



Dispute Resolution Services

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Residential Tenancy Branch Office of Housing and Construction Standards

A matter regarding Mainstreet Equity Corp.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNDC, MNSD, 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 conducted via teleconference and was attended by 3 agents for the landlord; the tenant and his agent. I note that the tenant himself did not speak during the hearing. The tenant's agent testified that he was a tenant in the rental unit as well.

The tenant's agent identified himself as a tenant under this tenancy agreement. He stated that he started living in the rental unit previously but that he had moved out for a couple of years. He stated that he moved back into the rental unit a couple of years ago and that the onsite manager has filled out a Shelter Information form for his disability assistance since he has moved back in.

The landlord submitted that while they recognized that the tenant's agent may have been staying with the tenant from time to time it was the named respondent who had interaction with the landlord for things such as paying rent; that the agent had been removed from the tenancy agreement and that they did not consider the agent as a tenant under this tenancy agreement.

The tenant's agent stated that he spent quite a substantial amount of time on Vancouver Island. He stated he was usually away one week or two on the Island and then return for a week or two. He also stated that often he stayed with his girlfriend at a different address.

When both parties to a dispute provide equally plausible testimony of their understanding of the circumstances of a tenancy or the terms of a tenancy agreement, the party attempting to establish their position must provide additional evidence that might corroborate it.

In the case before me, I find the tenant's agent was at one a time a tenant under the tenancy agreement for this tenancy. I also find that the tenant's agent had ended his responsibilities to that tenancy agreement when he vacated the unit for a period of "a couple of years" and the tenant retained possession of the unit. I find the tenant has failed to provide any evidence that he was reinstated as a tenant at any time within the period that he stated he has been living in the unit again.

Furthermore, I find the tenant's agent's testimony throughout the proceeding indicated that only the tenant himself was responsible for the failure of rent to be paid on May 1, 2016 and that it could not be resolved until he obtained the appropriate authority to administer the tenant's bank accounts.

For these reasons, I find the tenant's agent is not a tenant under the current tenancy agreement for this tenancy.

This hearing was convened as a result of a Review Consideration submitted on behalf of the tenant for a previous decision on this Application that granted the landlord an order of possession for non-payment of rent and a monetary order in the amount of \$804.12 for unpaid rent.

At the outset of the hearing I confirmed that both parties understood that because this hearing was based on a Review Consideration that this decision would confirm, vary or set aside the original decision.

The landlord's original Application sought a monetary order in the amount of \$3,150.69. This claim was broken down as unpaid rent for the months of May, June, and July 2016 totaling \$3,075.69 plus late fees for each of those same months in the amount of \$75.00. As to the quantum of the landlord's claim, I have considered the testimony and evidence of both parties to determine the amount of rent and late fees currently owed to the landlord at the time of this new hearing.

I note that during the hearing the tenant's agent referred to evidence he had submitted to the Residential Tenancy Branch on the morning of this hearing. He explained what it was that was submitted, including documentation from the tenant's bank as to payments of rent and the status of his accounts.

Residential Tenancy Branch Rule of Procedure 3.1 requires the applicant to serve the respondent with their evidence within three days, if available, of their Application being accepted. For any evidence not available at the time the applicant filed their Application it must be served on the respondent as soon as possible or at least no later than 14 days prior to the hearing. The respondent must submit their evidence as soon as possible or at least no later than 14 days prior to the hearing.

In a case, such as this, when a new hearing has been granted by Review Consideration the hearing is scheduled far enough after the Review Consideration to allow the parties to be able to comply with these same requirements. As such, I find the tenant had until September 5, 2016 to submit all evidence he intended to rely upon.

The tenant's agent stated that he was unaware that he had to submit evidence any time prior to the hearing. I referred him to all of the indications of the need to submit evidence and deadlines that were outlined in the Review Consideration Decision; the Notice of Hearing Documents and the fact sheets provided to the tenant when the Review Consideration Decision was sent to him.

As the tenant's agent only submitted this additional evidence on the day of the hearing I find the evidence has been submitted far too late to be considered in this decision. I have, therefore, not considered any of the evidence received on September 13, 2016.

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; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 46, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord submitted into evidence the following relevant documents:

- A copy of a tenancy agreement signed by the parties in September, 2004 for a month to month tenancy for a monthly rent of \$780.00 due on the 1st of each month with a security deposit of \$390.00 paid. The agreement included a requirement for the tenant to pay the landlord a \$20.00 fee for the late payment of rent;
- A copy of a Notice of Rent Increase issued on January 25, 2016 increasing rent to \$1,025.23 effective May 1, 2016; and
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent issued on May 4, 2016 with an effective vacancy date of May 14, 2016 due to \$1,025.23 in unpaid rent for the month of May 2016.

The landlord submitted that the tenant and the tenant's agent are involved in a disagreement regarding a parking stall and the removal, by the landlord, of the tenant's vehicle from this parking stall. The parties confirmed that this dispute is currently ongoing.

The landlord submitted the tenant's agent contacted them to advise the tenant would not be paying rent for the month of May 2016 because of the parking stall/car dispute. The tenant's agent confirmed he remembered having such a conversation but could not recall when it occurred, he stated he thought it was sometime in April 2016.

The tenant's agent stated, however, that rent was not withheld for that reason. He stated that he had been in and out of the rental unit over the course of several weeks from mid-April to sometime in May 2016. He believes he returned either the 18th, 19th, or 20th but was unsure of the exact date.

