



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; and, authorization to retain the tenant's security deposit.

The owner was represented by two agents and the tenant appeared along with his wife. All parties had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

The style of cause was amended, with consent, to correctly spell the tenant's last name and the name of street where the rental unit is located.

In filing this Application for Dispute Resolution in January 2020, the landlord had included a monetary claim for unpaid rent for the months up to and including January 2020. The monetary claim was amended, without objection, to include loss of rent for the months subsequent to filing this Application for Dispute Resolution as it was undisputed the tenant continues to occupy the rental unit as of the date of this hearing and has not paid for ongoing use and occupancy of the rental unit.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession for unpaid rent?
2. Is the landlord entitled to a Monetary Order for unpaid and/or loss of rent?
3. Is the landlord authorized to retain the tenant's security deposit?

Background and Evidence

I was provided consistent evidence that the tenancy started in mid to late December 2018 and the tenant paid a security deposit of \$900.00. The monthly rent was set at \$1800.00 payable on the first day of every month.

The tenancy had been managed by the owner of the property up until December 2019 when a property manager was engaged to take over management of the property. The property manager and his employee were present for the hearing.

The property manager testified that when he took over management of the property the owner informed him that the tenant had failed to pay \$1280.00 of the rent due for November 2019 and did not pay any rent for December 2019.

The tenant and his wife disputed that they owed rent for November 2019 and December 2019. They submitted that it was their ordinary practice to cash their Income Assistance cheques and then call the owner and he would come collect cash from them but the owner would not provide them any receipts. The tenant and his wife submitted they paid the full amount of rent for November 2019 on or about November 30, 2019 and the full amount of rent for December 2019 was paid on December 3, 2019.

The property manager conceded that he did not have any evidence to refute the tenant's testimony concerning November 2019 and December 2019 payments but pointed out that the tenant did not pay any rent for January 2020 or subsequent months. The tenant and his wife confirmed that to be accurate.

The property manager, along with his employee acting as a witness, personally served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent ("10 day Notice") on January 4, 2020. The tenant acknowledged receiving the 10 Day Notice on or about January 5, 2020.

The 10 Day Notice indicates rent of \$4,880.00 was outstanding as of January 1, 2020 and a stated effective date of January 15, 2020. The property manager explained this is the sum of \$1280.00 owing for November 2019, \$1800.00 for December 2019 plus \$1800.00 for January 2020.

All parties agreed that after the 10 Day Notice was served the tenant did not pay anything toward the outstanding rent; the tenant did not pay any monies for February

2020 or March 2020 and the tenant continues to occupy the rental unit along with his wife and two children.

The tenant provided varying reasons for not paying the rent including:

- The landlord showed up with a moving truck on January 1, 2020 and told the tenant to move out so that his family could move into the rental unit.
- On January 3, 2020 the owner and property manager attended the rental unit and the owner spoke about wanting to have family members move into the rental unit even though no notice had been given to the tenant.
- Outstanding repair issues that have not been resolved.
- The owner would not answer the tenant's phone calls to set up a meeting to collect the rent.
- The tenant had to clean up the property and deal with tenants still residing in the rental unit at the start of the tenancy.
- The tenant thought he had filed to dispute the 10 Day Notice in filing his own Application for Dispute Resolution (the tenant filed an Application for Dispute Resolution on January 14, 2020 seeking orders for emergency repairs).

The property manager confirmed that the service address appearing on the 10 Day Notice is his office address. The tenant acknowledged that he could have delivered rent to the property manager's office but he did not.

During the hearing, I orally informed the parties that I was satisfied the landlord was entitled to an Order of Possession as there was no dispute that the tenant failed to pay rent for January 2020 and did not pay the outstanding rent within five days of receiving the 10 Day Notice or dispute the 10 Day Notice within five days of receiving the 10 Day Notice. The landlord's agent requested an Order of Possession effective at the end of March 2020. The tenant requested occupancy of the rental unit until April 15, 2020 or April 30, 2020 as he has a wife and two children to move and they have health issues that make it more difficult given the COVID-19 outbreak. The landlord's agent was willing to work with the tenant if the tenant presented monies for continued use and occupancy.

Analysis

Under section 26(1) of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right under the Act to withhold rent. The Act provides very limited and specific circumstances when a tenant may legally

withhold rent from the landlord. They include: payment of an unlawful rent increase or overpaid security deposit or pet damage deposit; the tenant expended monies to make an emergency repair, as defined in section 33 of the Act, and gave the landlord the receipt for which he was not been reimbursed; or, authorization from an Arbitrator or the landlord.

