Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes: OPR, MNR and FF

This application was brought by the landlord seeking an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid rent dated March 2, 2009 and effective March 15, 2009. The landlord also sought a Monetary Order for the unpaid rent and filing fee for this proceeding. The landlord/applicant and the tenant/respondent appeared along with an advocate representing the tenant.

Issue(s) to be Decided

The landlord was seeking an Order of Possession and a monetary order for rental arrears and utilities. Issues to be determined based on the testimony and evidence are:

Whether or not the landlord is entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent

- Did the tenant receive a valid Notice to End Tenancy for Unpaid Rent?
- Did the tenant pay the rental arrears in full within five days of receiving the Notice, in which case the notice was automatically cancelled?
- Did the tenant make an application to dispute the notice within five days of receiving the Notice?
- Was the tenancy subsequently re-instated by the parties?

Whether or not the landlord is entitled to monetary compensation for rental arrears owed.

Whether or not the landlord is entitled to compensation for utilities

Preliminary Issues

1) Service

The advocate for the tenant put forth the allegation that the landlord failed to serve the hearing package in accordance with the requirements under the Act.

Rule 3.1 of the Residential Tenancy Branch Rules of Procedure requires that the applicant serve the respondent with the Application for Dispute Resolution, The Landlord served the Notice by registered mail and provided a copy of the registered mail envelope showing the tenant's current address, the address of the rental unit with the postal notation, "*RTS*" and indicating that *"This item is being returned because: Unclaimed*". Section 89 of the Act sets out mandatory requirements for service below:

89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

(a) by leaving a copy with the person;

(b) if the person is a landlord, by leaving a copy with an agent of the landlord;

(c) **by sending a copy by registered mail to the address at which the person resides** or, if the person is a landlord, to the address at which the person carries on business as a landlord;

(d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant; *(my emphasis)*

Canada Post records confirm that the documents were sent to the tenant's correct address by registered mail on the day of the application, which was March 18, 2009. Section 90 (a) of the Act states that any document given or served in accordance with section 88 *[how to give or serve documents generally]* or 89 *[special rules for certain documents]* is deemed to be received "*if given or served by mail, on the 5th day after it is mailed".*

Therefore, the hearing package was deemed, under the Act, to have been received by the tenant on March 25, 2009.

The Residential Policy Guideline 12(9) states that *"Deemed" service means that the document is presumed to have been served unless there is clear evidence to the contrary.* ***However, where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deeming provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing***. (my emphasis)

I find that the landlord fully complied with the service requirements under section 89 as evidenced by the properly addressed envelope validated by Canada Post. In fact, the landlord went beyond what is required under section 89. After the tenant neglected to respond to the official registered mail notice card left by Canada Post and failed to claim the registered mail, the landlord then contacted the tenant and ensured that the tenant had access to the documents.

In addition to the above, I find the matter of service has been effectively rendered moot by virtue of the fact that the tenant was actually in attendance at the hearing, In regards to the tenant's concern about the delay in receiving the documents for the hearing, I find that the tenant's own actions in choosing not to retrieve the registered mail, despite the notification from Canada Post, to be the cause of her receiving the information a couple of days prior to the hearing.

2) Subject Matter and Scope of the Hearing

The tenant's advocate pointed out that under Residential Tenancy Branch Rules of Procedure, the scope of the dispute resolution hearing must be restricted only to specific claims made by the landlord and those indicated on the Application for Dispute Resolution. According to the tenant, this would only include claims made for rental arrears and utilities specifically for the month of March 2009 and not for subsequent months. The tenant took the position that, in regards to rental arrears relating to April and May 2009, any monetary claims by the landlord would require the landlord to make a new application.

Rule 8.4 of the Residential Tenancy Branch Rules of Procedure states that the Dispute Resolution Officer must accept evidence only on the matters stated on the Application for Dispute Resolution unless, at the request of a party made at the start of the dispute resolution proceeding, the Dispute Resolution Officer permits an amendment to the application to include other related matters that may be the subject of an Application for Dispute Resolution between the parties. In considering whether to permit an amendment to an application at the start of a dispute resolution proceeding to include other related matters, the Dispute Resolution Officer will consider whether the amendment would prejudice the other party, or result in a breach of the principles of natural justice and the Dispute Resolution Officer must a) allow the other party the opportunity to make argument that the dispute resolution proceeding of the combined matters or of the additional matter or matters be adjourned and; b) rule whether to adjourn in accordance with Rule 6.4 [criteria for granting an adjournment] and give a reason for granting or refusing the adjournment. The Dispute Resolution Office may give reasons in accordance with Rule 6.7 [reasons for adjournment].

