



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, CNR, FF

### Introduction

This was a cross-application hearing for Dispute Resolution under the *Residential Tenancy Act* ("the Act").

On November 13, 2019, the Tenant applied to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. On December 20, 2019, the Tenant amended the application to include the return of double the security deposit.

On December 12, 2019, the Landlord applied for an order of possession for the rental unit; a monetary order for unpaid rent; and to keep the security deposit. The Landlord also applied for a monetary order for damage to the rental unit and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement.

The matter was set for a conference call hearing. Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to present affirmed oral testimony and to make submissions during the hearing.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Preliminary and Procedural Matters

The Residential Tenancy Branch Rules of Procedure permit an Arbitrator the discretion to dismiss unrelated claims with or without leave to reapply. For example, if a party has applied to cancel a notice to end tenancy, or is applying for an order of possession, an Arbitrator may decline to hear other claims that have been included in the application and the Arbitrator may dismiss such matters with or without leave to reapply.

I find that the most important matter to determine is whether or not the tenancy is ending and whether or not the Landlord is entitled to recover unpaid rent.

The Landlord's claims for compensation for damage and for money owed or compensation for damage or loss are dismissed with leave to reapply.

#### Issue to be Decided

- Is the Landlord entitled to an order of possession and monetary order due to non-payment of rent owing under the tenancy agreement?

#### Background and Evidence

The parties testified that the tenancy began on May 26, 2019, on a month to month basis. Rent in the amount of \$1,400.00 is due to be paid to the Landlord by the last day of each month. The Tenants paid the Landlord a security deposit of \$700.00. The Tenants lived in the upper unit of a two-unit residential property.

#### 10 Day Notice

The Landlord testified that the Tenants were served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated November 9, 2019 ("the 10 Day Notice"). The 10 Day Notice indicates the Tenants have failed to pay \$1,400.00 in rent that was due on November 1, 2019. The 10 Day Notice has an effective date of November 19, 2019. The Landlord and Tenants provided a copy of the 10 Day Notice.

The 10 Day Notice informed the Tenants that the Notice would be cancelled if the rent was paid within five days. The Notice also explains the Tenants had five days to dispute the Notice. The Tenants disputed the 10 Day Notice on November 13, 2019, within the required time period.

The Landlord testified that the Tenants did not pay the rent owing under the tenancy agreement for the month of November 2019 within five days of receiving of the 10 Day Notice. The Landlord testified that the Tenants have not paid the rent owing for November 2019. The Landlord is seeking a monetary order in the amount of \$1,400.00 for unpaid November 2019 rent.

In reply, the Tenant testified that the Tenants have not paid the Landlord the rent owing for the month of November 2019.

The Tenant testified that on October 24, 2019 there was a fire in the kitchen of the lower rental unit of the property. The Tenant testified that the fire department attended and informed the him that it was not safe to re-enter the home. The Tenant testified that he returned to the rental unit

on October 28, 2019 and found that the rental unit was not clean. The Tenant testified that he did not stay the night and did not stay in the rental unit after that date. The Tenant testified that the rental unit was uninhabitable due to the smoke damage and that the tenancy contract is frustrated due to the fire.

The Landlord provided testimony confirming that there was fire in the kitchen of the lower rental unit. The Landlord testified that the occupant left oil on the stove when he went to let a dog out. The Landlord testified that the rental unit was not uninhabitable. The Landlord testified that the unit was professionally cleaned, and the only thing left to be done on October 28, 2019 was to wash the floors.

The Tenant testified that he has moved out of the rental unit and is not disputing the 10 Day Notice in order for the tenancy to continue. The Tenant is simply disputing that he owes rent for November 2019 and is seeking the return of his security deposit.

The Landlord submitted that the Tenant has moved out and the Landlord does not require an order of possession for the rental unit. The Landlord is seeking a monetary order for unpaid November 2019 rent and to keep the security deposit. The Landlord testified that the Tenants possessions were left in the unit until November 29, 2019.

### Analysis

Section 26 of the Act states that a Tenant must pay the rent when it is due under the tenancy agreement, whether or not the Landlord complies with the Act, the regulations, or the tenancy agreement, unless the Tenant has a right under this Act to deduct all or a portion of the rent.

Residential Tenancy Branch Policy Guideline # 34 Frustration is intended to help the parties to an application understand issues that are likely to be relevant. The Guideline provides the following:

*A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.*

*The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.*

Based on the evidence before me, the testimony of the Landlord and Tenant, and on a balance of probabilities, I make the following findings:

I find that the tenancy contract was not frustrated. The fire originated in the lower rental unit and was confined to the kitchen area. While I accept that smoke affected the upper rental unit, I find that the Tenants could have remained living in the rental unit while the Landlord completed cleaning or repairs. I find that the Tenant has provided insufficient evidence that the contract was incapable of being performed because smoke from a fire radically changed the circumstances and that fulfillment of the contract as originally intended was impossible.

I find that the Tenant failed to pay the rent owing under the tenancy agreement within five days of receiving the 10 Day Notice. I find that the Tenant did not have a legal right to treat the tenancy as frustrated and withhold payment of the rent. If the Tenant wanted to end the tenancy, the Tenant was required to serve the Landlord with a written notice to end tenancy.

I dismiss the Tenant's application to cancel the 10 Day Notice dated November 9, 2019.

I find that the tenancy ended on November 19, 2019; the effective date of the 10 Day Notice. While the tenancy legally ended on November 19, 2019, I find that the Tenant remains responsible to pay the rent owing under the tenancy agreement for the entire month of November 2019 which is the earliest date that the Tenant could have legally ended the tenancy.

Under section 55 of the Act, when a tenants Application to cancel a Notice to end tenancy is dismissed and I am satisfied that the Notice to end tenancy complies with the requirements under section 52 regarding form and content, I must grant the landlord an order of possession. The Landlord declined the offer of an order of possession.

I find that the Tenants owe the Landlord \$1,400.00 for November 2019 rent.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. I order the Tenants to repay the \$100.00 fee that the Landlord paid to make application for dispute resolution.

I find that the Landlord has established a monetary claim of \$1,500.00 comprised of \$1,400.00 in unpaid rent and the \$100.00 fee paid by the Landlord for this hearing. I authorize the Landlord to keep the security deposit of \$700.00 in partial satisfaction of the monetary award.

I grant the Landlord a monetary order for the balance of \$800.00. This monetary order may be filed in the Provincial Court (Small Claims) and enforced as an order of that court. The Tenants are cautioned that costs of such enforcement are recoverable from the Tenants.

### Conclusion

The Tenants failed to pay the rent owing under the tenancy agreement within five days of receiving a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities and they did not have a legal right to withhold payment of the rent.

The Tenant's application to cancel the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated November 9, 2019 is dismissed.

The Landlord is granted a monetary order for unpaid rent and the cost of the filing fee in the amount of \$800.00.

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: January 10, 2020

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Residential Tenancy Branch