



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes: MNR OPR MNSD MNDC FF

### **Introduction:**

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) A monetary order pursuant to Sections 46 and 67 for unpaid rent;
- b) An Order of Possession pursuant to sections 46 or 49 and 55;
- c) An Order to retain the security deposit pursuant to Section 38; and
- d) An order to recover the filing fee pursuant to Section 72.

This hearing also dealt with an application by the tenant pursuant to the Residential Tenancy Act (the Act) for orders as follows:

- e) To cancel a Notice to End Tenancy for unpaid rent and, in the alternative, a Notice for landlord's use of the property;
- f) For a return of the security deposit pursuant to section 38;
- g) An Order that she might obtain a free month's rent for May pursuant to sections 49 and 51; and
- h) To recover the filing fee for this application.

### **SERVICE**

Both parties attended the hearing and each confirmed receipt of the Notice to End Tenancy dated May 26, 2014 for unpaid rent and of the Notice to End Tenancy dated April 15, 2014 for landlord's use of the property. They also confirmed receipt of each other's Application for Dispute Resolution. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing.

### **Issue(s) to be Decided:**

Has the landlord proved on the balance of probabilities that there was unpaid rent and he is now entitled to an Order of Possession and a monetary order for rental arrears and/or loss? If so, to what amount is he entitled? In the alternative, has the landlord proved on the balance of probabilities that he intends to occupy the home and the

Notice to End Tenancy for landlord's use of the home was issued in good faith? Is the landlord entitled to recover the filing fee of \$100?

Or is the tenant entitled to relief on either of the Notices? Is she entitled to one month's free rent and to the return of her security deposit and recovery of the filing fee?

**Background and Evidence:**

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. It is undisputed that the tenancy commenced in October 2010, that rent is \$2300 a month and a security deposit of \$1500 was paid on September 12, 2010; rent was originally \$3,000 but was renegotiated at \$2300. The lease agreement states that two thirds of utilities were to be paid but the tenant contended she had never paid utilities and thinks it was a mistake. This is a new landlord who just purchased the property who had no history of the background so he agreed to waive utility costs. It is undisputed that the tenant has not paid rent for May or June and had not returned the keys as of today's date (July 9, 2014) so the landlord requests rent arrears for May 2014 (\$2300) and rental loss for June and July (\$2300 + \$667.74 (calculated at \$74.19 per diem). The landlord submits that the tenant's Application to set aside the Notice to End Tenancy for unpaid rent should be dismissed. The landlord further submits that the tenant's Application to set aside the Notice to End Tenancy for landlord's use of the property should also be dismissed as the tenant did not file her Application until May 27, 2014, well beyond the 15 day limitation period set out in the Act.

The tenant said that there were confusing circumstances resulting in the rent not being paid. The new owner did not introduce himself until May 14, 2014 by email, she was unsure that the house was sold (although there was a sold sign on April 13, 2014 as noted in her email and she also asks in an email to the realtor on April 16, 2014 if he knows what the new owners are planning). She said it was also confusing that the new owner requested she make out the rent cheque to his wife who had a different surname. She submitted she was willing to pay the rent but the real estate company who acted for the previous owner had her postdated cheques and she was unwilling to write new cheques until they were returned and she advised the new landlord of this. She said she wrote a cheque for \$800 and asked the new owner to credit her security deposit for the balance but the owner refused.

The landlord acknowledged he should have contacted the tenant on May 1, 2014 when he took possession; he had no knowledge of the realtor's communication with the tenant but he did contact the realtor after her email to ask if the tenant's old cheques had been returned and he was assured they had been. He said the other two tenants

on the property had no problem paying their rent to him. He said he also made it clear by email on May 14, 2014 that rent was to be paid to his wife. He notes that on June 3, 2014, the tenant acknowledged in an email that she had the old cheques and submits she still could have paid her rent in full but chose not to do so. The landlord's Application was filed on June 19, 2014. The landlord said it was clear the property was sold as there was a sold sign on it and an architect gained lawful access on May 6, 2014 to draw up some plans for renovation. The landlord submitted that the tenant informed him by email that the tenant was not vacating until July 1, 2014 and that rent for May 2014 was therefore due and payable and the tenant disqualified herself from the benefits of a free month's rent for the section 49 Notice by not paying rent for May and forcing him to issue a 10 day Notice for unpaid rent. The landlord submits that under section 21 of the Act, a tenant cannot unilaterally deduct the amount of the security deposit from rent outstanding. He has not accepted or cashed the \$800 cheque submitted on May 22, 2014.

