



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNC, MNDC, RR, OPR, OPC, OPB, MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with an application by the tenant for an order setting aside a notice to end this tenancy, a monetary order and an order permitting her to reduce her rent and a cross-application by the landlord for an order of possession, a monetary order and an order to retain the security deposit in partial satisfaction of the claim. Both parties participated in the conference call hearing.

Issues to be Decided

Is the tenant entitled to a monetary order?

Is the landlord entitled to an order of possession?

Is the landlord entitled to a monetary order?

Background and Evidence

The parties agreed that the tenant gave the landlord notice that she would be ending her tenancy on January 1, 2011.

The tenancy agreement provides that the tenant pay \$135.00 per month for utilities. This sum included an oil heater which was to be used as the primary heat source. The agreement further provided that the tenant had the option of using a second heat source, which was a gas fired boiler with hot water radiant heat but that this would cost an additional \$275.00 per month. The tenant opted not to use the second heat source. The tenant testified that she was cold in the winter months, from October – present, because the oil heater was insufficient. The landlord claimed that the tenant left the door or window open while she smoked, which the tenant denied. The tenant seeks to

have the amount of utilities reduced from \$135.00 per month to \$50.00 per month retroactive to October 1 as she has not been sufficiently warm.

The landlord testified that the tenant has failed to pay the \$135.00 utility charge for the months of October – January inclusive and failed to pay rent in the month of January although she did not vacate the unit pursuant to her notice to end the tenancy. The tenant acknowledged that she did not pay rent in January but maintained that she paid utilities in October and December by way of a money order. She claimed to have stubs showing the dates on which the money orders were issued. The landlord denied having received the money orders. The tenant stated that she had given the landlord permission to deduct the November utility payment from her security deposit.

The landlord testified that the tenant backed into a gate causing a wheel on the bottom of the gate to break. He stated that the gate has a mark thereon which matches a black rubber strip on the tenant's bumper. The landlord seeks an award of \$40.00 as the cost of repairing the gate. The tenant denied having damaged the gate.

The landlord testified that the tenant's vehicle or a vehicle parked on the property by the tenant left engine fluid stains on his driveway. The landlord seeks an award of \$25.00 as the cost of cleaning the stains from the driveway. The tenant denied that the vehicle leaks any kind of fluid.

Analysis

The tenant is bound by her notice to the landlord that she is vacating the rental unit. I therefore find that the landlord is entitled to an order of possession and I grant him a formal order which is enclosed herewith. If the tenant fails to comply with the order, it may be filed in the Supreme Court and enforced as an order of that Court.

As the tenancy is ending, the tenant's claim for a reduction in rent is dismissed.

The tenant agreed to pay \$135.00 for utilities and it is very clearly stated on the agreement that she is paying for the use of an oil heater as her only heat source. In order to release her from that obligation, the tenant must prove that the term is

unconscionable. I am unable to make that conclusion. An unconscionable term is one which is manifestly unfair to one party. I find that while paying a flat rate for just one heating source may be somewhat unfair during the winter months when more than one may be required, the tenant actually benefitted during the hot summer months by paying a lower flat rate when no heating source was required. I therefore dismiss the tenant's claim for recovery of part of the utility costs.

The landlord has alleged that the tenant failed to pay utility costs in the months of October – January inclusive. The tenant acknowledged that she did not pay utilities in November and January and she bears the burden of proving that the utilities were paid in October and December. Although the tenant submitted stubs showing that money orders were drawn up, there is no way to determine whether those money orders were made payable to the landlord. I find that the tenant has failed to prove that payments were made in October and December. Although the tenant had given notice to end her tenancy on January 1, she did not vacate the unit thereby preventing the landlord from re-renting the unit for that month. I find that she must be held responsible for both the rent and the utility payment for January. I award the landlord \$540.00 for utilities for October – January inclusive and \$695.00 in loss of income for January.

As for the landlord's claim for the cost of repairing his gate and cleaning the driveway, the landlord provided no photographs or other independent evidence to corroborate his claim that the tenant caused this damage. I find that the landlord has not proven on the balance of probabilities that the tenant caused the damage to the gate or that her vehicle caused the stains on the driveway and I therefore dismiss those claims.

As the landlord has enjoyed substantial success, I award him \$50.00 which represents the filing fee paid to bring his application.

The landlord is awarded a total of \$1,285.00. I order the landlord to retain the \$300.00 security deposit in partial satisfaction of the claim and I grant the landlord a monetary order under section 67 for the balance of \$985.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The tenant's claim is dismissed in its entirety. The landlord is granted an order of possession and a monetary order for \$985.00. The landlord may retain the security deposit.

Dated: January 10, 2011

Residential Tenancy Branch