



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR

Introduction

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

- an Order of Possession pursuant to section 55; and
- a monetary order for unpaid rent pursuant to section 67.

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.

Preliminary Issues

This review hearing resulted from an August 24, 2015 Review Consideration Decision of Arbitrator R.M, who ordered a new hearing of the original August 17, 2015 decision (the original decision) of Adjudicator NH after considering the tenant's application for a review of the original decision. The original decision in which the landlord was granted a 2 day Order of Possession and a monetary Order of \$1,000.00 was suspended pending the outcome of this new hearing of the landlord's application.

At the hearing, the landlord confirmed that he received a copy of the Review Consideration Decision and Notice of Hearing sent by the tenant by registered mail on or about August 28, 2015. Both parties confirmed receiving one another's written evidence packages. In accordance with sections 88 and 89 of the *Act*, I find that the parties have been duly served with these documents.

At the hearing, the tenant testified that she vacated the rental unit on September 1, 2015. She said that she has not returned her key to the landlord and that her large and heavy treadmill has remained in the rental unit since she left the premises on September 1, 2015. The landlord said that he was unaware that the tenant had vacated the rental unit as some of her belongings appear to have been left there. At the hearing, the parties agreed that the tenant would remove all of her belongings from the

rental unit, including her treadmill, by 1:00 p.m. on the day after this hearing, and would surrender her key to the rental unit to the landlord by that time. I am issuing an Order of Possession as requested by the landlord to give legal effect to this settlement between the parties.

At the hearing, the landlord testified that the tenant has failed to pay any rent from the time he issued the 2 Month Notice to End Tenancy for Landlord's Use of Property on June 7, 2015 (the 2 Month Notice). He confirmed that he had applied for a monetary Order for unpaid rent for the months of July, August, September and October 2015 in a separate application for dispute resolution, scheduled to be heard on March 4, 2016. Although the tenant objected to the landlord's claim for a monetary Order of \$1,000.00 identified in the current application for dispute resolution, she did not dispute the landlord's assertion that she has failed to pay any rent for July, August, September or October 2015. On the basis of this undisputed evidence, I allowed the landlord to amend his current application from the \$1,050.00 cited in his original application to \$9,250.00, to reflect the unpaid rent the landlord claims is owing from June to October 2015. The tenant was clearly aware that the landlord was intending to pursue this amount of unpaid rent as part of his two applications for a monetary award, both of which she confirmed she had received.

Issues(s) to be Decided

Is the landlord entitled to an Order of Possession? Is the landlord entitled to a monetary award for unpaid rent?

Background and Evidence

This one-year fixed term tenancy began when the parties signed a Residential Tenancy Agreement for a tenancy commencing on July 15, 2014, scheduled to end on July 15, 2015. When the fixed term ended, the tenancy continued as a periodic tenancy. Monthly rent is set at \$2,050.00, payable in advance on the first of each month. The landlord continues to hold the \$1,025.00 security deposit paid by the tenant at the start of this tenancy. Although a \$200.00 pet damage deposit was supposed to have been paid, the tenant did not make this payment.

The landlord testified that he handed the tenant the 2 Month Notice on June 7, 2015, seeking an end to this tenancy by September 15, 2015, as he wanted to move into the rental unit himself. The tenant confirmed that the landlord handed her the 2 Month Notice, but said that this happened on June 10, 2015.

The landlord entered into written evidence a copy of the 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) for \$1,000.00 in rent that he maintained remained

owing from June 2015. He entered into written evidence and sworn testimony that he sent this 10 Day Notice to the tenant by registered mail on July 30, 2015, at the tenant's mailing address. The effective date of the end of the tenancy on the 10 Day Notice was identified as August 14, 2015. The landlord provided a copy of the Canada Post Tracking Number and Customer Receipt, the Canada Post Online Tracking Record and a copy of the envelope that was returned to him by Canada Post as unclaimed. The tenant maintained that she did not actually receive the 10 Day Notice or the notification from Canada Post that this Notice was available for pickup at the Post Office. She said that there had been difficulties with accessing her mail during this tenancy, and that she did not have sole access to her mailbox.

