



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MND, MNDC, MNSD, FF, O

Introduction

This matter dealt with an application by the Landlords for an Order of Possession and a Monetary Order for unpaid rent and utilities, for compensation for damages to the rental unit, to recover the filing fee for this proceeding and to keep the Tenants' security deposit in partial payment of those amounts.

The Landlords named three parties as Tenants on their application for dispute resolution, namely, L.T., J.K., and J.R. The Landlords initially submitted a copy of a tenancy agreement signed only by the Tenant, L.T. The Landlords then submitted a copy of a tenancy agreement signed by L.T. *and one of the Landlords*. Given that there is a tenancy agreement signed by L.T. *and one of the Landlords*, I find that J.K. and J.R. are not properly named as parties to this proceeding because they are not parties to that tenancy agreement. Consequently, the style of cause is amended by removing J.K. and J.R. as Tenants.

The Landlords said they served the Tenant on January 5, 2012 with the Application and Notice of Hearing (the "hearing package") by registered mail to the rental unit address. According to the Canada Post online tracking system, the "*recipient [was] not located at address provided.*" The Landlords claim, however, that the Tenant resided in the rental unit at that time and still resides in the rental unit because they did an inspection on January 19, 2012 and all of the Tenant's and her roommates' furnishings and personal possessions were there. Based on the evidence of the Landlords, I find that the Tenant was served with the Landlords' hearing package as required by s. 89 of the Act and the hearing proceeded in the Tenant's absence.

Issue(s) to be Decided

1. Do the Landlords have grounds to end the tenancy?
2. Are there rent and utility arrears and if so, how much?
3. Are the Landlords entitled to compensation for cleaning and repair expenses?

Background and Evidence

According to the copy of the tenancy agreement provided by the Landlords at the hearing, this fixed term tenancy started on March 19, 2011 and expires on April 30, 2012. Rent is \$2,145.00 per month payable in advance on the 19th calendar day of each month. The Tenant paid a security deposit of \$1,072.00 and a pet deposit of \$875.00 at the beginning of the tenancy.

The Landlords said the Tenant did not pay rent for the period, December 19, 2011 to January 18, 2012, when it was due and as a result, on December 21, 2011 they posted a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on the rental unit door. The Landlords said the Tenant has not paid anything since that time and now rent for the period, January 19 – February 18, 2012, is unpaid. The Landlords also claim that on or about January 10, 2012 they received a Notice from the municipality advising them that the municipal utility account was in arrears of \$219.42 and if it remained unpaid would be added to the Landlords' tax account.

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 with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on December 21, 2011 when it was posted to the rental unit door. Under s. 90 of the Act, the Tenant is deemed to have received the Notice 3 days later or on December 24, 2011. Consequently, the Tenant would have had to pay the amount on the Notice or apply to dispute that amount no later than December 29, 2011. I find that the Tenant has not paid the overdue rent and has not applied for dispute resolution. Consequently, I find pursuant to s. 55(2)(b) of the Act that the Landlords are entitled to an Order of Possession to take effect 2 days after service of it on the Tenant.

I also find that the Landlords are entitled to recover rent arrears of **\$2,145.00** for the period, December 19, 2011 to January 18, 2012, rent arrears for the period January 19 – 30, 2012, in the pro-rated amount of **\$830.32** and a loss of rental income for the period, January 31, 2012 to February 18, 2012 in the pro-rated amount of **\$1,314.68**. I also find that the Landlords are now financially responsible for the Tenant's unpaid municipal utility bill in the amount of **\$219.42** and award them that amount.

The Landlords also sought compensation for estimated cleaning and repair expenses, however, the Landlords claimed that the tenancy has not ended and therefore I find that

this part of their application is premature. In other words, the Landlords must mitigate their damages by giving the Tenants an opportunity to leave the rental unit reasonably clean and undamaged before vacating at the end of the tenancy and as a result, this part of the Landlords' claim is dismissed with leave to reapply. The Landlords also argued that they believed the Tenant may be delinquent on other bills (such as a gas bill) which if left unpaid could result in the Landlords or future Tenants having to pay a deposit. Consequently, the Landlords sought \$250.00 to compensate them in the event they had to pay a deposit. However, I find that this claim is speculative; the Landlords provided no evidence that they or future tenants would have to pay a utility deposit. As a result, this part of the Landlords' claim is dismissed with leave to reapply (however the Landlords are cautioned that such a claim is unlikely to succeed in the absence of evidence of an actual loss as required by s. 7(1) of the Act).

The Landlords also sought to recover late fees of \$29.50 per day for 20 days. Section 7 of the Regulations to the Act says that a Landlord can charge only a maximum of \$25.00 for a late fee and only if there is a term in the Parties' tenancy agreement to that effect. The Landlords argued that even if the amount they sought was contrary to the Act, they should still be entitled to recover a \$25.00 late fee. However, s. 5 of the Act says that a Landlord cannot avoid or contract out of the Act or tenancy agreement and if they do, the clause in question is of no force or effect. Consequently, I find that the clause or term of the tenancy agreement that provides for a late fee of \$29.50 per day contravenes s. 7 of the Regulations to the Act and is unenforceable. Furthermore, the Landlords cannot now try to gain an advantage under the Act by asking the director to amend the invalid clause so that it does comply with the Act.

The Landlords further sought to recover registered mail and photograph expenses. With the exception of compensation for filing the Application for Dispute Resolution (permitted under s. 72 of the Act), the Act does not allow an Applicant to make a claim for costs associated with participating in the dispute resolution process. Consequently, this part of the Landlords' application is dismissed without leave to reapply. However, I find that the Landlords are entitled to recover from the Tenant the \$100.00 filing fee they paid for this proceeding. I Order the Landlords pursuant to s. 38(4) of the Act to keep the Tenant's security and pet damage deposit in partial payment of the rent arrears. The Landlords will receive a Monetary Order for the balance owing as follows:

Unpaid rent (Dec. 19/11 – Jan. 18/12):	\$2,145.00
Unpaid rent (Jan. 19/12 – Jan. 30/12):	\$830.32
Loss of rent (Jan. 31/12 – Feb. 18/12):	\$1,314.68
Unpaid municipal Utilities:	\$219.42
Filing fee:	<u>\$100.00</u>
Subtotal:	\$4,609.42
Less: Security deposit:	(\$1,072.00)
Pet deposit:	<u>(\$875.00)</u>
Balance owing	\$2,662.42

Conclusion

An Order of Possession effective 2 days after service of it on the Tenant and a Monetary Order in the amount of **\$2,662.42** have been issued to the Landlords. 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: January 30, 2012.

Residential Tenancy Branch