



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR

Introduction

This matter dealt with an application by the Tenant to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated December 12, 2011.

Issue(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?

Background and Evidence

This month-to-month tenancy started on April 15, 2011. The rental property is a house. The Tenant resides in an upper suite and another tenant resides in a lower suite. The Tenant is responsible for the monthly rent of \$1,475.00, however she and the tenant of the lower suite pay the Landlord their respective portions of the rent separately; the Tenant's portion of the rent for the upper suite is \$825.00. Rent is due in advance on the 1st day of each calendar month.

The Tenant said she discovered in October of 2011 that the mortgagee of the rental property had filed a petition of foreclosure. The Tenant said she got independent legal advice and in particular was advised that she could lose her security deposit of \$725.00. Consequently, the Tenant said she decided to deduct the security deposit from her rent for November 2011 and she and the lower tenant each paid the Landlord ½ of their usual rent payments for a total of \$737.50. The Tenant made a full rent payment to the Landlord for December 2011.

On December 12, 2011, the Landlord served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated December 12, 2011 with respect to the unpaid rent for November 2011. The Tenant said she then received a letter dated December 13, 2011 from the lawyer for the mortgagee that stated in part, "that all rent payments due now or in the future in respect of the Property" were to be paid to the lawyer's office in trust for the mortgagee pursuant to an assignment of rents clause in the mortgage. The Tenant said the letter also advised her that if she failed to follow this direction, she could be liable to pay the rent twice. The Tenant said she decided to

wait until the dispute resolution hearing to determine who should receive the rent she withheld for November 2011.

The Landlord admitted that any rent payments should now be remitted to the lawyer for the mortgagee however he argued that the outstanding rent for November 2011 was due November 1, 2011, prior to the Tenant being directed to pay it to the mortgagee. The Landlord also argued that the letter dated December 13, 2011 did not direct the Tenant to make retroactive rent payments to the mortgagee.

Analysis

Section 46(4) of the Act says that a Tenant who receives a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities must within 5 days either pay the overdue rent or if they believe the rent is not owed, apply for dispute resolution to cancel the Notice. I find that the Tenant was served on December 12, 2011 with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on December 12, 2011. Consequently, the Tenant had 5 days or no later than December 17, 2011 to either pay the overdue rent or to apply for dispute resolution to cancel it.

Although the Tenant applied for dispute resolution to cancel the Notice within the 5 days granted under s. 46(4) of the Act, I find that there are no grounds to grant her application because I find that there is overdue rent that remains unpaid.

Section 21 of the Act says that, "unless the landlord gives written consent, a tenant must not apply a security deposit or a pet damage deposit as rent." Section 26 of the Act says that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent."

The Tenant admitted and I find that she withheld part of her rent for November 2011 without any authority under the Act and without the consent of the Landlord. I also find that even if the Tenant's rent payment for December 2011 was applied to the rent arrears for November 2011, there would still be the same amount of rent owing for December 2011 that comprised the rent arrears set out under the 10 Day Notice. Under the terms of the Parties' tenancy agreement, rent is due on the 1st calendar day of each month and a 10 Day Notice does not operate to extend the date that rent is due. Consequently, I agree with the Landlord that when the letter from the mortgagee's lawyer directed the Tenant to pay "**rent due now or in the future**", it did not operate retroactively or direct her to make her November rent payment that was due on November 1, 2011 to the mortgagee after December 13, 2011. Furthermore, the Tenant admitted that she has not paid the overdue rent for November 2011 to either the Landlord or the mortgagee. For all of these reasons, the Tenant's application to cancel the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated December 12, 2011 is dismissed without leave to reapply.

Conclusion

The Tenant's application is dismissed without leave to reapply. The Landlord requested and I find pursuant to s. 55(1) of the Act that he is entitled to 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: January 04, 2012.

Residential Tenancy Branch