Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 2KJAN PROPERTY MANAGEMENT INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MT, DRI, CNR, FF

Introduction

This hearing dealt with the tenant's application, filed 10 February 2015, pursuant to the *Residential Tenancy Act* (the "Act") for:

- more time to make an application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 66;
- an order regarding a disputed additional rent increase pursuant to section 43; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord was represented by its agents. The agents are both employees of the management company engaged by the landlord. The agents confirmed that they have authority to act on behalf of the landlord. The agent EE provided all of the landlord's evidence.

The tenant testified that she served the landlord with the dispute resolution package by registered mail. The agent confirmed receipt of the dispute resolution package including all of the tenant's evidence. On the basis of this evidence, I am satisfied that the landlord was deemed served with the dispute resolution package and all evidence pursuant to sections 88, 89 and 90 of the Act.

The tenant confirmed that she had received all of the landlord's evidence. On the basis of this evidence, I am satisfied that the tenant was served with the evidence pursuant to section 88 of the Act.

The agent testified that the landlord served the tenant with the 10 Day Notice on 4 February 2015 by posting the notice to the tenant's door. The tenant admitted that she received the 10 Day Notice, but could not state definitively on which day she received it. On the basis of this evidence, I am satisfied that the tenant was deemed served with the 10 Day Notice pursuant to sections 88 and 90 of the Act on 7 February 2015, the third day after its posting.

The agent testified that the landlord personally served the tenant with the Notice of Rent Increase on 26 January 2015. The landlord's documentary evidence conflicts with this: the agent's email of 27 February 2015 to herself states that the Notice of Rent Increase was slipped under the tenant's door. Delivery by slipping a notice under a door is not an acceptable method of service pursuant to section 88 of the Act; however, the tenant admitted that she received the Notice of Rent Increase and the tenant applied to dispute that notice. On the basis of this evidence, I am satisfied that the tenant had actual service of the Notice of Rent Increase.

Preliminary Issue – Amendments

The tenant's original application asked for more time to cancel the 10 Day Notice, but did not actually ask to cancel that notice. I asked the tenant at the hearing if she would like to amend her application to include an application to cancel the 10 Day Notice. I explained to the tenant and agent the possible outcomes:

1. If the application is amended and:
    a. If the notice is found to be invalid, then the tenancy will continue; or
    b. If the notice is found to be valid, and if the landlord makes an oral request for an order of possession pursuant to section 55, the tenancy will end; or
2. If the application is not amended:
    a. the landlord may, in the future, apply for an order of possession on that notice;
    b. the tenant will be bound by the presumption in subsection 46(5); and
    c. the tenancy will end.

The tenant considered the various outcomes. I confirmed with the tenant that she understood the implications of her choice. The tenant decided to ask to amend her application to include cancelation of the 10 Day Notice. The agent consented to this amendment.

Paragraph 64(3)(c) allows me to amend an application for dispute resolution. As the landlord (through its agent) has consented to the tenant's requested amendment, I allowed the amendment as there is no prejudice to the landlord.

I informed the parties of my decision to allow the amendment at the hearing. After I granted the amendment, the agent made an oral request for an order of possession in the event that I find that the 10 Day Notice is valid.

Issue(s) to be Decided

Is the tenant entitled to more time to file her application to cancel the 10 Day Notice? Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession? Is the Notice of Rent Increase validly issued? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

This tenancy began in 1998. The rental unit contains three bedrooms. In 1998, the tenant paid $725.00 in monthly rent for the rental unit.

In or about 2002, the tenant entered into an agreement with the former landlord to perform certain services (the First Service Agreement). In return for providing these services, the tenant was offered a rent abatement in the amount of $75.00. The net rent paid to the former landlord by the tenant was $650.00.

At some point after 2002, the former landlord and tenant entered into a subsequent agreement whereby the tenant would provide the same services and the former landlord would provide the rental unit and an additional unit to the tenant (the Second Service Agreement). The tenant agreed to pay to the former landlord $1,200.00 for the use of both units.

At some point after the Second Service Agreement the former landlord and tenant entered into another agreement whereby the tenant would provide additional services to the former landlord (the Third Service Agreement). The former landlord agreed to provide a further rent abatement to the tenant of $200.00 per month. The tenant agreed to pay to the former landlord net rent of $1,000.00 per month for the use of both units.

In or about May 2012, the former landlord sold the residential property to the current landlord.

On or about 16 June 2012, the landlord and tenant entered into a property management agreement (the Fourth Service Agreement). This agreement provided that the tenant would be paid a fee of $600.00 per month and pay $1,000.00 in rent for the use of the rental unit and an additional rental unit.

On or about 12 October 2012, the landlord and tenant entered into a second property management agreement (the Fifth Service Agreement). This agreement provided that the tenant would be paid 10% of monthly collected rent to a maximum of $1,000.00 per month. The agreement provided for a guaranteed minimum payment of $600.00 per month. The agreement provided that $750.00 in rent would be paid for the use of the rental unit. The agreement was signed by the tenant.

After the Fifth Service Agreement was signed, the tenant and landlord disagreed about the amount of rent that was to be paid. The tenant paid $700.00 towards her rent. The tenant testified that she paid this amount because it represented a compromise between the $650.00 that she believed that she should pay and the $750.00 rent that was set out in the Fifth Service Agreement.