I find that the landlord's application pertains to a claim for a monetary order for *rental arrears* owed by the tenant. I find that several weeks ago when the landlord made this application, on March 18, 2009, the tenant was in arrears for $600.00 rent for March 2009, which was due and payable on March 1, 2009. Subsequent to the landlord's application, this debt changed. This occurred in part because the tenant paid the

remainder of the rent owed for March on March 24, 2009, and in part because the tenant did not vacate the unit on the effective date of March 15, 2009 pursuant to the Ten-Day Notice and continued to overhold possession of the unit during which time some of the rent owed for May 2009 was not paid. As of the date of the hearing on May 11, 2009, the tenant had not moved out, and had only paid a portion of May's rent, accepted by the landlord for use and occupancy only. I find that the evidence submitted by the landlord and testimony from both parties confirmed that during this period, the tenant had paid $1,200.00 for the month of April 2009 and had also paid a further $600.00 partial rent for use and occupancy for the month of May 2009 with $600.00 still outstanding. The landlord had revised the monetary claim in writing and this data had been served on the tenant.

In any case, I find that the landlord's application and claim still related to rental arrears which are always subject to change according to payments made, or in light of further rental arrears that have accrued pending the hearing. The Act provides that, as long as the tenant is in possession of the unit, rent is owed. Amending the amount of the arrears is frequently necessary after the application has been made, often during the proceedings, at which time a determination must be made as to the actual quantum of the rental arrears still outstanding as of the date of the hearing. Had the tenant vacated, then the amount of the rental arrears would be frozen in time. In that case, the landlord would likely need to make another application to claim any further damages beyond rental arrears, such as a loss of rent if justified, applicable to a time period after the month that the tenant had vacated. In this instance, I find that rental arrears had accrued during the period from March 18, 2009 to date and that this would not require an amendment to the application because a determination of what was still outstanding would have to include all rental payments and any additional rental defaults. Sections 62, 67, 64 and 65, are applicable to this determination.

Even if an amendment to include recent developments was required, I would have to find such an amendment warranted under the circumstances. I find that changes to the amount and allocation of rental arrears in the landlord's claim are relevant to the

question at hand and are not in any way prejudicial to the respondent. I find that the tenant would already be fully aware of any unpaid rent owed and that the tenant had already been notified that the landlord was seeking compensation for rental arrears.

Section 62(1) of the Act grants authority for a Dispute Resolution Officer to determine

> (a) disputes in relation to which the director has accepted an application for dispute resolution, and
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> (b) any matters related to that dispute that arise under this Act or a tenancy agreement.

Sections 62 (2) and (3) state that the Disputer Resolution Officer may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act and may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, regulations or tenancy agreement and order that this Act applies.

Section 67 gives a dispute resolution officer authority, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, to determine the amount of, and order that party to pay, compensation to the other party.

Section 64 states that the Dispute Resolution Officer must make each decision or order based on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions. It also states that a Dispute Resolution officer may do any of the following:

(a) deal with any procedural issue that arises,

(b) make interim or temporary orders, and

(c) amend an application for dispute resolution or permit an application for dispute resolution to be amended.

Section 65 states that if the Dispute Resolution Officer finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:

(a) that a tenant must pay rent to the director, who must hold the rent in trust or pay it out, as directed by the director, for the costs of complying with this Act, the regulations or a tenancy agreement in relation to maintenance or repairs or services or facilities;

(b) that a tenant must deduct an amount from rent to be expended on maintenance or a repair, or on a service or facility, as ordered by the director;

(c) that any money paid by a tenant to a landlord must be

(i) repaid to the tenant,

(ii) deducted from rent, or

(iii) treated as a payment of an obligation of the tenant to the landlord other than rent;

(d) that any money owing by a tenant or a landlord to the other must be paid;

(e) that personal property seized or received by a landlord contrary to this Act or a tenancy agreement must be returned;

(f) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;

(g) that a tenancy agreement may be assigned or a rental unit may be sublet if the landlord's consent has been unreasonably withheld contrary to section 34 (2) *[assignment and subletting]*.

