

## **DECISION**

Dispute Codes      OPR MNR MNSD FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, to keep the security deposit as partial satisfaction of their claim, and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, served personally to the Tenant on September 18, 2009 and the amended application was served via registered mail on September 23, 2009. Mail receipt numbers were provided in the Landlord's evidence. The Tenant is deemed to be served the amended hearing documents on September 28, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Both the Landlord and Tenant appeared, acknowledged receipt of evidence submitted by the other, 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

Is the Landlord entitled to Orders under sections 38, 55, 67, and 72 of the *Residential Tenancy Act*?

### Background and Evidence

The undisputed facts provided in the testimony are that the fixed term tenancy began on June 15, 2009 and would switch over to a month to month tenancy after December 31, 2009. The current monthly rent is payable on the first of each month in the amount of \$750.00 and the Tenant paid a security deposit of \$375.00 on May 30, 2009.

The Landlord testified that the Tenant failed to pay his rent on September 1, 2009 and a 10 Day Notice to End Tenancy was issued and posted to the Tenant's door on September 2, 2009 by the Landlord.

The Tenant testified that he paid his rent and late payment fees in full on September 15, 2009 and his October rent was paid in full on October 1, 2009.

The Landlord testified that receipts were issued to the Tenant for these rent payments listing "use and occupancy only". The Landlord stated that he did not have copies of the receipts in front of him nor did he have a copy of the Tenant's ledger to provide testimony as to the date these payments were received by the Tenant.

The Tenant argued that he received a receipt dated September 15, 2009 which listed "use and occupancy" however the October 1, 2009 receipt did not state use and occupancy. The Tenant read the October 1, 2009 receipt during his testimony reading the pre-printed form words as well as the written words of the Landlord.

The Tenant testified that he attempted to deliver his November 2009 rent payment to the Landlord on Monday November 2, 2009 however the Landlord's office was closed. The Tenant argued that he went to pay his rent again this morning, with a certified cheque drawn on his parent's account, and the Landlord's daughter, acting as an agent for the Landlord, refused to accept the Tenant's payment.

The Landlord argued that it is their company policy not to accept cheques drawn on third party accounts and that a 10 Day Notice to End Tenancy would have been issued to the Tenant on November 2, 2009.

The Tenant testified that he did not receive a 10 Day Notice issued on November 2, 2009 and that there has been nothing posted to this door.

The Landlord testified that he was the one who issued the November notice and that he posted it on the Tenant's door himself.

### Analysis

I find that in order to justify issuing an Order of Possession and a Monetary Order for payment of damages or losses under section 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the Tenant.

Based on the evidence and testimony before me I find that the Tenant failed to pay his September 2009 rent pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I find that the Tenant has failed to comply with a material term of the tenancy agreement which stipulates that rent is due monthly on the first of each month.

The Landlord issued the Tenant a 10 Day Notice to End Tenancy on September 2, 2009 on an outdated form and when the Tenant paid his rent and late fees in full on September 15, 2009, the Landlord issued the Tenant a receipt for "use and occupancy" in accordance with the *Act*.

I note that the testimony supports that the Landlord later reinstated the tenancy, by implied waiver, when the Tenant paid his October rent in full on October 1, 2009 and the Landlord failed to write "use and occupancy only" on the October 2009 receipt. As provided for in the *Residential Tenancy Policy Guidelines # 11*, a notice to end tenancy can be waived when a landlord accepts the rent for the period after the effective date of a notice to end tenancy and does not inform the Tenant that the payment is accepted for use and occupancy only by writing "use and occupation only" on the receipt.

I note that the Landlord did not provide evidence of the receipts issued to the Tenant and did not submit a copy of the alleged 10 Day Notice to End Tenancy allegedly issued to the Tenant on November 2, 2009. The testimony supports that the Tenant attempted to pay his rent with a certified cheque issued by his parents the Landlord refused the payment because it was issued by a third party. The Landlord claims that the tenancy agreement contains a term that states that the Landlord will not accept third party cheques as payment towards rent. I find such a term, if it were to be included in a tenancy agreement, to be not enforceable pursuant to section 6(3) of the Act as the term is unconscionable.

I note that there is no provision under that Act which allows a Landlord to refuse any form of "legal tender" for payment of rent. While some may argue that the Landlord risks entering into a tenancy agreement with the person who issued the cheque, I find that this could be resolved by the Landlord issuing the Tenant a receipt that clearly states that the payment received by cheque drawn on the "payee's name" account is received as payment of "Tenant's name" rent for "the rental unit number" for the month of "month".

There is contradictory testimony about whether a second 10 Day Notice to End Tenancy was issued on November 2, 2009, and there is no documentary evidence in support of the alleged notice. The November 2009 rent is currently unpaid because the Landlord refused the Tenant's payment by certified cheque drawn on the Tenant's parent's account. Based on the aforementioned, I hereby order the Tenant to deliver to the Landlord payment of the November 2009 rent in full; payment is to be made by legal tender no later than 5:30 p.m. today, November 4, 2009.

As the Landlord was not successful in his application, I find that he is not entitled to recover the filing fee from the Tenant.

Conclusion

All 10 Day Notices to End Tenancy for unpaid Rent issued to the Tenant on or before November 4, 2009 are hereby cancelled and of no force or effect.

I HEREBY DISMISS the Landlord's application, 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: November 04, 2009.

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Dispute Resolution Officer