



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PUPPY HOLDINGS INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent 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; and
- authorization to recover its filing fee for this application from the tenant 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, to call witnesses and to cross-examine one another. The landlord was represented by its agent. The agent is the trustee of a trust that is the shareholder of the corporate landlord. On this basis I accept that the agent has authority to act on behalf of the landlord.

The agent testified that an employee of the landlord personally served the tenant with notice of this hearing on 10 February 2015. I reminded the agent that the landlord's application was not filed until 13 February 2015. The agent then testified that an employee of the landlord personally served the tenant with notice of this hearing on 13 February 2015. The tenant confirmed that she received notice of this hearing on the Friday. 13 February 2015 was a Friday. On the basis of this evidence, I am satisfied that the tenant was served with notice of this hearing pursuant to section 89 of the Act.

The agent testified that his employee personally served the tenant with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) on 2 February 2015. The tenant confirmed that she received the 10 Day Notice. On the basis of this evidence, I am satisfied that the tenant was served with the 10 Day Notice pursuant to section 88 of the Act.

Preliminary Issue – *Res Judicata*

This tenancy was subject of an earlier dispute resolution hearing. That hearing dealt with the tenant's application to cancel the 10 Day Notice. At that hearing the agent made an oral request for an order of possession. The previous arbitrator upheld the 10 Day Notice and, pursuant to subsection 55(1), awarded the landlord an order of possession.

Res judicata is the legal doctrine preventing, among others, the rehearing of an issue that has been previously settled by a judicial decision. There are three elements to this doctrine:

- an earlier binding decision has been made on the issue,
- a final judgment on the merits has been made, and
- the involvement of the same parties.

In this case, there is a final and binding earlier decision between these parties on the legal issue of the landlord's entitlement to an order of possession. On this point, I find that I am bound by the finding of the previous arbitrator. However, the previous arbitrator made no determination as to the quantum of rent outstanding; merely that some amount was outstanding to substantiate the 10 Day Notice. This issue of quantum is properly considered as part of the application before me. It is up to the landlord to provide evidence in this hearing as to the quantum of rent outstanding.

I explained the concept of *res judicata* to the agent at the hearing. I hope that this written explanation is of some assistance to the landlord's agent so that he may understand the impact of the previous decision on his current application.

I find that the landlord's application for an order of possession is *res judicata*, and, as a result, I cannot consider the landlord's application for an order of possession. The issue of the monetary order is for me to decide.

In coming to the above determination, I also note that the tenant and agent both testified that the tenant has vacated the rental unit in order to comply with the order of possession issued by the previous arbitrator. As possession of the rental unit has returned to the landlord, the landlord's current application for an order of possession for unpaid rent is also moot, even if the legal principle of *res judicata* did not prevent me from considering the landlord's application for an order of possession.

Preliminary Issue – Evidence Not Served to Tenant

The tenant testified that she did not receive copies of the landlord's evidence with notice of this hearing. The agent confirmed that the landlord's evidence was not served on the tenant. The evidence included copies of the 10 Day Notice, Proof of Service of Notice to End Tenancy and the tenancy agreement.

The agent submitted that these documents should be admitted despite not being served on the tenant as these were documents that were in the possession or control of the tenant. Further, the agent argued that the tenant did not serve evidence in the earlier hearing regarding this tenancy. What occurred in the last hearing is not relevant: the evidence in this hearing is all that is relevant to determining the facts before me (with the above-noted exception with respect to the issue *res judicata*).

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be received by the respondent not less than 14 days before the hearing.

In this case, the tenant has not received copies of the landlord's evidence. The tenant testified that her tenancy agreement provides for a late fee other than the one the landlord claims. The tenancy agreement before me stated that the late fee was \$25.00. The tenant is entitled to examine the documents provided to me as evidence. As the tenant has not been able to examine the landlord's evidence, I refuse to admit the landlord's documentary evidence as to do so would unduly prejudice to the tenant.

The landlord's documentary evidence is not admitted.

Preliminary Issue – Landlord's Application to Amend

At the hearing, the agent stated that he wished to amend the landlord's application to include the costs of cleaning the rental unit and rekeying the rental unit. These costs were incurred by the landlord after the tenant vacated the rental unit.

Paragraph 64(3)(c) allows me to amend an application for dispute resolution.

The landlord filed its application for dispute resolution on 13 February 2015. The tenant vacated the rental unit no earlier than 20 February 2015 and no later than 23 February 2015. At the time the landlord filed its application, any application for compensation for the state of the rental unit at the end of the tenancy was premature. Further, the tenant had no way of knowing from the landlord's application (as pleaded) that these issues were at all before me. As a result, the tenant did not have proper notice of the landlord's application. To allow the landlord's amendment would be a violation of the tenant's rights to procedural fairness within this administrative law proceeding.

The landlord's application to amend its application is refused.

Preliminary Issue – Parties Request that I Speak to The Previous Arbitrator

At the hearing, the parties requested that I speak to the previous arbitrator. I informed the parties at the hearing that this would not be happening. Speaking to the previous arbitrator before writing my decision would violate administrative law principles in two ways:

1. The parties have a right to make submissions on the evidence on which I base my decision. Conducting an investigation without allowing parties this chance for response would not be in keeping with my obligations of procedural fairness.
2. The decision maker that hears any case is obligated to make his or her decision free from influence of others. Consulting with the previous arbitrator may create an appearance that my decision was influenced by another decision maker.

Furthermore, I am not convinced that the previous arbitrator has any information or evidence that could not be introduced by the parties. In addition, the legal effect of the previous hearing is encapsulated within the previous arbitrator's decision on that hearing.