Based on the written evidence and the sworn testimony of the parties and in accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's 10 Day Notice on August 4, 2015, the fifth day after its registered mailing. Since the tenant did not apply to cancel the 10 Day Notice and the landlord maintained that the tenant did not pay the \$1,000.00 owing from June 2015, the landlord requested an end to this tenancy on the basis of the 10 Day Notice and not the 2 Month Notice issued to the tenant on June 7, 2015.

The tenant agreed that she did not pay all of her June 2015 rent when it was due. She testified that she paid the remaining \$1,000.00 portion of her June 2015 rent in cash on June 10, 2015, when the landlord presented her with the 2 Month Notice. She gave sworn testimony supported by written evidence that the landlord provided a "receipt" for her payment on the back of the 2 Month Notice to confirm that she had made this cash payment. The tenant gave sworn testimony that her 22 year old daughter witnessed her make this payment to the landlord. She said that the landlord did not typically issue receipts for cash payments during this tenancy.

The landlord confirmed that receipts were not always issued during this tenancy, but noted that most payments were made by the tenant by direct deposits into the landlord's bank account. The landlord denied having written anything on the reverse of the 2 Month Notice, and said that he would not have issued a 10 Day Notice on July 30, 2015, had he been paid rent owing from June 2015, on June 10, 2015, as the tenant maintained. The landlord entered written evidence in the form of a tenant ledger sheet outlining all payments the landlord maintained were made by the tenant during the course of this tenancy.

Analysis

Section 67 of the *Act* establishes that if loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation

to the other party. In order to claim for loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for loss that results from that failure to comply. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant did not abide by the terms of the Residential Tenancy Agreement.

Section 51(1) of the *Act* allows a tenant who receives a 2 Month Notice to withhold paying the last month's rent of the tenancy. In this case, had the tenancy ended on the basis of the 2 Month Notice, the tenant would not have been required to pay rent for the final month of her tenancy. Although monthly rent was shown as owing on the first of each month, the landlord identified August 14, 2015 as the last day of the tenancy on the 2 Month Notice, which is in line with the end day of the tenancy shown on the original one-year fixed term tenancy agreement.

Residential Tenancy Branch Policy Guideline No. 11 states the following with respect to the amendment and withdrawal of Notices to End Tenancy:

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties...

There is nothing in the legislation itself that addresses the withdrawal of a Notice to End Tenancy, in particular a Notice given for landlord use. However, prior to the final month of a tenancy, the tenant is still subject to the requirements of the following provisions of section 26 of the *Act*:

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...*

The tenant has not made application pursuant to section 46(4) of the *Act* within five days of receiving the 10 Day Notice. However, the tenant maintained that all of the \$1,000.00 in monthly rent identified as owing for June was paid by the time the landlord issued the 10 Day Notice on July 30, 2015. I received disputed sworn testimony and written evidence as to whether the tenant actually made the \$1,050.00 cash payment she claimed to have made on June 10, 2015.

In this instance, there is conflicting written evidence and sworn testimony as to whether any monthly rent for June 2015 was owing at the time that the landlord issued the 10 Day Notice on July 30, 2015. However, there is undisputed sworn testimony from both parties that the tenant did not pay monthly rent that was owing at that time for July 2015.

