



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR

Introduction

This hearing arose as a result of directions from the Supreme Court of British Columbia following a judicial review of a decision.

The original hearing was conducted by way of a Direct Request Proceeding on May 09, 2012, and dealt with the Landlord's application for an Order of Possession for unpaid rent. (the "Original Decision").

In the Original Decision, the Dispute Resolution Officer found that the Landlord met the burden of proof that rent remained unpaid and the Landlord was granted an Order of Possession.

On May 11, 2012 the Tenant filed an application for review consideration and on May 18, 2012 a decision was put forth which granted the review and a new hearing was scheduled for June 11, 2012.

On June 11, 2012 the Landlord appeared at the new hearing however no one appeared on behalf of the Tenant. The Dispute Resolution Officer dismissed the review without leave to reapply.

The Tenant filed for judicial review which was heard on June 26, 2012. An Order was filed on June 27, 2012 stating that:

1. *The decision of the Residential Tenancy Board dated June 11, 2012 is set aside.*
2. *Each party to bear their own costs.*

The matter was convened August 10, 2012, for this present session. The parties appeared at the teleconference hearing and gave affirmed testimony. At the outset of the hearing I explained that this was a "new" hearing and instructed the parties on how the hearing would proceed and the expectations for conduct during the hearing; in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Preliminary Matter

At the outset of the hearing the Tenant confirmed receipt of the Landlord's evidence however the Landlord asserted that he had not received any evidence from the Tenant.

The Tenant submitted that she had recently found out that her evidence from the previous hearings would not be considered and that she had to re-submit all evidence she wished to have considered for this proceeding. She confirmed faxing her evidence to the *Residential Tenancy Branch on August 8, 2012* and noted that by the time she attended the Landlord's place of business his office was closed so she taped the evidence to the exterior door.

The Landlord advised that his office is located inside a secured apartment building where access through the exterior door is granted by calling the occupant and being buzzed in. He confirmed that his office is closed at 5:00 p.m. on weekdays and is not open on weekends. He also confirmed that there is no mailbox or other method available to deliver documents outside of their regular business hours.

A discussion followed whereby the Landlord agreed that he did not want to delay this process any longer and he agreed to have the Tenant's evidence faxed to him and a short recess to allow him time to review the documents. The Tenant's evidence was faxed to the Landlord and when I asked if a five minute recess would be enough time for him to review the documents he advised that he did not need a recess as he knew these documents which were submitted by the Tenant.

Issue(s) to be Decided

1. Was the Tenant's security deposit previously paid to the Landlord?
2. Has a valid 10 Day Notice been issued and served upon the Tenant?
3. Should the Landlord be granted an Order of Possession for unpaid rent?

Background and Evidence

The parties agreed that they entered into a fixed term tenancy that began on August 1, 2009 and switched to a month to month tenancy after January 31, 2012. Rent is provided under a subsidy and a damage deposit (also referred as a security deposit) was required to be paid by July 31, 2009 in the amount of \$450.00; which is based on market value rent.

The Landlord submitted 39 pages of documents into evidence which included, among other things, copies of:

- the tenancy agreement;
- deposit reports dated October 09, February 10, June 10, October 10, May 12;
- a letter to the Tenant informing her of damage deposit arrears of \$200.00 dated 05 January 2010;
- a letter to the Tenant informing her of damage deposit arrears of \$350.00 dated 06 May 2010;
- an agreement to repay arrears signed by the Tenant and dated May 10, 2010;
- NSF cheques and cheques marked "account closed";
- proof of service charges for returned cheques;
- a letter to the Tenant dated 01 February 2011 which references an agreement signed September 2009 to repay the damage deposit of \$450.00;
- A 10 Day Notice to end tenancy for unpaid rent dated 18 April 2012 issued for \$210.00 of unpaid rent that was due 1 August 2009;

The Landlord asserted that the Tenant has failed to pay the full \$450.00 damage deposit that was due July 31, 2009. He stated that she has an unpaid balance of the damage deposit of \$200.00 and the additional \$10.00 included on the 10 Day Notice is for bank service charges incurred by the Landlord when the Tenant wrote two cheques on an account that had been closed. The Landlord confirmed that there is no provision in the tenancy agreement that allows the Tenant to be charged for bank charges incurred by the Landlord for returned cheques.

