



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNSD FF

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Landlord on November 29, 2016. The Landlord filed seeking: an Order of Possession for unpaid rent and a Monetary Order for: unpaid rent; for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; to keep all or part of the security and/or pet deposit; and to recover the cost of the filing fee.

The hearing was conducted via teleconference and was attended by the Landlord and her Agent (the Landlords). The Agent gave affirmed testimony and submitted all evidence on behalf of the Landlords. No one was in attendance on behalf of the Tenant.

The Landlords submitted evidence that the Tenant was served with copies of the Landlords' application for dispute resolution and Notice of dispute resolution hearing, on December 6, 2016, by registered mail.

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.

Based on the foregoing, I find the Tenant was deemed served notice of this application and hearing on November 27, 2016, five days after they were mailed, pursuant to section 90(a) of the *Act*. As such, I continued to hear the undisputed evidence of the Landlords.

Issue(s) to be Decided

- 1) Have the Landlords proven entitlement to an Order of Possession?
- 2) Have the Landlords proven entitlement to a monetary order?

Background and Evidence

The Landlord submitted evidence that the parties executed a written tenancy agreement for a one year fixed term tenancy that commenced on June 1, 2016. As per the tenancy agreement the Tenant was required to pay rent of \$2,250.00 on the first of each month. On May 10, 2016 the Tenant paid \$1,125.00 as the security deposit.

I heard the Agent state that when the Tenant failed to pay his November 1, 2016 rent they posted a 10 Day Notice to the Tenant's door on November 20, 2016. That 10 Day Notice was submitted into evidence and listed an effective date of November 30, 2016 and that November 1, 2016 rent of \$2,250.00 was unpaid.

The Agent testified they had been at the rental unit last week and the Tenant was still occupying the unit. The Tenant has not paid rent for November 2016, December 2016, or January 2017. The Agent requested to amend his application to include a Monetary Order for the three months unpaid rent.

Analysis

Given the evidence before me, in the absence of any evidence from the Tenant who did not appear despite being properly served with notice of this proceeding, I accept the undisputed version of events as discussed by the Landlord and corroborated by their evidence.

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.

Section 90(a) of the *Residential Tenancy Act* (the "Act") states that a document served by posting it to the person's door is deemed to have been received three days after it is posted.

Subsection (2) of Section 53 states that if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

In this case the Tenant was deemed to have received the 10 Day Notice on November 23, 2016, three days after it was posted to the door, pursuant to section 90 of the *Act*. Therefore, the effective date of the Notice automatically corrects to December 3, 2016, pursuant to section 53(2) of the *Act*.

Section 55(2)(b) of the *Act* provides that a landlord may request an order of possession of a rental unit if a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired.

The Tenant neither paid the rent nor disputed the Notice; therefore, the Tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice, **December 3, 2016**. Accordingly, I grant the Landlord's request and issue them an **Order of Possession effective 2 Days upon service** to the Tenant, pursuant to section 55(2)(b) of the *Act*. In the event that the Tenant does not comply with this Order it may be enforced through Supreme Court.

Section 26 of the Act stipulates, in part, that a tenant must pay rent in accordance with the tenancy agreement; despite any disagreements the tenant may have with their landlord.

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.

I grant the Agent's request to amend the application to include the unpaid rent for December and January as per Rule of Procedure 4.2 which provides that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

The Landlord claimed unpaid rent for November 1, 2016 and December 1, 2016, in accordance with section 26 of the *Act*. Based on the aforementioned, I find the Landlords have met the burden of proof and I award them unpaid rent for November and December 2016 in the amount of **\$4,500.00** (2 x \$2,250.00), pursuant to section 67 of the *Act*.

As noted above, this tenancy ended **December 3, 2016**, in accordance with the 10 Day Notice. Therefore I find the Landlords are seeking money for use and occupancy and any loss of rent January 2017, not rent.

I have considered that the Tenant continues to occupy the rental unit and the Landlords will not regain possession until after service of the Order of Possession. Once the Landlords regain possession they are required to mitigate there losses by trying to re-rent the unit for as soon as possible, pursuant to section 7(2) of the *Act*. Therefore, I conclude the Landlords are entitled to payment for use and occupancy and any loss of rent for the full month of January 2017 in the amount of **\$2,250.00**, pursuant to section 67 of the *Act*.

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 Landlords have been successful with their application; therefore I award recovery of the **\$100.00** filing fee, pursuant to sections 67 and 72 of the *Act*.

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 \$1,125.00 deposit since May 10, 2016.

Unpaid November & December 2016 Rent	\$4,500.00
Use & Occupancy & loss of rent January 2017	2,250.00
Filing Fee	<u>100.00</u>
SUBTOTAL	\$6,850.00
LESS: Security Deposit \$1,125.00 + Interest 0.00	<u>-1,125.00</u>
Offset amount due to the Landlord	<u>\$5,725.00</u>

The Tenant is hereby ordered to pay the Landlords the offset amount of \$5,725.00 forthwith.

In the event the Tenant does not comply with the above order, The Landlords have been issued a Monetary Order in the amount of **\$5,725.00** which may be enforced through Small Claims Court upon service to the Tenant.

Conclusion

The Landlords were successful with their application and were issued an Order of Possession and a monetary award of \$6,850.00 which was offset against the Tenant's security deposit leaving a balance owed to the Landlords of \$5,725.00.

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: January 11, 2017

Residential Tenancy Branch