



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MT, OPR, OPC, OPB, MNR, MND, MNSD, FF

Introduction

This hearing was convened in response to cross applications.

The Tenant filed an Application for Dispute Resolution, in which the Tenant applied for more time to make an application to cancel a Notice to End Tenancy and to recover the filing fee from the Landlord for the cost of this Application for Dispute Resolution. The Tenant stated that she intended to apply to set aside a Ten Day Notice to End Tenancy. The Landlord stated that he understood the Tenant was applying to set aside a Ten Day Notice to End Tenancy. As the Landlord understood the nature of the Tenant's Application for Dispute Resolution and it would be illogical to reach any other conclusion, the Application for Dispute Resolution has been amended to include an application to cancel the Ten Day Notice to End Tenancy.

The Landlord filed an Application for Dispute Resolution, in which the Landlord has made application for an Order of Possession for Unpaid Rent or Utilities, an Order of Possession for Cause, an Order of Possession because the Tenant has breached an agreement; a monetary Order for unpaid rent and utilities, a monetary Order for damage to the rental unit, a monetary Order for money owed or compensation for damage or loss, 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.

Both parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, and to make relevant submissions to me.

At the hearing the Landlord acknowledged that he did not serve the Tenant with a Notice to End Tenancy for Cause. I therefore amend the Landlord's Application for Dispute Resolution to remove his application for an Order of Possession for Cause or an Order of Possession because the Tenant has breached an agreement.

At the hearing the Landlord presented no evidence of damage to the rental unit. I therefore amend the Landlord's Application for Dispute Resolution to remove his application for a monetary Order for damage to the rental unit.

The Landlord stated that he amended his Application for Dispute Resolution to increase the amount of his monetary claim from \$1,125.00 to \$2,435.00. He stated that he sent copies of the amended Application for Dispute Resolution to the Tenant, via registered mail, on December 6, 2010. The Tenant stated that she has not yet received the amended Application for Dispute Resolution.

Section 90 of the *Residential Tenancy Act (Act)* stipulates that a document that is mailed is deemed to be received on the fifth day after it is mailed. The amended Application for Dispute Resolution that was mailed by the Landlord on December 06, 2010 is therefore deemed to be received by the Tenant on December 11, 2010.

As the Tenant stated she has not yet received the amended Application for Dispute Resolution and she is not deemed to have received the mailed document until December 11, 2010, I decline to accept the amendment made by the Landlord, as he has not served the Tenant with notice of the amendment in a manner that complies with rule 2.5 of the Residential Tenancy Branch Rules of Procedure.

Issue(s) to be Decided

The issues to be decided in relation to the Landlord's Application for Dispute Resolution are whether the Landlord is entitled to an Order of Possession for unpaid rent or utilities; to a monetary Order for unpaid rent or utilities; for a monetary Order for an unpaid pet damage deposit; to keep all or part of the Tenant's security deposit; and to recover the filing fee from the Tenant for the cost of the Application for Dispute Resolution, pursuant to sections 38, 55, 67, and 72 of the *Act*.

The issues to be decided in relation to the Tenant's Application for Dispute Resolution are whether the Tenant should be granted more time to file an application to cancel a Ten Day Notice to End Tenancy; whether the Ten Day Notice to End Tenancy should be set aside; and whether the Tenant is entitled to recover the filing fee from the Landlord for the cost of the Application for Dispute Resolution, pursuant to sections 46(4), 66(1) and 72 of the *Act*.

Background and Evidence

The Landlord and the Tenant agree that the Tenant moved into the rental unit on October 20, 2010; that the parties did not sign a written tenancy agreement; and that the parties verbally agreed that the Tenant would pay monthly rent of \$850.00 on the first day of each month.

The Landlord stated that the "he believes" the Tenant agreed to pay rent of \$300.00 for the period between October 20, 2010 and October 31, 2010. The Tenant stated that she agreed to pay something for the period between October 20, 2010 and October 31, 2010, although they did not agree on an amount that would be paid.

The Landlord and the Tenant agree that the Tenant paid a security deposit of \$425.00 on October 20, 2010.

The Landlord stated that the Tenant was also required to pay a pet damage deposit of \$425.00. The Tenant stated that she did not agree to pay a pet damage deposit when they discussed the terms of this tenancy.

The Landlord stated that the Tenant was required to pay a utility deposit of \$150.00 at the beginning of the tenancy and a subsequent monthly utility payment of \$200.00 on the first day of each month. He stated that the payments would be used to pay for the Tenant's portion of the utility costs for the residential complex and that any difference between the actual costs of the utility charges and the utility payments would be returned to the Tenant once the bills had been received, if the payment exceeded the costs of the utilities.

