



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OPR, OPC, CNR, MNR, MNSD, LRE, FF

Introduction

This hearing was convened in response to cross applications.

On September 17, 2012 the Landlord filed an Application for Dispute Resolution, in which the Landlord has made application for an Order of Possession for Unpaid Rent or Utilities, an Order of Possession for Cause, a monetary Order for unpaid rent and/or utilities, to retain all or part of the security deposit, and to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

On September 12, 2012 the Tenant filed an Application for Dispute Resolution, in which the Tenant has applied to set aside a Notice to End Tenancy for Unpaid Rent and for an Order suspending or setting conditions on the Landlord's right to enter the rental unit.

The Landlord stated that two copies of the Application for Dispute Resolution, two copies of the Notice of Hearing, and a package of evidence, which included the Notice to End Tenancy for Cause and the Notice to End Tenancy for Unpaid Rent, were sent to the rental unit, via registered mail, on September 17, 2012. The Landlord submitted a copy of a registered mail receipt that corroborates this statement.

The male Tenant acknowledged that they received the aforementioned documents, although he believes they were all placed through their mail slot on September 06, 2012.

On the basis of the Landlord's testimony and the registered mail receipt, I find that the Application for Dispute Resolution, the Notice of Hearing, and documents the Landlord intends to rely upon as evidence, including a Ten Day Notice to End Tenancy for Unpaid Rent and a One Month Notice to End Tenancy for Cause, were sent to the rental unit by registered mail. As both Tenants were present at the hearing and indicated they were aware the Landlord had filed an Application for Dispute Resolution, I find that they have both been served with these documents, pursuant to section 71(2)(b) of the Act on September 22, 2012, which is five days after they were mailed. In determining the date of service, I placed no weight on the male Tenant's testimony that they were served on September 06, 2012, as the Landlord did not file his Application until September 17, 2012.

The female Tenant stated that the Tenant's Application for Dispute Resolution, and Notice of Hearing were sent to the female Landlord on, or about, September 16, 2012, via regular mail. The Landlord stated that this mail has not been received by the Landlord.

The purpose of serving the Application for Dispute Resolution and the Notice of Hearing to the other party is to notify the Respondent that a dispute resolution proceeding has been initiated and to give them the opportunity to respond to the claims being made by the Applicant. When a tenant files an Application for Dispute Resolution the tenant has the burden of proving that the landlord was served with the Application for Dispute Resolution in compliance with section 89(1) of the *Residential Tenancy Act (Act)*.

Section 89(1) of the *Act* stipulates, in part, that a tenant must serve a landlord with an Application for Dispute Resolution in one of the following ways:

- (a) by leaving a copy with the person;
- (b) by leaving a copy with an agent of the landlord;
- (c) by sending a copy by registered mail to the address at which the person resides or carries on business as a landlord;
- (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

The Tenant submitted no evidence to show that either Landlord was personally served with the Application for Dispute Resolution or Notice of Hearing and I therefore cannot find that the Landlord was served in accordance with section 89(1)(a) of the *Act*.

The Tenant submitted no evidence to show that the Application for Dispute Resolution or Notice of Hearing was left with an agent of the Landlord and I therefore cannot find that the Landlord was served in accordance with section 89(1)(b) of the *Act*.

The Tenant submitted no evidence to show that the Application for Dispute Resolution or Notice of Hearing was sent by registered mail and I therefore cannot find that the Landlord was served in accordance with section 89(1)(c) of the *Act*.

There is no evidence that the director authorized the Landlord to serve the Application for Dispute Resolution to the Landlord in an alternate manner, and I therefore cannot find that the Landlord was served in accordance with section 89(1)(e) of the *Act*.

The Tenant submitted no evidence to cause me to conclude that the Landlord received the Tenant's Application for Dispute Resolution, therefore I cannot conclude that the Application has been sufficiently served pursuant to sections 71(2)(b) or 71(2)(c) of the *Act*.

As the Landlord has not been properly served with the Tenant's Application for Dispute Resolution, I dismiss the Tenant's Application for Dispute Resolution, with leave to reapply.

