



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNR, MNDC, LAT, RR, OPR, MNR, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has requested an Order of possession for unpaid rent an Order of possession based on a breach of an agreement with the landlord, a monetary Order for unpaid rent and utilities and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

The tenants applied to cancel a Notice ending tenancy for unpaid rent, compensation for damage or loss under the Act, an order allowing the tenants to change the locks to the unit, an Order allowing a rent reduction for repairs, services or facilities agreed upon but not provided and to recover the filing fee costs.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Matters

The tenants indicated several matters of dispute on their application and confirmed that the main issue to deal with during this proceeding was the Notice to End Tenancy. For disputes to be combined on an application they must be related. Not all the claims on this application were sufficiently related to the main issue to be dealt with together. Therefore, I dealt with the tenant's request to set aside or cancel the Notice to end tenancy for unpaid rent and the balance of the claim was dismissed with leave to reapply.

The parties were informed that I had discretion to issue any Orders, in accordance with section 62(3) of the Act.

The landlord did not submit a 1 month Notice ending tenancy for cause and the tenant did not dispute a 1 month Notice. Therefore, the only Notice before me was a 10 day notice to ending tenancy for unpaid rent and utilities issued on May 6, 2014.

Issue(s) to be Decided

Is the landlord entitled to an Order of possession for unpaid rent and utilities or should the Notice ending tenancy issued on May 6, 2014 be cancelled?

Is the landlord entitled to a monetary Order for unpaid rent and utilities?

Background and Evidence

The tenancy commenced on December 1, 2013. Rent is \$1,300.00 per month, due on or before the 1st day of each month.

Clause 16 of the tenancy agreement indicates:

The tenant is responsible for the payment of the following utilities and other charges in relation to the property: electricity, internet, cable, telephone and garbage collection.

The landlord said that clause 16 requires the tenants to pay the water and Fortis gas bills. The tenants said that they assumed "other charges" consisted of costs such as lawn maintenance and repair of any damage. The tenants said that initially they had paid a water bill. The landlord said the tenants had paid part of a water bill and also submitted they had never paid any part of a water or gas utility bill.

The parties agreed that on April 28, 2014 the gas service to the home was shut off by the gas company. The furnace was leaking and repair was ordered. The landlord entered the home on the next day and repairs were made to the hot water service. The licenced plumber turned the gas service back on. The landlord confirmed that the furnace has not yet been repaired or turned on.

The landlord and tenants communicated via text message and the tenants failed to respond to several messages sent by the landlord at the beginning of May 2014, no further contact occurred. The landlord was not aware of the process for notice of entry to a rental unit and believed the lack of response by the tenants barred the landlord from entering the rental unit.

The tenants confirmed that they continue to possess the home and that they have not paid rent for May or June, 2014 as a list of repairs, given to the landlord in writing on April 28, 2014 have yet to be completed. There are birds in the attic and the heating system is not working. The female tenant has serious asthma health concerns and cannot tolerate the presence of pests in the attic.

The tenants said that they have lived elsewhere for the past 2 months and have been paying rent in the sum of \$1,100.00. That home is being sold and they cannot live there any longer. The tenants have continued to access the rental unit and have been keeping their pets on the property. The tenants could not afford to repair the furnace, so could not treat the furnace repair as an emergency repair.

The parties agreed that on May 6, 2014 the tenants received a 10 day Notice ending tenancy for unpaid rent or utilities, which had an effective date of May 19, 2014.

The Notice indicated that the Notice would be automatically cancelled if the landlord received \$1,300.00 rent due on May 1, 2014 and \$422.34 in utility costs within 5 days after the tenants were assumed to have received the Notice. The Notice also indicated that the tenants were presumed to have accepted that the tenancy was ending and that the tenant must move out of the rental by the date set out in the Notice unless the tenant filed an Application for Dispute Resolution within 5 days.

The tenants confirmed they have not paid rent to the landlord since April 2014.

