



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, OPL, FF

Introduction

This hearing dealt with the landlords' Application for Dispute Resolution seeking an order of possession.

The hearing was conducted via teleconference and was attended by both landlords and both tenants.

Issue(s) to be Decided

The issues to be decided are whether the landlords are entitled to an order of possession for unpaid rent and/or for landlords' use of the property and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 46, 49, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

From the evidence and testimony provided the parties agree the tenancy began on April 1, 2012 as a 1 year and 1 day fixed term tenancy agreement with the end date of the fixed term listed as April 1, 2013 for a monthly rent of \$1,400.00 due on the 2nd of each month with a security deposit of \$700.00 and a pet damage deposit of \$700.00 paid.

The landlord did not provide a copy of either a 10 Day Notice to End Tenancy for Unpaid Rent or a 2 Month Notice to End Tenancy for Landlord's Use of Property into evidence but the tenants provided a copy of a 2 Month Notice issued by the landlord on October 26, 2012 with an effective vacancy date of December 31, 2012 citing the rental unit will be occupied by the landlord or the landlord's spouse or a close family member.

The landlords testified that as a result of this tenancy the landlord is suffering some financial difficulty and as such seeks to end the tenancy so that one of the landlords can move into the rental unit. As such, the landlord issued the 2 Month Notice.

The parties did agree the landlords issued a 10 Day Notice on November 2, 2012 with an effective vacancy date of November 12, 2012 for unpaid rent in the amount of \$1,200.00 due November 1, 2012. The landlord testified she served the notice by posting in on the rental unit door.

The tenants testified that they had paid rent, by electronic transfer to the landlords' account, on November 2, 2012 in the amount of \$550.00. The tenants submit that this amount was determined as the result of a previous dispute Decision granted on October 16, 2012 allowing the tenants a rent reduction of \$200.00 per month. The tenants submit that they understood the decision to be retroactive to August 2012 and reduced the amount paid by \$600.00 for the months of August, September, and October 2012 and \$50.00 for the filing fee of that previous decision.

The landlords acknowledged that they had received an electronic transfer of \$550.00 on November 2, 2012 but were not provided with any explanation as to what the payment was for and as such believed at the time that the tenants had not paid any rent for November 2012.

The parties agree the tenants also paid rent for the month of December 2012 in the amount of \$1,200.00. The landlord did not indicate that she issued a receipt for use and occupancy only.

Analysis

Section 46 of the *Act* allows a landlord to end a tenancy if rent is unpaid on any day after the day it is due by giving the tenant notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

Section 46(4) goes on to say that within 5 days of receiving such a notice the tenant may pay the overdue rent, in which case the notice has no effect or dispute the notice by making an application for dispute resolution.

While I accept the tenants failed to pay rent in the amount of \$1,200.00 for the month of November, 2012 I also accept that they did pay the landlord \$550.00 on November 2, 2012 in accordance with what they thought the decision of October 16, 2012 had granted.

Despite the landlord's claim that they did not know what the \$550.00 deposit was for, I find that a discrepancy in their accounting led the landlord to issue a 10 Day Notice for Unpaid Rent in the incorrect amount. Section 52 of the *Act* requires that when a landlord issues a notice to end tenancy it must include the grounds for ending a tenancy.

As the grounds stated in the 10 Day Notice were that rent in the amount of \$1,200.00 was unpaid when, in fact, the landlord had received \$550.00 towards rent, I find the landlord issued an invalid notice to end tenancy as it provided an invalid reason to end the tenancy.

Residential Tenancy Policy Guideline # 11 stipulates that a notice to end tenancy may be waived and a new or continuing tenancy created, only by expressed or implied consent of both parties. The Guideline goes on to say that when a landlord accepts rent

for the period after the effective date of a Notice to end tenancy the intention of the parties will be at issue.

As the landlord has not indicated that she issued a receipt for use and occupancy only after the tenants paid rent for December 2012 or that there was any clear communication from the landlord to the tenant that acceptance of rent for December would be for use and occupancy, I find the landlord waived her right to end the tenancy in accordance with the 10 Day Notice to End Tenancy for Unpaid Rent.

For these reasons I find the 10 Day Notice to End Tenancy is not valid or enforceable. However, as I clarified in the hearing, the decision of October 16, 2012 does not include a retroactive rent reduction and the tenants were required to pay rent in the amount of \$1,200.00 less the \$50.00 filing fee for a total of \$1,150.00.

As such the tenants should pay the outstanding amount as soon as possible and if they fail to do so the landlord is at liberty to issue a new 10 Day Notice to End Tenancy for Unpaid Rent for any amount of rent outstanding.

Section 49 of the *Act* allows a landlord to end a tenancy by issuing a notice to end tenancy with an effective date not earlier than 2 months after the date the tenant receives the notice; the day before the day in the month that rent is payable under the tenancy agreement if the rental unit; and if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end date of the tenancy if the rental unit will be occupied by the landlord or the landlord's spouse or a close family member of the landlord or the landlord's spouse.

Based on the testimony and evidence of both parties accept that the tenant has been served with notice to end tenancy as declared by the landlord. The notice is deemed to have been received by the tenant on October 29, 2012 and the effective date of the notice is amended to April 1, 2013, pursuant to Section 53 of the *Act*. I accept the evidence before me that the tenant failed to dispute the Notice within the 15 days granted under Section 49(8) of the *Act*.

Based on the foregoing, I find the tenant is conclusively presumed under Section 49(9) of the *Act* to have accepted that the tenancy ended on the effective date of the Notice.

I also note that during the hearing the tenants raised the issue of the furnace not working and that they did not have an emergency contact number. The landlord provided a contact number that would reach her in South America, where she is until December 24, 2012.

I advised the parties that this was not sufficient and that the landlord and tenant must discuss these matters immediately, after the hearing. I also ordered that should the landlord fail to assist the tenant in ensuring the heat is working that the tenant, by virtue of this hearing, had sufficiently met the requirements under Section 33 of contacting the landlord to have emergency repairs completed. I further ordered that if the landlord

failed to address the heating issue immediately the tenant was at liberty to arrange for any necessary emergency repairs in accordance with Section 33.

Conclusion

I find the landlord is entitled to an order of possession effective **two days after service on the tenant**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **\$50.00** comprised of the fee paid by the landlord for this application. I order the landlord may deduct this amount from the security deposit held in the amount of \$700.00 in satisfaction of this claim.

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: December 20, 2012.

Residential Tenancy Branch