



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ARAGON DEVELOPMENT CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

OPR, MNR

Introduction

This hearing was original scheduled as a Direct Request Proceeding. The application for A Direct Request Proceeding was found to have deficiencies that necessitated a participatory hearing. The participatory hearing commenced today by way of conference call in repose to the landlord's application for an Order of Possession for unpaid rent and for a Monetary Order for unpaid rent.

Service of the hearing documents, by the landlord to the tenant, was done in accordance with section 89 of the *Act*; served in person on June 19, 2015. The tenant was also sent the interim decision and new Notice of Hearing by the Residential Tenancy Branch.

The landlord's agents (the landlord) appeared, gave sworn testimony, were provided the opportunity to present evidence orally, in writing, and in documentary form. There was no appearance for the tenant, despite being served notice of this hearing in accordance with the *Residential Tenancy Act*. All of the testimony and documentary evidence was carefully considered.

Preliminary Issues

The matter of whether or not this is a tenancy that falls under the *Residential Tenancy Act* was discussed as the tenancy agreement states "this is a commercial lease subject to B.C. *Commercial Tenancy Act*. Provisions under the B.C. *Residential Tenancy Act* in no way govern this agreement." Hand written on the lease agreement is the wording "this is a live/ work building. Leases are deemed to fall under the *Residential Tenancy Act* per RTB. These leases have been replaced with standard RTB rental agreements."

A discussion took place to determine if I have jurisdiction under the *Residential Tenancy Act* in this matter. The landlords testified that the *Commercial Tenancy Act* does not apply to this tenancy as this is a residential tenancy. All new tenants now sign a residential tenancy agreement. The landlord testified that s.4 of the *Commercial Tenancy Act* sets out what applies to a commercial tenancy including, but not limited to, charging GST on rent, client presence, signage and zoning. This tenant is not charged GST on her rent, she does not operate a business from her unit; there is no client presence and no signage. The zoning for this building is for mixed usage both residential and commercial. The landlords testified that under paragraph 6 of the tenancy agreement it clearly states that this unit is rented for residential use only.

Based on the above submissions I am prepared to accept that this is a residential tenancy and the *Residential Tenancy Act* applies.

Issue(s) to be Decided

- Is the landlord entitled to an Order of Possession due to unpaid rent?
- Is the landlord entitled to a Monetary Order to recover unpaid rent?

Background and Evidence

The landlord testified that this tenancy original commenced on June 15, 2007 for a period of a year and thereafter continued on a month to month basis. Rent for this unit was \$925.00 per month and was increased by legal rent increase notices over the term of the tenancy to \$1,080.00 on October 01, 2014. Rent is due on the 1st of each month.

The landlords testified that the tenant failed to pay the rent due for March, April, May and June, 2015, leaving an unpaid balance of \$4,320.00. The landlord issued a 10 Day Notice to End Tenancy (the Notice) for unpaid rent on June 04, 2015. This was served by posting the Notice to the tenant's door on this date and was deemed served three days later. The Notice states that the tenant owes rent of \$4,320.00 which was due on June 01, 2015 plus \$298.00 for late fees and NSF fees. The tenant had five days to either pay the outstanding rent or apply for Dispute Resolution or the tenancy would end on June 18, 2015. The tenant did not pay the outstanding

rent or dispute the Notice within five days. Since that time the tenant has failed to pay rent for July and August 2015 and as of 11.00 a.m. on September 01, 2015 no rent has yet been received for September, 2015. The total amount of unpaid rent is now \$6,480.00 not including September. The landlord orally requested to amend the application to include the unpaid rent for July, August and September, 2015.

The landlord referred to clause 7 of the tenancy agreement which states that a fee of \$30.00 will be applied for NSF fees incurred by the landlord and \$20.00 for late fees. The landlord seeks to recover late fees for six months from March to August, 2015 of \$120.00. The landlords testified that the tenant's rent cheques have all been returned by the tenant's bank due to insufficient funds. The landlord therefore seeks to recover NSF fees of \$30.00 per month

The landlord requested an Order of Possession to take effect as soon as possible and a Monetary Order to recover the unpaid rent, late fees and NSF fees.

Analysis

Section 26 of the *Residential Tenancy Act* (Act) states:

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.

Consequently, as the tenant has failed to attend the hearing to dispute the landlord's claim I find from the documentary evidence and testimony of the landlord that the tenant has failed to pay rent for April, May and June, 2015, and the landlord is entitled to recover these rent arrears. I have allowed the landlord to amend their application to include the unpaid rent for July and August, 2015 as the tenant failed to vacate the rental unit by the effective date of the Notice and would be aware that rent should be paid on the 1st of each month.

With regard to the landlord's request to recover unpaid rent for September, 2015; as the tenant still has time to pay rent for September, as today is the first day of the month, I find the landlord's request for September's rent is premature and will not be considered at this hearing.

Consequently, the landlord will receive a Monetary Order to the sum of **\$6,480.00** for unpaid rent pursuant to s. 67 of the *Act*.

With regard to the landlord's claim to recover \$20.00 for late fees and \$30.00 for NSF fees from March to August, 2015; I refer the parties to the Residential Tenancy Regulations s. 7(1)(d) and s. 7(2)(e) which states:

7 (1) *A landlord may charge any of the following non-refundable fees:*

(d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

I have reviewed the tenancy agreement and find there is a clause contained in the agreement that provides for an administrative fee for late fees of \$20.00 and NSF fees of \$30.00.

Consequently, pursuant to s. 7(1)(d) of the regulations I find the landlord is entitled to recover \$20.00 in late fees for six months to an amount of **\$120.00**. As the maximum amount the landlord may charge for NSF fees is \$25.00 I have limited the landlord's claim for six months of NSF fees to **\$150.00**.

I accept that the tenant was served the 10 Day Notice to End Tenancy for unpaid rent, pursuant to section 88 of the *Residential Tenancy Act*. The Notice states that the tenant had five days to pay the rent or apply for Dispute Resolution or the tenancy would end. The tenant did not pay the outstanding rent within five days nor apply to dispute the Notice within five days.

Based on the foregoing, I find that the tenant is conclusively presumed, under section 46(5) of the *Act*, to have accepted that the tenancy ended on the effective date of the Notice and grant the landlord an Order of Possession pursuant to s. 55 of the *Act*.

Conclusion

I HEREBY FIND in favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for **\$6,750.00** pursuant to s. 67 of the *Act*. The Order must be served on the Respondent. If the Respondent fails to comply with the Order, the Order is enforceable through the Provincial Court as an Order of that Court.

I HEREBY ISSUE an Order of Possession in favour of the landlord effective **two days** after service upon the Respondent. This Order must be served on the Respondent. If the Respondent fails to comply with this Order, the Order may be filed in the Supreme 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: September 01, 2015

Residential Tenancy Branch

