

DECISION

Dispute Codes:

CNR, OP, MNR, MNDC, MNSD, 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, a monetary Order for unpaid rent, damage and loss under the Act and to retain all or part of the security deposit.

The tenant Applied to cancel a Notice ending the tenancy for unpaid rent and to recover the filing fee costs.

Both parties were present at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present affirmed oral evidence and to make submissions during the hearing.

The tenant confirmed service of Notice of the landlord's Application that was left at her rental unit door. The landlord submitted evidence that the Notice had been sent to the tenant and her son, in one package, by registered mail sent May 27, 2010. A copy of the Canada Post receipt was submitted as evidence. This mail was not claimed by either party.

Section 89(1) of the Act requires an Application requesting a monetary Order be served to a respondent either personally or by registered mail. Neither the tenant present at this hearing, or her son, picked up the registered mail. Residential Tenancy Rules of Procedure require that each respondent be served with Notice of a hearing. The landlord mailed only one hearing package intended for both tenants; therefore, I am unable to find that either tenant named in the Application was served by registered mail.

As the tenant confirmed receipt of the Notice of hearing left for her at the door of rental unit, I find, pursuant to section 71 of the Act, that the tenant has been sufficiently served with Notice of this hearing. As the landlord did not provide evidence of service to the male tenant named on the Application I find that the monetary claim may proceed only against the female tenant, who was named on the Application and served with Notice of this hearing. I find that the male tenant has been served with the portion of the Application related to an Order of possession, via an adult with whom he resides.

Preliminary Matter

During the hearing the parties confirmed that the tenant's adult son has paid some rent directly to the landlord via government issued cheques. As the landlord has accepted rent payments from the tenant's son, I find that a tenancy was established with the son, as the landlord has received rent directly from this individual.

The tenant indicated she had not received all of the evidence submitted by the landlord to the Residential Tenancy Branch. The landlord was at liberty to reference any evidence during the hearing, so that the tenant could establish if she had the document before her. Any evidence not before the tenant was not considered in my decision.

Issue(s) to be Decided

Should the Notice ending the tenancy for unpaid rent issued on May 20, 2010, be cancelled?

Is the landlord entitled to an Order of possession?

Is the landlord entitled to a monetary Order for unpaid rent and damages or loss?

May the landlord retain the deposit paid?

Is the tenant entitled to fining fee costs?

Background and Evidence

The tenancy commenced on January 5, 2010. Rent was \$1,150.00 per month, due on the first day of the month. A deposit in the sum of \$575.00 was paid on January 21, 2010.

The landlord stated that a ten (10) day Notice to End Tenancy for non-payment of rent, which had an effective date of May 30, 2010, was served to the tenants and on May 25, 2010 the tenant Applied to cancel the Notice. The Notice to End Tenancy indicated that the Notice would be automatically cancelled if the landlord received \$1,325.00 within five days of service.

The landlord amended his monetary claim from \$3,575.00 to \$2,050.00. During the hearing the landlord provided testimony in relation to the amount of rent paid from March to July, 2010. The landlord provided conflicting testimony, at times stating he had received only one government cheque toward rent owed and, at other times, indicating that he had received some payments via government cheque.

The landlord and tenant each had receipts before them, issued by the landlord. The parties' copies did not agree and when the landlord was asked to read from his copies of the receipts issued, the amounts differed from those that the landlord provided earlier in the hearing.

The parties agreed that the tenants had applied the deposit paid to March rent owed. The parties also agreed that July rent had not been paid.

Settled Agreement – Order of Possession

The landlord and tenant reached a mutual agreement that the tenant will move out by July 31, 2010, at 1 p.m. The tenant understood that the landlord will be issued an Order of possession based upon this mutual agreement and that this Order can be enforced if the tenant and all occupants do not move out by the agreed upon date and time.

Analysis – Unpaid Rent

The onus of burden of proof is on the party making a claim to prove the claim; in this case the landlord must provide proof of unpaid rent.

The landlord did not provide any copies of receipts or financial statements demonstrating the dates rent payments were made and the amount of those payments. During the hearing the landlord stated that certain amounts had been paid and then provided contradictory testimony for the same months. I could not rely upon the testimony as the landlord did not provide consistent testimony.

Therefore, based upon the testimony of both parties, the contradictory testimony of the landlord and the absence of any evidence that provided a history of payments made and rent arrears, I find, on the balance of probabilities, that the landlord has failed to prove his claim for any unpaid rent from March to June, 2010, inclusive and that portion of the claim is dismissed.

The parties have agreed that the deposit has been disbursed by applying the deposit to rent owed in March. Therefore, despite section 21 of the Act, which requires the landlord's written consent for use of the deposit toward rent, the matter of the deposit has been decided between the parties.

As the tenant acknowledged that July rent has not been paid and the tenancy agreement requires payment of rent, I find that the landlord is entitled to compensation for July rent owed and I have issued a monetary Order to the landlord in that amount.

As the landlord has failed to provide evidence supporting the claim for unpaid rent indicated on the Notice and claimed in his Application, I find that the tenant is entitled to filing fee costs, which will be deducted from the amount owed to the landlord.

Conclusion

Based upon a mutual agreement by the parties the landlord has been granted an Order of possession that is **effective July 31, 2010, at 1 p.m.** 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 \$1,150.00, which is comprised of unpaid July 2010, rent. I have deducted the \$50.00 filing fee cost provided to the tenant, resulting in a balance owed to the landlord in the sum of \$1,100.00 and I grant the landlord a monetary Order in that amount. 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 unpaid rent from March to June, 2010, inclusive is dismissed.

There is no evidence before me of any loss or damage under the Act; therefore that portion of the landlord's claim is dismissed.

The matter of the deposit has been decided by the parties and was applied to March, 2010, rent owed.

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: July 09, 2010.

Dispute Resolution Officer