



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes OPR, MNR, MNDC, MNSD, FF

Introduction

This matter dealt with an Application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts.

The Landlord's agents said they served the Tenant with the Application and Notice of Hearing (the "hearing package") by registered mail on December 6, 2010. Section 90 of the Act says that a document delivered in that manner is deemed to be received by the recipient 5 days later. Based on the evidence of the Landlord, I find that the Tenant was served with the Landlord's hearing package as required by s. 89 of the Act and the hearing proceeded in the Tenant's absence.

Issues(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?
2. Are there rent arrears and if so, how much?
3. Is the Landlord entitled to keep the Tenant's security deposit?

Background and Evidence

This fixed term tenancy started on March 15, 2010 and expires on March 31, 2011. Rent was originally \$1,600.00 per month but was reduced to \$1,500.00 as of September 1, 2010. Rent is due in advance on the 1st day of each month. The Tenant paid a security deposit of \$800.00 at the beginning of the tenancy.

The Landlord's agents said the Tenant had rent arrears of \$300.00 for November 2010 and did not pay rent when it was due for December 2010. As a result, on December 2, 2010, the Landlord's agents served the Tenant by registered mail with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated December 2, 2010 which showed rent arrears of \$1,800.00. The Landlord's agents said the Tenant paid \$1,500.00 in cash on December 20, 2010 for which he was given a receipt "for use and occupancy only" (indicating that the Landlord was not reinstating the tenancy by accepting overdue rent).

Analysis

I find that the Tenant was served with the 10 day Notice to End Tenancy for Unpaid Rent or Utilities by registered mail on December 2, 2010. Pursuant to section 90 of the Act, the Tenant is deemed to have received the Notice on December 7, 2010. Pursuant to s. 46(4) of the Act the Tenant had 5 days or until December 13, 2010 (the “effective date of the Notice”) to either pay the rent arrears and therefore cancel the Notice or to apply for dispute resolution to dispute that the amount is owed. I find that the Tenant did not apply for dispute resolution and did not pay the overdue rent in full.

However, RTB Fact Sheet #124 sets out the common law position when a Landlord accepts a rent payment after serving a Tenant with a Notice to End Tenancy as follows:

“When a landlord does not want the tenancy to continue, the landlord must:

1. Clearly tell the tenant that the payment of rent outside the 5 day period, or payment of some of the rent within the five 5 day period, does not cancel the Notice;
2. Specifically tell the tenant that the rental payment is being accepted for the use and occupancy only and does not reinstate the tenancy; and
3. Tell the tenant of one of the following options:
 - o The tenant must vacate in accordance with the Notice to End Tenancy, or
 - o The tenant must vacate at the end of the month.

If a dispute arises, the landlord must prove the payment was accepted for use and occupation only and not to reinstate the tenancy. Therefore, the landlord should advise the tenant, in writing, that the tenancy is not being reinstated and the tenant must vacate.

The Landlord’s agent (V.E.) claimed that he gave the Tenant a receipt for his late rent payment on December 20, 2010 and noted on it that the payment was accepted for use and occupancy only. The Landlord’s agent was asked to submit a copy of this receipt as evidence following the hearing and did so. The copy of the receipt provided by the Landlord’s agent however, **does not** say that it is for use and occupancy only but rather, “partial rent.”

While it is arguable that the Landlord may have reinstated the tenancy by accepting the Tenant’s late rent payment after the effective date of the Notice and without qualification, the Tenant did not attend the hearing to make that argument. Consequently, I find that the Landlord is entitled to an Order of Possession to take effect 2 days after service of it on the Tenant pursuant to s. 55(2)(b) of the Act.



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I also find that the Landlord is entitled to recover rent arrears of \$300.00 as well as the \$50.00 filing fee for this proceeding. I order the Landlord pursuant to s. 72 of the Act to deduct the amount of \$350.00 from the Tenant's security deposit in full satisfaction of the monetary award.

Conclusion

The Landlord's application to recover unpaid rent is granted. An Order of Possession to take effect 2 days after service of it on the Tenant has been issued to the Landlord. A copy of the Order must be served on the Tenant and may be enforced in the Supreme Court of British Columbia.

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 21, 2010.

Dispute Resolution Officer