

DECISION

Dispute Codes:

OPR; MNR; MNDC, MNSD; FF

Introduction

This is the Landlord's application for an Order of Possession; a Monetary Order for unpaid rent and loss of revenue, to retain the security deposit in partial satisfaction of its monetary claim; and to recover the cost of the filing fee from the Tenant.

The parties gave affirmed testimony at the Hearing.

The parties agreed that the Landlord's agent KK hand delivered the Notice of Hearing documents and copies of the Landlord's documentary evidence to the Tenant at the rental unit on November 21, 2011, at 2:58 p.m.

The parties also agreed that the Tenant provided the Landlord's agent LP with copies of her documentary evidence, by fax, on November 28, 2011.

Issues to be Decided

- Is the Landlord entitled to an Order of Possession?
- Is the Landlord entitled to a Monetary Order, and if so, in what amount?

Background and Evidence

The parties agreed on the following facts:

The parties entered into a month-to-month tenancy agreement on June 5, 2009. Monthly rent is \$875.00 per month, due the first day of each month. The Tenant paid a security deposit in the amount of \$437.50 and a pet damage deposit in the amount of \$437.50.

The Landlord's agents gave the following testimony:

On November 2, 2011, the Landlord issued a Notice to End Tenancy for unpaid rent in the amount of \$875.00 that was due on November 1, 2011 (the "Notice"). The Landlord's agent KK served the Tenant with the Notice by posting it on the Tenant's door at the rental unit on November 2, 2011, at 9:58 a.m.

The Tenant did not pay the outstanding rent within 5 days of receipt of the Notice. On November 24, 2011, the Tenant paid \$1,125.00; on November 29, 2011, the Tenant paid \$300.00 and on December 2, 2011, the Tenant paid \$325.00 to the Landlord for which the Landlord provided the Tenant with receipts "for use and occupancy only". The Landlord's agent explained to the Tenant that the Landlord was accepting the payments as debt but was not reinstating the tenancy.

The Landlord's agent DS requested an Order of Possession effective December 31, 2011, at 1:00 p.m.

The Tenant and her advocate gave the following testimony and submissions:

The Tenant concurred with the Landlord's agents' testimony. The Tenant's advocate submitted that rent is paid up to date, albeit late. She stated that the Tenant had run into difficulty finding work because of family issues, but is now working full time and wants to keep her tenancy. The Tenant's advocate submitted that the Tenant was not aware of the requirements of the Act with respect to payment of outstanding rent and stated that she acted in good faith. The Tenant's advocate submitted that the Notice was for November rent and that no notice to end tenancy was issued and served with respect to December rent.

The Landlord's agent LP gave the following response:

The Landlord's agent stated that the Landlord was not interested in entering a new tenancy agreement with the Tenant.

Analysis

Sections 46 (1), (4) and (5) of the Act state:

Landlord's notice: non-payment of rent

46 (1) A landlord may end a tenancy **if rent is unpaid on any day after the day it is due**, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

(4) **Within 5 days** after receiving a notice under this section, the tenant may

(a) pay the overdue rent, in which case the notice has no effect, or

(b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is **conclusively presumed to have accepted that the tenancy ends on the effective date of the notice**, and

(b) **must** vacate the rental unit to which the notice relates by that date.

(emphasis added)

In this case, the Tenant's advocate argued that the Tenant paid the rent, which the Landlord accepted and which reinstated the tenancy. I do not accept that argument. In order to reinstate a tenancy, or create a new tenancy, there must be an agreement by both parties that a tenancy is being formed. The Landlord's agent provided the Tenant with a receipt for money paid, marked "for use and occupancy only" and explained to the Tenant what that meant.

Based on the testimony of both parties, I accept that the Landlord's agent served the Tenant with the Notice posting it on the Tenant's door on November 2, 2011. Pursuant to the provisions of Section 90 of the Act, service in this manner is deemed to be effected three days after posting the documents. The Tenant did not pay the arrears, or file for dispute resolution, within 5 days of receiving the documents. Therefore, I find that the Landlord is entitled to an Order of Possession. I find the effective date of the end of tenancy was November 15, 2011, however the Landlord has accepted money from the Tenant for use and occupancy of the rental unit until December 31, 2011. Therefore, I hereby provide the Landlord with an Order of Possession effective 1:00 p.m., December 31, 2011.

With respect to the Landlord's application for a Monetary Order, I find that the Landlord is not entitled to a monetary award for unpaid rent for November, 2011, or for loss of revenue for December, 2011, as the Tenant has already paid that debt. It is premature to request loss of revenue for the month of January, 2012, and I dismiss this portion of the Landlord's claim with leave to reapply.

The Landlord's application had merit and I find that it is entitled to recover the cost of the filing fee from the Tenant. Pursuant to the provisions of Section 72(2)(b) of the Act, the Landlord may deduct \$50.00 from the security deposit being held for the Tenant. The remainder of the security deposit and the pet damage deposit must be applied in accordance with the provisions of the Act.

Conclusion

I hereby provide the Landlord an Order of Possession effective **1:00 p.m., December 31, 2011**. This Order must be served on the Tenant and may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to the provisions of Section 72(2)(b) of the Act, **the Landlord may deduct \$50.00 from the security deposit being held for the Tenant.**

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 06, 2011.

Residential Tenancy Branch