



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ACR Investments
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

CNR, MNDC, OLC, ERP, PSF, RR, OPR, OPC, MND, MNR, MNSD, FF

Introduction

This was a cross-application hearing.

On March 9, 2015 the tenants applied requesting to cancel a Notice ending tenancy for unpaid rent; compensation for damage or loss under the Act, an Order the landlord comply with the legislation, that the landlord make emergency repairs to the unit, provide services or facilities required by law, allow the tenants to reduce rent for repair, services or facilities agreed upon but not provided and to recover the filing fee costs from the landlord.

On March 30, 2015 the landlord applied requesting an Order of possession based on a 10 day Notice to end tenancy for unpaid rent issued on March 2, 2015; an Order of possession based on a 1 month Notice to end tenancy for cause, compensation for damage to the rental unit, compensation for unpaid rent and damage or loss under the Act, to retain the security deposit and to recover the filing fee costs from the tenants.

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, to present affirmed oral testimony evidence and to make submissions during the hearing.

Preliminary Matters

The landlord confirmed receipt of the tenant's application on March 11 or 12, 2015. The landlord received the tenants 52 page evidence submission in March 2015.

The tenants testified that they received the landlord's registered mail that had been sent on April 2, 2015 by the landlord. The tenants said that the Canada Post notice of registered mail did not arrive until 2 days ago. The tenants then went to pick the mail up; they had not looked at the evidence or application in any detail prior to the hearing.

The landlord was unable to check the Canada Post tracking site to determine why the registered mail notice delivery was so delayed.

A respondent must have the opportunity to comply with section 3.15 of the Rules, allowing service of a rebuttal submission no later than seven days before the hearing.

Section 90 of the Act determines registered mail is deemed served on the fifth day after mailing; in this case April 7, 2015. In the absence of evidence to the contrary I find that the tenants received the landlord's application and evidence on April 15, 2015. Service two days prior to a hearing fails to meet the requirement that a party be given sufficient notice of a hearing in order to allow rebuttal submissions at least seven days prior to the hearing.

The details of each claim were reviewed. I determined that the hearing could proceed in relation to the 10 day Notice to ended tenancy for unpaid rent issued on March 2, 2015. This decision considered the service of the landlord's application and evidence; therefore the landlord's evidence was set aside. The landlord agreed she was prepared to proceed in relation to the 10 day Notice to end tenancy, in the absence of the evidence. .

The tenants agreed to proceed with a hearing related to the 10 day Notice to end tenancy. The tenant's evidence was considered.

Section 2.11 of the Residential Tenancy Rules of Procedure requires an applicant to serve an amended application and any evidence to the respondent no less than 14 days before the hearing.

On April 13, 2015 the tenant's amended their application to increase the monetary sum claimed. The amended application was provided to the Residential Tenancy Branch (RTB) on April 13, 2015. The tenants mailed the amended application, including additional evidence, to the landlord on April 13, 2015 via registered mail. The landlord has not received that mail.

As the tenants failed to meet the requirement of section 2.11 of the Rules of Procedure the amended application and evidence submitted to the RTB on April 13, 2014 was set aside.

Issue(s) to be Decided

Is the landlord entitled to an Order of possession based on a 10 day Notice to end tenancy for unpaid rent issued on March 2, 2015?

Background and Evidence

This one year, fixed-term tenancy commenced on July 15, 2015. It is to end effective July 15, 2015 and the tenants are to vacate. Rent is \$2,500.00 due on the first day of each month. A security deposit in the sum of \$1,000.00 was paid. A copy of the signed tenancy agreement was supplied as evidence.

Emails contained in the tenant's evidence were referenced during the hearing. The landlord referenced an email sent to the tenants on October 30, 2014 which was contained in the tenant's evidence. The landlord asked about November rent and said she could pick up a cheque the next day. The landlord asked if she could have post-dated cheques for the year or, if not, would the tenants pay electronically. The tenants replied that post-dated cheques would work and they would be left in the mail box.

The landlord said she received 3 post-dated cheques; she then had to repeatedly request more cheques. In December 2014 the landlord received cheques in the rental unit mail box for January and February 2015 rent.

On March 1, 2015 the landlord sent a message telling the tenants she had not received March 2015 rent. At 12:11 a.m. on March 2, 2015 the tenants responded asking if there would be any discussion to reduce the rent by \$500.00 per month "while we terminate our lease agreeably." The landlord said she responded saying she had previously offered to reduce the rent if the tenant's would sign a mutual agreement to end the tenancy, but the tenants had declined.

The landlord said the tenants emailed again on March 2, 2015 saying they had gone to the RTB office and been advised their rent should be reduced by \$500.00. The tenants told the landlord her rent cheque was ready to be picked up.

On March 10, 2015 the landlord checked the mailbox at the rental unit and there was no cheque there for the rent. On March 16, 2015 the landlord received a cheque sent to her by mail, in the sum of \$550.00. On March 21, 2015 a second cheque in the sum of \$1,950.00 was received by mail. The landlord then mailed the tenant's receipts for use and occupancy only.

The tenants confirmed receipt of the 10 day Notice ending tenancy for unpaid rent on March 6, 2015. The Notice had an effective date of March 20, 2015.

