

DECISION

Dispute Codes: OPR, MNR, MNSD and FF

Introduction

This application was brought by the landlord seeking an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid served by posting on the tenant's door on March 3, 2010. The landlord also sought a Monetary Order for the unpaid rent and recovery of the filing fee for this proceeding and authorization to retain the security deposit in set off against the balance owed.

Despite having been served with the Notice of Hearing served by registered mail sent on February 1, 2010, the tenant did not call in to the number provided to enable his participation in the telephone conference call hearing. Therefore, it proceeded in his absence.

This matter was originally dealt with as a Direct Request Proceeding on April 12, 2010 on written submissions only but was adjourned to the present participatory hearing due to a defect in the declaration of service of the Notice to End Tenancy, whereby the witness signed on behalf of the person effecting service, indicating there was no witness.

Issues to be Decided

This application requires a decision on whether the landlord is entitled to an Order of Possession and a Monetary Order for the unpaid rent and filing fee, and authorization to retain the security deposit in set off.

Background and Evidence

This tenancy began on November 1, 2009. Rent is \$825 per month and the landlord holds a security deposit of \$412.50.

During the hearing, the landlord gave evidence that the Notice to End Tenancy had been served when the tenant had not paid the rent for November 2009. He stated that the rent had initially not been paid because he had served a Notice to End Tenancy for landlord use on September 25, 2009 to take effect on November 30, 2009.

Consequently, he had waived the November rent as required under section 51 of the *Act*.

The landlord subsequently learned that he could not use the home for the proposed use and rescinded the Notice to End for landlord use and gave the tenant the option to continue the tenancy if he wished as confirmed by his letter to the tenant of December 2, 2009. However, as the tenancy was no longer ending pursuant to the Notice to Tenancy for landlord use, the landlord requested payment of the previously waived rent for November 2009.

The landlord stated that the tenant remains in the rental unit and refuses to pay the rent for November 2009.

Analysis

Section 46 of the *Act* provides that a landlord may issue a Notice to End Tenancy for unpaid rent on a day after the rent is due. The tenant may cancel the notice by paying the overdue rent or make application to dispute the notice within five days of receiving it.

In this instance, I find that the tenant did not pay the rent within five days of receiving the notice and did not make application to dispute it. Therefore, under the *Act*, the tenant is conclusively presumed to have accepted that the tenancy ended on the date specified in the Notice to End Tenancy.

Under the *Act*, neither party can unilaterally withdraw a Notice to End Tenancy. If the tenant had chosen to move at the end of November or earlier as permitted under section 50 of the *Act*, the tenant would have been entitled to pay no rent for November 2009. However, by remaining in the rental unit, I find that by his conduct, the tenant agreed to nullify the notice to end for landlord use and in so doing, became liable for the November rent.

Therefore, I find that the landlord is entitled to an Order of Possession effective two days from service of it on the tenant.

I further find that, including recovery of the filing fee for this proceeding and authorization to retain the security deposit plus interest in set off against the balance owed, the tenant owes the landlord an amount calculated as follows:

Rent for November 2009	\$ 2,300.00
Filing fees	<u>50.00</u>
Sub total	\$2,350.00

Less retained security deposit	- 1,150.00
Less interest (Nov. 18, 2006 to date)	- 35.49
TOTAL	\$1,164.51

Conclusion

The landlord's copy of this decision is accompanied by an Order of Possession, enforceable through the Supreme Court of British Columbia, to take effect two days from service of it on the tenant.

In addition to authorization to retain the security deposit in set off, the landlord is also issued with a Monetary Order for \$1,164.51, enforceable through the Provincial Court of British Columbia, for service on the tenant.