In evidence are two Notices to End Tenancy one for unpaid rent and the second for owner's use, many emails from the tenant to the realtor and other parties; one email dated April 16, 2014 asks if she can pay all the NSF by the end of the month or if she needs to pay half now. She notes she is waiting for her taxes to come in. In another email dated April 22, she tells the real estate managers that she prefers all correspondence to be by email and attempts to call her will be considered harassment. On April 23, 2014, she proposes that they cancel the funds she owes from the NSF cheque as it was as much their fault as hers for cashing her February rent cheque in the middle of March 2014 and in her statement she notes the March rent cheque deposited March 19, 2014 was returned NSF.

On May 22, the landlord by email offered to collect the rent that day or the next day or she could drop it off at his mailbox but she declined as she said she did not have her post dated cheques written out to her old landlord. The written statement of the tenant says she got a receipt for payment of the NSF cheque on May 28, 2014 and later, she states that she did not realize that the realtor had returned her post dated cheques in the same envelope. On May 23, 2014, the landlord's lawyer sent her a demand for past due rent advising that failure to pay might result in commencement of eviction proceedings. When no payment was received, the Notice to End Tenancy for unpaid rent was issued on May 26, 2014. To date it is undisputed that the May rent has not been paid.

The tenant states that she had medical issues and family matters to attend to and this whole process was so upsetting and confusing that she is suffering extreme stress.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

**Analysis:**

**Order of Possession:**

The Notice to End Tenancy for unpaid rent was served May 26, 2014 and the tenant disputed it on May 27, 2014. The onus is on the landlord to prove on a balance of probabilities that the tenant owed rent as stated and did not pay it within the 5 days allowed by the Act. I find the landlord satisfied this onus and the weight of the evidence is that the tenant chose not to pay the rent even after being cautioned as to the consequences of not doing so. Although the tenant contended the landlord did not meet his obligation as a new owner to meet her, I find that section 26 of the Act provides that a tenant must pay rent when due whether or not the landlord meets his obligations. Furthermore, I find that even when the landlord did contact her on May 14, 2014, he provided further opportunity to pay the rent when he served her the 10 day Notice to End Tenancy but she chose not to pay it within the 5 days provided in the Act to cancel the Notice and has not paid it to date. I find under section 21 of the Act, a tenant cannot unilaterally deduct the amount of the security deposit from rent outstanding and I find the landlord was entitled not to accept or cash the \$800 cheque offered on May 22, 2014 as an alleged balance of rent owing. I find the tenant had received all her post dated cheques from the realtor on May 28, 2014 although she alleges she did not realize that until June, 2014. I find the landlord entitled to an Order of Possession based on the 10 day Notice to End Tenancy. As an Order of Possession is issued based on the 10 day Notice, I find it is moot to consider the two month Notice to end Tenancy for landlord's use and I dismiss this portion of the tenant's Application.

**Monetary Order:**

The onus is on the applicant to prove on a balance of probabilities their claim. I find the landlord has satisfied the onus of proving the tenant owes rent of \$2300 for May, 2014, \$2300 for June 2014 and \$667.74 to July 9, 2014. Apparently the tenant has vacated but only arranged to return the keys today in the hearing so owes rent to date as she has not yielded possession of the premises.

Although the tenant contended she was entitled to a month's free rent, I find that the Order of Possession has been issued as a result of a 10 day Notice to End Tenancy and not as the result of the two month Notice. Therefore, I find the tenant not entitled to compensation under section 49 and 51; I find she received some warning of these potential consequences but chose to not pay rent in full for May 2014. I dismiss the Application to cancel the Notice to End Tenancy for unpaid rent.

**Conclusion:**

I dismiss the application of the tenant in its entirety without leave to reapply and I find she is not entitled to recover filing fees for her application. I find the landlord entitled to an Order of Possession and a Monetary Order as calculated below. I find the landlord entitled to retain the security deposit and to recover filing fees for their Application.

Calculation of Monetary Award:

Rent arrears and loss (2300+2300+667.74)	5267.74
Filing fee	100.00
Less security deposit (no interest 2010-14)	-1500.00
Total Monetary Order to landlord	3867.74

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: July 09, 2014

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Residential Tenancy Branch

