



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNRL –S, FFL

Introduction

This hearing dealt with a landlord's application for an Order of Possession for unpaid rent and a Monetary Order for unpaid rent, late fees and loss of rent, as amended. The landlord also requested authorization to retain the tenant's security deposit and pet damage deposit in partial satisfaction of the unpaid and/or loss of rent. Both parties appeared or were represented at the hearing and had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

At the outset of the hearing, I confirmed that the tenant received the landlord's hearing documents and evidence, including the amended monetary claim, by posting on the door of the rental unit. An Application for dispute Resolution concerning an Order of Possession may be served by posting on the door of the rental unit. An Application for Dispute Resolution and Amendment pertaining to a monetary claim is to be served in person or by registered mail; however, the tenant acknowledged receiving these documents and I deemed her sufficiently served pursuant to the authority afforded me under section 71 of the Act.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession?
2. Is the landlord entitled to the compensation she claimed for unpaid rent, late fees, and loss of rent?
3. Is the landlord authorized to retain the tenant's security deposit and pet damage deposit?

Background and Evidence

The tenancy started on March 12, 2019 and the landlord collected a security deposit of \$437.50 and a pet damage deposit of \$437.50. The tenant is required to pay rent of \$875.00 on the first days of every month for a fixed term set to expire February 29, 2020.

It was undisputed that on April 24, 2019 the landlord personally served the tenant with a *1 Month Notice to End Tenancy for Cause* ("1 Month Notice") with a stated effective date of May 31, 2019. During the hearing, the tenant indicated she did not agree with the reasons stated on the 1 Month Notice; however, the tenant acknowledged that she did not file an Application for dispute Resolution to dispute the 1 Month Notice.

On May 2, 2019 the landlord posted a *10 Day Notice to End Tenancy for Unpaid Rent* ("10 Day Notice") on the door of the rental unit. The 10 Day Notice indicates the tenant failed to pay rent of \$875.00 on May 1, 2019 and has a stated effective date of May 12, 2019. The tenant acknowledged that she received the 10 Day Notice and did not file an Application for dispute Resolution to dispute it.

The parties were in dispute as to whether the tenant paid any rent for the month of May 2019. The landlord testified that she did not receive any rent for the month of May 2019. The tenant initially testified that she gave the landlord "just under half" of the month's rent in cash on May 1, 2019 and then she changed her testimony to say it was on May 2, 2019 and that the landlord posted the 10 Day Notice after she gave the landlord the cash.

Both parties provided consistent testimony that the previous month the tenant had paid rent in cash and the landlord had issued a receipt to the tenant for the cash payment. The tenant also testified that the rent for March 2019 was in cash as well and the landlord gave her a receipt for that payment as well.

The tenant stated that after receiving the 10 Day Notice she withheld the rest of the rent. According to the tenant, the reason she withheld rent was because she received the 1 Month Notice and she disagreed with the reasons stated on the 1 Month Notice and because the landlord refused to acknowledge or treat the rental unit for bed bugs.

Both parties also provided consistent testimony that the tenant has paid no monies for the month of June 2019 yet the tenant continues to occupy the rental unit.

The tenant attempted to submit evidence orally concerning losses she has suffered as a result of bed bugs; however, I declined to permit her to do so since it was not relevant to the matters before me. I informed the tenant that the Act does not permit a tenant to withhold rent because they have pests or need repairs unless the tenant has already obtained authorization to withhold rent or make deductions from rent from an Arbitrator. I informed the tenant of her right to make her own Application for Dispute Resolution to seek compensation from the landlord if the tenant is of the position the landlord has breached the Act, regulations or tenancy agreement.

The landlord seeks an Order of Possession as soon as possible considering she has not received rent since April 2019. The tenant argued that the landlord did receive some rent for May 2019.

The landlord seeks a Monetary Order for unpaid rent for May 2019 and loss of rent for June 2019 and July 2019. In addition, the landlord seeks a \$300.00 "fine" for late payment of rent for each of these three months. The landlord submitted that the addendum includes a late payment fine of \$300.00. I declined to consider the landlord's request for the late payment "fine" for reasons provided in the analysis.

The landlord requested authorization to retain the tenant's deposits in partial satisfaction of the unpaid and loss of rent. The tenant objected, stating the deposits are to be used for damage only.

Analysis

Where a tenant receives a Notice to End Tenancy, the tenant has a certain amount of time to dispute the Notice by filing an Application for dispute Resolution. For a 1 Month Notice, section 47 of the Act provides that the tenant has 10 days to file an Application for Dispute Resolution to dispute a 1 Month Notice. For a 10 Day Notice, section 46 of the Act provides that a tenant has five days to file to dispute the 10 Day Notice or pay the outstanding rent. If a tenant does not file to dispute a Notice to End Tenancy within the time limit for doing so, or does not pay the outstanding rent in the case of a 10 Day Notice, the tenant is conclusively presumed to have accepted that the tenancy will end on the effective date of the Notice pursuant to sections 46(5) and 47(5) of the Act.

