



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. An Order of Possession - Section 55;
2. A Monetary Order for unpaid rent - Section 67;
3. A Monetary Order for compensation – Section 67;
4. An Order to retain the security deposit - Section 38; and
5. An Order to recover the filing fee for this application - Section 72.

The Landlord and Tenants were each given full opportunity to be heard, to present evidence and to make submissions.

Issue(s) to be Decided

Is the notice to end tenancy valid?

Is the Landlord entitled to an Order of Possession?

Is the Landlord entitled to the monetary amounts claimed?

Background and Evidence

The tenancy began on November 23, 2012. Rent of \$1,150.00 is payable in advance on the first day of each month. At the outset of the tenancy, the Landlord collected a security deposit from the Tenant in the amount of \$575.00 and a pet deposit of \$575.00.

The Landlord states that the Tenants failed to pay rent for January 2013 and that on January 8, 2013 the Landlord served the Tenants with a 10 day notice to end tenancy for unpaid rent (the "Notice") by posting the Notice on the door. The Tenants states that they received no Notice. The Landlord states that the service of the Notice was personally witnessed by himself.

The Tenants state that they contacted the Landlord prior January 1, 2013 to arrange rent payments but were unable to meet the Landlord's technical requirements for payment. The Tenants state that they again called the Landlord in January 4, 2013 to inform the Landlord that their elderly father would be immediately sending four post dated cheques for the rent. The Tenants state that these cheques were provided to the Landlord on January 6, 2013. The Landlord confirms that these cheques were received but that he has no knowledge of when these cheques were received. The Landlord states that these cheques did not include a January 2013 cheque and the other cheques were made out for dates later than the 1st day of each month. The Tenants state that they assumed that the four cheques included a cheque for January 2013 rent and did not know that no cheque for January rent had been provided.

The Tenants state that they called the Landlord on January 18, 2013 in relation to repairs and that had they known that the rent was not paid they would not have called for repairs. The Parties agree that rent was paid in full by January 28, 2013. The Landlord states that upon payment of January rent the Tenants were informed verbally that the Landlord would still "want to proceed to enforce the application" and that the Tenants were provided receipts indicating payment was accepted for use and occupancy only. The Tenants state that they did not understand what this meant and that the Landlord had told them something to the effect that the hearing would determine whether the tenancy was reinstated. The Tenants state that had they received the Notice, they would have discovered that January rent had not been included in the cheques sent to the Landlord and would have ensured that January rent was paid.

The Tenants state that they also paid \$190.00 in late charges for January 2013. It is noted that the tenancy agreement provides for daily late fees of \$10.00 for late rent payments. The Landlord agrees that the late fees are not consistent with the requirements of the Act and that these monies will be repaid to the Tenants.

Analysis

Section 46 of the Act requires that upon receipt of a Notice to End Tenancy for non-payment of rent the tenant must, within five days, either pay the full amount of the arrears indicated on the Notice or dispute the notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch.

In considering whether the Notice is valid, I take into account the credible evidence of the Tenants in relation to their efforts to make rent payments and the undisputed evidence that four post-dated rent cheques were provided to the Landlord by January 6, 2013. I also consider that the Landlord did not inform the Tenants that the cheques received prior to the service of the Notice did not include a cheque for January 2013. I find that the Tenants made an honest mistake in not including this cheque and had the Landlord informed the Tenants of the lack of a January 2013 rent cheque that this would have been remedied immediately and more than likely before the Notice was issued. Although the Landlord provided evidence of service of the Notice, considering the Tenants reasonably held belief of rent being paid and the undisputed evidence of their call for repairs on January 18, 2013, I accept that for some unknown reason the Tenants did not have knowledge of this Notice and therefore could not have made an application to dispute the Notice. As such, I find that the Notice is not valid and I dismiss the Landlord's application.

Section 5 of the Act provides that parties may not avoid or contract out of the Act or regulations and that any attempt to do so is of no effect. Section 7 of the Regulations provides that a Landlord may not charge more than \$25.00 for the late payment of rent. Given that the tenancy agreement in relation to late fees is not consistent with the Regulations, I find that this part of the tenancy agreement is of no effect. I order the

Landlord to return the amount of \$190.00 to the Tenants forthwith and I provide a monetary order to the Tenants to give effect to this order.

Conclusion

The Landlord's application is dismissed.

I grant the Tenants an order under Section 67 of the Act for **\$190.00**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

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 19, 2013

Residential Tenancy Branch

