



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Dispute Codes: OPR, OPC, CNC, MNR, MNDC, MNSD, OLC, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for Unpaid Rent, for damages to the rental unit and to recover the filing fee for this proceeding. The Landlord also applied to keep all or part of a security deposit. The Tenants applied for an order cancelling a Notice to End Tenancy for Cause, for an Order that the Landlord comply with the Act and for a monetary order for compensation for damage or loss under the Act or tenancy agreement.

Issue(s) to be Decided

1. Are there arrears of rent and if so, how much?
2. Is the Landlord entitled to end the tenancy?
3. Is the Landlord entitled to keep all or part of the Tenants' security deposit?

Background and Evidence

This month to month tenancy started in July, 2008. The parties disagree about what date the Tenants moved in. Rent is \$1,000.00 per month payable on the 1st day of each month. The Tenants paid a security deposit of \$500.00 on July 1, 2008. The Landlord said the Tenants did not pay rent for January, 2009 and as a result, the Landlord posted a 10 Day Notice to End Tenancy for Unpaid Rent and Utilities on the Tenants' door on January 2, 2009. The Landlord said the Tenants have not paid anything since being served with the 10 Day Notice and now are also in arrears of rent for February, 2009.

The Landlord said he agreed the Tenants could pay $\frac{1}{2}$ of a month's rent for July, 2008 because they said they could not move in until the 15th. The Landlord said that in fact, the Tenants moved in a week earlier (on July 8th) and have not paid rent of \$250.00 for that week despite requests that they do so. The Landlord said he wrote on the Tenants' receipt for July rent that \$250.00 was due but he did not provide a copy of that receipt as evidence at the hearing.

The Tenants claim that they tried to pay the Landlord rent by cheque sometime between January 2nd and 5th, 2009 but that he would not accept it. The Tenants said they did not leave the cheque for the Landlord (who lives upstairs) because they were concerned he would deny having received it. The Tenants admitted they did not make an attempt to pay the Landlord any rent thereafter because they filed an application for compensation on January 8, 2009 and thought they would be able to offset their January and

February, 2009 rent from any award they might receive. The Tenants also claimed that due to a mistake, they did not apply to cancel the 10 Day Notice to End Tenancy for Unpaid Rent.

The Landlord denied that the Tenants offered him payment for January rent. He said he went to the rental unit on January 1, 2009 to collect the rent but the Tenants would not come to the door even though they were home. The Landlord said he returned 3 more times on January 2, 2009 to pick up the rent but again the Tenants would not answer the door, so he posted the 10 Day Notice on their door. The Landlord said he did not hear from the Tenants until January 12, 2009 when they telephoned him and asked him to come to the rental unit. The Landlord said when he arrived, he again asked for the rent but the Tenants handed him their hearing package, told him to read it and shut the door. The Landlord said he returned to the rental unit on January 13, 2009 and asked for the rent but the Tenants advised him that he owed them a lot of money (referring to their application). The Landlord said he told the Tenants they could not withhold the rent while they waited for their claim to be heard but they still refused to pay rent.

Analysis

Section 66(3) of the Act says the director may not extend the time to apply to cancel a notice to end tenancy any later than the effective date of the Notice. As the effective date of the 10 Day Notice was January 15, 2009, the Tenants' cannot amend their application to include a claim to cancel the 10 Day Notice dated January 2, 2009. Even if the Tenants had applied on time to cancel the Notice to End Tenancy for unpaid rent, I find there are no grounds for setting that notice aside because the Tenants have not paid the rent arrears set out on the Notice. I do not accept the Tenants' evidence that the Landlord would not accept their January 2009 rent payment and find instead that the Tenants withheld payment of rent because they were under the mistaken belief that any amounts awarded to them when their compensation application (which was not for emergency repairs) was heard could be applied to set off arrears of rent for January and February. This however is not the case; section 26(1) of the Act says a Tenant must pay rent when it is due and cannot withhold rent without an order of the director permitting them to do so.

Consequently, I find pursuant to s. 55(2)(b) of the Act that the Landlord is entitled to an Order of Possession to take effect on February 22, 2009 at 1:00 pm. I also find that the Landlord is entitled to recover arrears of rent for January, 2009 and for February 1 – 12, 2009. The Landlord is also entitled to loss of rental income for the period February 13 – 22, 2009. Should the Landlord be unable to re-rent the rental unit for the balance of February, 2009, the Landlord may re-apply for loss or rental income for that period as well.

I find there is insufficient evidence that the Tenants owe rent for July, 2008. The Landlord claimed he charged the Tenants \$500.00 for July because they were

supposed to move in on July 15, 2008. Tenants claim that when the Landlord gave them the keys, he told them they could move in at any time. I find there is insufficient evidence that the Landlord intended to recover rent for one week in July, 2008 until December 9, 2008 after he'd advised the Tenants he intended to end the tenancy (for other reasons). Consequently, I conclude that the Landlord waived payment of rent for the 5 – 7 days of July, 2008 that the Tenants moved in early and that part of his claim is dismissed.

The Landlord is also entitled to recover his \$50.00 filing fee for this proceeding. I order the Landlord pursuant to s. 38(4) of the Act to keep the Tenants' security deposit plus accrued interest in partial payment of the rent arrears. The Landlord will receive a monetary order for the balance owing as follows:

January, 2009 unpaid rent:	\$1,000.00
Unpaid rent (Feb 1-12/09):	\$428.57
Loss rental income for February 13 - 22, 2009:	\$357.14
Filing fee:	<u>\$50.00</u>
Subtotal:	<u>\$1,835.71</u>
Less: Security deposit:	(\$500.00)
Accrued interest:	<u>(\$3.77)</u>
Balance owing:	<u>\$1,331.94</u>

The Landlord's application for compensation for damages to the rental unit is premature and it is dismissed with leave to re-apply. The Tenants' application to cancel the Notice to End Tenancy for Cause is now unnecessary, and that part of their claim is dismissed. The balance of the Tenant's application will be heard on **February 23, 2009 at 9:30 am** as previously scheduled.

Conclusion

An Order of Possession to take effect on February 22, 2009 at 1:00 pm and a Monetary Order in the amount of **\$1,331.94** have been issued to the Landlord and a copy of the Orders must be served on the Tenants. The Order of Possession may be enforced in the Supreme Court of British Columbia and the Monetary Order may be enforced in the Provincial (Small Claims) Court of British Columbia.