



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Nai Goddard Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, FF, OPR, MNR, MNSD, MNDC, O

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover his filing fee for this application from the tenant pursuant to section 72; and
- other unspecified remedies.

The tenant applied for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that the landlord's agent (the agent) handed him the 10 Day Notice on July 4, 2014. The landlord confirmed that his agent received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on July 9, 2013. The tenant confirmed that he received a copy of the landlord's dispute resolution hearing package sent by the agent on July 17, 2013. The tenant also confirmed that he received a full copy of the landlord's written evidence. I am satisfied that the parties served the above documents to one another in accordance with the *Act*.

The tenant testified that he had not sent the landlord or his agent a copy of his written evidence package. Since the tenant did not serve his written evidence to the landlord, I cannot consider this evidence. However, the tenant gave undisputed sworn testimony

that his written evidence was comprised almost entirely of originals of documents provided to him by the landlord or his agent (e.g., original copy of rent receipt; original signed Residential Tenancy Agreement; original of 10 Day Notice). I have considered those documents provided to the tenant by the landlord in reaching my decision.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to retain the tenant's security deposit in partial satisfaction of the monetary award requested? Are either of the parties entitled to recover the filing fee for their applications from one another?

Background and Evidence

The tenant gave undisputed sworn testimony that his periodic tenancy based on an oral agreement commenced on or about April 1, 2009. At that time, both parties agreed that the monthly rent was set at \$1,800.00, payable in advance on the first of each month.

The tenant testified that in 2010, he approached the landlord about establishing a legal medical marijuana grow operation (grow-op) in the detached garage of this rental home. The tenant gave undisputed sworn testimony that the landlord signed the required document at that time required by the Federal Government to enable the tenant to establish his grow-op in this rental property. During that period, the tenant's rent remained at \$1,800.00 per month.

The tenant testified that shortly before the August 1, 2011 anniversary date for the tenant's grow-op, the landlord approached the tenant seeking an increase in the monthly rent to \$2,500.00. The tenant said that the landlord asked him to sign a one-year fixed term tenancy agreement at that time. The tenant said that he objected to this increase, as he realized that this increase was not allowed under the Act. After some negotiation, the tenant said that he agreed to sign a fixed term Residential Tenancy Agreement (the Agreement) for the 13-month period from August 1, 2011 until August 30, 2012. He said that the agreed monthly rent was \$2,000.00, an amount he said he has paid since that time. The tenant testified that he was never provided a signed copy of the Agreement signed on August 1, 2011.

The landlord maintained that the correct monthly rent since August 1, 2011 was set at \$3,000.00. He testified that the tenant and the landlord signed the Agreement on August 1, 2011. In the copy of the 12-month fixed term tenancy Agreement, the landlord entered into written evidence, the period identified was from August 1, 2011 until August 30, 2012. The landlord continues to hold a \$1,000.00 security deposit paid

on August 1, 2011. The amount stated on both the landlord's copy of that Agreement and the tenant's copy he entered into written evidence was \$3,000.00. The landlord said that he requested the increase in monthly rent from \$1,800.00 to \$3,000.00 because of the risks associated with the tenant's use of part of the rental property for a grow-op. He said that insurance costs are higher for properties containing legalized grow-ops and that such properties, once established, become more difficult to sell. He and his agent testified that the rental property is currently listed for sale. He testified that the presence of a grow-op, legal or illegal, affects the price of the property and the range of buyers potentially interested in the property.

The tenant asserted that the Agreement he signed in August 2011 called for monthly rent payments of \$2,000.00, the amount he has been paying. He claimed that the Agreement document entered into written evidence by the landlord and the copy of that Agreement provided to him are fraudulent. In making this claim, he noted irregularities on the background of both the monthly rent identified in the Agreement entered into written evidence by the landlord and in an unusual initialled section that the tenant asserted was added to this document after he signed the Agreement. He gave sworn testimony that the relevant section of the copy of the Agreement provided to the tenant much later than when it was signed showed even more grey areas around the monthly rent amount and the tenant's alleged initials beside that section of the Agreement. The landlord denied having altered this Agreement and testified that he added a handwritten amount of "Three Thousand" beside the numeric value as a way of clearly signalling the tenant's agreement to the monthly amount of the tenant's rent.

