



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNSD MNDC FF

Introduction

This hearing was convened to hear matters pertaining to the Landlord's Application for Dispute Resolution filed on September 7, 2016. The Landlord filed seeking to obtain an Order of Possession for unpaid rent or utilities and a Monetary Order for: unpaid rent or utilities; to keep the security deposit; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee.

The hearing was conducted via teleconference and was attended by the Landlord. No one was in attendance on behalf of the Respondents. The Landlord provided affirmed testimony that each Respondent was served notice of this application and this hearing by registered mail on September 15, 2016.

Section 90(a) of the *Residential Tenancy Act* (the "Act") states that a document served by mail is deemed to have been received five days after it is mailed. Residential Tenancy Policy provides that a party cannot avoid service by failing or neglecting to pick up mail.

Based on the undisputed evidence of the Landlord, I find that each Respondent was deemed served notice of this proceeding on September 20, 2016; five days after they were mailed, pursuant to section 90 of the *Act*. As such, I continued to hear the undisputed evidence of the Landlord in the absence of the Respondents.

Issue(s) to be Decided

1. Are both respondents Tenants or Occupants?
2. If a respondent is found to be an occupant, do they have obligations under the *Residential Tenancy Act (the Act)*?
3. Has the Landlord regained possession of the rental unit?
4. Is the Landlord entitled to a Monetary Order?

Background and Evidence

The Landlord submitted evidence of a written tenancy agreement which initially listed both Respondents as Tenants in section 1 of that agreement. The male Respondent, S.G.'s name had been crossed out in section 1 of the tenancy agreement. The male Respondent S.G. did not sign the tenancy agreement; however, the female respondent, L.M., did sign the tenancy agreement.

The tenancy agreement indicated the Tenant(s) entered into a month to month tenancy that began on April 1, 2011 for the monthly rent of \$1,050.00. The rent has since been increased to \$1,173.90 per month. On March 24, 2011 the Tenant(s) paid a security deposit of \$525.00.

The Landlord testified that at some point during this tenancy the Tenant(s) entered into a separate written parking agreement to pay \$15.00 per month parking. That agreement was not submitted into evidence.

The Landlord submitted that the Tenant(s) were always late with paying their rent which resulting in her serving them numerous 10 Day Notices month after month. Then when the Tenant(s) failed to pay their August 1, 2016 rent the Landlord posted a 10 Day Notice to the Tenant's door and applied for an Order of Possession through the Direct Request Process. When that application failed they served the Tenant(s) another amended 10 Day Notice on September 2, 2016.

On October 7, 2016 the Landlord had a telephone conversation with the Tenant who said they would be moving out the following weekend. The Landlord scheduled the move out inspection for October 10, 2016 and when she arrived she found the unit filled with garbage and a note saying the Tenant(s) required one more day to move. The Landlord went back to the unit on October 12, 2016 finding the unit left dirty, with debris throughout, and the keys on the kitchen counter.

The Landlord confirmed she regained full possession of the unit on October 12, 2016 and was withdrawing her request for an Order of Possession. The unit was cleaned up and re-rented as of November 1, 2016.

The Landlord received a \$400.00 paying from the Tenant(s) on July 31, 2016 leaving an outstanding amount owed for rent up to October 31, 2016 in the amount of \$4,335.60 (\$813.90 July 2016 + \$1,173.90 Aug 2016 + \$1,173.90 Sep 2016 + \$1,173.90 Oct 2016). The Landlord also seeks to recover \$45.00 for the unpaid parking fees for August 2016 through to October 2016 (3 x \$15.00) and the late payment charges from August to October 2016 in the amount of \$75.00 (3 x \$25.00).

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing; undisputed evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

The *Residential Tenancy Act* applies to tenancy agreements, rental units and residential property. These terms are all defined by the *Act*. A tenancy agreement is an agreement between a landlord and tenant respecting possession of a rental unit and use of common areas. In order to make a determination on this application I must first be satisfied that the parties named in this dispute meet the definition of landlord and tenant.

A tenancy agreement may be amended to change or remove a term, other than a standard term, only if both the landlord and tenant agree to the amendment in writing, pursuant to section 14(2) of the *Act*.

An occupant is defined in Residential Tenancy Policy Guideline 13 where a tenant allows a person who is not a tenant to move into the premises and share the rent, the new occupant has no rights or obligations under the original tenancy agreement, unless all parties (owner/agent/landlord(s), tenant(s), and occupant) agree to enter into a written tenancy agreement to include the new occupant(s) as a tenant.