Section 46 (5) states that if a tenant who has received a Ten-Day Notice to End Tenancy and did not pay the rent or make an application for dispute resolution within five days, the tenant; a) is conclusively presumed to have accepted that the tenancy

ends on the effective date of the notice, and (b) must vacate the rental unit to which the notice relates by that date. (my emphasis)

I find that this tenant did not vacate on or before March 15, 2009, the date shown on the Notice as the date the tenancy was to end. Section 57 of the Act deals with what will happen if a tenant remains after a tenancy ends. "*Overholding tenant*" is defined in the Act as, "*a tenant who continues to occupy a rental unit after the tenant's tenancy is ended*". Section 57 (3) specifically permits a landlord to claim compensation from an overholding tenant for any period that the tenant occupies the rental unit after the tenancy is ended.

Given the above, I find that I have the authority to hear and consider the matters before me, that being the landlord's request for an Order of Possession based on the Ten-Day Notice to End Tenancy for Unpaid Rent dated March 2, 2009 and the landlord's request for a monetary order to compensate for any and all rental arrears and utilities owed as of the date of the hearing.

Background and Evidence

The hearing proceeded and it was established through the testimony and evidence of both parties that:

- The landlord holds a security deposit paid by the tenant in the amount of $400.00 paid in November 2008 plus an additional $50.00 paid later
- the tenant had failed to pay rent for the March on March 1, 2009;
- a Notice to end Tenancy was issued on March 2, 2009;
- the tenant did not pay the rent owed within five days of receiving the Notice and did not make an application to dispute the notice;
- the tenant subsequently paid the arrears for the month of March and was issued a receipt "for use and occupancy only";
- the tenant paid the rent for the month of April 2009 and was issued a receipt "for use and occupancy only";

- the tenant paid partial rent in the amount of $600.00 for the month of May 2009 and was issued a receipt “for use and occupancy only”.
- the tenant acknowledged receiving a written demand for $33.00 for utilities.

The landlord was claiming $600.00 for rent owed for the month of May 2009 and further utilities owed, including a Terasen Gas bill for $36.42, supported by an invoice, as well as a copy of a written demand sent to the tenant on April 30, 2009. The landlord claimed an estimated BC Hydro bill of $100.00 too. The landlord was also seeking an order for the unpaid remainder of the security deposit of $150.00.

Analysis

Based on the evidence and the testimony of both parties, I find that the tenant was served with a Notice to End Tenancy for Unpaid Rent. The tenant failed to pay all of the outstanding rent and did not make application to dispute the Notice within five days of receiving the Notice. Under section 46(5) of the Act, the tenant is therefore conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice, which in this instance was March 15, 2009. Despite payment of rent accepted subsequent to that date, I find that the landlord and tenant did not re-instate this tenancy. Based on the above facts I find that the landlord is entitled to an Order of Possession under the Act.

In regards to the date of the Order of Possession and the funds owed, a mediated discussion ensued, the outcome of which was a mutual agreement by the parties that in exchange for immediate payment of rent of $600.00 by the tenant for the remainder of May 2009, for use and occupation only, the landlord would agree to an Order of Possession effective May 31, 2009. A copy of the receipt for payment was faxed into this office and, accordingly, this Order will therefore be issued on consent.

In regards to the landlord’s claim for utilities, I find that the tenant does owe $33.00. However I find the remainder of the landlord’s utility claims to be premature. Section 46(6) states that if: (a) a tenancy agreement requires the tenant to pay utility charges

to the landlord, and; (b) the utility charges are *unpaid more than 30 days after the tenant is given a written demand for payment* of them, then the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

Given the above I dismiss the landlord's claims for the Terasen Gas for $36.42 and the estimated BC Hydro bill of $100.00 with leave to reapply for damages at a later date, should the utilities remain unpaid.

In regards to the landlord's claim for full payment of the security deposit, I dismiss this portion of the landlord's application as the tenancy is coming to an end.

Conclusion

I hereby issue an Order of Possession in favour of the landlord effective at 1:00 p.m. on Sunday May 31, 2009. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I hereby order that the landlord is entitled to monetary entitlement, under section 67 and 72 of the Act, of $83.00 comprised of $33.00 for utilities owed and the $50.00 cost of filing this application. I order that this amount be retained from the tenant's security deposit of $450.00. The balance of the security deposit of $367.00 must be administered in compliance with section 38 of the Act.

The landlord's additional claim for utilities is dismissed with leave to reapply and the remainder of the landlord's application is dismissed without leave.

May 2009 _____

Date of Decision Dispute Resolution Officer