The Landlord advised that the "deposit reports" provided in evidence are copies of an Excel spreadsheet which is created by their Executive Director and is simply a list of payments received during each month. The Landlord submitted that they did not provide copies of deposit reports from the onset of the tenancy as they only provided copies of the reports which indicate a payment received from the Tenant towards her damage deposit.

Upon review of the Landlord's evidence, the Landlord stated that he did not have knowledge of the September 2009 repayment agreement that is referenced in the 01 February 2011 letter issued to the Tenant. Furthermore, the Landlord advised that he could not explain why the outstanding balance noted in the January 5, 2010 letter is \$200.00 and the outstanding balance in the May 06, 2010 letter is listed as \$350.00.

The Landlord indicated that when the Tenant failed to pay the outstanding balance they decided to issue the 10 Day Notice to end her tenancy. He asserts that the Tenant has been served copies of this 10 Day Notice on April 18, 2012, April 30, 2012, June 26, 2012, and again on July 25, 2012.

The Tenant submitted 5 pages of documents into evidence which included, among other things, copies of:

- A business card from a supervisor at the Ministry of Social Development with a hand written note from the Tenant;
- A Cheque History for the benefit month of 2009 Jul from the Ministry of Social Development which indicates a cheque was cashed that was issued to the Landlord in the amount of \$450.00;
- An undated letter from the Ministry of Social Development which states that the Tenant's rent is paid directly to the Landlord and has been since August 2009;
- A June 13, 2012 letter from Canada Post;
- A signed receipt indicating the Tenant received a copy of the mailbox key on June 27, 2012.

The Tenant asserted that her evidence supports that the Landlord was paid the \$450.00 security deposit back in July 2009. She explained that the cheque history print out indicates that a hold was previously placed on the cheque, delaying the cheque's release, until the Tenant signed an agreement with the Ministry to repay the deposit. She advised that after she signed the agreement the cheque was released to the Landlord and subsequently cashed. She confirmed that her rent has always been paid directly to the Landlord by the Ministry and she does not have a balance owing for unpaid rent.

The Tenant submitted that she suffers from a chronic form of leukemia and that periods throughout her life she has to undergo extensive treatment when she is not in remission. She stated that she has found it difficult to keep track of things with her Landlord and argued that she signed the repayment agreements because she trusted that the Landlord's records were correct. She stated that since she has had to go through this eviction process she has found out that the Ministry paid the deposit back in 2009 and therefore the additional payments of \$250.00 are an overpayment and should be returned to her.

At the end of the hearing I discussed with the Landlord the feasibility of ordering the Landlord to provide copies of their bank records for the period of July 2009 to December 2009. It was during this discussion that the Landlord advised that the Tenant, along with 19 other tenants, were all being moved into this new building for the first of August 2009. He stated that it was a very busy and chaotic time where they had to deal with twenty tenants entering into new tenancy agreements for subsidized rent and every one of them was required to pay the exact same damage deposit of \$450.00. The Landlord confirmed that both he and the Executive Director were employed by the Landlord during this time.

Analysis

A party who makes an application for dispute resolution against another party has the burden to prove their claim. In this case the Landlord has the burden to prove the Tenant did not pay the damage deposit of \$450.00 in July 2009.

Upon review of the Landlord's evidence I note the Landlord and Tenant signed the tenancy agreement on July 22, 2009 which indicates the Tenant was to pay the damage deposit by July 31, 2009. The Landlord is relying on evidence of deposit reports which begin at October 2009 and has provided no evidence of deposits made during July, August or September 2009. Furthermore the Landlord has provided contradictory evidence in their letters to the Tenant when they initially indicate in their letter dated January 5, 2010 that the Tenant had damage deposit arrears of \$200.00 and later on May 6, 2010 they issue a letter advising the Tenant she has arrears of \$350.00. The Landlord later advised that July and August 2009 were chaotic as they were moving 20 tenants into this new building at the beginning of August and all 20 tenants were required to pay the same damage deposit amount of \$450.00.

