



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent as well as to recover the filing fee for this proceeding. At the first day of the hearing, the Tenant said he had received a copy of the Landlord's statement of account up to and including March 2011. However, the Landlord provided the Residential Tenancy Branch with a statement of account up to and including October 2011. The Tenant also said he believed that he had made some payments that did not appear on his copy of the Landlord's statement of account however he did not provide any evidence of those alleged payments. Consequently, the hearing was adjourned so that the Landlord could serve the Tenant with the same evidence package that he submitted to the Residential Tenancy Branch. The Tenant was also ordered to file any responding evidence of alleged payments and to serve a copy of them on the Landlord. On the 2nd day of the hearing, the Parties confirmed that they had served each other with their documents.

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?

Background and Evidence

This month-to-month tenancy started on September 1, 2007. Pad rent was \$561.01 for 2010 and is \$579.73 for 2011. Rent is due in advance on the 1st day of each calendar month. On October 16, 2011, the Landlord served the Tenant in person with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated October 16, 2011. The Notice alleged that there were rent arrears of \$2,403.03. The Landlord relied on a hand-written statement of account showing the payments purportedly made by the Tenant for 2010 and 2011.

The Tenant argued that the Landlord's accounts were in error in that they showed that his rent cheque for October 2010 had been returned for non-sufficient funds. The Tenant provided a copy of the cancelled cheque dated October 1, 2010 as well as a copy of his bank statement showing that these funds had cleared his account. The Tenant claimed that he also gave the Landlord a cheque dated October 30, 2010 for November 2010 pad rent but that the Landlord deposited it on October 13, 2010. The

Tenant said he was charged a \$40.00 fee by his bank for this returned cheque and therefore the Landlord agreed that he could deduct \$40.00 from his rent payment for November 2010. The Tenant said that was why he made a payment of \$521.00 for November 2010. The Landlord's records however show that the Tenant had a shortfall of rent of \$40.00 for this month. The Tenant further claimed that the Landlord's records show a payment on January 23, 2011 of \$400.00 for December 2010 pad rent. The Tenant said he gave the Landlord a cheque dated December 1, 2010 for \$561.01 for December 2010 pad rent. The Tenant provided a copy of his bank statement showing that these funds had cleared his account. Consequently, the Tenant argued that the Landlord's records did not account for rent payments of \$1,162.02 by him and a rent reduction of \$40.00 for November in 2010.

Analysis

Section 39(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 apply for dispute resolution. If a Tenant fails to do either of these things, then under section 39(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 16, 2011 with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated October 16, 2011. Consequently, the Tenant would have had to pay the rent arrears stated on the Notice or apply to dispute that amount no later than October 21, 2011.

Although the Landlord claimed that there were rent arrears of \$2,403.03, I find that this amount is not correct because it includes \$420.00 for late fees and NSF fees which are not "rent" as defined under s. 1 of the Act. Furthermore, I agree with the Tenant and find that the Tenant made two payments of \$561.00 by way of cheques dated October 1, 2010 and December 1, 2010 that are not accounted for on the Landlord's statement of account. I also find on a balance of probabilities that the Tenant was given a rent reduction of \$40.00 in November 2010 to compensate him for bank fees he incurred due to the Landlord depositing his November 2010 rent cheque early. Consequently, having considered the evidence of both parties, I find that as of October 16, 2011, there were rent arrears of \$821.01 as follows:

Landlord statement of account:	\$2,403.03
Less: Late fees and NSF fees:	(\$420.00)
Payments not included:	(\$1,122.02)
Rent reduction in November 2010:	(\$40.00)
Total rent arrears:	\$821.01

I find that the Tenant has not paid the overdue rent and has not applied for dispute resolution. Consequently, I find pursuant to s. 48(2)(b) of the Act that the Landlord is entitled to an Order of Possession to take effect 2 days after service of it on the Tenant.

The Parties agree that the Tenant has not paid rent for November and December 2011. As a result, I also find that the Landlord is entitled to recover rent arrears in the amount of \$1,943.03.

Section 5(d) of the Regulations to the Act says that a Landlord may charge a Tenant no more than \$25.00 as a late payment fee *provided that there is a term in the Parties' tenancy agreement to that effect*. Section 5(c) of the Regulations to the Act also says that a Landlord may charge a Tenant a service fee charged by the Landlord's financial institution for the return of a Tenant's cheque. This means that a Landlord must provide evidence that they were actually charged an NSF fee by their financial institution.

I find that there is no term in the Parties' tenancy agreement regarding the payment of a late payment fee. I also find that the Landlord has provided no evidence that he incurred expenses from his financial institution due to the return of the Tenant's cheques. Consequently, I find that the Landlord is not entitled to recover late payment fees and NSF fees in the amount of \$420.00 and that part of his application is dismissed without leave to reapply. The Landlord is entitled pursuant to s. 65(1) of the Act to recover from the Tenant the \$50.00 filing fee he paid for this proceeding.

Conclusion

An Order of Possession to take effect 2 days after service of it on the Tenant and a Monetary Order in the amount of **\$1,993.03** have been issued to the Landlord. 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.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Manufactured Home Park Tenancy Act*.

Dated: December 14, 2011.

Residential Tenancy Branch