



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OPR, MNR, MNSD, FF

Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord has made application for an Order of Possession for Unpaid Rent, a monetary Order for unpaid rent and 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.

The Tenant filed an Application for Dispute Resolution, in which the Tenant applied to set aside a Notice to End Tenancy for Unpaid Rent.

Both parties were represented at the original hearing and the reconvened 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.

The Landlord stated that a copy of the Application for Dispute Resolution, a copy of the Notice of Hearing and several documents, including a copy of the tenancy agreement, were personally served to the Tenant on November 22, 2011. The Tenant acknowledged receiving several documents from the Landlord on November 22, 2011 but she stated that she did not receive a copy of the tenancy agreement on that date and that she does not have a copy of that agreement with her at this time.

The Tenant stated that a copy of the Application for Dispute Resolution and a copy of the Notice of Hearing were personally served to the Landlord on November 22, 2011. The Landlord acknowledged receiving these documents.

As the original hearing proceeded I determined that the tenancy agreement was integral to this dispute and that it should be considered when making a determination in this matter. As the Landlord believes it was served on the Tenant as evidence and the Tenant does not believe it was served, the matter was adjourned to provide the Landlord with a second opportunity to serve this document to the Tenant. The Landlord was directed to either serve the

document to the Tenant in person or by registered mail no later than December 09, 2011.

During the original hearing the Landlord was having significant difficulty explaining how the alleged debt of \$2,907.50 had accrued. He was therefore directed to provide the Tenant and the Residential Tenancy Branch to provide a detailed calculation, in writing, of how this debt had accrued.

Issue(s) to be Decided

The issues to be decided are whether the Notice to End Tenancy should be set aside; whether the Landlord is entitled to an Order of Possession for unpaid rent; whether the Landlord is entitled to a monetary Order for unpaid rent/loss of revenue; whether the Landlord is entitled to keep all or part of the security deposit; and whether the Landlord is entitled 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 *Residential Tenancy Act (Act)*.

Background and Evidence

The Landlord and the Tenant agree that this tenancy began on November 15, 2008; that the parties signed a written tenancy agreement; and that the Tenant paid a security deposit of \$965.00 sometime in November of 2008. The tenancy agreement was submitted as evidence.

The tenancy agreement stipulates that the tenant agrees to pay "bi-weekly rent" of \$800.00 plus a water fee of \$35.00. The Tenant stated that she interpreted this to mean that she had to pay monthly rent of \$1,670.00. The Landlord stated that he interpreted this to mean that she had to pay rent of \$835.00 every two weeks.

The Landlord and the Tenant agree that the bi-weekly rent was increased to \$860.00, including the water fee, on March 11, 2011. The Tenant stated that she interpreted this to mean that she had to pay monthly rent of \$1,720.00. The Landlord stated that he interpreted this to mean that she had to pay rent of \$860.00 every two weeks.

The Landlord and the Tenant agree that they entered into a written agreement to increase the rent to \$860.00, which was dated July 27, 2011. I have no evidence that the Landlord gave the Tenant 3 month's notice of the rent increase, as is required by section 42(2) of the Act.

The tenancy agreement stipulates that the bi-weekly rent was due on the first day of each month. The Landlord and the Tenant both stated that they understood the rent was due on every second Saturday.

The Tenant contends that she has overpaid her rent because she has made 26 bi-weekly payments each year and she believes she should only make two

payments each month, for a total of 24 payments...did she overpay because of an illegal rent increase???

The Agent for the Landlord stated that she put a Ten Day Notice to End Tenancy for Unpaid Rent, which had an effective date of October 20, 2009, under the front door of the rental unit on October 23, 2009. The Notice declared that the Tenant owed \$1,200.00 in rent that was due on October 01, 2009.

Analysis

I find that the Landlord and the Tenant entered into a periodic tenancy agreement that requires the Tenant to pay \$835.00 in rent every two weeks. In reaching this determination I was heavily influenced by the tenancy agreement that clearly outlines that rent is due bi-weekly and by the absence of any reference in the agreement to a monthly tenancy.