Until questioned regarding whether there were any witnesses to the tenant's cash payment for the remainder of the June 2015 rent, the tenant made no mention that she paid the June 2015 in front of her adult daughter. While the tenant explained that her daughter was unavailable for this hearing because she was attending school, the tenant failed to provide anything in writing from her daughter to confirm that she witnessed this significant cash payment. She explained that she extracted this \$1,050.00 payment from her paycheck. She did obtain any information or documentation from her bank to show that she had \$1,050.00 in cash available to her on that date to make the payment she claimed to have made. Her sole supporting evidence other than her sworn testimony was a faltering signature on the back of the 2 Month Notice. This signature was clearly written in different handwriting than the text in two separate portions of the page stating that "1050 for the balance of rent owing for June Rent 2015" was paid on June 10th. The tenant testified that the landlord signed this "receipt" on the back of the 2 Month Notice handed to the tenant by the landlord. The landlord adamantly denied having received the \$1,050.00 payment, nor did he confirm having signed this statement.

I find that the weight that I can attach to the tenant's written evidence and sworn testimony is affected by the questionable nature of this type of receipt for a significant cash payment. This signature loosely resembles one of the signatures placed on the original Tenancy Agreement, but does not closely align with the landlord's other signatures provided in the written evidence. The tenant also gave sworn testimony that the landlord wrote this receipt on the back of the 2 Month Notice handed to her by the landlord. Although the 2 Month Notice is a 2 page notice, there is little way of determining whether the landlord handed her a double-sided 2 Month Notice or the 2 page notice entered into written evidence by the tenant as part of her application for

review of the original decision. I also find the way that the tenant presented her statements regarding her daughter's witnessing of her payment lacked credibility.

Based on a balance of probabilities, I find the tenant's lack of evidence relating to her alleged cash payment on June 10, 2015, when such evidence was clearly available to her, defeats her claim that she paid the remainder of her rent for June 2015. Her failure to claim the landlord's 10 Day Notice from Canada Post placed the tenant in the position that she was unable to apply to cancel the 10 Day Notice. Her history of late payments of rent during this tenancy and her refusal to pay any rent after receiving the landlord's valid 2 Month Notice, which she also accepted and did not contest, adds further weight to my finding that it is more likely than not that the tenant did not pay \$1,000.00 of her June 2015 rent, in addition to all subsequent months. For these reasons, I allow the landlord's application for a monetary award of \$1,000.00 for unpaid rent owing from June 2015.

I find that this tenancy ended on the basis of the 10 Day Notice as of August 14, 2015, and not on the basis of the earlier 2 Month Notice, which showed an effective date of September 15, 2015. I find that the tenant overheld the tenancy after August 14, 2015, and did not return her key to the landlord, notify the landlord that she had vacated, and did not remove all of her possessions from the rental unit. For these reasons, I allow the landlord's application for a monetary award for unpaid rent of \$2,050.00 for each of July, August and September, and a further \$991.94 for the first 15 days of October 2015.

I allow the landlord to retain the tenant's \$1,025.00 security deposit plus applicable interest. No interest is payable over this period.

As I have combined the landlord's subsequent application for a monetary award for unpaid rent owing from July through the first 15 days of October 2015, within this application, the only portion of the landlord's application that has not yet been considered is the landlord's application for loss of rent that may become owing for the final 16 days of October 2015. This portion of the landlord's outstanding application could not be considered at this hearing as the landlord's losses may not yet be calculated and may be considered at the hearing scheduled for March 4, 2016.

Conclusion

The original decision and Orders of August 17, 2015, are set aside.

As per the agreement of the parties, the landlord is provided with a formal copy of an Order of Possession effective by 1:00 p.m. on October 15, 2015, a copy of which must

be served on the tenant as soon as possible. Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover unpaid rent owing from this tenancy and to retain the tenant's security deposit:

Item	Amount
Unpaid June 2015 Rent	\$1,000.00
Unpaid July, August and September 2015 Rent (\$2,050.00 x 3 months = \$6,150.00)	6,150.00
Unpaid Rent October 1-15, 2015 (\$2,050.00 x 15/31 = \$991.94)	991.94
Less Security Deposit	-1,025.00
Total Monetary Order	\$7,116.94

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: October 15, 2015

Residential Tenancy Branch

