



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking an order of possession and a monetary order.

The hearing was originally convened on August 27, 2015 before an arbitrator who wrote a decision on August 28, 2015 granting the landlord an order of possession and a monetary order in the amount of \$3,324.05.

That original decision was suspended by another arbitrator on September 8, 2015 when she granted the tenant a new hearing based on his Application for Review Consideration on the ground that he was unable to attend the hearing due to service issues.

On November 12, 2015 a new hearing was held, at which the tenant again did not attend, and a third arbitrator granted a new order of possession and a monetary order in the amount of \$7,024.05. This third arbitrator did not comment on whether she intended to set aside or vary the original decision or orders.

A third hearing was granted and the decision and orders issued on November 12, 2015 were suspended as the result of a second Application for Review Consideration made by the tenant. This hearing was granted for medical reasons impacting the tenant's ability to attend as submitted in the tenant's second Application.

This hearing was conducted via teleconference and was attended by the landlord; his agent; and the tenant.

The tenant testified he had not received evidence from the landlord prior to the hearing. I asked the landlord to explain when he served evidence to the tenant for the August 27, 2015 and for the November 12, 2015 hearings.

The landlord submitted that he provided his evidence for the first hearing personally to the tenant on June 30, 2015. The tenant submitted that the landlord had given him some notations that he didn't understand regarding how much rent the landlord thought was owed.

The landlord submitted that he served his evidence for the November 12, 2015 hearing by registered mail and that it had been returned as unclaimed. The tenant stated he never received any evidence by registered mail.

As to the service of the landlord's evidence to the tenant for the August 27, 2015 hearing, I find the landlord served the tenant personally with his evidence and the tenant acknowledges receipt of it on June 30, 2015. As such, I find that this evidence was sufficiently served.

In regard to the service of evidence for the November 12, 2015 hearing, I find the landlord served the tenant with his evidence in a manner that is acceptable under the *Residential Tenancy Act (Act)* (registered mail). The landlord provided a tracking confirmation number and confirmed that the package was returned to him marked as "unclaimed".

I find the tenant failing to claim registered mail is an attempt to avoid service, as such, I advised both parties that I found the tenant to be sufficiently served, pursuant to Section 71 of the *Act*.

The landlord submitted that they had not received any evidence or the notice of this hearing from the tenant within the 3 days as ordered in the Review Consideration Decision dated November 19, 2015 granting this hearing. The tenant confirmed that he did not serve any evidence.

As the Residential Tenancy Branch had provided the landlord with a copy of the Notice of Hearing I find the landlord was sufficiently aware of this hearing with sufficient time to prepare. Further, as the landlord had already attended and provided evidence to the two previous hearings I find there has been no prejudice on the landlord resulting from a failure to receive this Notice directly from the tenant.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession for unpaid rent; to a monetary order for unpaid rent; and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 46, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The parties acknowledged that no written tenancy agreement was signed by the parties but that they agreed the tenancy began on September 1, 2014 as a month to month tenancy for the monthly rent of \$900.00 due on the 1st of each month and a security deposit of \$200.00 was paid. The parties disagree on whether or not utilities were included in the rent.

The parties agreed that as compensation for the tenant completing substantial repairs to the bathroom the tenant would get free rent for 2 months. The tenant submits that they had also agreed that should it be determined that the scope of work was greater than first anticipated they would renegotiate further compensation.

The tenant submits within the first couple of days they knew the work required would be much greater than originally thought and that he has been attempting to re-negotiate the amounts of compensation with the landlord ever since but that the landlord has refused to do so. The tenant submits the work that was complete has the equivalent value of 13 month's rent.

The landlord submits that due to a sewer line back up the parties agreed to a further 3 month rent free compensation. The landlord submits the tenant does not owe him for rent for the months of September, October, November, December 2014 or January 2015. He also testified he did receive \$800.00 from the tenant on March 8, 2015. The landlord seeks rent for the months of April to November 2015 and utilities in the amount of \$485.00.

The tenant submits that he had never agreed to any amount of additional free rent and the landlord did not negotiate with the tenant for an additional three months. He also testified that he has paid the landlord the \$200.00 security deposit and the \$800.00 rent payment in March 2015, but that he has not paid the landlord anything further.