As the Landlord and the Tenant both understand that the rent was due on every second Saturday, I find that the bi-weekly payment is due every second Saturday. In reaching this determination I have placed no weight on the tenancy agreement that stipulates the rent is due on the first day of each month. As this term is unclear I find that it is unenforceable and I must rely on the oral agreement the parties had reached regarding payment of rent.

Based on the evidence provided by the Landlord and in the absence of evidence to the contrary, I find that the Tenants have not paid rent for October or November of 2009. As he is required to pay rent pursuant to section 26(1) of the Act, I find that the Tenant must pay \$2,400.00 in outstanding rent to the Landlord.

If rent is not paid when it is due, a tenancy may be ended pursuant to section 46 of the Act. In the absence of evidence to the contrary, I find that the Tenant was served with a Notice to End Tenancy that directed the Tenant to vacate the rental unit by XXXXXX, pursuant to section 46 of the Act.

Section 90 of the Act stipulates that a document that is posted on a door is deemed to be received on the third day after it is posted. I therefore find that the Tenant received the Notice to End Tenancy on XXXXX.

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 is deemed to have received this Notice on XXXXXX, I find that the earliest effective date of the Notice is XXXXXX.

Section 53 of the *Act* stipulates that if the effective date stated in a Notice is earlier than the earliest date permitted under the legislation, the effective date is deemed to be the earliest date that complies with the legislation. Therefore, I find that the effective date of this Notice to End Tenancy was XXXXXX.

Section 46 of the *Act* stipulates that a tenant is conclusively presumed to have accepted the tenancy ends on the effective date of the Notice to End Tenancy if the tenant does not either pay the outstanding rent or file an Application for Dispute Resolution to dispute the Notice within five days of receiving the Notice to End Tenancy. In the circumstances before me I have no evidence that the Tenant exercised either of these rights and, pursuant to section 46(5) of the *Act*, I find that the Tenant accepted that the tenancy has ended. On this basis I find that the Landlord is entitled to an Order of Possession.

As the Tenant did not vacate the rental unit on February 18, 2011, I find that he is obligated to pay rent, on a per diem basis, for the days he remained in possession of the rental unit. As he has already been ordered to pay rent for the period between February 18, 2011 and February 28, 2011, I find that the Landlord has been duly compensated for that period. I also find that the Tenant must compensate the Landlord for the four days in March that he remained in possession of the rental unit, at a daily rate of \$26.61, which equates to \$106.44.

I find that the Tenant fundamentally breached the tenancy agreement when he did not pay rent when it was due. I find that the Tenant fundamentally breached section 46(5) of the *Act* when he did not vacate the rental unit by the effective date of the Ten Day Notice to End Tenancy. I find that his continued occupancy of the rental unit made it difficult, if not impossible for the Landlord to find new tenants for March 01, 2011 as the Tenant had not vacated the rental unit by that time. I therefore find that the Tenant must compensate the Landlord for the loss of revenue he experienced between March 05, 2011 and March 31, 2011, which was \$718.56.

I find that the Landlord's application has merit and that the Landlord is entitled to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

I find that the Landlord is entitled to retain the Tenant's security deposit plus interest, in the amount of \$XXXXX, in partial satisfaction of the monetary claim.

Conclusion

I hereby grant the Landlord an Order of Possession that is effective two days after it is served upon the Tenant OR at 1:00 p.m. on March 31, 2011. This Order may be served on the Tenant, filed with the Supreme Court of British Columbia, and enforced as an Order of that Court.

I find that the Landlord has established a monetary claim, in the amount of \$2,450.00, which is comprised of \$2,400.00 in unpaid rent and \$50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution. The Landlord will be retaining the Tenant's security deposit plus interest, in the amount of \$600.00, in partial satisfaction of the monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance of \$1,850.00. 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.

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 07, 2011.

Residential Tenancy Branch