The landlord gave undisputed sworn testimony that the tenant did not pay any rent for this property for one year. He entered into written evidence an undisputed document signed by both the landlord and the tenant in which the parties agreed that the tenant owed the landlord's company (then the landlord) \$21,700.00 as of March 15, 2011. After payments made and credits given for \$4,000.00 in work performed by the tenant for the landlord, this amount was lowered to \$17,700.00, the amount the landlord maintained is still owed by the tenant to the landlord as of April 9, 2011. The landlord also entered into written evidence a copy of a July 4, 2013 letter from the agent to the tenant in which the agent asserted that there remained an outstanding rent balance of \$1,000.00 owing for July's rent and an overall balance owing of \$17,700.00.

The tenant gave undisputed testimony that he performed work for the landlord from time to time as a locksmith and building contractor. He also testified that he also assisted the landlord in removing non-paying tenants who used a number of the landlord's properties as grow-ops. He said that over time this work and cash payments he made to the landlord addressed the \$17,700.00 he agreed he owed to the landlord on April 9,

2011. Both parties agreed that receipts have seldom been issued by the landlord for the tenant's rent payments or for work the tenant performed for the landlord.

The parties agreed that the landlord's agent prepared a June 18, 2013 Lease Agreement for the tenant's signature to cover the 12-month period commencing on July 1, 2013. Monthly rent according to this proposed new fixed term tenancy was set at \$3,000.00. The landlord entered a copy of this Lease Agreement into written evidence. The parties agreed that the tenant refused to sign this Lease Agreement. The tenant claimed that this Lease Agreement contravened the rent increase provisions of the *Act* and the *Regulations*.

The landlord's 10 Day Notice identified \$1,000.00 as owing as of July 4, 2014, the date of the 10 Day Notice. The landlord's application for a monetary award was for \$5,000.00. The landlord testified that much more than \$5,000.00 was actually owing, but he doubted whether he would be able to recover these funds from the tenant.

The tenant entered into written evidence the original of a receipt for the tenant's cash payment of \$2,000.00 paid on July 2, 2013 to a representative in the agent's office. The tenant noted that the agent's representative had incorrectly cited "\$200.00" in the numeric portion of the receipt, but the receipt was written as having received "Two thousand" dollars. The tenant noted that the copy of this receipt entered into written evidence by the landlord using the same receipt number (i.e., 401983) revealed two significant differences with the original he provided. In the copy of the receipt entered into written evidence by the landlord, an extra zero was added to the original receipt, now correctly showing a payment of \$2,000.00. In addition, the tenant asserted that someone had added a notation to the original receipt that the cash payment was received for "use/occupance." When questioned about the tenant's claim that the landlord, his agent or one of the agent's representatives had altered the original receipt entered into written evidence by the agent, the agent said that this was likely a correction of the original errors that had been made when the receipt was issued.

Analysis – Landlord's Application for an Order of Possession

I find that there is undisputed sworn testimony that this tenancy commenced as a periodic tenancy on or about April 1, 2009 for a monthly rent of \$1,800.00. Once that monthly rent was established, the landlord became bound by the provisions of the *Act* and the *Regulations* restricting landlords from increasing a monthly rent in excess of the annual allowable percentages permitted under the *Act* and the *Regulations*. For example, for 2011, the maximum allowable rent increase was 2.3 %, unless a landlord applied for authorization to impose an additional rent increase. Even when a landlord

seeks to increase rent within the allowable provisions of the legislation, a landlord must give a tenant three month's written notice using the proper RTB forms for doing so.

