



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PROTECTION PROPERTY MANAGEMENT REALTY LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, FF; CNR

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

This hearing dealt with the tenants' application pursuant to the Act for cancellation of the landlord's 10 Day Notice pursuant to section 46.

The tenant LR (the tenant) appeared. The tenant confirmed that she was acting on behalf of herself and her cotenant. The landlord's agent appeared. The agent is an employee of the landlord. The parties were given a full opportunity to be heard, to present their sworn testimony and to make submissions.

This hearing was originally set to be heard in early July. That hearing had to be adjourned as the landlord had not effected service upon the tenants. This decision should be read in conjunction with the prior interim decision.

Preliminary Issue – Service of Tenants' Evidence

The tenant sent a package of evidence to the landlord by registered mail on 25 August 2015. The agent testified that he had just received the notice to pick up the mailing on the second hearing date.

The agent expressed that it was his preference to go ahead with the hearing today and consented to my consideration of the evidence. I read the evidence not in the agent's possession to him. This evidence mostly related to the 1 Month Notice to End Tenancy for Cause (the 1 Month Notice).

Preliminary Issue – Tenant's Amendment

It was clear from the evidence submitted by the tenant that a second notice to end tenancy was issued by the landlord in the period intervening the first and second hearing dates. I asked the tenant at the second hearing date if she wished to amend her application to include an application to cancel the 1 Month Notice.

The tenant, at first, indicated she wished to amend this application to include cancellation of the 1 Month Notice. The agent consented. The tenant later indicated that she wished to withdraw this amendment as she wished to provide more evidence.

Explained the tenant that her choice was to either proceed today on the issue of the 1 Month Notice on the available evidence or to apply at a later date to cancel the 1 Month Notice in a separate application. I informed the tenant that she would require more time to make that application and that she risked exposure to the deeming provision in subsection 47(5) of the Act.

The tenant stated that she understood the risk of withdrawing her application to cancel the 1 Month Notice and stated that she wished to withdraw that portion of her application. I allowed the tenant to withdraw this portion of her application as there is no undue prejudice to the landlord in doing so.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession? Is the landlord entitled to a monetary award for unpaid rent? Is the landlord entitled to recover the filing fee for this application from the tenants?

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 both the tenants' claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began approximately thirteen years ago. Monthly rent of \$640.00 is due on the first.

On 1 March 2015, the building transferred management to a new property manager. The letter was sent by ordinary mail to the tenants. The tenant could not recall when she received it. It seems that the tenant took this letter to the Province. It was received by the Ministry of Social Development and Social Innovation on 1 April 2015.

The tenant testified that April's rent was sent to the old management company. The tenant testified that when she asked for a new cheque from the Province, she was told that a new cheque could not be issued until the old cheque was returned.

In late April 2015, the Province issued a cheque to the new management company in the amount of \$640.00. The benefit month indicates that it is rent for May. The agent testified that the cheque received in late April 2015 was applied to April's rent arrears.

The landlord served the tenant with the 10 Day Notice on 3 May 2015 by registered mail. The 10 Day Notice is dated 3 May 2015. The 10 Day Notice has an effective date of 13 May 2015. The notice sets out that it is given as the tenant had failed to pay \$640.00 in rent that was due 1 May 2015.

On or about 16 May 2015, the landlord applied for an order of possession on the basis of the 10 Day Notice. The landlord served this dispute resolution package to the tenant by registered mail.

On or about 27 May 2015, the Province issued a cheque to the management company in the amount of \$640.00. The benefit month indicates that it is rent for June.

At the first hearing date the tenant informed me that both she and her co-tenant had been unable to retrieve the registered mailings as they did not have valid, government-issued, photo identification. The tenant informed me that she told one of the landlord's agents this when she first received a registered mailing from the landlord and she continued to receive service in this manner. On 6 July 2015, I made an order for substituted service on the basis that the tenants were unable to retrieve registered mailings. This order permitted the landlord to serve documents for the purposes of this hearing by posting anything to the tenants' door.

When the tenant became aware that there was a 10 Day Notice issued, she filed a protective application on 18 June 2015, notwithstanding the fact that she had not yet received the 10 Day Notice.

At the first hearing date the tenant testified that the Province had sent a replacement cheque. The agent had not yet received the mailing. The tenant said that she would attempt to get a new cheque issued and place a stop payment on the other cheque.

On 6 July 2015, the landlord received a registered mailing from the Province. The agent testified that the landlord received the mailing on 7 July 2015. The agent testified that there was a cheque from the Province in the amount of \$640.00. The agent testified that he was not sure if the cheque was still negotiable because of the tenant's statement that she would place a stop payment on it. The agent testified that he tried to contact the tenants, but could not reach them by phone. The agent testified that attempted to call the Province, but was unable to receive any

information. The agent testified that as he was uncertain if the cheque was still negotiable he returned the cheque to the Province.

The tenant testified that she did not put a stop payment on the cheque and testified that she has no ability to do so.

On 13 July 2015, the landlord posted copies of the 10 Day Notice, the dispute resolution package, and notice of reconvened hearing to the tenants' door. The tenant testified that this was the first time she received the 10 Day Notice.

The agent testified that the landlord has not issued any receipts to the tenants in respect of rent received since the issuance of the 10 Day Notice. The agent testified that it is not the landlord's practice to issue a receipt where payment is made by cheque.

Analysis

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. Pursuant to paragraph 46(5)(a) of the Act, if the tenant pays the overdue rent within five days of receiving a 10 Day Notice, that notice is of no effect.

The tenant testified that the first time she received the 10 Day Notice was on 13 July 2015 when that notice was posted to the tenants' door.

In accordance with paragraph 90(a), a document delivered by registered mail is deemed served on the fifth day after its mailing. Pursuant to the Court's decision in *Atchison v British Columbia*, 2008 BCSC 1015, this presumption is rebuttable on proper evidence.

The tenant advised an agent of the landlord that the tenants were not capable of receiving service in this manner. The tenant stated that she does not have current, government-issued, photo identification. On this basis, I find that the deeming provision of paragraph 90(a) of the Act is defeated and the tenants were not served by registered mail. I find that the tenants were served with the 10 Day Notice when it was posted to the tenants' door.

The landlord issued the 10 Day Notice on 3 May 2015. The tenants received the 10 Day Notice on 13 July 2015. The landlord received a cheque for the full amount of May's rent on or about 7 July 2015. I was not provided with any evidence that this cheque was postdated and conclude that the cheque was dated on or before 6 July 2015. I am not persuaded that the tenant's statements regarding the cheque at the 6 July hearing caused the cheque to cease to be a valid payment instrument. In particular, this cheque is issued by a third party and the landlord ought to have known that the tenant would have had limited ability to order a stop payment on that cheque. On this basis, I find that the landlord received a valid and negotiable instrument to pay

the tenants' May rent in full on 7 July 2015. The landlord chose to not attempt to negotiate the cheque and return the cheque to the Province.

I find that the 10 Day Notice was of no force and effect as full payment of the outstanding rent amount was received before the expiration of five days after receipt of that notice. As the 10 Day Notice is of no force and effect, the landlord is not entitled to an order of possession.

The landlord has mistakenly returned the payment of May's rent to the Province. This issue is now between the Province and the landlord. I make no order in respect of May's rent.

As the landlord has not been successful in its application, I am exercising my discretion to refuse to award recovery of the filing fee from the tenants.

Conclusion

The tenants' application is allowed: the 10 Day Notice is cancelled. The tenancy will continue until it is ended in accordance with the Act.

The landlord's application is dismissed.

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: September 10, 2015

Residential Tenancy Branch

