



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, 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 and money owed or compensation for damage or loss, pursuant to section 67;
- authorization to recover the filing fee for this application, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 24 minutes. The landlord RC (the "landlord"), his wife ("KH"), their daughter ("EC") and translator ("GC") 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 provided documentary evidence in the form of an application for tenancy that listed him as an agent.

The landlord testified that the tenant was personally served with the landlord's application for dispute resolution hearing package ("Application") on March 15, 2016, at the rental unit where the tenant is residing. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's Application on March 15, 2016, the day it was served.

The landlord testified the tenant was personally served with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated March 5, 2016 ("10 Day Notice"), on the same date, at the rental unit. 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 March 5, 2016, the day it was personally served.

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 a monetary award for money owed or compensation for damage or loss ?

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

Background and Evidence

The landlord testified that this tenancy began on February 1, 2016 on a month-to-month basis. Rent in the amount of \$1,800.00.00 was payable on the first of each month. The tenant remitted a \$900.00 security deposit at the start of the tenancy. The tenant continues to reside in the rental unit.

A 10 Day Notice for unpaid rent of \$4,300.00 due on March 1, 2016 was issued to the tenant. The notice indicates an effective move-out-date of March 15, 2016. The tenant provided one cheque in the amount of \$2,700.00 to the landlord on February 1, 2016. The memo portion of the cheque indicates a breakdown of \$1,800.00 rent and damage deposit. The cheque was returned due to insufficient funds on February 10, 2016. On February 24, 2016 the landlord received \$200.00 from the tenant. The landlord testified the tenant paid \$1,800.00 cash on April 1, 2016 for April's rent. The landlord testified he issued a receipt to the tenant for the above payment, indicating it was for "occupancy for April only."

The landlord seeks a monetary order of \$4,300.00 for unpaid rent from February to March 2016 and the security deposit. The landlord claimed that the tenant paid only \$200.00 in rent for the above two months. 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 March 1, 2016 and did not pay the rent within five days of receiving the 10 Day Notice. The tenant made a payment on April 1, 2016 for full rent, however the payment was due by March 10, 2016, five days after the deemed receipt date of March 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 April 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 March 15, 2016, the date on the 10 Day Notice. In this case, this required the tenant and anyone on the premises to vacate the premises by March 15, 2016. As this has not occurred, I find that the landlord is entitled to a two (2) Day 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 \$1,800.00. I find the landlord provided undisputed evidence that the tenant failed to pay full rent for February and March 2016. Therefore, I find that the landlord is entitled to \$3,600.00 in rental arrears less the February \$200.00 payment for a total of \$3,400.00

The tenant was required to vacate the rental unit by March 15, 2016, the effective date on the 10 Day Notice. As per the landlord's evidence, the tenant continues to reside in the rental unit, which ordinarily would cause loss to the landlord under section 7(1) of the *Act*. However in this case, rent of \$1,800.00 was due on April 1, 2016 and was paid in cash on April 1, 2016. Therefore, I find that the landlord is not entitled to any compensation other than outstanding rent arrears in the amount of \$3,400.00.

The landlord applied to recover the tenant's security deposit of \$900.00 that was returned insufficient funds on February 10, 2016. Pursuant to section 20(a) of the *Act*, a landlord cannot require a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement. As the time has passed to collect the security deposit, the landlord's application to recover the security deposit is denied.

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 \$3,500.00 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 13, 2016

Residential Tenancy Branch