



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MND, MNR, MNSD

Introduction

This hearing convened as a result of a Landlord's Application for Dispute Resolution filed December 28, 2016 wherein the Landlord sought an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities issued on December 12, 2016 (the "Notice") a Monetary Order for unpaid rent and damage to the rental unit, authority to retain the security deposit and to recover the filing fee.

The hearing was conducted by teleconference on January 23, 2017. Both parties called into the hearing and were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form, and make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Are the Landlords entitled to an Order of Possession?
2. Are the Landlords entitled to monetary compensation from the Tenant?
3. Should the Landlord be permitted to retain the Tenant's security deposit?
4. Should the Landlord recover the filing fee?

Background and Evidence

M.S. testified on behalf of the Landlords. Also introduced in evidence was a copy of the residential tenancy agreement indicating the following: this tenancy began January 1, 2016;

monthly rent was payable in the amount of \$800.00 per month on the 1st of the month; and the Tenant paid a \$800.00 security deposit.

M.S. testified that the Tenant failed to pay rent for the month of December 2016 and as a result on December 12, 2016 the Landlord issued the Notice. The Landlord testified that he served the Notice by posting it to the rental unit door on December 12, 2016. Documents served in this manner are deemed served three days later; accordingly, I find the Tenant was served as of December 15, 2016.

The Notice informed the Tenant that she had five days to pay the outstanding rent or make an application to dispute the Notice.

The Landlord testified that the Tenant failed to pay the outstanding rent and also failed to make an application for dispute resolution by December 20, 2016.

The Landlord further testified that the Tenant failed to pay the January 2017 rent such that at the time of the hearing the Tenant owed \$1,600.00

The Landlord also claimed the cost to repair a broken glass entrance door and to clean and fix up the rental unit in the total amount of \$1,200.00. I informed the Landlord that I would not grant him these amounts as the tenancy had yet to end and the Tenant had the opportunity to attend to these repairs and the cleaning before the tenancy ended.

The Tenant also testified. She confirmed that the spelling of her name is the same as what is indicated on the Application for Dispute Resolution by Direct Request filed on December 28, 2016 as well as on the residential tenancy agreement.

The Tenant confirmed that her monthly rent is \$800.00 per month. She further confirmed that she paid a security deposit in the amount of \$800.00, which she understood is in excess of the allowable amount.

The Tenant also testified that she received the Notice on December 20, 2016 as she had been away from the rental unit visiting with her mother. She claimed that she made an application for dispute resolution on December 21, 2016 by faxing in her application to the "local tenancy office" in a community near the community in which the rental unit is located. She claimed that she also applied for a fee waiver and more time to make her application. I confirm no such application appears to have been made. In response she stated that she was provided the wrong fax number.

The Tenant further confirmed that she did not pay her rent for December or January as the rental unit has "black mould".

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

The Tenant has not paid the outstanding rent and did not apply to dispute the Notice and is therefore conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the effective date of the Notice.

Under section 26 of the Act, the Tenant must not withhold rent, even if the Landlords are in breach of the tenancy agreement or the *Act*, unless the Tenant has some authority under the Act to not pay rent.

The Tenant submitted that the security deposit was in excess of the allowable amount. Section 19 of the *Residential Tenancy Act* provides as follows:

- 19** (1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.
- (2) If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

In this situation I find the Tenant was authorized to withhold \$400.00 of her December rent as an overpayment of the security deposit. However, she had no authority to withhold the *balance* of the December rent in the amount of \$400.00. Further, the Tenant had no authority under the *Act* to withhold her January 2017 rent.

Accordingly, and as discussed during the hearing, I find that the Landlords are entitled to an Order of Possession effective **two days** after service on the Tenant. This Order must be served on the Tenant and may be filed in the Supreme Court and enforced as an Order of that Court.

I find that the Landlords have established a total monetary claim of \$1,300.00 comprised of \$400.00 in outstanding rent for December 2016, \$800.00 in outstanding rent for January 2017 and the \$100.00 fee paid by the Landlords for this application.

As I have already given credit to the Tenant for the overpayment of the security deposit, I find the Landlords continue to hold \$400.00 as a security deposit.

I Order that the Landlords retain the security deposit of \$400.00 in partial satisfaction of the claim and I grant the Landlords a Monetary Order under section 67 for the balance due of **\$900.00**. This Order must also be served on the Tenant and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

Conclusion

The Tenant failed to pay the outstanding rent and did not file to dispute the Notice to End Tenancy. The Tenant is presumed under the law to have accepted that the tenancy ended on the effective date of the Notice to End Tenancy.

The Landlord accepted a security deposit which was equal to the monthly rent (\$800.00); pursuant to section 19 of the *Residential Tenancy Act*, the Tenant was authorized to withhold the excess payment of \$400.00 and be credited that amount towards her rent. Despite this, the Tenant still failed to pay the full amount of rent owing, namely \$400.00 for December 2016. She also failed to pay the rent for January 2017.

The Landlord is granted monetary compensation for those two months of unpaid rent in the amount of \$1,200.00 in addition to the \$100.00 filing fee. The Landlords are granted an Order of Possession, may keep the \$400.00 security deposit in partial satisfaction of the claim, and is granted a monetary order for the balance due in the amount of **\$900.00**.

The Landlords' claim for monetary compensation for damage to the rental unit and the cost of cleaning is dismissed with leave to reapply after the tenancy ends.

This decision is final and binding on the parties, except as otherwise provided under the Act, 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 19, 2017

Residential Tenancy Branch