He stated that the tenant himself had been ill at the time and was not aware that he had received a 10 Day Notice. Since the tenant's agent was away from the rental unit until May 18th, 19th, or 20th it was not until the agent had gone through all of the tenants banking and bill payment information that he determined that rent had not been paid. He stated that at some point the tenant's bank account was depleted and a number of bills and commitments went unpaid. The tenant's agent did not, in his testimony, provide any indication that when he saw the 10 Day Notice.

The landlord submitted that on May 4, 2016 they issued the Notice to End Tenancy for Unpaid Rent and posted it on the rental unit door. The agents for the landlord testified that they received a call from the tenant's agent within a couple of days of the Notice being issued confirming that the tenant would not be paying rent because of the parking stall/car dispute.

The tenant's agent submitted that the tenant himself does not have capacity to act on his own behalf due to his age and an onset of dementia. Neither the tenant or the tenant's agent have provided any medical document confirming any infirmity or incapacity or a copy of a power of attorney assigning authority to the tenant's agent to act on behalf of the tenant.

The landlord asserts that May 2016 rent remains unpaid and stated that they have received payments from the tenant as follows, since the May 4, 2016 Notice was issued:

- June 1, 2016 - \$996.34 for June 2016;
- July 4, 2016 – \$1,060.00 for July 2016;
- August 2, 2016 - \$996.34 for August 2016; and
- September 1, 2016 – \$996.34 for September 2016.

The tenant agrees with those payment dates but indicated that the June 1, 2016 payment was for May 2016 rent; the July 4, 2016 payment was for June 2016 rent; the August 2, 2016 payment was for July 2016 rent; and the September 1, 2016 payment was for August 2016.

Analysis

In regard to the tenant's agent evidence and submissions I find the tenant's agent's testimony cannot be considered reliable, in part, because he could not provide a specific date for any action he took or responded to, including when he spoke with the landlord about the potential of not paying rent; when he travelled and returned; when he determined that rent had not been paid. I also find the tenant's agent's testimony was non-specific and at times evasive.

I also find that in the absence of any medical documentation or legal declaration to establish that the tenant himself is not capable of managing his affairs the tenant and his agent have failed to provide any evidence that the tenant could not have responded to the landlord's 10 Day Notice to End Tenancy for Unpaid Rent when it was issued on May 4, 2016.

Section 46 of the *Act* states a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy on a date that is not earlier than 10 days after the date the tenant receives the notice. A notice under this section must comply with Section 52 of the *Act*.

Section 46(4) allows the tenant to either pay the rent or file an Application for Dispute Resolution to dispute the notice within 5 days of receipt of the notice.

Section 46(5) states that if a tenant who has received a notice under this section does not pay the rent or make an Application for Dispute Resolution to dispute the notice within the allowed 5 days the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit.

Based on the evidence and testimony of both parties, I find the landlord has established that the Notice was served to the tenant by posting it on the rental unit door on May 4, 2016. I am also satisfied the tenant received that Notice.

However, as I cannot determine the actual date the Notice was received I order that it is deemed to have been received by May 7, 2016, pursuant to Section 90(c). As such, I find the tenant had until May 12, 2016 to either pay the rent in full or submit an Application for Dispute Resolution seeking to cancel the Notice as allowed under Section 46(4).

Neither party provided any evidence that the tenant filed an Application for Dispute Resolution seeking to cancel the Notice. From the evidence submitted I find the tenant did not pay rent for May 2016 until the landlord received the payment on June 1, 2016 or 19 days after receipt of the Notice.

As a result, I find the tenant failed to either file an Application to dispute the Notice or pay the rent owed within 5 days of receipt of the May 4, 2016 Notice. I, therefore, find the tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the rental unit in accordance with the 10 Day Notice to End Tenancy for Unpaid Rent issued on May 4, 2016.

As to the amount of rent owed to the landlord on the date of this hearing, I note that for the period beginning May 1, 2016 the tenant was obligated to pay rent in the amount of \$1025.23 per month for 5 months for a total of \$5,126.15.

From the agreed upon payment amounts made since the 10 Day Notice to End Tenancy for Unpaid Rent was issued on May 4, 2016 I find the tenant has paid the landlord a total of \$4,049.02. As such, I find there is currently a balance of rent owing in the amount of \$1,077.13.

I also find that the payments made by the tenant are for the periods as follows:

- Payment received June 1, 2016 for May 2016;
- Payment received July 4, 2016 for June 2016;
- Payment received August 2, 2016 for July 2016; and
- Payment received September 1, 2016 for August 2016.

As such, I find the tenant has been late paying rent for all four months. In addition, since the tenant's agent acknowledged that rent for September 2016 is not yet paid, I find the tenant is also late paying rent for September 2016. Therefore, I find the landlord is entitled to late fees, as per the tenancy agreement, in the amount of \$20.00 per month for 5 months for a total of \$100.00.

Conclusion

Based on the above I confirm the landlord is entitled to the order of possession issued on June 28, 2016 effective two days after service on the tenant.

I order that the June 28, 2016 order of possession remains enforceable. 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.

In addition, I set aside the monetary order issued on June 28, 2016 in the amount of \$804.12.

Furthermore, I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **\$1,277.13** comprised of \$1,077.13 rent owed; \$100.00 late fees and the \$100.00 fee paid by the landlord for this application.

I order the landlord may deduct the security deposit (\$390.00) and interest (\$13.81) held in the amount of \$403.81 in partial satisfaction of this claim; and I grant a monetary order in the amount of **\$873.32**. 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: September 15, 2016

Residential Tenancy Branch