The Landlord stated that he submitted additional evidence to the Residential Tenancy Branch on October 11, 2012, although that evidence was not before me at the time of the hearing. The landlord stated that his evidence was placed in the mail slot of the rental unit on October 11, 2012. The male Tenant stated that this evidence was not received. The Landlord declined the opportunity to request an adjournment for the purposes of re-serving this evidence to the Tenant, and he was advised that this evidence would not be considered when determining this matter.

Issue(s) to be Decided

The issues to be decided are whether the Landlord is entitled to an Order of Possession; to a monetary Order for unpaid rent or utilities; to keep all or part of the security deposit; and to recover the filing fee from the Tenant for the cost of the Application for Dispute Resolution, pursuant to sections 38, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The Landlord and the Tenant agree that this tenancy began in July of 2011, which required the Tenant to pay monthly rent of \$1,150.00 by the third day of each month, and that the Tenant paid a security deposit of \$575.00.

The Landlord and the Tenant agree that the Tenant was granted a monetary Order, in the amount of \$3,600.00, at a previous dispute resolution hearing. The parties agree that a dispute resolution hearing into this matter was convened on August 01, 2012, after which the Dispute Resolution Officer determined that no rent was owing for any period prior to August 01, 2012 and that as of August 01, 2012 the Tenant still had a balance remaining from the original monetary Order in the amount of \$775.00, which could be applied to rent for August.

At the hearing the Landlord argued that there had been a mathematical error in a previous decision and that the balance on August 01, 2012 was \$725.00. The Landlord stated that he did not file an application to correct the mathematical error he believes has occurred. At the hearing the male Tenant stated that he believed the balance on August 01, 2012 was \$675.00.

The Landlord stated that the Tenant paid no rent for August of 2012. He stated that he went to the rental unit on August 03, 2012 for the purposes of collecting the rent and he was told by occupants of the unit that neither Tenant was at home. The male Tenant stated that the Landlord came to the rental unit on August 03, 2012; that the Tenant tried to give him \$575.00, in cash, for rent for August; and that the Landlord refused to take the cash.

The Landlord stated that the Tenant paid no rent for September of 2012. He stated that he went to the rental unit on September 03, 2012 for the purposes of collecting the rent and he was told by occupants of the unit to leave. The male Tenant stated that he and the other Tenant were home on September 03, 2012 and that he was not aware the Landlord had come to the rental unit. He stated that he phoned the Landlord on two occasions in September, for the purposes of paying the rent; that he does not recall the dates that he phoned the Landlord; that the Landlord did not answer the phone; and that he did not leave a message on either occasion.

The Landlord stated that on September 05, 2012 the Landlord placed a Ten Day Notice to End Tenancy for Unpaid Rent through the mail slot of the rental unit, which had a declared effective date of September 15, 2012. The male Tenant stated that this Notice to End Tenancy was received on September 06, 2012.

The Landlord stated that on September 05, 2012 the Landlord also placed a One Month Notice to End Tenancy for Cause through the mail slot of the rental unit, which had a declared effective date of October 05, 2012. The male Tenant initially stated that this Notice to End Tenancy was received on September 06, 2012. When he was asked why the Tenant did not dispute this Notice to End Tenancy the male Tenant insisted that they had disputed it. When it was pointed out that the Tenant had not filed an application to cancel a Notice to End Tenancy for Cause the Tenant stated that the One Month Notice to End Tenancy was not received on September 06, 2012.

The Landlord and the Tenant agree that in a previous dispute resolution proceeding a Dispute Resolution Officer determined that the Tenant was obligated to pay 50% of the gas bills. The Landlord argued that since there is no longer anyone living in the rental unit below the Tenant, the Tenant should now be obligated to pay 100% of the gas bill. The Landlord and the Tenant agree that they never discussed what portion of the gas bill would be paid by the Tenant if the lower unit was vacant.

The Landlord submitted a gas bill for the billing period between February 09, 2012 and February 22, 2012, in the amount of \$510.22. The Landlord and the Tenant agree that the Tenant has not paid any portion of this bill.