The tenant testified that the landlord had issued several 10 Day Notices that the landlord never pursued. The landlord submitted that he had issued two previous Notices that he did not pursue.

The parties agreed that on June 14, 2015 the landlord served the tenant personally with a 10 Day Notice to End Tenancy for Unpaid Rent that was issued on June 14, 2015 with an effective vacancy date of June 25, 2015 due to \$2,800.00 in unpaid rent and \$488.82 in unpaid utilities. A copy of this Notice was submitted into evidence by the landlord.

The Notice states 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 rent in full or apply to dispute the Notice to End Tenancy within five days.

Analysis

When both parties to a dispute provide equally plausible interpretations of a term of the tenancy agreement, the party with the burden of proof must provide additional evidence to corroborate their claim. In the case before me, I find the landlord seeks recovery of rent and the cost of utilities and the tenant has disputed responsibility for utilities.

As such, in the absence of any corroborating evidence such as a tenancy agreement, I find the landlord has failed to establish that the tenant had agreed to responsibility for the payment of utilities as a term of the tenancy agreement. Therefore, I find the

landlord has failed to establish a violation of the tenancy agreement and I dismiss the portion of the landlord's Application seeking compensation for utilities in the amount of \$485.00.

Section 26(1) of the *Act* states a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the *Act*, the regulations or the tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent.

The *Act* does allow for very specific circumstances where a tenant may deduct a portion of rent which includes when there is mutual agreement between the landlord and tenant; when there has been an overpayment of a security deposit; as ordered by an arbitrator; or if the tenant has had to complete emergency repairs that the landlord failed to complete.

In the case of an emergency repair the Section 33 of the *Act* very clearly defines what are considered emergency repairs. The *Act* also outlines the tenant must make two attempts to contact the landlord to make the repairs and if he fails to make the repairs the tenant must make the repairs themselves; provide receipts to the landlord and then if the landlord fails to reimburse the tenant he may deduct from rent.

In the case before me, I find the parties had entered into a tenancy agreement with specific terms as to the amount of rent and when it was due - \$900.00 due on the 1st of each month. I also find that the parties entered into a further agreement for work to be completed in the rental unit by the tenants who would receive up to 2 months' rent as compensation. As a result, I find that this work did not constitute emergency repairs as defined in Section 33 of the *Act*.

Whether or not the parties had agreed that they would re-negotiate if the scope of work increased I find, by the testimony of both parties, no agreement was reached by the parties for any further compensation. As such, I find the tenant was obligated to pay rent in the amount agreed upon in the original verbal tenancy agreement, pursuant to Section 26 of the *Act*.

I accept that the landlord continues to want to provide compensation in the amount of 5 months' rent – 2 months for the work on the bathroom and 3 months for the sewer back up. As such, I find the landlord is entitled to rent for the months of April to November 2015 as claimed.

I also find that when the landlord issued the 10 Day Notice to End Tenancy for Unpaid Rent on June 14, 2015 the rent was outstanding and the tenant had no authority under the *Act* to deduct any amounts.

I have reviewed the 10 Day Notice to End Tenancy for Unpaid Rent and accept that the tenant was served with notice to end tenancy as agreed by the parties. By the testimony of both parties I find the notice was received by the tenant on June 14, 2015

and the effective date of the notice was June 25, 2015. I accept the evidence before me that the tenant failed to pay the rent owed in full within the 5 days granted under Section 46(4) of the *Act*.

Based on the foregoing, I find 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.

Conclusion

Based on the evidence and testimony of both parties and pursuant to Section 82(3) of the *Act*, I order the decision and orders issued on August 28, 2015 and the decision and orders issued on November 12, 2015 in these matters are set aside.

I find the landlord is entitled to an order of possession effective **two days after service on the tenant**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

I find the landlord is entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **\$7,250.00** comprised of \$7,200.00 rent owed and the \$50.00 filing fee paid by the landlord for this Application for Dispute Resolution.

This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be 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: December 07, 2015

Residential Tenancy Branch