Upon review of the tenancy agreement, in absence of a signature from the Respondent S.G.; I find S.G. was not a Tenant. Rather, I conclude S.G. was an occupant and therefore is not a party to this dispute. As such, I have removed S.G.'s name from the style of cause on any award granted to the Landlord below.

When a tenant receives a 10 Day Notice to end tenancy for unpaid rent they have (5) days to either pay the rent in full or to make application to dispute the Notice or the tenancy ends.

In this case the Tenant is deemed to have received the 10 Day Notice on September 5, 2016, three days after it was posted to the door, and the effective date of the Notice would be automatically corrected to **September 15, 2016**, pursuant to section 53 of the *Act*.

In this case the Landlord regained possession of the rental unit on October 12, 2016 and has withdrawn their request for an Order of Possession.

Section 67 of the Residential Tenancy Act states that without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

The Landlord claimed unpaid rent of \$3,161.70 (\$813.90 July 2016 + \$1,173.90 Aug 2016 + \$1,173.90 Sep 2016) that was due September 1, 2016 in accordance with section 26 of the Act which stipulates a tenant must pay rent in accordance with the tenancy agreement. Based on the aforementioned, I award the Landlord unpaid rent for the period of July 1, 2016 to September 30, 2016, in the amount of **\$3,161.70**, pursuant to section 67 of the Act.

As noted above this tenancy ended **September 15, 2016**, in accordance with the 10 Day Notice. Therefore I find the Landlord is seeking money for use and occupancy of the unit and not rent for October 2016. The Landlord did not regain possession of the unit until October 12, 2016 and was not able to re-rent it until November 1, 2016. Therefore, I award the Landlord use and occupancy and any loss of rent for the entire month of October 2016 in the amount of **\$1,173.90**, pursuant to section 67 of the Act.

In response to the claim for parking, the tenancy agreement did not include a charge for parking. In absence of a copy of the written parking agreement I find there was insufficient evidence to prove the claim for parking fell within the jurisdiction of the Act. Accordingly, I dismiss the claim for parking fees, without leave to reapply.

Section 7 of the Regulations stipulates that a landlord may charge a tenant a non-refundable fee for late payments providing that the tenancy agreement provides for that fee.

In this case section 10 of the tenancy agreement provides for \$25.00 late payment fees in accordance with section 7 of the *Residential Tenancy Regulation*. The evidence supports the rent for August and September 2016 was late, as it was not paid. Therefore I find the Landlord has proven the loss and I award their claim for late payment charges for August and September 2016 in the amount of **\$50.00**.

As noted above, this tenancy ended **September 15, 2016**, in accordance with the 10 Day Notice. Provisions such as late payment fees provided in the tenancy agreement are no longer in effect once a tenancy has ended. Therefore, I find the Landlord is not entitled to claim late payment fees for October 2016. As such that claim is dismissed, without leave to reapply.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) [*starting proceedings*] or 79 (3) (b) [*application for review of director's decision*] by one party to a dispute resolution proceeding to another party or to the director.

The Landlord has succeeded with their application; therefore, I award recovery of the **\$100.00** filing fee, pursuant to section 72(1) of the Act.

Monetary Order – This claim meets the criteria under section 72(2)(b) of the Act to be offset against the Tenant's security deposit plus interest as follows:

The Residential Tenancy Branch interest calculator provides that no interest has accrued on the \$525.00 deposit since March 24, 2011.

Unpaid Rent July to Sept 2016	\$3,161.70
Use & Occupancy & Loss of Rent Oct 2016	1,173.90
Late fees	50.00
Filing Fee	<u>100.00</u>
SUBTOTAL	\$4,485.60
LESS: Security Deposit \$525.00 + Interest 0.00	<u>-525.00</u>
Offset amount due to the Landlord	<u>\$3,960.60</u>

The Tenant is hereby ordered to pay the Landlord the offset amount of **\$3,960.60** forthwith.

In the event the Tenant does not comply with the above order, The Landlord has been issued a Monetary Order in the amount of **\$3,960.60** which may be enforced through Small Claims Court upon service to the Tenant.

Conclusion

The Respondent, S.G., was found to be an occupant and not a respondent to this dispute. As a result S.G.'s name was removed from the Monetary Order. The Landlord was awarded \$4,485.60 against the Tenant. That award was offset against the Tenant's security deposit; leaving a balance owed to the Landlord of \$3,960.60.

This decision is final, legally binding, and 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: November 08, 2016

Residential Tenancy Branch