The Tenant stated that she understood she was required to pay \$200.00 per month for utilities and that a part of that payment would be returned to her if the payment exceeded the cost of the utilities, although she did not understand when the payments would be reconciled or how the costs of the utilities would be shared between her unit and the other rental unit in the residential complex.

The Landlord and the Tenant agreed that the Tenant paid \$200.00 to the Landlord on October 27, 2010 and \$600.00 to the Landlord on November 01, 2010. The Tenant stated that when she made the payment on November 01, 2010 she believed she had paid all the rent that was due for November of 2010.

The Landlord and the Tenant agree that on November 14, 2010 the Landlord personally served the Tenant with a Ten Day Notice to End Tenancy for Unpaid Rent and Utilities, which had a declared effective date of November 22, 2010. The Notice to End Tenancy declared that the Tenant owed \$925.00 in unpaid rent and \$200.00 in unpaid utilities, for a total of \$1,125.00. The Notice informed the Tenant she must dispute the Notice to End the Tenancy or pay the outstanding rent and utilities within five days.

The Landlord stated that when he served the Notice to End Tenancy he believed the Tenant still owed a \$75.00 in rent from October of 2010; \$850.00 in rent from November of 2010, for a total of \$925.00, plus a utility payment of \$200.00 that was due on November 01, 2010. The Tenant stated that she believed she had paid all the rent that was due by November 01, 2010 and she did not understand how she could still owe \$925.00 for rent.

The Tenant stated that the Landlord assaulted her on November 14, 2010 when he served the Notice to End Tenancy; that the incident was reported to the police; and that the Landlord was arrested and charged with assault. The Landlord acknowledged that he forced the door of the rental unit when he was trying to serve the Notice to End Tenancy as the Tenant was attempting to close the door on him. The Landlord acknowledged that he has been issued a Peace Bond as a result of this incident. The

Tenant stated that the police officer who investigated the incident took the Notice to End Tenancy that had been served to her by the Landlord as he required it for his investigation. The Tenant stated that she filed her Application for Dispute Resolution on November 22, 2010, which is eight days after it was served upon her. She stated that she could not file it within five days of receiving it because it was not returned to her until after that time period had passed, and she has applied for more time to file an application to set aside the Notice.

The Landlord and the Tenant agree that the Tenant paid \$200.00 to the Landlord on November 25, 2010.

Analysis

The undisputed evidence shows that the Tenant entered into a tenancy agreement with the Landlord that requires the Tenant to pay monthly rent of \$850.00 on the first day of each month and that she paid a security deposit of \$425.00 on October 20, 2010.

There is a general legal principle that places the burden of proving that damage occurred on the person who is claiming compensation for damages, not on the person who is denying the damage. In these circumstances the Landlord bears the burden of proving how much rent the Tenant was required to pay for October of 2010.

I find that the Tenant's statement that the parties had not agreed on the amount of rent she would be required to pay for the period between October 20, 2010 and October 31, 2010 is credible. In reaching this conclusion I was heavily influenced by the absence of a written tenancy agreement, which could easily lead to this misunderstanding; by her candid and forthright acknowledgement that she should pay something for rent for this period; and by the fairly apparent lack of clear communication between the parties regarding this tenancy. As the Tenant agrees that she agreed to pay some rent for the period between October 20, 2010 and October 31, 2010, I find that the Tenant must pay \$300.00, which is a reasonable amount calculated at a daily rate of \$27.41.

In these circumstances, the Landlord also bears the burden of proving that the Tenant was required to pay a pet damage deposit and I find that the Landlord has submitted insufficient evidence to show that the Tenant agreed to pay a pet damage deposit. In reaching this conclusion, I was strongly influenced by the absence of evidence that corroborates the Agent for the Landlord's statement that the Tenant agreed to pay a pet damage deposit and by the Tenant's testimony that she did not agree to that payment. On this basis, I am unable to conclude that the Tenant was required to pay a pet damage deposit and I dismiss the Landlord's application for a monetary Order for a pet damage deposit.

Section 17 and 18 of the *Act* authorizes landlords to collect a security deposit or a pet damage deposit under certain circumstances. The *Act* does not authorize landlords to collect any other deposits, including a utility deposit. Deposits are generally considered to be money paid by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant in respect to the rental unit.

I find that the \$150.00 utility payment the Landlord required the Tenant to pay at the beginning of the tenancy and the \$200.00 payment on the first day of each month constitutes a utility deposit, as the money was collected for the purpose of paying utility expenses that the Tenant was expected to incur in the future. In determining that the payments were deposits, I was heavily influenced by the understanding that a portion of this payment would be returned if the payment exceeded the cost of utility charges for any particular month. As the Landlord is not authorized to collect a utility deposit, I find that the Tenant was not obligated to pay a \$150.00 utility deposit at the beginning of the tenancy nor is she required to pay a monthly deposit of \$200.00.