The Notice indicated that the Notice would be automatically cancelled if the landlord received \$2,500.00 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 tenants must move out of the rental by the date set out in the Notice unless the tenants filed an Application for Dispute Resolution within 5 days.

The tenants said they had left a cheque in the mailbox and that someone had taken it prior to March 10, 2015. The tenants had issued a cheque in the sum of \$1,950.00, not \$2,500.00. The tenants then obtained further advice and were told to pay the balance of the rent owed. On March 8, 2015 the tenants mailed the landlord a cheque in the sum of \$550.00. The tenants said they did not place the cheque for \$550.00 in the mail box as they had ten days to pay and were not going to risk late payment.

The tenants alleged that someone took the initial cheque issued for March 2015 rent in the sum of \$1,950.00 and that this was the cheque the landlord says she received on March 21, 2015. The tenants said that only one cheque in the sum of \$1,950.00 was issued for March. The tenants then sent the balance of rent owed to the landlord via registered mail on March 8, 2015.

The tenants said they are not interested in paying rent by electronic transfer and prefer a paper method of payment. When discussing the April rent payment the male tenant said he placed it in the mail box at 10 p.m. on April 1, 2015 and that at "precisely" midnight someone took the cheque. When asked how he knew someone had taken the cheque at midnight the tenant said he goes to bed at 10 p.m. and is up by 8 a.m. The tenant said he does not believe someone is stealing the cheques but believes someone is taking them; perhaps a friend of the landlord or a neighbour.

Analysis

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 March 6, 2015, I find that the earliest effective date of the Notice is March 16, 2015.

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 March 20, 2015, the date 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. The tenants disputed the Notice within 3 days of receipt.

However, I find that the tenants did not pay all of March 2015 rent within 5 days of March 6, 2015. There was no dispute that the March 2015 rent payment made in the sum of \$550.00 was placed in the mail on March 8, 2015. The tenants refused to use electronic transfer and had never mailed rent to the landlord in the past. The tenants chose not to make the \$550.00 payment by the method they had always used; placing it in the mail box. The only registered mail receipt in the tenant's evidence was one for mail sent on March 9, 2015.

Therefore, as the landlord did not receive the \$550.00 payment until March 16, 2015 I find that the payment was not made within five days of March 6, 2015. Even if I were to find that the mail sent to the landlord containing the cheque was served on the fifth day after mailing, March 13, 2015, that is well outside of the required five day period of time. All rent had to be paid not later than March 11, 2015.

Section 26 of the Act requires a tenant to pay rent when it is due. The parties had a method of rent payment that involved placing a cheque in the mail box. There was history of email communication between the parties, yet the tenants did not choose to place a cheque in the mail box and notify the landlord it was there. The tenants rejected a method of electronic payment and, while that was their choice, they did have a responsibility to ensure rent was paid within five days of March 6, 2015. Payment is not considered to have been made on the day a cheque is mailed.

In relation to the matter of the cheque issued in the sum of \$1,950.00 I will consider the matter of payment as if the \$1,950.00 had been left in the mailbox on March 1, 2015 rather than mailed, as the landlord said it was. The landlord has confirmed all of March 2015 rent has been paid. The critical issue here, if I accept that the \$1,950.00 was placed in the mailbox on March 1, 2015, is that the balance of the rent owed was not paid within 5 days of March 6, 2015.

Section 90 of the Act deems service by mail is completed on the fifth day after mailing. However, as demonstrated during the hearing when reviewing service of the landlord's application sent to the tenants; service by registered mail is rebuttable. If I were to accept the mail containing the cheque was served effective March 13, 2015; which would be most beneficial to the tenants, it still leaves them with having paid rent outside of the required 5 day period following March 6, 2015. However, I have accepted the landlord's testimony that the \$550.00 rent payment was received on March 16, 2015 just as I accepted the tenant's testimony in relation to the mail sent to them containing the landlord's hearing documents. This payment was not made by March 11, 2015.

Therefore; pursuant to section 46(5) of the Act, I find that the tenants are conclusively presumed to have accepted that the tenancy has ended on the effective date of the Notice; March 20, 2015.

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 filing fee from the tenants for the cost of this Application for Dispute Resolution. The landlord may deduct \$50.00 from the security deposit; leaving a balance in the sum of \$950.00.

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.

The tenant's application to cancel the 10 day Notice ending tenancy for unpaid rent issued on March 2, 2015 is dismissed.

Pursuant to section 2.3 of the Residential Tenancy Rules of Procedure I find that the balance of each application is severed. The parties have leave to reapply within the legislated time-frame.

Conclusion

The landlord is entitled to an Order of possession based on a 10 day Notice to end tenancy for unpaid rent.

The landlord may deduct the \$50.00 filing fee that would be required for an application of this nature from the \$1,000.00 security deposit held in trust.

The tenant's application to cancel the 10 day Notice to end tenancy issued on March 2, 2015 is dismissed.

The balance of each claim is severed with leave to reapply within the legislated time-frame.

This decision is final and binding 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: April 17, 2015

Residential Tenancy Branch

