. 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. Is the Landlord entitled to an Order of Possession?
2. Is the Landlord entitled to a Monetary Order?

Background and Evidence

The Landlord submitted 33 pages into evidence which included, among other things, copies of: proof of service documents, a 10 Day Notice to end tenancy, the tenancy agreement, notices of returned automatic rent payments, and a tenancy ledger.

The parties confirmed they entered into a fixed term tenancy that began on April 1, 2011 that switched to a month to month tenancy after March 31, 2012. Rent is payable on the first of each month in the amount of \$1,875.00 and on February 1, 2011, the Tenant paid \$925.00 as the security deposit.

The Landlord stated the Tenant's automatic withdraws for rent had been being returned NSF over the past few months and that the Tenant would make the payments later in the month. The August 1, 2012 rent was returned and on August 21, 2012 the Tenant made a partial payment of \$900.00 which left an outstanding balance due for August

2012 of \$975.00. A 10 Day Notice to end tenancy was issued for the \$975.00 unpaid rent and posted to the Tenant's door on August 29, 2012.

The Landlord submitted that since issuing the 10 Day Notice the Tenant has made a lump sum payment of \$3,000.00 for which the Landlord issued a receipt stating the payment was received for "use and occupancy only" and that the Tenant had a credit balance of approximately \$30.00, after applying NSF charges of \$35.00 for August and September 2012. The Landlord stated that they wished to proceed with the Order of Possession for as soon as possible because the Tenant remains in the unit and has failed to pay rent that was due October 1, 2012.

The Tenant prefaced his testimony stating that English was his second language and that he does not read English well but that the Landlord has explained everything to him and he understands. Then the Tenant confirmed he has been paying rent late. He initially stated that the Resident Manager accepted his \$3,000.00 payment and told him it would be okay to pay October and November rent on the 15th of each month. Upon further clarification the Tenant acknowledged that the Resident Manager did not say it was okay to pay his rent on the 15th, rather he asked permission to pay on the 15th and she said they would still be attending the hearing to go through the process.

The Tenant continued his testimony stating "I know I was wrong" but the Resident Manager said it was okay to pay on the 15th. The Tenant confirmed the Property Manager called him on Wednesday September 19th and told him he had to pay the rent and move out of the unit by the next day.

The Resident Manager denied giving the Tenant permission to pay October rent on the 15th. She acknowledged giving the Tenant the receipt for use and occupancy only and the other property manager spoke with the Tenant to explain how they would be proceeding with the Hearing.

Analysis

Notwithstanding the Tenant's statement that English was his second language, I found that throughout the hearing the Tenant spoke English clearly and stated that he understood what was being discussed.

The Tenant alleged that the Resident Manager gave him permission to pay his October rent on the 15th of October; however he later confirmed that he requested permission but that she did not give him permission. The Resident Manager denies telling the Tenant he had permission to pay his October rent late, on the 15th; rather she claims she told him they would be proceeding with the hearing.

In the case of verbal agreements, I find that where verbal terms are clear and both the Landlord and Tenant agree on the interpretation, there is no reason why such terms cannot be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes as they arise. Therefore, in the absence of a written

agreement I find that rent is payable on the first of each month in accordance with the tenancy agreement.

The evidence supports that a 10 Day Notice to end tenancy was posted to the Tenant's door on August 29, 2012. The Notice is deemed to have been received by the Tenant three days after it was posted (September 1, 2012) and therefore the effective date of the Notice is corrected to **September 11, 2012**.

When a tenant receives a 10 Day Notice to end tenancy for unpaid rent the *Act* stipulates that they have (5) days to either pay the rent in full or to make application to dispute the Notice or the tenancy ends.

In this case the Tenant did not make a payment towards the August unpaid rent until September 21, 2012, which is long after the five day time period. Therefore, the Tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice, **September 11, 2012**, and must vacate the rental unit to which the notice relates pursuant to section 46(5) of the *Act*. Accordingly, I approve the Landlord's request for an Order of Possession.

The Landlord filed seeking a monetary award for unpaid rent of \$975.00 that was due August 1, 2012 plus use and occupancy for September 2012 and October 2012. In this case the Tenant made a \$3,000.00 payment towards the arrears up to September 30, 2012 paying them in full by September 21, 2012, after the effective date of the 10 Day Notice. The payments were received for use and occupancy only and therefore did not reinstate the tenancy.

Based on the aforementioned, I find the Landlord's claim for August 2012 unpaid rent and September 2012 use and occupancy to be fully satisfied by the Tenant and no monetary award is warranted.

The Landlord indicated that they had charged the Tenant \$35.00 for NSF fees for each month of August and September 2012.

Section 7 (1) of the *Regulation* stipulates that a landlord may charge a service fee charged by a financial institution to the landlord for the return of a tenant's cheque; "or" an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent, providing the tenancy agreement provides for such a fee.

In this case there was insufficient evidence to prove that the Landlord was charged \$35.00 by a financial institution to the landlord for the return of a tenant's cheque. Therefore I find the Landlord may only charge the Tenant \$25.00 for each NSF fee charged in August and September 2012.

A party who makes an application for monetary compensation against another party has the burden to prove they have taken steps to mitigate or minimize the loss.

The Landlord has requested unpaid rent for October 2012, however in this case it would be considered loss of rent as the tenancy ended September 11, 2012. As this decision is being issued October 2, 2012, I find the Landlord's request for loss of rent for October 2012 to be premature, as there is still opportunity for the Landlord to re-rent the unit before the end of the month. Accordingly, I dismiss this request with leave to reapply.

The Landlord has succeeded with their application; therefore I award recovery of the **\$50.00** filing fee.

Based on the foregoing, I find the Tenant to have a credit balance with the Landlord as follows:

August unpaid rent	\$ 975.00
September use and occupancy	1,875.00
August NSF charges	25.00
September NSF charges	<u>25.00</u>
Subtotal Due to the Landlord	\$2,900.00
LESS: Sept. 21st payment	(3,000.00)
Filing Fee – Oct. 2, 2012	<u>50.00</u>
Credit balance at Sept. 21, 2012	(\$ 50.00)

Conclusion

I HEREBY FIND the Landlord is entitled to an Order of Possession effective **Two (2) Days upon service to the Tenant**. This Order is legally binding and must be served upon 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: October 02, 2012.

Residential Tenancy Branch