

DECISION

Dispute Codes:

OPR, CNC, ET, MNDC, MNR, MNSD

Introduction

This was a cross-Application hearing.

This hearing was scheduled in response to two Applications submitted by the landlord. The first Application submitted on May 27, 2010; requested an Order of possession for unpaid rent. A second Application submitted on June 11, 2010, requested an early end to the tenancy, a monetary Order for damage or loss and unpaid rent and to retain all or part of the security deposit.

On May 7, 2010, the tenant submitted an Application to cancel a Notice ending tenancy issued for cause.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process.

Preliminary Matter

Each party submitted evidence for reference during this hearing. As there were a number of individual submissions, all evidence was reviewed and the documents received by each party were confirmed and agreed upon.

The landlord confirmed that the tenant does not have any rent arrears and the portion of the claim for unpaid rent was withdrawn. The landlord's claim for damages was withdrawn as the tenancy has not ended and the landlord will be at liberty to submit an Application in relation to any damages claim at the end of the tenancy.

As the landlord's monetary claim did not proceed I reviewed the requirements of the Act in relation to the deposits paid by the tenant and held in trust by the landlord.

During the hearing the landlord confirmed that the tenancy agreement does not include a clause allowing fees to be levied for NSF fees. The landlord agreed to return to the tenant any NSF fees that the tenant has paid.

Issue(s) to be Decided

Is the landlord entitled to an Order of possession for unpaid rent?

Should a Notice ending the tenancy for cause issued on April 17, 2010, be cancelled?

Is the landlord entitled to end the tenancy early?

Preliminary Matter

The tenant has applied to cancel a Notice issued ending her tenancy for cause. The tenant believed that she would also have the opportunity to make submissions in relation to cancellation of the 10 Day Notice, issued after the tenant had submitted her Application.

I determined that I would hear the tenant's testimony in relation to the 10 Day Notice, and allowed the tenant's Application to be amended to include a request to cancel the 10 Day Notice.

Background and Evidence

This fixed term tenancy commenced on October 1, 2009 and was to end on September 14, 2010. Rent is \$650.00 due on the first day of each month. On September 15, 2009 the tenant paid a security deposit in the sum of \$325.00 and a pet deposit in the sum of \$325.00.

The tenant confirmed receipt of a ten (10) day Notice to End Tenancy for non-payment of rent on May 17, 2010. The parties agreed that the tenant sent the landlord a cheque via registered mail for unpaid May rent in the sum of \$650.00 for May rent owed.

The Notice had an effective date of May 30, 2010. The Notice indicated that the Notice would be automatically cancelled if the landlord received \$650.00 within five days after the tenant is assumed to have received the Notice. The Notice also indicated that the tenant is presumed to have accepted that the tenancy is ending and that the tenant must move out of the rental by the date set out in the Notice unless the tenant filed an Application for Dispute Resolution within five days.

The landlord received an email from the tenant on May 20, 2010. As the tenant did not have a telephone, this was the only method of communication between the parties. The email informed the landlord that the tenant would pay her rent owed within 10 days. On May 20 the landlord responded to the tenant that she only had until May 22, 2010, to pay the rent. On May 26, 2010, the landlord received a cheque for May rent; that cheque was returned as NSF. The initial rent payment made for May 1, 2010; had also been NSF.

The tenant was confused, and thought that there were sufficient funds in her account and when the landlord informed her that the cheque had been NSF the tenant obtained

a bank draft and paid her May rent owed. The tenant felt she had acted in good faith and made attempts to ensure the landlord was paid the rent and that by sending a cheque on May 20, 2010, via registered mail, payment had been made.

The landlord stated that the envelope they received containing the second payment for May rent owed was stamped by Canada Post as having been mailed on May 22, 2010. This cheque sent by registered mail was NSF. The parties agreed that a bank draft payment for May rent owed was made on June 12, 2010, and that the landlord issued the tenant a receipt for use and occupancy only.

By June 16, 2010 the tenant paid June rent owed via a bank draft dated June 15, 2010, and was issued another receipt for use and occupancy only.

Analysis

There is no dispute that the tenant received the 10 Day Notice on May 17, 2010. There is also no dispute that the tenant did not pay her rent owed within five days of May 17, 2010; as the May rent owed was not paid until June 12, 2010, via bank draft issued on that date. I have considered the tenant's argument that she was confused, that she thought she had adequate funds in her bank account to cover the rent and that by mailing the cheque via registered mail within 5 days; she had paid the rent owed.

Section 26 of the Act requires a tenant to pay the rent when it is due. Payment requires that the landlord receive the amount owed and is not based upon a sincere effort by the tenant to pay. The tenant argued that she did not know her bank had insufficient funds; however, I find that it is the responsibility of the tenant to ensure that payment is able to be successfully completed, and that did not occur within 5 days of May 17, 2010.

Section 46 of the Act stipulates that a tenant has five (5) days from the date of receiving the Notice to End Tenancy to either pay the outstanding rent or to file an Application for Dispute Resolution to dispute the Notice. I have considered the tenant's testimony in relation to cancelling the 10 Day Notice and have found that the tenant did not pay the rent owed, within 5 days of receipt of the 10 Day Notice. I find that the 10 Day Notice is valid and that the tenant's submission in relation to the rent payment failed to prove that rent was paid within 5 days of May 17, 2010.

As the tenant did not pay the rent owed within 5 days of receiving the Notice and rent payments made after the effective date of the Notice resulted in receipts issued for use and occupancy only, I find, pursuant to sections 44 and 55 of the Act, that the landlord is entitled to an Order of possession effective two days after service to the tenant.

The landlord applied requesting reimbursement of 2 NSF fees in the sum of \$70.00. The parties agreed that the tenant has paid the landlord and that no clause is contained in the tenancy agreement allowing fees to be levied. The landlord agreed to return the

fees to the tenant. Regulation 7 provides that a fee for returned cheques may not exceed \$25.00.

As the tenancy is ending I did not consider submissions in relation to the tenant's Application to cancel a Notice issued for cause or the landlord's submission in relation to reasons for an early end of this tenancy.

The deposits held in trust by the landlord must be disbursed as required by the Act.

Conclusion

The landlord has been granted an Order of Possession 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.

The landlord withdrew the request for a monetary Order for unpaid rent as the rent is paid.

The landlord withdrew the portion of the Application requesting compensation for damages and damage to rental unit and is at liberty to submit a future Application.

The deposits held in trust by the landlord must be disbursed as required by the Act.

The tenant's Application to cancel a Notice issued for cause and the landlord's Application requesting an Early end to the tenancy were not decided, as the tenancy is ending as the result of a 10 Day Notice issued for unpaid rent.

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: June 28, 2010.

Dispute Resolution Officer