



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MNR, MNDC, MNSD, MND, FF

Introduction

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

- an Order of Possession for repeatedly late paying rent and assigned or sublet the rental unit without landlord's written consent, pursuant to section 55;
- a monetary order for unpaid rent, pursuant to section 67;
- a monetary order 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 tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

The tenant did not participate in the conference call hearing, which lasted approximately 45 minutes. The landlord ("landlord") and his agent ("agent") attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed he is the owner of the rental unit while his brother, the agent manages the property.

The agent testified that on March 3, 2016 the agent forwarded the landlord's application for dispute resolution package ("Application") via registered mail to the tenant. The agent provided a tracking number from Canada Post as proof of service. The agent testified that an evidence package was sent to the tenant via registered mail on March 24, 2016. The agent provided a receipt a tracking number from Canada Post. Based on the testimony of the agent and in accordance with sections 89 and 90 of the *Act*, I find that the tenant has been deemed served with the application and evidence on March 8, 2016, the fifth day after their registered mailing and the evidence package on March 29, 2016, the fifth day after their registered mailing.

The agent testified the landlord's 1 Month Notice to End Tenancy for Cause, dated January 25, 2016, ("1 Month Notice") was sent by registered mail to the tenant at the rental unit, on this same date. The agent provided a Canada Post tracking number to confirm this mailing. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's 1 Month Notice on January 30, 2016, five days after it was mailed.

Preliminary Issue – Amendment of Landlords' Application

The agent confirmed that he wished to amend the landlords' Application to increase his monetary claim to include April 2016 unpaid rent of \$4,400.00 total. I find that the tenant should reasonably have known that the landlord would suffer this loss of income if he did not pay the rent or vacate the rental unit to allow it to be re-rented. Based on the undisputed evidence and in accordance with section 64(3)(c) of the *Act*, I amend the landlords' Application to include a monetary claim for March and April 2016 unpaid rent of \$4,400.00 total.

Issues to be Decided

Is the landlord entitled to an Order of Possession for repeatedly late paying rent? If not, is the landlord entitled to an Order of Possession for assigned or sublet the rental unit without landlord's written consent?

Is the landlord entitled to a monetary award for unpaid rent and utilities?

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested?

Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

The agent testified that the tenancy began March 1, 2012 on a month-to-month basis. The tenant occupied the upper level of the two level rental unit, while the downstairs was rented out to a second tenant. Monthly rent in the amount of \$1,500.00 was payable on the first day of each month. The tenant and the landlord signed a tenancy

agreement on February 29, 2012. A security deposit of \$750.00 was remitted by the tenant on February 29, 2012. The agent is still in possession of this deposit. The tenant continues to reside in the upper suite of the rental unit.

On January 25, 2016, the agent issued a 1 Month Notice to the tenant for repeatedly late payment of rent and assignment or sublet of the rental unit without the landlord's written consent. The notice indicates an effective move-out date of March 1, 2016.

The agent testified the tenant was habitually late with his rent and has provided bank statements showing deposits into his account past the rent due date. The agent testified following the departure of one of the lower suite tenants the tenant contacted him and enquired on the rent for the lower suite and for the entire rental unit. The agent provided a copy of the text thread dated November 16, 2012, in which the agent replied to the tenant. Specifically, the agent told the tenant the amount the lower tenant paid was \$825.00 and the amount a previous tenant paid for the entire rental unit was \$2,350.00. The text thread shows the agent also wrote, "knocking off a few bucks probably looking at \$2,200.00." It is the agent's position that although this text thread established the tenant's monthly rent as \$2,200.00, this rental amount was not payable until March 2013. In March 2013, an individual that was living upstairs with the tenant moved to the lower suite. The agent acknowledged he knew the tenant began renting out the lower suite and even renting out rooms in his own upper level suite, however the agent contends this was not agreed to in writing.

The agent seeks a monetary order of \$14,200.00 for unpaid rent accrued from November 1, 2014 to April 1, 2016 inclusive. The agent testified the tenant paid \$1,100.00 on March 1, 2016 and is seeking a monetary order for the total of \$13,100.00. The agent testified he did not provide a receipt however, he did send an email to the tenant on March 4, 2016 advising the tenant that the March payment was for use and occupancy only. The agent provided a copy of the email.

The landlord testified he could not provide a monetary amount he was seeking for damages as he has not inspected the rental unit due to the tenant's occupancy. The landlord is also seeking to recover the \$100.00 filing fee for this Application from the tenant.

Analysis

The agent provided undisputed evidence at this hearing, as the tenant did not attend. It is the agent's position that the rent was initially \$1,500.00 as per the signed tenancy agreement and increased to \$2,200.00 to include the entire rental unit as of March

2013. The agent relied on the submitted text message to substantiate the new rental amount. Upon review of the agent's bank records from November 2012 to March 2016 it becomes clear that the tenant actually never paid \$2,200.00 in rent. The rent the tenant paid fluctuated between \$800.00 and \$2,050.00. Based on the records showing rent paid in excess of \$1,500.00, the submitted text message and the undisputed testimony of the agent, I find the rent was \$2,200.00 as of March 2013.

Section 47 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within 10 days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant does not file an application, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice and must move out of the rental unit.

Based on the agent's undisputed evidence I find that the tenant was served with an effective notice. The tenant has not disputed the notice. As the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice, and must move out of the unit, I find that the landlord is entitled to an order of possession.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which is the first day of each month. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. I find that the landlord proved that the current rent for this unit is \$2,200.00. I find the landlord provided undisputed evidence that the tenant failed to pay full rent from November 1, 2014 to April 1, 2016. Therefore, I find that the landlord is entitled to \$13,100.00 in rent.

Although the landlord applied for compensation for damages, I find the claim to damages premature as the tenant has not vacated the rental unit. For this reason I dismiss the landlord's application for damages with leave to reapply. Therefore, I find that the landlord is not entitled to any compensation other than outstanding rent in the amount of \$13,100.00. As the landlord was successful in this Application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for the Application for a total award of \$13,200.00.

In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the security deposit in the total amount of \$750.00 in partial satisfaction of the claim and I grant the landlord a monetary order for the balance due of \$12,450.00.

Conclusion

The landlord's application for an order of possession is granted.

The landlord's application for damages is dismissed with leave to reapply.

I issue a monetary order in the landlord's favour in the amount of \$12,450.00 against the tenant. The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: April 20, 2016

Residential Tenancy Branch