



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNR-DR, OPR-DR, FFL**

Introduction

This hearing originated as a Direct Request proceeding and was adjourned to a participatory hearing in an Interim Decision dated September 28, 2021. This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for unpaid rent, pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent, pursuant to sections 26 and 67; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

Tenant J.M., the landlord and the landlord's translator attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The Direct Request Proceeding was adjourned to a participatory hearing because the tenancy agreement was not signed by tenant J.M. Tenant J.M. refused to answer my questions about her status as a tenant. Tenant J.M. was warned that refusal to answer questions may result in an adverse inference; Tenant J.M. elected to remain silent. The landlord testified that tenant J.M. is a tenant; this was not disputed by tenant J.M. Tenant J.M. did not request that her name be removed from the style of cause. I accept the landlord's undisputed testimony and find, on a balance of probabilities, that tenant J.M. is a tenant, as defined by the *Act*, at the subject rental property.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

The September 28, 2021, Interim Decision states:

Notices of Reconvened Hearing are enclosed with this interim decision. The applicant must serve the Notice of Reconvened Hearing, the interim decision, and all other required documents, upon each tenant within three (3) days of receiving this decision in accordance with section 89 of the Act.

Both parties agree that the Notice of Reconvened Hearing and the September 28, 2021 Interim Decision were served on the tenants via registered mail on October 1, 2021. Tenant J.M. testified that the above documents were received on October 7, 2021. I find that the tenants were served with the above documents in accordance with section 88 of the Act.

The landlord testified that she served her amendment on the tenants via registered mail on January 18, 2022. Tenant J.M. testified that she received the landlord's amendment but did not testify to the date of receipt. I find that the tenants were deemed served with the amendment on January 23, 2022, in accordance with sections 88 and 90 of the Act. The amendment increased the monetary claim for unpaid rent to \$6,750.00.

The landlord testified that her evidence was not served on the tenant.

Section 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the "Rules") states that evidence not submitted at the time of Application for Dispute Resolution that are intended to be relied on at the hearing must be received by the respondent not less than 14 days before the hearing. I find that since the tenants did not receive the landlord's evidence package, all evidence submitted by the landlord are not admitted into evidence and will not be considered.

Preliminary Issue- Amendment

Section 64(3)(c) of the Act states that subject to the rules of procedure established under section 9 (3) [director's powers and duties], the director may amend an application for dispute resolution or permit an application for dispute resolution to be amended.

Section 4.2 of the Residential Tenancy Branch Rules of Procedure (the "Rules") states 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's amended claim sought unpaid rent in the amount of \$6,750.00. Since filing the amendment, the landlord testified that the amount of rent owed by the tenant has increased as no rent has been paid from August 2021 to the present date.

I find that in this case the fact that the landlord is seeking compensation for all outstanding rent, not just the amount outstanding on the date the landlord filed the amendment, should have been reasonably anticipated by the tenants. Therefore, pursuant to section 4.2 of the Rules and section 64 of the *Act*, I amend the landlord's application to include a monetary claim for all outstanding rent in the amount of \$9,450.00.

Issues to be Decided

1. Is the landlord entitled to an Order of Possession for unpaid rent, pursuant to sections 46 and 55 of the *Act*?
2. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
3. Is the landlord entitled to recover the filing fee from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on January 15, 2020 and is currently ongoing. Monthly rent in the amount of \$1,350.00 is payable on the first day of each month. A security deposit of \$675.00 was paid by the tenants to the landlord.

The landlord testified that on August 3, 2021 tenant J.M. was personally served with a 10 Day Notice to End Tenancy for Unpaid Rent (the “10 Day Notice”) for failure to pay August 2021’s rent in the amount of \$1,350.00. No evidence to substantiate this serve was accepted for consideration. Tenant J.M. testified that she does not have a 10 Day Notice and is not sure if she ever received one.

Both parties agree that the tenants have not paid any rent for the months of August, September, October, November, and December of 2021 or for January and February of 2022. The tenant testified that she levied criminal charges pertaining to theft against the landlord and so should not have to pay the landlord rent.

Analysis

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

The landlord testified that tenant J.M. was personally served with the 10 Day Notice; however, this was not confirmed by tenant J.M. No proof of service documents were accepted for consideration. I find that the landlord has not proved, on a balance of probabilities, that the tenants were served with a 10 Day Notice. The landlord’s application for an Order of Possession is dismissed for failure to prove service in accordance with section 88 of the *Act*.

Section 26(1) of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*. Pursuant to section 26(1) of the *Act*, I find that the tenants were obligated to pay the monthly rent in the amount of \$1,350.00 on the first day of each month. Based on the testimony of both parties I find that the tenants did not pay rent in accordance with section 26(1) of the *Act* and owe the landlord seven months of rent (August 2021 to February 2022) totalling \$9,450.00. I note that criminal allegations made against the landlord for theft do not permit the tenants to breach section 26(1) of the *Act*.

As the landlord was successful in the monetary portion of this application, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the landlord in the amount of \$9,550.00.

The landlord is provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: February 04, 2022

Residential Tenancy Branch