The parties' request that I speak to the previous arbitrator is denied.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 1 May 2014. The landlord and tenant entered into a written tenancy agreement dated 26 April 2014. Monthly rent of \$1,010.00 was due on the first. The agent testified that the landlord continues to hold the tenant's security deposit of \$505.00, which was collected 1 May 2014.

The landlord issued a 10 Day Notice to the tenant dated 2 February 2015. This notice set out an effective date of 13 February 2015. The 10 Day Notice set out that the tenant had failed to pay \$1,010.00 in rent that was due 1 January 2015. The agent did not explain why this amount fails to include February's rent or account for a partial payment made in January.

The agent testified that the tenant made a partial rent payment of \$310.00 on 2 January 2015. The agent testified that the landlord has not received any payments from the tenant since this payment (with the exception of a cheque which was returned for insufficient funds). The agent testified that the landlord has not received any receipts for emergency repairs from the tenant. The tenant confirmed that she has not submitted any receipts for emergency repairs to the landlord. The tenant and agent both testified that this tenancy is not the subject of any outstanding orders of this Branch.

The tenant admits that she has failed to pay partial rent for January in the amount of \$700.00 and rent for February in the amount of \$1,010.00. The tenant argues that she should be allowed a reduction in February's rent because the tenant testifies that she vacated the rental unit on 20 February 2015.

The agent testified that the tenant did not vacate the rental unit until 23 February 2015. The agent testified that he has been unable to rerent the rental unit.

Analysis

Monetary Order for Unpaid Rent

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

The tenant and agent both agree that the tenant failed to pay a portion of January's rent and all of February's rent when due. The tenant and agent both agree that the tenant was not entitled to deduct any amount for emergency repairs or any amount pursuant to an order of this Branch.

I find that the landlord has proven its entitlement to \$1,710.00 on the following terms:

Item	Amount
Unpaid January Rent	\$700.00
Unpaid February Rent	1,010.00
Total Rent Arrears	\$1,710.00

I find that the landlord would have been unable to rerent the rental unit for the remainder of February.

The tenant raised the issue as to whether or not she was entitled to a reduction in the amount of rent payable as a result of her vacating the rental unit before the end of February. As the landlord was entitled to the entirety of February's rent on 1 February 2015, the landlord was entitled to receive that amount. Whether or not the tenant would be entitled to recover a portion of that amount as part of a claim in restitution is beyond the scope of this application (see, for example, the consequences of frustration as set out in Residential Tenancy Policy Guideline, "34. Frustration"). In any event, I find that the landlord has shown that they were entitled to the full amount of February's rent: partly on the basis of the tenant's use and occupancy of the rental unit and partly on the basis of the landlord's rental loss for the remainder of the month.

The landlord's application to recover rent arrears is allowed.

Monetary Order for Late Fees

Paragraph 7(1)(d) of the *Residential Tenancy Regulations* (the Regulations) provides that a landlord may charge an administration fee of \$25.00 for late payment of rent. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee.

| In this case, there is disagreement about the amount of the late fee. Further, there is only oral evidence on the existence of the late fee before me. Oral evidence provided in the place of available documentary evidence is given less weight as it is inherently less reliable. This is especially the case where documentary evidence is available that could easily substantiate the landlord's case: The best evidence available should be provided.

There is no tenancy agreement in evidence before me. Accordingly, the landlord has failed, on a balance of probabilities, to prove that the tenancy agreement contains a clause regarding the payment of late fees and the quantum of any such payment.

The landlord's claim to recover \$50.00 in late fees from the tenant is dismissed without leave to reapply.

Recovery of Monetary Order from Tenant's Security Deposit

The landlord has applied to keep all of the tenant's security deposit in partial satisfaction of the monetary order for unpaid rent. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

The landlord's application to retain the tenant's security deposit is allowed.

Recovery of Filing Fee

The landlord has been successful in two components of his applications and unsuccessful in two components of his applications. The landlord failed to comply with the procedural requirements regarding service of evidence. Furthermore, the agent was unsuccessful in his application to amend the landlord's application. In addition, the agent carelessly provided me with false testimony regarding the date he served the dispute resolution package. This false testimony was provided under oath.

Subsection 72(1) permits an arbitrator to make a discretionary award of repayment of a filing fee from one party to another. Generally this repayment is ordered where a party has been successful in its application. In this case, on the basis of the factors listed above, I am excising my discretion to refuse to award recovery of the filing fee from the tenant.

The landlord's application to recover its filing fee from the tenant is denied.

Conclusion

The landlord's application for an order of possession is not properly before me as a final and binding decision has already been issued on that matter, and the tenancy has ended.

The landlord's application for a monetary order for late fees is dismissed without leave to reapply. The landlord's application to recover its filing fee from the tenant is dismissed without leave to reapply.

The landlord's application for a monetary order for unpaid rent is allowed. The landlord's application to retain the tenant's security deposit in partial satisfaction of the monetary order is allowed.

I issue a monetary order in the landlord's favour in the amount of \$1,205.00 under the following terms:

Item	Amount
Unpaid January Rent	\$700.00
Unpaid February Rent	1,010.00
Offset Security Deposit Amount	-505.00
Total Monetary Order	\$1,205.00

The landlord is provided with this order in the above terms and the tenant must be served with this order as soon as possible. Should the tenant fail to comply with these orders, these orders may be filed in the Small Claims Division of the Provincial Court and enforced as orders of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: March 10, 2015

Residential Tenancy Branch