On 5 March 2014, the landlord sent a letter to the tenant stating that her rent was in arrears by $900.00. The landlord stated in this letter that it was deducting this amount from monies otherwise payable to the tenant by the landlord. The letter put the tenant on notice that her rent was due, in full, at the beginning of the month.

On 27 April 2014, the landlord sent a letter to the tenant stating that the tenant failed to pay April's rent, demanding payment, and putting the tenant on notice that her rent was due, in full, at the beginning of the month.

On 20 May 2014, the landlord sent a letter to the tenant stating that the tenant failed to pay rent for May, demanding payment, and putting the tenant on notice that her rent was due, in full, at the beginning of the month.

On 30 June 2014, the landlord sent a letter to the tenant stating that her rent was in arrears by $50.00 for June. The landlord demanded payment and put the tenant on notice that the tenant's rent was due, in full, at the beginning of the month.

On 13 July 2014, the landlord sent a letter to the tenant stating that her rent was in arrears by $50.00 for July. The landlord demanded payment and put the tenant on notice that the tenant's rent was due, in full, at the beginning of the month.

On 3 August 2014, the tenant sent an email to the landlord asking for a copy of the Fifth Service Agreement. On 4 August 2014, the landlord sent a copy of the Fifth Service Agreement to the tenant.

On 4 August 2014, the tenant emailed the landlord and asked that the landlord agree to rent of $700.00.

On 4 February 2015, the landlord issued the 10 Day Notice to the tenant. That notice set out that the tenant had failed to pay $200.00 in rent that was due 1 February 2015. The agent testified that this amount represents accrued $50.00 rent shortfalls over four months. The 10 Day Notice set out an effective date of 14 February 2015.

The tenant testified that she tried to talk to her landlord about the disagreement, but that he would not return her emails and would not take her calls.

Analysis

The tenant has applied for more time to make her application. The tenant was deemed to have received the 10 Day Notice on 7 February 2015. The tenant filed her application 10 February 2015. As the tenant has filed within the five days allowed under the Act, the tenant does not require more time. As such, I have dismissed the tenant's application for more time.

Subsection 2(1) of the Act sets out that:

> **2** (1) Despite any other enactment…, this Act applies to tenancy agreements, rental units and other residential property.

“Tenancy agreement” is defined in section 1 of the Act:

> "tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Residential Tenancy Policy Guideline, “1. Landlord & Tenant – Responsibility for Residential Premises” states:

> The landlord and tenant may enter into a separate agreement authorizing the tenant to provide services for compensation or as rent.

Pursuant to subsection 62(2), I have the jurisdiction to make any finding of fact or law that is necessary or incidental to making a decision or order under the Act.

I find that the landlord (both former and current) and tenant had two separate agreements that ran concurrently:

1. a tenancy agreement; and
2. successive service agreements.

I find that the tenancy agreement established in 1998 between the former landlord and tenant continued, unaltered, until October 2012. The function of the First Service Agreement, Second Service Agreement, Third Service Agreement, and Fourth Service Agreement was to alter the amount of compensation paid to the tenant for her services. The amount of compensation was the total of the rent abatement provided and any monetary compensation.

Pursuant to section 43 of the Act, a landlord may impose a rent increase only up to the amount:

> (a) calculated in accordance with the regulations,
> (b) ordered by the director, or
> (c) agreed to by the tenant

The allowable percentage rent increase for each calendar year is calculated according to the inflation rate. The rate for the year 2012 was 4.3%.

I find that when the tenant and landlord entered into the Fifth Service Agreement, that agreement functioned as an agreement by the tenant to raise her monthly rent from

$725.00 to $750.00. While not necessary, I note that this increase is less than the increase permitted in accordance with paragraph 43(a) of the Act.

I find that the tenant has failed to show that the landlord made any representations or acted in such a way that resulted in the tenant's rent being a different amount than the amount the tenant agreed to, in writing, in the Fifth Service Agreement. At all material times, I find that the tenant's rent for the rental unit was $750.00 per month.

Subsection 26(1) of the Act sets out:

> A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

The tenant admits that she paid only $700.00 towards her rent. I have found the landlord was entitled to rent of $750.00. As the tenant has failed to pay her rent in full when due, I find that the 10 Day Notice issued 4 February 2015 is valid and dismiss the tenant's application to cancel the 10 Day Notice without leave to reapply. As the tenant's application to cancel the 10 Day Notice is dismissed, the landlord was entitled to possession of the rental unit on 17 February 2015, the corrected effective date of the 10 Day Notice. As this date has now passed, the landlord is entitled to an order of possession effective two days after it is served upon the tenant(s).

As the tenancy is ending there is no need for me to consider the rent increase that would have come into effect on 1 May 2015 as the issue is moot.

As the tenant has not been successful in her application, she is not entitled to recover her filing fee from the landlord.

Conclusion

The tenant's application is dismissed.

Pursuant to section 55 of the Act, where an arbitrator dismisses a tenant's application or upholds the landlord's notice and the landlord makes an oral request for an order of possession at the hearing, an arbitrator must grant the landlord an order for possession. As the tenant's application is dismissed and the landlord has made an oral request for an order of possession, I am obligated by the Act to grant the landlord an order of possession. This order of possession is effective two days after it is served upon the tenant(s). This order may be served on the tenant(s), filed with the Supreme Court of British Columbia 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 subsection 9.1(1) of the Act.

Dated: March 16, 2015

Residential Tenancy Branch