The Landlord submitted a gas bill for the billing period between March 21, 2012 and April 23, 2012, in the amount of \$333.18. This bill includes an unpaid amount of \$164.42 for the billing period between February 22, 2012 and March 21, 2012. The Landlord and the Tenant agree that the Tenant has not paid any portion of this bill.

The Landlord submitted a gas bill for the billing period between May 23, 2012 and May 30, 2012, in the amount of \$891.51. The Landlord and the Tenant agree that the Tenant has not paid any portion of this bill. This bill includes an unpaid amount of \$878.13 from a previous billing period. There is nothing in the documentary evidence submitted by the Landlord that shows how the overdue amount of \$878.13 was accrued. Specifically, there is nothing that shows whether the previous bill of \$333.18

has been paid or whether this amount is included in the overdue amount of \$878.13. The Landlord stated that he has a stamp that shows the \$333.18 bill was paid on May 04, 2012, however I do not have that evidence before me.

Analysis

On the basis of the undisputed evidence presented at the hearing, I find that the Landlord and the Tenant have a tenancy agreement that requires the Tenant to pay monthly rent of \$1,150.00 by the third day of each month and that the Tenant paid a security deposit of \$575.00.

On the basis of the undisputed evidence presented at the hearing, I find that a previous Dispute Resolution Officer determined that the Tenant had the right to deduct \$775.00 from the rent payment for August of 2012. I find that this specific issue has previously been decided; that I have no authority to alter that decision; and that I must accept the previous determination that there was a balance of \$775.00 on August 01, 2012. In reaching this decision I specifically note that either party had the right to file an application to correct the previous decision if they believed the Dispute Resolution Officer had miscalculated the amount owing to the Tenant on August 01, 2012.

On the basis of the undisputed evidence presented at the hearing, I find that the Tenant has not paid any rent for August or September of 2012. After deducting the \$775.00 that the Tenant had the right to deduct from the rent payment for August of 2012, I find that the Tenant owes the Landlord \$375.00 in rent for August of 2012 and \$1,150.00 in rent for September.

If rent is not paid when it is due, a landlord may end the tenancy pursuant to section 46 of the *Act*. On the basis of the undisputed testimony of the Landlord, I find that the Landlord placed a Ten Day Notice to End Tenancy, which had a declared effective date of September 15, 2012, in the mail slot of the rental unit on September 05, 2012. On the basis of the undisputed testimony of the male Tenant, I find that the Tenant received the Ten Day Notice to End Tenancy on September 06, 2012.

Section 46(1) of the *Act* stipulates that a Ten Day Notice to End Tenancy is effective ten days after the date that the tenant receives the Notice. As the Tenant acknowledged receiving the Notice on September 06, 2012, I find that the earliest effective date of the Notice was September 16, 2012.

Section 53 of the *Act* stipulates that if the effective date stated in a Notice is earlier than the earliest date permitted under the legislation, the effective date is deemed to be the earliest date that complies with the legislation. Therefore, I find that the effective date of this Notice to End Tenancy was September 16, 2012.

Section 46(5) of the *Act* stipulates that a tenant is conclusively presumed to have accepted the tenancy ends on the effective date of the Notice to End Tenancy if the tenant does not either pay the outstanding rent or file an Application for Dispute

Resolution to dispute the Notice within five days of receiving the Notice to End Tenancy. As the Tenant received the Ten Day Notice to End Tenancy on September 06, 2012, the Tenant had until September 11, 2012 to either pay all the outstanding rent or file an Application for Dispute Resolution disputing the Notice. As the Tenant has not yet paid the rent and the Tenant did not file an Application for Dispute Resolution until September 12, 2012, I find that the Tenant accepted that the tenancy has ended, pursuant to section 46(5) of the *Act*. On this basis I find that the Landlord is entitled to an Order of Possession.

As the Tenant did not vacate the rental unit on September 16, 2012, I find that the tenant is obligated to pay rent, on a per diem basis, for the days the Tenant remained in possession of the rental unit. As the Tenant has already been ordered to pay rent for the period between September 16, 2012 and September 30, 2012, I find that the Landlord has been fully compensated for that period. I also find that the Tenant must compensate the Landlord for the 16 days in October that the Tenant remained in possession of the rental unit, at a daily rate of \$37.10, which equates to \$593.60. I am unable to award any additional rent for October, as it is possible that the Tenant will vacate the rental unit by October 17, 2012, and the Landlord has not filed a claim for lost revenue.