Where a tenant does not pay rent the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent. When a tenant receives a 10 Day Notice the tenant has five days to pay the outstanding rent to nullify the 10 Day Notice or the tenant has five days to dispute the 10 Day Notice by filing an Application for Dispute Resolution. If a tenant does not pay the outstanding rent or dispute the 10 Day Notice within five days then, pursuant to section 46(5) of the Act, the tenant is conclusively presumed to have accepted the tenancy will end and must vacate the rental unit by the effective date of the 10 Day Notice.

I accept the unopposed evidence before me that the tenant was required to pay rent of \$1800.00 on the first day of every month and the tenant failed to do so for the month of January 2020.

In this case, the tenant was served with a 10 Day Notice in person on January 4, 2020 or January 5, 2020. The 10 Day Notice includes unpaid rent for January 2020 and the tenant acknowledged he never did pay the rent for January 2020. The tenant stated that he thought he disputed the 10 Day Notice in filing his Application for Dispute Resolution; however, that application was made on January 14, 2020 which is greater than five days after receiving the 10 Day Notice and the issue identified is the need for repairs.

Having outstanding repair issues is not a legal basis for withholding rent. The tenant did not have an Arbitrator's authorization to withhold rent for January 2020 and the tenant did not present any evidence to suggest the landlord authorized the tenant to withhold rent for January 2020. The monthly rent had not been increased and the security deposit does not exceed the maximum limitation. Other alleged issues raised by the tenant during the hearing are not a legal basis under the Act to withhold rent. The 10 Day Notice served upon the tenant has the landlord's agent's name and address on it and I find no reason the tenant could not have paid the outstanding rent to the landlord's agent. Therefore, I find that even if the tenant had filed to dispute the 10 Day Notice within five days, which he did not, he would not have succeeded in establishing a legal basis for withholding rent.

In light of the above, I find the tenancy ended on the effective date of January 15, 2020 and the landlord is entitled to an Order of Possession. Considering it is undisputed that the landlord has suffered loss of rent for at least three months (January 2020, February 2020 and March 2020) I decline to grant the tenant's request to permit him to continue to occupy the rental unit into April 2020 as to do so would unduly prejudice the landlord by causing him to suffer another month of loss of rent. As such, I grant the landlord an Order of Possession effective on March 31, 2020 as requested by the landlord's agent and if the landlord is willing to extend the tenant occupancy beyond March 31, 2020 upon receipt of monies from the tenant that is the landlord's prerogative.

As for the landlord's monetary claim, I heard undisputed evidence that the tenant has not paid rent or monies for use and occupancy for the three months of January 2020 through March 2020 yet the tenant continues to occupy the rental unit. As such, I award the landlord unpaid and loss of rent for those three months in the sum of \$5400.00 [\$1800.00 x 3 months]. I further award the landlord recovery of the \$100.00 filing fee paid for this application.

I authorize the landlord to retain the tenant's security deposit in partial satisfaction of the rent owed to the landlord.

As for rent owing for the months of November 2019 and December 2019 I accept there is some likelihood the tenant did not pay rent as alleged in the landlord's claim; however, the landlord has the burden of proof and I find the landlord has not provided sufficient evidence to satisfy me that the tenant owes rent for those months. I make this finding considering the following:

- the tenant and his wife provided affirmed testimony that they paid rent in full for these months to the owner, in cash, and the owner did not appear at the hearing to respond to or refute their direct testimony;
- the tenant and his wife described an ordinary practice of paying the rent in cash to the owner and the owner not providing any receipts for cash payments despite the legal requirement that the landlord do so under section 26(2) of the Act so avoid disputes over cash payments; and,
- it follows that if the tenant did pay the rent in cash, the tenant would not have any receipts to present to me to prove it was paid.

Having found the landlord failed to meet his burden of proof with respect to his claims for unpaid rent for November 2019 and December 2019, I dismiss that portion of his monetary claim without leave to reapply.

In keeping with my findings and awards above, the landlord is provided a Monetary Order calculated as follows:

Unpaid rent – January 2020	\$1800.00
Loss of rent – February 2020	1800.00
Loss of rent – March 2020	1800.00
Filing fee	100.00
Less: security deposit	<u>(900.00)</u>
Monetary Order	\$4600.00

Conclusion

The landlord is provided an Order of Possession effective on March 31, 2020.

The landlord is authorized to retain the tenant's security deposit and is provided a Monetary Order for the balance of \$4600.00 to recover unpaid and/or loss of rent for January 2020 through March 2020.

The landlord's claims for unpaid rent for November 2019 and December 2020 are dismissed without leave to reapply.

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: March 24, 2020

Residential Tenancy Branch