



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the tenant: CNR, FF
For the landlord: MNR, OPR, FF

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the "Act").

The tenants applied seeking cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice") and for recovery of the filing fee.

The landlords applied for a monetary order for unpaid rent, an order of possession due to unpaid rent due and for recovery of the filing fee.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally, refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

At the outset of the hearing, each party confirmed that they had received the other party's evidence, with the exception of a 7 page evidence package from the landlord, submitted to the Residential Tenancy Branch ("RTB") on August 30, 2012. The tenant said, and the landlord confirmed, that this particular evidence package was not sent to the tenants. No other issues were raised by any party regarding service of the application or the evidence.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Preliminary Issue-Although there was some disagreement as to when the tenants vacated the rental unit, all parties confirmed that the tenants no longer resided in the rental unit. Therefore the tenants' request seeking a cancellation of the Notice was rendered moot and it was no longer necessary to consider their application to cancel the Notice.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent and to recover the filing fee?

Background and Evidence

This tenancy started on October 15, 2009, originally for a fixed term of 2 years, 17 days, ending on October 31, 2011. The parties thereafter executed a new tenancy agreement, with the tenancy commencing on November 1, 2011, and ending on October 31, 2012.

The current monthly rent is \$3063.89. The parties agreed that the landlords were paid a security deposit of \$1497.50 on September 9, 2009.

The landlord stated that on August 2, 2012, the tenants were served a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice"), via personal delivery to tenant JD, listing an amount of \$3063.89 as unpaid rent as of August 1, 2012. The effective move out date listed on the Notice was August 12, 2012.

The landlords submitted that the tenants did not make any rent payment in the month of August and still owed rent of \$3063.89 for that month.

The tenant submitted that rent was not owed for the month of August due to an agreement he had with landlord VM regarding consulting work.

The landlords additionally are claiming loss of revenue for the months of September and October 2012, until the end of the fixed term, in the amount of \$6127.78.

The parties disputed the actual date of the end of the tenancy; however, all parties agree that the landlord's agent received the keys to the rental home on August 30, 2012.

After the parties agreed that the keys were returned on this date, the landlord said that not all keys were returned, receiving 4 of the 5 keys given to the tenants. When questioned, the landlord said that each occupant of the rental unit was given a key.

The tenant said that he returned all keys given to him, as he was given only 4 keys.

I note that the tenancy agreement does not contain the names of 5 occupants.

I also note that during the hearing, the landlord initially agreed that they were aware that the rental unit was vacant on August 29, 2012 and that the parties communicated about a date of a move out inspection at the end of August 2012, with no success regarding a mutually agreeable move out date.

At some point later in the hearing, the landlord's agent said that she does not consider the tenancy to be over as the fixed term of the tenancy agreement was through October 31, 2012.

The landlords relevant evidence included the tenancy agreements and email communication between the parties.

Analysis

In a claim for damage or loss under the Act or tenancy agreement, the claiming party, the landlords in this case, has to prove four different elements:

First, proof that the damage or loss exists, **second**, that the damage or loss occurred due to the actions or neglect of the respondent in violation of the Act or agreement, **third**, verification of the actual loss or damage claimed and **fourth**, proof that the party took all reasonable measures to mitigate their loss.

Where the claiming party has not met all four elements, the burden of proof has not been met and the claim fails.

Tenants' application-As the tenants vacated the rental unit prior to the hearing, I dismiss their application seeking a cancellation of the 10 Day Notice. As I have dismissed their application, I also dismiss their request seeking recovery of the filing fee.

Landlords' application- Where a tenant fails to pay rent in full when due, the landlord may serve the tenant with a 10 Day Notice for Unpaid Rent. Upon receipt of the 10 Day Notice, the tenant must pay the outstanding rent or dispute the Notice within five days. In this case, I find that the tenants disputed the Notice within the required time. Where a Notice is disputed, the tenants must be able to show that they do not owe to rent to the landlords or had some other legal right to withhold rent.

Upon hearing from the parties and considering the evidence presented, I am satisfied that the tenants owed the landlord rent for August 1, 2012, when the Notice was issued, that they did not pay the outstanding rent to the landlords within five days of receiving the Notice and the tenants did not establish that they had the legal right to withhold the rent owed.

I therefore find the landlords have established a monetary claim of \$3063.89 for unpaid rent for August 2012.

As to the issue of the date this tenancy ended, I find the evidence substantiates, and I find, that the tenancy ended on August 30, 2012, when the tenants returned the keys to the rental unit to the landlord's agent. I do not accept the landlord's agent's statement that the tenancy is ongoing, considering the keys have been returned and the parties were attempting to schedule a move out inspection.

As to the landlord's claim for unpaid rent or loss of revenue for September and October 2012, an applicant seeking a monetary order is under a statutory duty to take reasonable steps to minimize their loss.

I find that the landlords have not submitted any evidence that they have made or are making any reasonable efforts as soon as possible after the end of the tenancy to re-rent the rental unit at a reasonably economic rent.

Due to this and the early date in the current month for this hearing, I find the landlord's claim for loss of revenue for September and October to be premature as they have not yet sustained a loss for the entire month of September or for October 2012.

I therefore dismiss their claim for loss of revenue for September and October 2012, with leave to reapply.

As the landlords' application contained partial merit, I allow them recovery of a partial filing fee in the amount of \$50.00.

Conclusion

The tenants' application is dismissed, without leave to reapply.

The landlords have established a monetary claim \$3113.89, comprised of unpaid rent of \$3063.89 for August 2012 and \$50.00 for partial recovery of the filing fee.

At the landlords' oral request, I allow the landlords to retain the tenants' security deposit of \$1497.50 in partial satisfaction of their monetary claim and I therefore grant the landlords a final, legally binding monetary order in the amount of \$1616.39 for the balance due, which I have enclosed with the landlords' Decision.

Should the tenants fail to pay the landlords this amount without delay, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court.

The portion of the landlords' application seeking loss of revenue for September and October 2012 is dismissed, with 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: September 05, 2012.

Residential Tenancy Branch