On the basis of the testimony of the Landlord, I find that a One Month Notice to End Tenancy for Cause, served pursuant to section 47 of the *Act*, was placed through the mail slot of the rental unit on September 05, 2012. As the male Tenant very clearly acknowledged receiving this One Month Notice to End Tenancy for Cause on September 06, 2012 and he did not amend that testimony until after he realized that the Tenant had not applied to cancel this Notice to End Tenancy, I find that the Tenant did receive this Notice on September 06, 2012. I find his subsequent denial lacked credibility, given that he did not deny receiving it until he realized that he had not filed an application to dispute it. Even if I did conclude that the Tenant had not received the One Month Notice to End Tenancy on September 06, 2012, I would find that the Tenant received the Notice on September 22, 2012, when the Landlord served Tenant with a copy of the Notice to End Tenancy and the Application for Dispute Resolution, via registered mail.

Section 47(5) of the *Act* stipulates that tenants are conclusively presumed to have accepted that the tenancy ends on the effective date of a notice received pursuant to section 47 of the *Act* and that the tenants must vacate the rental unit by that date unless the tenant disputes the notice within ten days of receiving it. As there is no evidence that the Tenants filed an application to dispute the One Month Notice to End Tenancy, I find that the Tenants accepted that the tenancy was ending on the effective date of the Notice, pursuant to section 47(5) of the *Act*. On this basis I find that the Landlord is entitled to an Order of Possession.

I find that it was determined at a previous dispute resolution proceeding that the Tenant was obligated to pay 50% of the gas bill. I find that the Landlord submitted no evidence to show that the Tenant agreed to pay 100% of the gas bill if the lower unit was vacated

and I therefore find no reason to alter the previous decision that the Tenant was obligated to pay 50% of the gas bill.

On the basis of the undisputed evidence presented at the hearing, I find that the Tenant had not paid any portion of the gas bill of \$510.22 for the billing period between February 09, 2012 and February 22, 2012. As the Tenant is obligated to pay 50% of this bill, I find that the Tenant must now pay \$255.11 to the Landlord.

On the basis of the undisputed evidence presented at the hearing, I find that the Tenant had not paid any portion of the gas bill of \$333.18 for the billing period between February 22, 2012 and April 23, 2012. As the Tenant is obligated to pay 50% of this bill, I find that the Tenant must now pay \$166.59 to the Landlord.

On the basis of the undisputed evidence presented at the hearing, I find that the Tenant had not paid any portion of the gas bill for \$891.51. As \$878.13 of this bill was a balance due from a previous billing; the Landlord has submitted no documentary evidence to show that this outstanding balance did not include the \$333.18 from the billing period between February 22, 2012 and April 23, 2012; and the Tenant has already been ordered to pay 50% of the \$333.18, I find that this bill must be reduced by \$333.18, leaving an amount due of \$558.33. I find that the Tenant is obligated to pay 50% of this amount, which is \$279.17.

I find that the Landlord's application has merit and that the Landlord is entitled to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

Conclusion

I grant the Landlord an Order of Possession that is effective two days after it is served upon the Tenant. This Order may be served on the Tenant, filed with the Supreme Court of British Columbia, and enforced as an Order of that Court.

I find that the Landlord has established a monetary claim, in the amount of \$2,869.47, which is comprised of \$375.00 in unpaid rent for August of 2012; \$1,150.00 in unpaid rent for September of 2012; \$593.60 for unpaid rent for October of 2012; \$700.87 in gas charges; and \$50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution. Pursuant to section 72(2), I authorize the Landlord to retain the Tenant's security deposit of \$575.00 in partial satisfaction of the monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance of \$2,294.47. In the event that the Tenant does not comply with this Order, it may be served on the Tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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: October 17, 2012.

Residential Tenancy Branch