



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MND, MNDS, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent, for compensation for repair expenses, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts. At the beginning of the hearing, the Landlord's agent applied to amend the application by adding a claim for November 2011 rent. Given that the Tenant consented to this amendment, I grant the Landlord's request to increase the monetary claim by that amount.

Issue(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 compensation for repairs?
4. Is the Landlord entitled to keep the Tenant's security deposit?

Background and Evidence

This fixed term tenancy started on April 1, 2010, expired on March 31, 2011 and continued on a month-to-month basis thereafter. Rent is \$1,530.00 per month plus \$30.00 for parking. The Tenant paid a security deposit of \$750.00 at the beginning of the tenancy.

The Parties agree that the Tenant's rent cheque for October 2011 was returned for non-sufficient funds and as a result, on October 11, 2011 the Landlord's agent served the Tenant in person with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated October 11, 2011. The Parties also agree that the Tenant made a payment of \$500.00 on October 25, 2011 and another payment of \$200.00 some time in November 2011 for which she was issued receipts which stated that they were accepted as "partial payments of rent." The Parties agree that the Tenant currently has rent arrears of \$830.00 for October 2011 and of \$1,530.00 for November 2011 (not including parking).

The Parties further agree that on September 3, 2011, one of the toilets in the rental unit overflowed and water leaked into the suite below (and the garage below that) causing

water damage to areas of the lower suite's floor, walls and ceiling. The Parties agree that the Tenant had not been using this toilet for some time because it was not flushing properly, however the Tenant did not report this to the Landlord. A guest of the Tenant's children was unaware that the toilet was not being used and used the toilet on September 3, 2011 without the Tenant's knowledge.

The Landlord's agent said the leak was not discovered for approximately an hour and a half because the occupants of that suite were not home at the time. When an agent for the Landlord discovered water leaking he asked the Tenant if there was any water leaking from her unit but she responded that there was not. However, the Tenant said she investigated just to be sure and discovered that the toilet had overflowed and she immediately advised the Landlord's agent who turned off the water to the toilet and used a plunger to clear it. The Landlord's agent argued that the Tenant was responsible for the water damage because she knew the toilet was not working and failed to report it. The Tenant argued that the cause of the toilet "running slow" was not determined because no blockages were found. The Tenant also argued that because she was not using the toilet, she had no reason to believe that it had overflowed and she reported the leak to the Landlord as soon as she discovered it.

Analysis

Section 46(4) of the Act states that within 5 days of receiving a Notice to End Tenancy for Unpaid Rent or Utilities, a Tenant must either pay the overdue rent or (if they believe the amount is not owed) apply for dispute resolution. If a Tenant fails to do either of these things, then under section 46(5) of the Act, they are conclusively presumed to have accepted that the tenancy will end on the effective date of the Notice and they must vacate the rental unit at that time.

I find that the Tenant was served in person on October 11, 2011 with a 10 Day Notice to End Tenancy for Unpaid Rent. I also find that the Tenant made payments of a total of \$700.00 after the effective date of the 10 Day Notice which were accepted as "rent" by the Landlord's agent. It is a principle of common law that if a Landlord accepts a payment of rent after the effective date of the Notice, the Landlord is thereby deemed to have reinstated the tenancy (*see RTB Fact Sheet #124*). The Landlord's agent claimed that she repeatedly had conversations with the Tenant about the tenancy ending and the Tenant admitted that she was aware that the Landlord did not intend to reinstate the tenancy. Consequently, I find that the Landlord did not reinstate the tenancy and that the 10 Day Notice remains enforceable.

As a further consequence, the Tenant would have had to pay the full amount stated on the Notice or apply to dispute that amount no later than October 17, 2011 (given that the 16th fell on a non-business day). I find that the Tenant did not pay the rent arrears in full and did not apply for dispute resolution to dispute the Notice. 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. I also find that the Landlord is entitled to recover unpaid rent of \$830.00 for October 2011 plus \$30.00 for parking and pro-rated rent and parking fees of \$832.00 for the period, November 1 – 16, 2011.

The Landlord also sought to recover a late payment fee of \$25.00 and an NSF fee of \$42.50 with respect to the Tenant's returned cheque for October 2011 rent. Section 7 of the Regulations to the Act says that a Landlord may charge a late payment fee of no more than \$25.00 provided that there is a term in the Parties' tenancy agreement to that effect. Section 7 of the Regulations says that a Landlord may also recover from a Tenant the actual amount charged by its financial institution for a returned cheque. The Landlord provided an incomplete copy of the tenancy agreement at the hearing and it did not contain a provision regarding late payment fees. The Landlord also provided no evidence that it was charged an NSF fee by its financial institution for the Tenant's returned cheque. Consequently, I find that there is insufficient evidence to support this part of the Landlord's claim and it is dismissed without leave to reapply.

Section 32(3) of the Act says that a Tenant is responsible for damages caused by their (or a guest's) act or neglect but it not responsible for reasonable wear and tear. The Tenant argued that she reported the water leak from the toilet to the Landlord as soon as she discovered it. However, I find that this is not the issue; the issue is that the Tenant was negligent in failing to report the malfunctioning toilet to the Landlord in a timely manner. As a result of the Tenant's failure to advise the Landlord that there was a problem with the toilet, the toilet overflowed and leaked for an extended period of time causing damages to the suite below her. Consequently, I find that the Landlord is entitled to recover its repair expenses of \$3,033.60.

I also find that the Landlord is entitled to recover the \$50.00 filing fee for this proceeding. I order the Landlord pursuant to s. 38(4) and s. 72 of the Act to keep the Tenant's security deposit of \$750.00 in partial payment of the monetary award. The Landlord will receive a Monetary Order for the balance owing as follows:

Rent arrears:	\$1,692.00
Repair expenses:	\$3,033.60
Filing fee:	<u>\$50.00</u>
Subtotal:	\$4,775.60
Less: Security Deposit:	<u>(\$750.00)</u>
Balance Owing:	\$4,025.60

Conclusion

An Order of Possession effective 2 days after service of it on the Tenant and a Monetary Order in the amount of **\$4,025.60** have been issued to the Landlord. A copy of the Orders must be served on the Tenant; the Order of Possession may be enforced in the Supreme Court of British Columbia and the Monetary Order may be enforced in the Provincial (Small Claims) 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: November 17, 2011.

Residential Tenancy Branch