

DECISION

Dispute Codes:

OPR, OPC, MND, MNR, MNSD, MNDC, FF

Introduction

This was a cross-Application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for an Order of Possession for Unpaid Rent and Cause, a monetary Order for unpaid rent, utilities, for damages to the rental unit, damages and loss under the Act, to retain all or part of the security deposit, and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The tenant has made Application to cancel a Notice ending tenancy for cause.

The landlord provided affirmed testimony that both respondents were served copies of the Application for Dispute Resolution and Notice of Hearing via registered mail at the address noted on the Application. A Canada Post tracking number for each respondent was provided as evidence of service.

These documents are deemed to have been served in accordance with sections 89 and 90 of the Act; however the tenant did not appear at the hearing.

Preliminary Matter

The landlord stated that they were unaware of the tenant's Application as they were only informed by the Residential Tenancy Branch at the time they submitted their Application on April 20, 2010. The landlord testified that they have not been served with Notice of the tenant's cross-Application.

The tenant did not attend her hearing that was scheduled to be heard at this time. This hearing continued from 10:30 a.m. until 11:12 a.m. during which time the tenant did not appear. As the tenant failed to attend her hearing I find that the tenant's Application is dismissed.

The landlord has named a male respondent as a tenant on their Application. The landlord entered into a tenancy agreement with the female tenant only. The landlord did receive an unsolicited cheque deposited to their bank account, from the male tenant. This cheque was NSF and I determined that this failed to establish a tenancy with the male respondent. I find that the male respondent is an occupant who has no rights or obligations under the Act.

At the start of the hearing the landlord stated that he was not sure if the tenant had made some of the repairs that are required to the rental unit, or if additional damage has occurred. The landlord elected to proceed with a request for an Order of possession and monetary claim for unpaid rent, retention of the deposit and fees only. The balance of the landlord's Application requesting compensation was withdrawn and the landlord is at liberty to submit a future Application, as provided by the Act.

The landlord's evidence was personally served to the tenant on April 21, 2010 by the landlord's agent at the rental unit.

Issue(s) to be Decided

Is the landlord entitled to an Order of possession for Cause?

Is the landlord entitled to a monetary Order for unpaid rent?

May the landlord retain the deposit paid by the tenants?

Is the landlord entitled to filing fee costs?

Background and Evidence

The tenancy agreement requires the tenant to pay monthly rent of \$1,200.00 due on the fifteenth day of each month. The tenant paid a security deposit of \$800.00 on March 13, 2009.

On March 24, 2010, at 9 a.m. the landlord's agent and his spouse personally served the female tenant the 1 Month Notice ending the tenancy for cause. The agent was not present to testify in relation to service. On April 1, 2010, the tenant submitted an Application, disputing this Notice. The Notice indicated a number of reasons for ending the tenancy; the first being repeated late payment of rent.

The landlord has also issued at least one previous Notice to end the tenancy for unpaid rent, in response to the late payments and has made telephone calls to the tenant warning her of the rent due date.

The landlord held post-dated cheques, issued by the tenant for the fifteen day of each month. Copies of NSF cheques were submitted as evidence for late payments made on June 15, August 15 and September 15, 2009; plus January 15, and March 15, 2010. Rent payments were always made after the cheques were returned as NSF, but those payments were late. The tenants did not pay rent from March to May, 2010, inclusive. The landlord is claiming compensation for unpaid rent in the sum of \$3,600.00.

The landlord had submitted a claim for an additional \$400.00 rent per month, due to the presence of an additional occupant.

The landlord requested late payment of fees in the sum of \$40.00 per event. The tenancy agreement includes a term imposing this fee.

Analysis

I find that, pursuant to section 71(2) of the Act that the tenant has been sufficiently served with a copy of the Notice to End Tenancy for Cause issued on March 23, 2010. I base this decision on the evidence submitted by the tenant, disputing the Notice and on the landlord's testimony that his agent personally served the tenant with a copy of the Notice.

I find, pursuant to section 47(b) of the Act, that the tenant has repeatedly paid rent late and that the Notice issued on March 23, 2010, is valid. The tenant has paid rent late on 5 occasions since the tenancy commenced in April 2009. Residential Tenancy Branch policy suggests that a Notice based on late payment may be issued even if late payments are not consecutive; as in this case. I also base this decision on the number of NSF cheques written and the verbal warning given by the landlord that rent was due on the fifteenth of each month and the term of the tenancy requiring payment on the fifteenth day of each month. The tenant had provided post-dated cheques for the fifteenth of each month and would have known that the cheques would be processed for that date.

The Notice issued on March 23, 2010, included an effective vacancy date of April 5, 2010.

Section 53 of the Act stipulates that if the effective date stated in a Notice is earlier than the earliest date permitted under the legislation, the effective date is deemed to be the earliest date that complies with the legislation. Therefore, I find that the effective date of this Notice to End Tenancy was May 14, 2010.

In the absence of evidence to the contrary, I find that the tenant was served with a Notice to End Tenancy that required the tenant to vacate the rental unit on May 14, 2010, pursuant to section 47 of the Act.

The tenant's Application disputing the Notice has been dismissed, as the tenant has failed to attend this cross-Application hearing in support of her Application.

Therefore, I will grant the landlord an Order of Possession that is effective 2 days after service to the tenant.

In the absence of evidence to the contrary, I find that the tenant has not paid rent in the amount of \$3,600.00 for March, April and May, 2010, inclusive, and that the landlord is entitled to compensation in that amount.

I find that the landlord's application has merit and that the landlord is entitled to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

I find that the landlord is entitled to retain the tenant's security deposit plus interest, in the amount of \$800.00, in partial satisfaction of the monetary claim.

Residential Tenancy Regulation 7 sets the maximum allowable late payment fee at \$25.00. As the tenancy agreement includes a term that exceeds the allowable amount for late fees, I find that the term is unenforceable and the claim for late fees is dismissed.

As the male respondent is an occupant, the monetary order issued will name the female tenant only.

Conclusion

The landlord has been granted an Order of Possession based upon the 1 Month Notice issued on March 23, 2010, that is effective 2 days after service to the tenant. This Order may be served on the tenant, filed with the Supreme Court of British Columbia and enforced as an Order of that Court.

I find that the landlord has established a monetary claim, in the amount of \$3,650.00, which is comprised of \$3,600.00 in unpaid rent and \$50.00 in compensation for the filing fee that would be payable for a claim made for less than \$5,000.00. In relation to the landlord's Application for Dispute Resolution, the landlord will be retaining the tenant's security deposit plus interest, in the amount of \$800.00, in partial satisfaction of the monetary claim.

Based on these determinations I grant the landlord a monetary Order for the balance of **\$2,750.00**. In the event that the tenant does not comply with this Order, it may be served on the tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The claim for late fees is dismissed.

The portion of the landlord's claim for compensation in excess of rent and fees has been withdrawn and the landlord is at liberty to submit another Application as provided by the Act

The tenant's Application is dismissed.

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: May 20, 2010.

Dispute Resolution Officer