In this case, the tenant received a 1 Month Notice on April 24, 2019 and did not file to dispute it. Accordingly, the tenancy was set to end on May 31, 2019 based on the 1 Month Notice. Then, the tenant received a 10 Day Notice after it was posted to her door on May 2, 2019 and she did not file to dispute it. Although the parties were in dispute

as to whether the tenant paid any rent for May 2019 the tenant acknowledged that she did not pay all of the rent for May. Accordingly, I find her tenancy was set to end even earlier than May 31, 2019 based on the 10 Day Notice.

In light of the above, I find the tenancy has ended and the landlord is entitled to regain possession of the rental unit. Considering the landlord has not received rent for quite some time, I grant her request to obtain an Order of Possession effective as soon as possible. Provided to the landlord with this decision is an Order of Possession effective two (2) days after service upon the tenant.

As for the landlord's monetary claim, I provide the following findings and reasons.

Section 26 of the Act provides that a tenant must pay rent, even if the landlord has violated the Act, regulations or tenancy agreement; unless, the tenant has a legal right to withhold rent. The Act provides very specific and limited circumstances when a tenant may lawfully withhold rent. The circumstances the tenant described is not a legal basis for withholding rent. Rather, if a tenant is in need of repairs or maintenance, including pest control, the tenant may seek repair orders and authorization to make deductions from rent from an Arbitrator and if the Arbitrator gives the tenant consent to make deductions from rent the tenant may proceed to do so under the Arbitrator's authorization. The tenant did not have any such authorization to withhold rent due to the landlord under the tenancy agreement.

As to whether the tenant paid some rent or no rent for May 2019, I find I prefer the landlord's version of events over that of the tenant. The tenant acknowledged that the landlord had given receipts to her in the past for cash payments and I find it likely the landlord would have done so if the tenant made a partial payment in cash in May 2019. I also noted that the tenant's testimony concerning the date she made the partial payment changed and her testimony concerning the amount she allegedly paid was vague and non-specific. Also of consideration is that the tenant had received a 1 Month Notice to End Tenancy from the landlord prior to the rent becoming due for May 2019. Finally, the tenant did not provide any corroborating evidence to demonstrate she made a payment to the landlord in early May 2019, such as a bank account withdrawal or other documentation to demonstrate the source of the funds given to the landlord. All of these things considered, I find on the balance of probabilities that the tenant did not pay any rent for May 2019 as put forth by the landlord. Therefore, I award the landlord unpaid rent of \$875.00 for the month of May 2019 as requested.

It is undisputed that the tenant has continued to occupy the rental unit and did not pay any monies to the landlord for the month of June 2019. Therefore, I award the landlord loss of rent for the month of June 2019 in the amount of \$875.00 as requested.

As for the landlord's request for loss of rent for July 2019, I find that request to be premature and anticipatory. I dismiss this claim with leave to reapply.

With respect to the landlord's claim for a late payment "fine" of \$300.00 per month, I dismiss that claim in its entirety. In order for a landlord to charge a fee for late payment of rent, the tenancy agreement must include such a term and the term must comply with the Residential Tenancy Regulations. Section 7 of the Regulations limits a late fee to \$25.00. Even when parties have agreed to a term, if the term violates the Act or the Regulations it will not be enforced, as provided in section 6 of the Act. I find the term in the addendum to be non-compliant with the Regulations and I do not enforce the term. Therefore, I dismiss the landlord's request for late payment "fine" of \$300.00 per month.

As provided under section 72 of the Act, I have the authority to order one party to pay the other party the cost of the filing fee and I have the authority to permit a landlord to retain a tenant's security deposit or pet damage deposit to offset amounts awarded to the landlord. In keeping with section 72, I award the landlord recovery of the \$100.00 filing fee she paid for this application. I also authorize the landlord to retain the tenant's security deposit and pet damage deposit in partial satisfaction of the amounts awarded to the landlord with this decision.

In keeping with the above findings, I provide the landlord with a Monetary Order to serve and enforce upon the tenant, calculated as follows:

Unpaid rent – May 2019	\$875.00
Loss of rent – June 2019	875.00
Filing fee	100.00
Less: security deposit and pet damage deposit	<u>(875.00)</u>
Monetary Order	\$975.00

Conclusion

The landlord has been provided an Order of Possession effective two (2) days after service upon the tenant.

The landlord has been authorized to retain the tenant's security deposit and pet damage deposit and has been provided a Monetary Order for the balance owing of \$975.00 to serve and enforce upon the tenant.

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: June 28, 2019

Residential Tenancy Branch