



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Public Safety and Solicitor General

## **DECISION**

**Dispute Codes**      OPR, MNR, MNSD, FF

### **Introduction**

This hearing was convened by way of conference call to deal with the landlord's application for an Order of Possession for unpaid rent or utilities; for a monetary order for unpaid rent or utilities; for an order permitting the landlord to retain all or part of the security deposit or pet damage deposit in full or partial satisfaction of the claim; and to recover the filing fee from the tenant for the cost of this application.

The parties both attended the conference call hearing, gave affirmed testimony, and were given the opportunity to cross examine each other on their testimony. The landlord also provided an evidence package to the Residential Tenancy Branch and to the tenant. All information and testimony provided has been reviewed and is considered in this Decision.

### **Issue(s) to be Decided**

Is the landlord entitled to an Order of Possession for unpaid rent or utilities?

Is the landlord entitled to a monetary order for unpaid rent or utilities?

Is the landlord entitled to retain all or part of the security deposit or pet damage deposit in full or partial satisfaction of the claim?

### **Background and Evidence**

This month-to-month tenancy began on December 15, 2010, although the evidence is unclear on what day the tenant actually moved into the rental unit. The landlord collected half a month's rent for the first month of the tenancy, and the tenant still resides in the rental unit. Rent in the amount of \$750.00 per month is payable in advance on the 1<sup>st</sup> day of each month. On December 20, 2010 the landlord collected a security deposit from the tenant in the amount of \$375.00.

The landlord testified that on January 27, 2011 he served a 2 Month Notice to End Tenancy for Landlord's Use of Property with an expected date of vacancy of March 31,

2011. He stated that his mother-in-law and sister-in-law have moved in with him, and he wishes the rental unit, which is a basement suite in the house that the landlord resides in, for his spouse's mother and sister.

The landlord further testified that he served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities by taping it to the door of the rental unit on February 2, 2011. He further stated that he had asked the tenant for the rent on February 4, 2011 and the tenant replied that he had 10 days to pay it. The landlord re-served the 10 Day Notice upon the tenant on February 11 or February 16, 2011. A copy of that notice was provided in advance of the hearing and it states that the tenant failed to pay rent in the amount of \$750.00 that was due on February 1, 2011. The form is dated February 2, 2011 and contains an expected date of vacancy of February 12, 2011. He also gave the tenant a receipt on February 11, 2011 because the tenant paid \$380.00 toward February's rent on that date. A copy of that receipt was provided in advance of the hearing, and does not indicate that the money accepted was "For Use and Occupancy Only." The landlord requests an Order of Possession for unpaid rent and a monetary order for \$370.00 which represents the current arrears.

The tenant testified that within 3 or 4 days of the tenancy, the landlord asked him to give his dog away. He had introduced the landlord to the dog before moving in, and the landlord indicated at that time that the dog was not a problem. He further stated that the landlord's wife had accused his son of smoking marihuana and told the tenant he was a liar. He stated that he does not believe anything was taped to his door on February 2, 2011 because the landlord's wife always hassled him and gave him numerous written notices. The tenant works grave-yard shift and the landlord's wife would wake him up and give him notices.

The tenant further testified that during the tenancy the landlord put up "No Trespassing" signs and told the tenant he was not permitted to have guests on the premises. Then they put a padlock on the gate and told the tenant he had to lock it each time he went through the gate and gave him a key. One of the notices provided to the tenant was a letter given on January 26, 2011 stating that they had spoke to the tenant and he wasn't permitted guests. The landlords also put up a no smoking sign on the doors. Another letter stated that the tenant was to smoke under the deck, and then they had a problem with that.

The tenant further testified that he had authorized the landlord to retain the security deposit for the balance of the rent that was due, and that he would be moving at the end of March in accordance with the 2 Month Notice that had been issued by the landlord.

## **Analysis**

The *Residential Tenancy Act* provides that a landlord may serve a tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on any day after rent is due and remains unpaid. Once served, the tenant has 5 days to pay the rent in full or dispute the notice. If the tenant does neither, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, which is 10 days after the notice is deemed served on the tenant, and must move out. In this case, the tenant did not move out of the rental unit on February 12, 2011 in accordance with the notice, however, the landlord collected rent before that date and did not specifically inform the tenant that he was collecting it for use and occupancy only and has therefore reinstated the tenancy.

I have not been provided with a copy of the 2 Month Notice to End Tenancy for Landlord's Use of Property, but I have the evidence of the parties that the notice was issued on January 27, 2011 and contains an expected date of vacancy of March 31, 2011. The landlord has not applied for an Order of Possession with respect to that notice, and the tenant testified that he will move on March 31, 2011.

I also find that the landlord and his wife have effectively "changed the rules" with respect to what they consider to be acceptable from when the tenancy agreement was signed. The landlord put up no smoking signs after the tenancy commenced, put a lock on a gate preventing the tenant from having guests and had no trespassing signs erected. The *Act* specifically states that the landlord is not permitted to deny access to or from the rental unit for the tenant or the tenant's guests.

With respect to the issue of unpaid rent, the *Residential Tenancy Act* states that unless the landlord gives written consent, a tenant must not apply a security deposit as rent, and the *Act* further states that the landlord may retain the security deposit at the end of a tenancy if the tenant agrees to it in writing. I accept the evidence of the tenant that he agreed that the landlord may keep the security deposit as rent, but the landlord did not give his written consent to that. The landlord also currently holds \$375.00 in trust on behalf of the tenant, and has now applied to retain it for the unpaid portion of the rent, but did not agree to that when the tenant offered. I further find that the tenant offered the security deposit after the tenant was served with the 2 Month Notice to End Tenancy for Landlord's Use of Property. Therefore, I find that the landlord is not entitled to recovery of the \$50.00 filing fee.

Therefore, in summary, I find that the landlord has reinstated the tenancy thereby cancelling the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. I further find that the tenant is in arrears and owes the landlord \$370.00 in unpaid rent. The tenant is

not required under the *Act* to pay rent for the month of March unless the landlord cancels the 2 Month Notice and the tenant agrees. I have no application before me for an Order of Possession for Landlord's Use of Property. If the tenant fails to move at the end of March, 2011, the landlord will be at liberty to apply for an Order of Possession at that time.

Since the landlord refused the tenant's offer to retain the security deposit for the unpaid portion of February's rent, and then made an application to retain it for rent, I decline to accept that the landlord is entitled to recovery of the \$50.00 filing fee for the cost of this application.

### **Conclusion**

For the reasons set out above, I hereby dismiss the landlord's application for an Order of Possession for unpaid rent or utilities.

I order that the landlord retain a portion of the security deposit in the amount of \$370.00 in full satisfaction of the landlord's claim.

I further order the landlord to comply with Section 38 of the *Residential Tenancy Act* as it relates to the balance of the security deposit currently held in trust.

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 09, 2011.

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Residential Tenancy Branch