Upon consideration of the foregoing I prefer the Tenant's evidence which included a copy of the Cheque History report from the Ministry of Social Development which indicates a cheque in the amount of \$450.00 was issued to the Landlord during the benefit month of July 2009 and was cashed.

After considering the chaotic circumstances of July and August 2009 presented to me during the hearing and in the absence of deposit records for July, August or September 2009, I find it plausible that the Tenant's damage deposit of \$450.00 was paid directly to the Landlord by the Ministry and the Landlord's tracking of deposits during that time was inaccurate. Accordingly, I find the Tenant's damage deposit of \$450.00 was paid in July 2009, and the subsequent payments of \$250.00 are an overpayment and should be returned to the Tenant.

If the Landlord fails to return the overpaid damage deposit of \$250.00 the Tenant will be at liberty to file an application for dispute resolution to obtain a Monetary Order for the return of the over payment.

Section 46 of the Act provides that a landlord may end a tenancy by issuing a 10 Day Notice if **rent** is unpaid on any day after the day it is due. Section 47 of the Act provides that a landlord may end a tenancy by issuing a 1 Month Notice to end tenancy for Cause if the tenant does not pay the **security deposit** within 30 days of the date it is required to be paid under the tenancy agreement [emphasis added]. (Section 46 and 47 of the Act are reproduced at the end of this decision).

Part 1 Section 7 of the Regulation stipulates that a landlord may charge a tenant a service fee charged by a financial institution to the landlord for the return of a tenant's cheque; the charge cannot be more than \$25.00; and the landlord **must not** charge the service fee unless the tenancy agreement provides for that fee [emphasis added]. (Part 1, Section 7 of the Regulations is also listed at the end of this decision).

The evidence supports that the \$210.00 list as being outstanding rent on the 10 Day Notice is comprised of \$200.00 for the damage deposit and \$10.00 for returned cheque charges which are not provided for in the tenancy agreement. Based on the

aforementioned, I find the 10 Day Notice to end tenancy issued April 18, 2012, to be invalid as it lists amounts that are not unpaid rent.

Conclusion

The Tenant's damage deposit of \$450.00 was paid in full in July 2009 and the Tenant has subsequently overpaid the damage deposit by \$250.00.

The 10 Day Notice to end tenancy for unpaid rent issued April 18, 2012, is invalid and is of no force or effect.

The Landlord's application for an Order of Possession is hereby dismissed, without leave to reapply.

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: August 15, 2012.

Residential Tenancy Branch

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.
- (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
- (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.
- (6) If
- (a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and
 - (b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,
- the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

Landlord's notice: cause

- 47** (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
- (a) the tenant does not pay the security deposit or pet damage deposit within 30 days of the date it is required to be paid under the tenancy agreement;
 - (b) the tenant is repeatedly late paying rent;

(c) there are an unreasonable number of occupants in a rental unit;

(d) the tenant or a person permitted on the residential property by the tenant has

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or

(iii) put the landlord's property at significant risk;

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

(i) has caused or is likely to cause damage to the landlord's property,

(ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

(iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

(g) the tenant does not repair damage to the rental unit or other residential property, as required under section 32 (3)

[obligations to repair and maintain], within a reasonable time;

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

(i) the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*;

(j) the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser viewing the residential property;

(k) the rental unit must be vacated to comply with an order of a federal, British Columbia, regional or municipal government authority;

(l) the tenant has not complied with an order of the director within 30 days of the later of the following dates:

- (i) the date the tenant receives the order;
- (ii) the date specified in the order for the tenant to comply with the order.

(2) A notice under this section must end the tenancy effective on a date that is

- (a) not earlier than one month after the date the notice is received, and
- (b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.

(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not 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 by that date.

Non-refundable fees charged by landlord

7 (1) A landlord may charge any of the following non-refundable fees:

- (a) direct cost of replacing keys or other access devices;
- (b) direct cost of additional keys or other access devices requested by the tenant;
- (c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
- (d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
- (e) subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;

(f) a move-in or move-out fee charged by a strata corporation to the landlord;

(g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.