In this case, the landlord did not utilize any of the provisions of the *Act* or the *Regulations* to seek an additional rent increase beyond the \$1,800.00 amount established when this periodic tenancy based on an oral agreement began. Rather, the landlord maintained that the changed circumstances resulting from the tenant's use of the detached garage of this rental property as a grow-op constituted an essentially different type of rental than was provided when this tenancy began.

From a contractual perspective, a landlord may be able to establish that an increase in rent in excess of that allowed under the *Act* or the *Regulations* is permitted if additional consideration has been provided to the tenant in exchange for the increase in rent. For example, if acreage was made available to a tenant when no such acreage was previously included in the rent or if a large storage shed was added to an existing tenancy agreement, perhaps a landlord could increase monthly rent in a new fixed term tenancy agreement. Had the landlord's agreement to let the tenant use the garage for a legalized medical marijuana grow-op been contingent on the tenant's agreement to increase his monthly rent, then I might accept that consideration had been exchanged by both parties in what was essentially a new contractual agreement, one not bound by the terms of the existing periodic tenancy agreement. However, in this case the landlord waited almost a full year before he decided that he needed further monetary consideration beyond that which the tenant was already paying in exchange for the landlord's agreement to let him use the garage as a grow-op. The landlord was not bound by a fixed term tenancy agreement when he allowed the tenant to commence using the garage as a grow-op. In fact, there was no written Agreement whatsoever until August 1, 2011. According to contract law, a party cannot introduce new terms to an agreement for past consideration given. For these reasons, I find that the landlord did not provide any additional consideration when he attempted to increase the tenant's monthly rent in August 2011. By then, the landlord had already given the tenant consideration almost one year earlier, beyond that which was established in his original oral periodic tenancy agreement.

Based on the tenant's testimony, I find that the tenant has acquiesced in allowing the landlord to increase the monthly rent from \$1,800.00 in April 2009 to \$2,000.00 as of August 1, 2011. Although \$2,000.00 is significantly higher than the *Act* and the *Regulations* would have allowed at that time, the tenant has acknowledged that he accepted the landlord's increase in rent as of August 1, 2011. For these reasons, I find that the correct monthly rent for this tenancy as of August 1, 2011 is \$2,000.00.

Although it has little actual bearing on my decision, I also note that I find sufficient written evidence and sworn testimony before me to call into question the accuracy of the \$3,000.00 in monthly rent shown in the Agreement entered into written evidence by the landlord. I find that the evidence of tampering with an issued receipt of July 2, 2013, lends credibility to the tenant's claim that the landlord and his agent have been willing to submit altered written evidence to further their interests in ending this tenancy while the landlord tries to sell this property. The unusual markings in the background of the monthly rent identified in the Agreement, the unusual addition of a handwritten monthly rent beside the numeric notation, the insertion of an additional initial box in this section of the Agreement and the tenant's claim that he never received this copy of the Agreement until long after he signed it raises further questions as to the landlord's claim that the tenant agreed to pay \$3,000.00 in monthly rent as of August 1, 2011.

Based on my finding that the correct monthly rent for this tenancy as of August 1, 2011 was \$2,000.00, it is unclear as to whether there is any amount owing towards this tenancy. The only rent identified as owing for this tenancy noted on the 10 Day Notice was \$1,000.00, which the landlord and his agent claimed was owed as of July 4, 2013. I understand that the agent only identified the amount which the agent claimed was owing for July 2013 on the 10 Day Notice. He chose not to include the \$17,700.00 that he and the landlord alleged was owing since April 9, 2011 in the 10 Day Notice.

As the landlord has only sought an end to this tenancy on the basis of the \$1,000.00 identified as owing on the 10 Day Notice, I base my decision regarding the landlord's request for an Order of Possession on whether I find that this amount of rent was owing for unpaid rent due on July 1, 2013, as stated on the 10 Day Notice. For the reasons outlined above, I find that the correct monthly rent that was due on July 1, 2013 was \$2,000.00. Since there is undisputed evidence that the tenant paid \$2,000.00 in monthly rent for July 2013, I find that the landlord's 10 Day Notice has provided no basis for the landlord to obtain an end to this tenancy and an Order of Possession. I dismiss the landlord's application to end this tenancy and obtain an Order of Possession on the basis of the 10 Day Notice of July 4, 2013, without leave to reapply.

