



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HEAD INVESTMENTS
and [tenant name suppressed to protect privacy]

Dispute Codes: OPR, OPC, MNR, MNSD, MND, CNR, FF.

Introduction

This hearing dealt with applications by both the landlord and the tenant, pursuant to the *Residential Tenancy Act*.

The landlord had applied for:

- An order of possession pursuant to Section 55;
- A monetary order for rent owed, pursuant to Section 67;
- An order to retain all or part of the security deposit pursuant to Section 38;

The tenant had applied for the following:

- An order to cancel the notice to end tenancy for rent, pursuant to Section 46;
- Monetary compensation for over-paid utilities;
- An order to force the landlord to comply with the Act.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Issues to be decided:

Is the landlord entitled to an order of possession based on the Ten Day Notice to End Tenancy for Unpaid Rent?

Is the landlord entitled to monetary compensation for rental arrears?

Should the 10-Day Notice be cancelled as requested by the tenant?

Is the tenant entitled to monetary compensation for over-paid utilities?

Background and Evidence

The tenancy began in February 2013 and rent is \$800.00. The tenancy agreement indicated that heat was not included and the tenant was responsible for ½ of the hydro.

The rental premises consisted of the tenant's unit sharing utilities with a vacant commercial unit, including the gas furnace and the electricity. The landlord required that the tenant place the utilities in the tenant's name and there was apparently some discussion with respect to the landlord paying 50% of the hydro bill to the tenant by allowing a deduction from rent. However, the tenant apparently had to pay a deposit for the hydro hook-up in the amount of \$200.00.

According to the tenant, the arrangements for the hydro were unfair as the usage was charged at commercial rates and the landlord did not respond to her complaints. According to the tenant, in addition to the above, although she had signed the agreement committing to pay for her own gas heat, the furnace was large enough to service both of the units. The tenant testified that, despite the fact that the landlord had apparently blocked off vents to the vacant commercial unit, the gas bill was about \$1,200.00 for four months at the commercial rate. The tenant testified that she also had to pay a deposit of approximately \$250.00 to connect the gas.

The landlord testified that, although the tenancy agreement did not specify that the gas payments would be shared, the landlord voluntarily agreed to pay \$25.00 per month of the gas bill that was in the tenant's name.

The landlord testified that the tenant did not pay all of the rent owed for June, 2013 and withheld \$300.00. The landlord stated, that in order to address the tenant's concerns, the landlord finally agreed to put the utilities in the landlord's name. The landlord testified that the landlord also paid some of the utility arrears still owed.

The landlord testified that the parties then negotiated a new term for the tenancy agreement that allowed the tenant to pay rent of \$800.00 rent, including the utilities. The landlord pointed out that, despite this concession, the tenant still failed to pay \$800.00 rent for July 2013 and a Ten Day Notice to End Tenancy for Unpaid Rent was issued. The landlord testified that the tenant never paid the arrears and also defaulted on the \$800.00 rent owed for August 2013. The landlord is seeking an Order of Possession and monetary order for the arrears.

The tenant explained that she chose to withhold a portion of her rent because of the uncertainty about whether the tenant would be reimbursed for utilities already paid and the fact that there was an upcoming Dispute Resolution hearing.

The tenant is seeking monetary compensation for the utilities already paid.

Analysis:

I find that section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement.

In this instance, I find that the tenant chose to withhold payment of her rent on the basis that she felt the landlord was not complying with the Act. I find that this is not a permitted option under the Act.

A landlord can issue a Notice to End Tenancy for Unpaid Rent or Utilities under section 46 of the Act when rent is in arrears. I find that the evidence confirmed that the tenant did not pay the rent when it was due and the landlord duly issued a Ten Day Notice to End Tenancy for Unpaid Rent on July 6, 2013.

In regard to the interpretation of the utility terms in the tenancy agreement, I find that Section 6 of the Act states that a party can make an application for dispute resolution seeking enforcement of the rights, obligations and prohibitions established under the Act or the tenancy agreement. And section 58 of the Act also states that, except as restricted under the Act, a person may make an application for dispute resolution in relation to a conflict dealing with: (a) rights, obligations and prohibitions under the Act; OR (b) *rights and obligations under the terms of a tenancy agreement.* (My emphasis)

In determining what the term in the agreement entailed and whether or not it was enforceable under the Act, I find that Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if:

- a) the term is not consistent with the Act or Regulations,
- b) the term is unconscionable, or
- c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

In the contract between these two parties, I find that the term dealing with the utilities is both unconscionable, due to the circumstances, and not expressed in a manner that communicates the reciprocal rights and responsibilities of the parties.

That being said, I also find that the landlord acted in good faith to renegotiate the faulty term by placing the utilities in the landlord's name and agreeing that the tenant's rent included utilities.

In any case, regardless of all other factors, I find that the tenant failed to pay the rent when it was due, and therefore there is no basis to cancel the 10-Day Notice to End

Tenancy for Unpaid Rent. I find that the landlord is entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent.

With respect to the monetary compensation to the landlord, I find that the landlord is entitled to \$1,900.00 total rent owed for June, July and August 2013.

I find that the tenant is entitled to be reimbursed the \$450.00 the tenant claimed to have paid as utility deposits and an additional portion of the gas utility charges the tenant was charged for four months amounting to \$400.00.

In setting off the landlord's entitlement of \$1,900.00 and the \$850.00 granted to the tenant, I find that the remainder is \$1,050.00 in favour of the landlord. I order that the landlord retain the tenant's \$400.00 security deposit in partial satisfaction of the claim.

I hereby grant a monetary order of \$650.00 to the landlord. This order must be served on the tenant and may be enforced through Small Claims Court if unpaid.

Based on the evidence of both parties, I hereby issue an Order of Possession in favour of the landlord effective two days after service on the tenant. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

Neither party is entitled to be reimbursed for the cost of their applications.

Conclusion

Both parties are partly successful in their claims and are found to be entitled to monetary compensation. The landlord is granted an Order of Possession based on the Ten Day Notice to End Tenancy for Unpaid Rent.

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: August 20, 2013

Residential Tenancy Branch