

DECISION

Dispute Codes OPR MNR MNSD FF & MT CNR

Introduction

This hearing dealt with cross Applications for Dispute Resolution by the landlord seeking an Order of Possession, Monetary Order for unpaid rent and to recover the filing fee from the tenant, and by the tenant seeking an extension to apply to dispute the notice to end tenancy, to cancel the notice to end tenancy, and to recover the filing fee from the landlord.

Service of the hearing documents, by the landlord to the tenant, was done in accordance with section 89 of the *Act*, sent via registered mail on March 27, 2009. Copies of the mail receipts were entered into evidence by the landlord. The Tenant was deemed to be served the hearing documents on April 01, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The tenant testified the he served the landlord with the hearing documents by sliding them under her apartment door on March 13, 2009 in the evening. The landlord stated that they were not slide under her door until the morning of the March 14, 2009. I find that the tenant did not serve the landlord the hearing documents in accordance with the *Residential Tenancy Act*.

The tenant acknowledged receiving a copy of the evidence submitted by the landlord; however the landlord did not receive copies of any of the evidence submitted by the tenant. The tenant confirmed that he did not supply copies of his evidence to the landlord.

Both the landlord and tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

Issues(s) to be Decided

The issues to be decided based on the testimony and the evidence are:

- Whether the landlord is entitled to an Order of Possession under Section 55 of the *Act* for unpaid rent
- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent
- Whether the tenant is entitled to an extension to apply to dispute a notice to end tenancy
- Whether either the landlord or the tenant are entitled to recover their filing fee for dispute resolution

Background and Evidence

This is a month to month tenancy which began on May 1, 2008 with rent of \$670.00 payable on the first of each month. The tenant paid a security deposit of \$340.00 on May 1, 2008.

Landlord's Testimony and Evidence

The landlord testified that a written tenancy agreement was signed by both parties on May 1, 2008 and that a copy was left for the tenant on his counter. The tenant stated that he did not recall signing a tenancy agreement and requested a copy of the written agreement.

The landlord testified that, just before Christmas of 2008, the tenant began to pay his rent late and is paying later and later as time goes on. The landlord stated that the tenant began to write his rent cheques for the 15th of each month instead of the 1st. As shown by the documentary evidence, the tenant issued rent cheques on 15/01/2009 and March 15/09 both of which were returned NSF, by the financial institution.

As testified by the landlord, when the tenant failed to pay March 1, 2009 rent she issued a 10 Day Notice to End the Tenancy for unpaid rent on March 4, 2009 and posted it on the tenant's rental unit door between 5:00p.m. and 5:30 p.m. The landlord stated that the tenant is in arrears for March 1, 2009 rent of \$670.00 and April 1, 2009 rent of \$670.00 plus \$20.00 late fee for each month and a \$25.00 NSF fee.

The landlord testified that the tenant slipped another cheque under her door this morning, April 9, 2009 and that she returned it to the tenant as she will not accept another cheque from the tenant for fear that it will bounce.

The landlord is wishing to end the tenancy and is requesting an Order of Possession.

Tenant's Testimony and Evidence

The tenant is requesting an extension to apply to cancel a notice to end tenancy. He testified that he did not see the 10 Day Notice to End Tenancy on his door until March 9, 2009 after which he filed for Dispute Resolution on March 13, 2009.

The tenant advised that he had faxed additional evidence to the Residential Tenancy Branch this morning, April 9, 2009 and that the evidence included a copy of a certified cheque that he issued to the landlord for March 2009 rent, which was slid under her door this morning, April 9, 2009.

The tenant stated that he has not issued payment for April 2009 rent as he did not know if he would be allowed to stay until the end of the month or if he would need to leave earlier, thus only being responsible for a partial month's rent. The tenant advised that he has found another place to live but that he does not gain possession until the end of April 2009 and has requested that the landlord allow him to stay until April 30, 2009.

When questioned why he began to start issuing his rent payments on the 15th of each month instead of the 1st when it was due, the tenant testified that he thought his

relationship with the landlord was adequate to enable him to post date his rent cheques. The tenant felt that after he prevented a fire from destroying the building and after he warded off an intoxicated person from causing anyone harm or the building damage, that he could arbitrarily change the date when his rent was due.

The landlord and tenant came to an agreement that if the tenant provided the following items to the landlord, either by sliding it under her door or by handing it to her in person, by 6:00 p.m. tonight, April 9, 2009, then the tenant would be permitted to occupy the rental unit until Thursday April 30, 2009, 1:00 p.m. at which time he would peacefully deliver possession to the landlord.

Items to be delivered to the landlord by 6:00 p.m. April 9, 2009

- A certified cheque or bank draft in the amount of \$670.00 for March 2009 rent for Use and Occupancy
- A certified cheque or bank draft in the amount of \$670.00 for April 2009 rent for Use and Occupancy
- A written note listing the forwarding address for the tenant effective April 30, 2009

Both parties were in agreement to attend a move out inspection on or before April 30, 2009, and that the landlord would provide a written copy of the move out inspection to the tenant pursuant to the *Act*.

Analysis

Late Evidence - I find that I cannot consider the evidence faxed on the day of the hearing, by the tenant, pursuant to the *Residential Tenancy Branch Rules of Procedure* Section 3.5 which stipulates that evidence must be filed at least (5) days before the dispute resolution proceeding date.

Late Application for Dispute Resolution – Section 66 of the *Residential Tenancy Act* allows for an extension to a time limit established by the *Act* but only in exceptional circumstance. The reasons given by the tenant on why he did not apply within the prescribed timeframes does not constitute exceptional circumstances and so I find that I cannot accept his application to cancel the notice to end tenancy.

10 Day Notice to End Tenancy – Both documentary and testimonial evidence support the landlord's claim that rent has not been paid, that a 10 Day Notice to End Tenancy was deemed to be served on the tenant on March 7, 2009 and that the tenant failed to pay the rent or apply to dispute the notice by March 12, 2009, the five day time limit. Pursuant to Section 46(5) of the *Act*, if a tenant fails to pay the rent or make an application to dispute the notice in accordance with section (4), the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice. I find in favour of the landlord and grant an Order of Possession.

Monetary Claim for Unpaid Rent – As the two parties came to an agreement whereby the tenant would pay March and April 2009 rent to the landlord by 6:00 p.m. today, with certified cheques or bank drafts, I hereby dismiss the landlords monetary claim with leave to reapply if so needed.

With respect to late fees and NSF charges, I found that without documentary proof that the tenancy agreement provided for such fees, that I could not rule on this portion of the landlord's claim and dismiss it with leave to reapply.

Recovery of the Filing Fee - I find in favour of the landlord's monetary claim to recovery the filing fee from the tenant as the landlord was primarily successful in their application.

Conclusion

I HEREBY FIND that the landlord is entitled to an Order of Possession effective **two days after service on the tenant**. In the event the tenant fails to pay March 2009 and April 2009 rent, via certified cheque or bank draft, by 6:00 p.m. on April 09, 2009, 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 HEREBY FIND in favor of the landlord's monetary claim to recover the filing fee of \$50.00 and authorize the landlord to offset this claim by withholding the \$50.00 from the tenant's security deposit pursuant to section 38(1)(d) of the *Residential Tenancy Act*.

I HEREBY GRANT the landlord leave to reapply for a monetary claim for March and April 2009 rent, late fees and NSF fees, if the tenant fails to uphold the agreement made here today.

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: April 09, 2009.

Dispute Resolution Officer