Analysis

Section 26 of the Act provides:

26 (1) *A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.*

There is evidence before me that the landlord has failed to provide the tenants with the essential service of heat. The furnace was deemed in need of repair on April 28, 2014 and that repair has yet to be completed. However, I find that the need for repair does not support the decision taken by the tenants to withhold rent owed to the landlord.

Section 33 of the Act deems that the need for repair to the primary heating system may qualify as an emergency repair. A tenant is required to make at least 2 telephone calls to the landlord, to request repair. The tenant must then give the landlord a reasonable period of time to make the repair. On April 28, 2014 the tenants did give the landlord a written request for repairs; a copy of which was supplied as evidence by the landlord. That list did not include a request for furnace repair. There was no evidence before me that the tenants telephoned the landlord or made any other contact in relation to the furnace.

Therefore, in the absence of evidence that the tenants met the standard set out in section 33 of the Act; by contacting the landlord and then completing the emergency repairs, in lieu of rent payments, I find that the tenants had no right to withhold rent owed.

In relation to the utilities, section 6 of the Act provides:

- 3) *A term of a tenancy agreement is not enforceable if*
- (a) the term is inconsistent with this Act or the regulations,*
 - (b) the term is unconscionable, or*
 - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

In the absence of a term that sets out the requirement to pay gas and water costs I find that the tenants are not required to pay those costs. Clause 16 of the tenancy agreement did provide specific detail regarding other utilities, but I find on the balance of probabilities, that the term is not expressed in a manner that clearly communicates the requirement to pay water and gas costs. If the landlord had wanted the tenants to pay those costs and to be able to rely on the term, it should have included the specific utilities to be paid. Therefore, I find that the tenants are not required to pay gas and water costs.

Section 46(1) of the Act stipulates that a 10 day Notice ending tenancy is effective 10 days after the date that the tenant receives the Notice. As the tenants have confirmed receipt of the Notice on May 6, 2014, I find that the earliest effective date of the Notice is May 16, 2014.

In the absence of evidence to the contrary, I find that the tenants were served with a Notice ending tenancy that required the tenants to vacate the rental unit on May 19, 2014; the date indicated on the Notice, pursuant to section 46 of the Act.

Section 46 of the Act stipulates that a tenant has 5 days from the date of receiving the Notice ending tenancy to either pay the outstanding rent or to file an Application for Dispute Resolution to dispute the Notice. In the circumstances before me the tenants did apply to dispute the Notice but have confirmed rent was not paid and they have not made any emergency repairs equivalent to the sum owed for rent; in compliance with the legislation. Therefore, I find that the tenants did not have the right to withhold rent.

Therefore, pursuant to section 46(5) of the Act, I find that the tenants accepted that the tenancy has ended on the effective date of the Notice; May 19, 2014.

The tenants were in a position to make the request for repair, to submit an application requesting Orders and possible rent abatement, but the legislation required the tenants to pay the rent; even if the landlord was not complying with the legislation.

In the absence of evidence to the contrary, I find that the tenants has not paid rent in the amount of \$2,600.00 for May and June 2014 and that the landlord is entitled to compensation in that amount.

I find that the landlord's application has merit and, pursuant to section 72 of the Act that the landlord is entitled to recover the \$50.00 filing fee from the tenants for the cost of this Application for Dispute Resolution.

The landlord has been granted an Order of possession that is effective 2 days after service to the tenants. This Order may be served on the tenants, filed with the Supreme Court of British Columbia and enforced as an Order of that Court.

Based on these determinations I grant the landlord a monetary Order for the balance of \$2,650.00. In the event that the tenants do not comply with this Order, it may be served on the tenants, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

Conclusion

The landlord is entitled to an Order of possession and monetary Order for unpaid May and June 2014 rent.

The claim for unpaid utilities is dismissed.

The landlord is entitled to filing fee costs.

The tenant's application to cancel the Notice is dismissed. The balance of the tenant's application is dismissed with leave to reapply.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: June 27, 2014

Residential Tenancy Branch

