



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the tenant – CNR

For the landlord – OPR, OPB, MNR, MNSD, FF

Introduction

This hearing was convened by way of conference call in response to both parties' applications for Dispute Resolution. The tenants applied to cancel the Notice to End Tenancy for unpaid rent. At the outset of the hearing the tenant attended stated that they are moving from the rental unit today and therefore the tenants withdraw their application to cancel the Notice. The hearing proceeded with the landlord's application only.

The landlord has applied for an Order of Possession for unpaid rent and utilities; For an Order of Possession because the tenants have breached an agreement with the landlord; for a Monetary Order for unpaid rent and utilities; for an Order permitting the landlord to keep all or part of the tenants security deposit; and to recover the filing fee from the tenants for the cost of this application. At the outset of the hearing the landlord withdrew the application for an Order of Possession because the tenants have breached an agreement with the landlord.

One of the tenants and the landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The landlord and tenant 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 due to unpaid rent and utilities?
- Is the landlord entitled to a Monetary Order to recover unpaid rent and utilities?
- Is the landlord permitted to keep the tenants security deposit?

Background and Evidence

The parties agree that this tenancy started on March 15, 2012 for a fixed term tenancy which is due to expire on March 15, 2013. Rent is \$1,100.00 plus shared utilities. Rent is due on the 31st of each month. The tenants paid a security deposit of \$550.00 on March 15, 2012.

The landlord testifies that the tenants failed to pay all the rent for January, 2013. The tenants paid \$450.00 sometime at the beginning of January but no further rent was received by the landlord. The balance outstanding is \$650.00. The landlord served the tenants with a 10 Day Notice to End Tenancy on January 31, 2013 after receiving a Notice from the tenants to end the tenancy. The landlord testifies that as the tenants had not paid rent for February on that day the landlord also included unpaid rent for February on the Notice. The total amount of unpaid rent is now \$1,750.00.

The landlord testifies that the tenants were served the 10 Day Notice in person and this Notice informs the tenant of the outstanding rent of \$1,750.00 and outstanding utilities of \$241.00. The notice also informs the tenants that they have five days to pay the outstanding rent and utilities, or either move from the rental unit or file an application to dispute the Notice.

The landlord testifies that the addendum to the tenancy agreement has a clause to notify the tenants that they will be charged \$25.00 for late rent, after five days an additional amount of \$50.00 will be charged and an additional \$5.00 per day will be

added thereafter until the rent is paid. The landlord therefore seeks to recover these sums from the tenants for January and February, 2013.

The landlord testifies that the amount of the utilities has increased since the Notice was served. The landlord testifies that originally the tenants and the downstairs tenants paid an equal 50 percent share of utilities. However when a new single tenant moved into the basement unit that tenant approached the landlord about the 50 percent share not being fair when the tenants have five people living upstairs. The landlord testifies that she approached the male tenant and a verbal agreement was made that the utilities would be added together and the downstairs tenant would pay \$100.00 per month and these tenants would pay the remainder. The landlord testifies that the male tenant agreed to this arrangement.

The landlord has provided copies of the utility bills for December and January and one for February. The landlord testifies that the December bills came to a total of \$222.52, the downstairs tenant owes \$100.00 and these tenants owe \$122.52. The landlord testifies that the total bill for January is \$296.25, the downstairs tenant pays \$100.00 and these tenants owe the sum of \$196.25. The landlord has not provided all the bills for February at this time as the landlord has not yet received one of the bills to calculate the tenants' share of the bills for February.

The landlord seeks a Monetary Order to recover the unpaid rent and utilities. The landlord seeks an Order of Possession in case the tenants do not vacate the rental unit today. The landlord seeks an Order to keep the tenants security deposit of \$550.00 to offset against the unpaid rent. The landlord also seeks to recover the \$50.00 filing fee.

The tenant agrees that they owe rent to the landlord for January and February, 2013. The tenant disputes the landlords claim for utilities and testifies that she is not aware of any verbal agreement about the change to split the utilities. The tenant does however testify that her husband the other tenant may have agreed this with the landlord. The

tenant testifies that her husband is not available to attend the hearing to give testimony as he is at home packing to move.

The tenant testifies that the 10 Day Notice should be void as the landlord served it on the same day that rent was due and therefore not in accordance to the *Residential Tenancy Act (Act)*.

Analysis

With regard to the landlords claim for unpaid rent; Section 26 of the *Residential Tenancy Act (Act)* states:

A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Consequently, as the tenant attending agrees that they owe rent for January and February, 2013 I find the landlord is entitled to recover these rent arrears.

Consequently, the landlord will receive a Monetary Order to the sum of **\$1,750.00**.

With regard to the landlords claim for unpaid utilities; No percentage split for the utilities has been documented on the tenancy agreement. Therefore I cannot make a determination as to what the split had been agreed at the start of the tenancy. The landlord has testified that there was a verbal agreement in place with the male tenant to split the utilities in a more equitable manner with the downstairs tenant. As the male tenant has not attended the hearing to dispute this verbal agreement I must find in favor of the landlords claim for unpaid utilities for December, 2012 and January, 2013. The landlord has therefore established a claim, to the sum of \$318.77. The landlords claim for unpaid utilities for February, 2013 will not be dealt with at this hearing as the landlord is still waiting for the final utility bill to come in order to determine the tenants share. This section of the landlords claim is therefore dismissed with leave to reapply.

With regard to the landlords claim for late fees; The *Act* allows a landlord to charge a maximum amount of \$25.00 for late fees. Even if the landlord has a different agreement in place between the landlord and tenant for a higher amount the *Act* takes precedence and other terms are considered unconscionable. I therefore find the landlord is entitled to recover late fees to the sum of **\$50.00** for January and February.

I find the landlord is entitled to keep the tenants security deposit of \$550.00 pursuant to s. 38(4)(b) of the *Act*. This sum has been offset against the landlord monetary award. I further find as the landlord has been largely successful with this claim that 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 has been issued to the landlord for the following amount:

Unpaid rent for January and February	\$1,750.00
Unpaid utilities for December and January	\$318.77
Late fees for two months	\$50.00
Filing fee	\$50.00
Subtotal	\$2,168.77
Less security deposit	(-\$550.00)
Total amount due to the landlord	\$1,618.77

I accept that the tenants were served the 10 Day Notice to End Tenancy for unpaid rent, pursuant to section 88 of the *Residential Tenancy Act*. I have allowed the 10 Day Notice as the tenants still owed rent for January, 2013 and although the landlord had included Februarys rent on this Notice it does not make the Notice void. The Notice states that the tenants had five days to pay the rent or apply for Dispute Resolution or the tenancy would end. The tenants did not pay the outstanding rent within five days and although the tenants did apply to cancel the notice within five days as the tenants have stated they are moving out today the tenant attending has withdrawn their application.

Based on the foregoing, I find that the tenants are conclusively presumed, under section 46(5) of the *Act*, to have accepted that the tenancy ended on the effective date of the Notice and grant the landlord an order of possession pursuant to s. 55 of the *Act*.

Conclusion

I HEREBY FIND in partial favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for **\$1,618.77**. The order must be served on the Respondents and is enforceable through the Provincial Court as an order of that Court.

I HEREBY ISSUE an Order of Possession in favour of the landlord effective **two days after service upon the tenants**. This order must be served on the Respondents and may be filed in the Supreme Court and enforced as an order of that Court.

The landlord is at liberty to reapply for unpaid utilities for February when the utility bill is available and has been provided to the tenants with a 30 day demand for payment.

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 28, 2013

Residential Tenancy Branch