I find that the Tenant did agree to pay for the utilities she uses and that she is obligated to pay for an equitable portion of utilities for the residential complex, taking into account the size of her rental unit in comparison with the size of the entire residential complex. I find, however, that she is not required to pay those utility charges until the Landlord and the Tenant reach an agreement on the percentage of the costs that the Tenant must pay and I find that she is not required to pay any utility charges until she is provided with copies of the utility bills. In the event that the Landlord and the Tenant are unable to reach an agreement of how the utility bills should be shared between the upper and lower rental units, the parties have the right to have that matter determined by a Dispute Resolution Officer.

Based on the above calculations, I find that by November 01, 2010, the Tenant should have paid the Landlord \$850.00 in rent for November plus the security deposit of \$425.00, for a total of \$1,275.00. Based on the undisputed evidence, I find that the Tenant had only paid \$1,225.00 by November 01, 2010 and that she still owed the Landlord \$50.00 to the Landlord on November 01, 2010.

I find that the Tenant was personally served with a Ten Day Notice to End Tenancy for Unpaid Rent and Utilities on November 14, 2010. I find that the amount owing on the Notice to End Tenancy was incorrect, based on my determination that she only owed \$50.00 in rent to the Landlord on November 01, 2010 and she was not required to pay the utility payment of \$200.00. I find that the incorrect information contained on the Notice to End Tenancy was prejudicial to the Tenant, as it did not correctly inform her that she still owed \$50.00 in rent. I find the incorrect information placed the Tenant at a significant disadvantage, as she may have elected to pay the outstanding rent of \$50.00 if she had been informed of the correct amount that was due.

I find that it was reasonable for the Tenant to file an Application for Dispute Resolution as she did not understand the amount of rent that the Landlord had declared was due on November 01, 2010. I find that the Landlord contributed to the confusion regarding the amount of rent that was due, in part, because he was including the pet damage deposit in the declared rent arrears. More importantly, I find that the Landlord significantly contributed to the confusion regarding the amount of rent that was due when he failed to prepare a written tenancy agreement which clearly outlined whether a security deposit was due, whether a pet damage deposit was due, the amount of pro-

rated rent that was due for October of 2010, and the amount of monthly rent that was due. Section 13(1) of the *Act* requires landlords to prepare a written tenancy agreement for new tenancies and I find that this confusion may not have arisen if the Landlord had complied with this obligation. In my view this tenancy should not end on the basis of unpaid rent which arose from the Landlord's failure to clearly communicate the terms of the tenancy. On this basis, I am dismissing the Landlord's application for an Order of Possession and granting the Tenant's application to set aside the Notice to End Tenancy.

The undisputed evidence is that there was a police investigation into the circumstances surrounding the service of the Ten Day Notice to End Tenancy. In the absence of evidence to the contrary, I accept the Tenant's testimony that the police took the Notice to End Tenancy during this investigation, as I find this evidence to be plausible and credible.

Section 46(4) of the *Act* stipulates that a tenant must either pay the outstanding rent or make an application for dispute resolution to set aside the Notice to End Tenancy within five days of receiving the Notice. Section 66(1) of the *Act* authorizes me to extend time limits established by section 46(4) of the *Act* in exceptional circumstances. I find that the Tenant was unable to dispute this Notice to End Tenancy within five days of receiving it because the Notice was in the possession of the police until after the time limit had expired. I find these to be exceptional circumstances and I therefore grant the Tenant's application to extend the time limit established by section 46(4) of the *Act*.

Section 46(1) of the *Act* stipulates that a 10 Day Notice to End Tenancy is effective ten days after the date that the tenant receives the Notice. As the Tenant was not served the Notice until November 14, 2010, I find that the earliest effective date of the Notice is November 24, 2010. I therefore find that section 66(3) has no bearing on this matter.

I find that the Application for Dispute Resolution of both parties have some merit and I therefore find that they are each responsible for the costs of filing their own Applications for Dispute Resolution.

Conclusion

I find that the Landlord has established a monetary claim, in the amount of \$350.00, which is comprised of \$300.00 in unpaid rent from October and \$50.00 in unpaid rent from November of 2010.

I find this monetary claim must be reduced by \$200.00, which is the amount that the Tenant paid to the Landlord on March 25, 2010. On the basis of these calculations, I grant the Landlord a monetary Order of \$150.00. 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.

Both parties are hereby advised that the amount due to the Landlord constitutes unpaid rent that is now due. In the event that Tenant fails to pay the Landlord this amount, the Landlord has the right to serve the Tenant with another Ten Day Notice to End Tenancy 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: December 13, 2010.

Dispute Resolution Officer