



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MACDONALD COMMERCIAL RES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNDC, MNR, FF

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 and loss pursuant to section 67; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 1001 in order to enable the tenant to connect with this teleconference hearing scheduled for 0930. The landlord's agents attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The agent RF testified that he personally served the tenant with the dispute resolution package on or about 1 October 2015. RF testified that he served the tenant outside the rental unit. On the basis of this evidence, I find that the tenant was served with the dispute resolution package pursuant to section 89 of the Act.

The agent RE testified that he personally served the tenant with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) on 19 August 2015. The landlord provided me with a signed proof of service that showed the same. On the basis of this evidence, I am satisfied that the tenant was served with the 10 Day Notice pursuant to section 88 of the Act.

The agent RM testified that the landlord served the tenant with its evidence package. On the basis of this evidence, I am satisfied that the tenant was served with the evidence package pursuant to section 88 of the Act.

The tenant filed evidence in response to the landlord's application. The landlord's agent admitted receipt of this evidence.

Prior Hearing

This tenancy and this 10 Day Notice were the subjects of an earlier application for dispute resolution by the tenant. Neither party attended that hearing. The tenant's application was dismissed with leave to reapply.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent? Is the landlord entitled to a monetary award for unpaid rent and loss? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agents, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 1 October 2014. The parties entered into a written tenancy agreement on 1 October 2014. Monthly rent of \$550.00 is due on the first. The landlord continues to hold the tenant's security deposit of \$275.00, which was collected at the beginning of the tenancy.

Clause 10 of the tenancy agreement provides for a fee of \$25.00 for rent payments returned for insufficient funds.

The tenant commenced paying rent by direct payment for rent due 1 April 2015. Direct deposits were received from the tenant's account for rent due 1 April 2015, 1 May 2015, and 1 June 2015. On or about 29 April 2015, the tenant delivered a bank draft for May's rent. This resulted in an over payment of \$550.00.

On or about 15 June 2015, the landlord prepared a cheque for the amount of the overpayment and attempted to deliver it to the tenant. The tenant would not accept the cheque and denied that there had been an overpayment.

In order to correct for the overpayment, the landlord did not withdraw any amount for rent due 1 July 2015 from the tenant's account. In error, the landlord did not withdraw

rent due 1 August 2015 from the tenant's account. The landlord advised the tenant that the landlord would withdraw the funds later that month. When the landlord attempted to withdraw the rent amount, the transaction was declined for insufficient funds and no amount was transferred to the landlord. The tenant provided her bank statement for August, which shows the rent amount being debited and then credited to her account within days. The tenant's bank statement also shows the application of a \$25.00 fee for the "NSF" transaction. This fee was administered by the tenant's bank.

On 19 August 2015, the landlord issued the 10 Day Notice to the tenant. The 10 Day Notice set out an effective date of 28 August 2015. The 10 Day Notice set out that the tenant had failed to pay rent in the amount of \$550.00, which was due 1 August 2015.

On 3 September 2015 the landlord wrote to the tenant setting out that the landlord sought payment of the rent arrears for August.

The agent WR testified that the tenant paid rent due 1 September 2015, 1 October 2015, and 1 November 2015. WR testified that the landlord did not issue any receipts to the tenant for these payments as they were received by way of direct deposit. WR testified that the tenant was aware that the landlord was seeking enforcement of the 10 Day Notice. WR and the agent RM testified that the landlord has consistently indicated intent to enforce the 10 Day Notice.

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.

The landlord has provided uncontested evidence that the tenant had provided authorization for preauthorized rent payments. The landlord did not automatically withdraw August's rent on 1 August 2015. When the landlord realised the error, its agents contacted the tenant to inform her of the later withdrawal date. The debit was not honoured by the tenant's bank. While the landlord's error on 1 August 2015 would have not formed the basis for a 10 Day Notice immediately, once the landlord informed the tenant of the error and informed the tenant that her rent would be withdrawn on 13 August 2015, the tenant's failure to ensure that rent was in the account and the payment would be honoured formed a basis for the issuance of the 10 Day Notice on 19 August 2015. On the basis of this evidence, I find that the tenant did not pay her rent when it was due in accordance with the tenancy agreement and on this basis the 10 Day Notice was validly issued.

In accordance with paragraph 46(4)(a), the tenant had five days from receiving the notice to pay the rent arrears. The tenant did not pay the outstanding amount. The notice was not cancelled.

I have not been provided with any evidence that the landlord's conduct or expressed intention was to waive its ability to enforce the 10 Day Notice. There is no evidence before me that indicates that the tenant was entitled to deduct any amount from her rent. On this basis, the landlord was entitled to possession of the rental unit on 29 August 2015. As possession has not yet returned to the landlord, the landlord is entitled to an order of possession effective two days from service on the tenant.

The landlord through its agents has provided sworn and uncontested testimony that the tenant has \$550.00 in rent arrears. I find that the landlord is entitled to this amount.

The landlord seeks recovery of \$25.00 for the dishonoured preauthorized debit.

Paragraph 7(1)(d) of the *Residential Tenancy Regulations* (the Regulation) provides that a landlord may charge an administration fee of \$25.00 for a dishonoured cheque. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee. The tenancy agreement provides for this fee at clause 10.

The ordinary meaning of the word "cheque" does not encompass a preauthorized debit. On this basis, I find that the language of paragraph 7(1)(d) of the Regulation does not encompass a fee in circumstances where a bank dishonours an electronic payment. Rent for August was late as a result of the landlord's error. On this basis and pursuant to subsection 7(2) of the Act, I find that the landlord failed to mitigate its loss and find that the landlord cannot recover \$25.00 as late fee. Accordingly, the landlord is not entitled to compensation under paragraph 7(1)(d) of the Regulation.

As the landlord has been successful in this application, it is entitled to recover its filing fee from the tenant.

The landlord continues to hold the tenant's \$275.00 security deposit collected at the beginning of the tenancy. Over that period, no interest is payable. Although the landlord's application does not seek to retain the security deposit, using the offsetting provisions of section 72 of the Act, I allow the landlord to retain the security deposit in partial satisfaction of the monetary award.

Conclusion

The landlord is provided with a formal copy of an order of possession. 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 in the amount of \$325.00 under the following terms:

Item	Amount
Unpaid August Rent	\$550.00
Offset Security Deposit Amount	-275.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	\$325.00

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 subsection 9.1(1) of the Act.

Dated: December 01, 2015

Residential Tenancy Branch

