



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1230 BURNABY STREET HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

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

- an Order of Possession for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent, pursuant to section 67;
- authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 13 minutes. The landlord's agent, CS ("landlord") attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed that she is the property manager for the "landlord company" named in this application and that she had authority to speak on its behalf as an agent at this hearing.

The landlord testified that the tenant was served with the landlord's application for dispute resolution hearing package ("Application") on February 19, 2016, by way of registered mail to the rental unit where the tenant is residing. The landlord provided a Canada Post tracking number verbally during the hearing. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's Application on February 24, 2016, five days after its registered mailing.

The landlord testified that she served the tenant with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated February 2, 2016 ("10 Day Notice"), on the same date, by way of posting to the rental unit door where the tenant is residing. The landlord provided a signed, witness proof of service. 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 February 5, 2016, three days after its posting.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's Application to increase the landlord's monetary claim to increase it from \$850.00 to \$1,750.00 to include March and April 2016 rent and late fees. I also amend the landlord's Application to include a claim for the landlord to retain the tenant's security deposit and to recover the \$100.00 filing fee for the Application. The landlord served an Amendment to the Application, dated March 10, 2016, on the tenant on March 11, 2016 for the above claims. The landlord did not include the \$25.00 late fee for April 2016 on the Amendment but requested it verbally during the hearing. The tenant is aware that rent is due on the first day of each month and that late fees up to \$25.00 are charged for late rent payments, as per his tenancy agreement. The tenant continues to reside in the rental unit, despite the fact that a 10 Day Notice required him to vacate for failure to pay the full rent due. Therefore, the tenant knew or should have known that by failing to pay his rent, the landlord would pursue all unpaid rent at this hearing. For the above reasons, I find that the tenant had appropriate notice of the landlord's claims for increased rent and late fees, despite the fact that he did not attend this hearing.

Issues 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?

Is the landlord entitled to retain the tenant's security deposit in partial satisfaction of the monetary award requested?

Is the landlord entitled to recover the filing fee for this Application from the tenant?

Background and Evidence

The landlord confirmed that the landlord company named in this Application assumed this tenancy in October 2015, when the company bought the property from the former landlord.

The landlord testified that this tenancy began with the former landlord on July 1, 2013 for a fixed term ending on January 31, 2014, after which it became a month-to-month tenancy. Monthly rent in the current amount of \$850.00 is payable on the first day of each month. The landlord provided a legal Notice of Rent Increase, dated September 16, 2014, issued by the former landlord, increasing the rent from the original tenancy agreement amount of \$840.00 to the current amount of \$850.00, effective as of

February 1, 2015. A security deposit of \$420.00 was paid by the tenant and the landlord assumed this deposit from the former landlord. The landlord testified that the tenant continues to reside in the rental unit. The landlord provided a copy of the written tenancy agreement signed by the tenant with the former landlord.

The landlord issued a 10 Day Notice for unpaid rent of \$850.00 due on February 1, 2016. The notice indicates an effective move-out date of February 12, 2016. The landlord said that the tenant paid \$850.00 for rent and \$25.00 for the late fee for February 2016 to the landlord on February 18, 2016. She claimed that the landlord issued a receipt to the tenant for the above payment, indicating it was for "use and occupancy only."

The landlord seeks a monetary order of \$1,700.00 for unpaid rent from March to April 2016 inclusive. The landlord claimed that the tenants did not pay any rent for the above two months. The landlord seeks late fees of \$50.00 from March to April 2016 inclusive. The landlord is also seeking to recover the \$100.00 filing fee for this Application from the tenant.

Analysis

The landlord provided undisputed evidence at this hearing, as the tenant did not attend. The tenant failed to pay the full rent due on February 1, 2016, within five days of being deemed to have received the 10 Day Notice. The tenant made a payment on February 18, 2016 for full rent, but the payment was due by February 10, 2016, five days after the deemed receipt date of February 5, 2016.

The next issue is whether the landlord waived its right to pursue the 10 Day Notice. Residential Tenancy Policy Guideline 11 discusses the issue of waiver:

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. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent. If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- *whether the receipt shows the money was received for use and occupation only.*
- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

Although the landlord accepted rent after the effective date on the 10 Day Notice, I do not find this to be a waiver of the 10 Day Notice. The landlord did not withdraw its Application to enforce the 10 Day Notice, at any time prior to this hearing. The landlord testified that the landlord issued a receipt for “use and occupancy only” to the tenant for the February 2016 rent payment. This is recent evidence of the landlord’s intention to pursue the 10 Day Notice and obtain an order of possession against the tenant.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive its rights to pursue the 10 Day Notice and did not waive the 10 Day Notice expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting a rent payment after the effective date of the 10 Day Notice.

The tenant has not made an application pursuant to section 46(4) of the *Act* within five days of being deemed to have received the 10 Day Notice. In accordance with section 46(5) of the *Act*, the failure of the tenant to pay the full rent or file an application within five days led to the end of this tenancy on February 15, 2016, the corrected effective date on the 10 Day Notice. In this case, this required the tenant and anyone on the premises to vacate the premises by February 15, 2016. As this has not occurred, I find that the landlord is entitled to a two (2) Order of Possession, pursuant to section 55 of the *Act*. I find that the landlord’s 10 Day Notice complies with section 52 of the *Act*.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which is the first day of each month. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

I find that the landlord proved that the current rent for this unit is \$850.00. I find that the landlord provided a legal notice of rent increase to raise the rent from \$840.00 to \$850.00 in accordance with the *Regulation* amount for 2015. The landlord provided undisputed evidence that the tenant failed to pay rent of \$850.00 for March 2016. Therefore, I find that the landlord is entitled to \$850.00 in rental arrears for the above period.

The tenant was required to vacate the rental unit by February 15, 2016, the corrected effective date on the 10 Day Notice. As per the landlord's evidence, the tenant continues to reside in the rental unit, causing loss to the landlord under section 7(1) of the *Act*. Rent of \$850.00 was due on April 1, 2016. Therefore, I find that the landlord is entitled to \$850.00 in rental arrears for the entire month of April 2016, despite the fact that this hearing was held on April 6, 2016. I make this finding because the landlord may have to serve the tenant with the order of possession, possibly enforce the order of possession, examine the rental unit, repair any potential damage, and possibly advertise and attempt to re-rent the unit.

As per section 7(1)(d) and 7(2) of the *Regulation*, I find that the landlord is entitled to \$50.00 in late fees from March to April 2016, as the tenant did not pay rent for the above months and a \$25.00 amount was indicated in the tenancy agreement for each late fee.

The landlord continues to hold the tenant's security deposit of \$420.00. Although the landlord did not apply to retain the deposit, in accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the deposit of \$420.00 in partial satisfaction of the monetary award. No interest is payable over this period.

As the landlord was successful in this Application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for the Application.

Conclusion

I grant an Order of Possession to the landlord effective **two (2) days after service on the tenant**. Should the tenant or anyone on the premises 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 \$1,430.00 against the tenant. The tenant must be served with this Order as soon as possible. Should the tenant 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 06, 2016

Residential Tenancy Branch