Analysis – Landlord's Application for a Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has

been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, I find that the landlord has provided very few details to quantify how he arrived at his claim for \$5,000.00, or for that matter his more general assertion that the tenant owed him in excess of \$17,700.00. As noted above, the agent explained why these amounts varied considerably from the \$1,000.00 amount identified as owing on July 4, 2013 as stated in the 10 Day Notice. While the landlord has provided few details regarding his application for unpaid rent of \$5,000.00, there is also a signed statement from the tenant confirming that he owed the landlord \$17,700.00 on April 9, 2011. The very informal nature of the working relationship between the parties that apparently happened parallel to this Agreement clouds efforts to establish what if anything remains owing for this tenancy. I have serious reservations regarding the tenant's claim that he paid \$17,700.00 to the landlord since April 2011 or performed work in kind in that amount without receiving receipts. However, Item 4 of the landlord's own written evidence identified some deductions for rent paid in April 2011 and for \$4,000.00 in work performed by the tenant on behalf of the landlord. The landlord also confirmed that the tenant has performed work for the landlord for which he was given credit against his rent. Neither the landlord nor the agent disputed the tenant's claim that he has performed work for the landlord as a trained locksmith, a contractor and an individual adept at obtaining ends to tenancy for the landlord's grow-op tenants.

I find it very difficult to ascertain whether the landlord's claim for a monetary award of \$5,000.00 involves only the difference between the \$3,000.00 in monthly rent the landlord believed was due him since August 1, 2011 and the \$2,000.00 in monthly rent the tenant maintained was due since that date. For example, this difference of opinion as to the correct monthly rent due would result in an annual \$12,000.00 difference in the rent owing for this tenancy. By April 9, 2011, this difference in the parties' view of the monthly rent due would result in a \$21,000.00 difference between what the tenant claimed he was required to pay and what the landlord expected to be paid. Once the \$4,000.00 allowance for work performed by the tenant is deducted from the amount owing as of March 15, 2011, it becomes unclear as to whether the tenant owes the landlord anything at this point.

Based on the written evidence and sworn testimony before me, I find that virtually all of the \$17,700.00 the landlord claimed was owed to him by the tenant results from the landlord's attempt to increase the monthly rent for this tenancy to \$3,000.00 from \$1,800.00 in August 2011. As I find no legal basis for the landlord to have raised the tenant's rent beyond the \$2,000.00 the tenant said he agreed to pay in August 2011, I dismiss the landlord's application for a monetary award without leave to reapply.

Since I have not allowed the landlord's claim for a monetary award and this tenancy continues, I also dismiss the landlord's application to retain the tenant's security deposit. As the landlord has been unsuccessful in his application, he bears the cost of his filing fee for this application.

As the tenant has been successful in his application, I allow the tenant to recover his \$50.00 filing fee from the landlord.

Conclusion

I allow the tenant's application to set aside the landlord's 10 Day Notice issued on July 4, 2013. I dismiss the landlord's application to end this tenancy on the basis of the 10 Day Notice issued on July 4, 2013 and his request for an Order of Possession without leave to reapply. This tenancy continues.

I order that the monthly rent for this tenancy as of August 1, 2011 is \$2,000.00, which is also the current monthly rent.

I dismiss the landlord's application for a monetary Order without leave to reapply. I dismiss the landlord's application to retain the tenant's security deposit as this tenancy continues. I dismiss the landlord's application to recover his filing fee from the landlord without leave to reapply.

I order the tenant to reduce his next scheduled monthly rent payment by \$50.00 in order to recover his filing fee for his application from the landlord. Once this one-time reduction in monthly rent has occurred, the tenant's monthly rent reverts to the \$2,000.00 established in this decision.

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 14, 2013

Residential Tenancy Branch

