



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER EVICTION SERVICES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, OPC, MNR, MNDC, MNSD, FF

Introduction

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

- an order of possession for cause and for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain a portion of the tenants' security deposit in full satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

The two tenants, "tenant DM" and "tenant JM," did not attend this hearing, which lasted approximately 10 minutes. The landlords' agent, SA ("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 provided a signed, written authorization that she had authority to speak on behalf of the individual landlord and the landlord company named in this application, as an agent at this hearing (collectively "landlords").

The landlord testified that the tenants were each served with the landlords' application for dispute resolution hearing package ("Application") on August 19, 2016, by way of registered mail. The landlords provided two Canada Post receipts and tracking numbers with their Application. In accordance with sections 89 and 90 of the *Act*, I find that both tenants were deemed served with the landlords' Application on August 24, 2016, five days after their registered mailings.

The landlord confirmed that tenant JM was personally served with the landlords' 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated July 27, 2016 ("10 Day Notice") on the same date. In accordance with sections 88 and 90 of the *Act*, I find that both tenants were served with the landlords' 10 Day Notice on July 27, 2016.

The landlord confirmed that tenant DM was personally served with the landlords' 1 Month Notice to End Tenancy for Cause, dated July 28, 2016 ("1 Month Notice") on the same date. In accordance with sections 88 and 90 of the *Act*, I find that both tenants were served with the landlords' 1 Month Notice on July 28, 2016.

Issues to be Decided

Are the landlords entitled to an Order of Possession for unpaid rent or for cause?

Are the landlords entitled to a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Are the landlords entitled to retain a portion of the tenants' security deposit in full satisfaction of the monetary order requested?

Are the landlords entitled to recover the filing fee for this Application from the tenants?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the landlord, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the landlords' claims and my findings are set out below.

The landlord testified regarding the following facts. This tenancy began on July 1, 2014. Monthly rent in the amount of \$800.00 is payable on the first day of each month. A security deposit of \$400.00 was paid by the tenants and the landlords continue to retain this deposit. A written tenancy agreement was signed by both parties but a copy was not provided for this hearing. The tenants continue to reside in the rental unit.

The landlords issued the 10 Day Notice for unpaid rent of \$230.00 due on July 1, 2016. The notice indicates an effective move-out date of August 6, 2016. The landlord said that the tenants did not pay the above rent owed within 5 days of receiving the 10 Day Notice. The landlords provided rent receipts to confirm the above.

The landlords issued the 1 Month Notice indicating that “the tenant is repeatedly late paying rent.” The notice indicates an effective move-out date of August 31, 2016. The landlord provided rent receipts from January to October 2016, indicating that the tenants paid rent late more than three times during this tenancy. Most of the receipts indicate that there is balance of rent owing each month. The landlord said that the tenants made rent payments from August to October 2016, but that \$184.00 was still outstanding for October 2016 rent. The latest rent receipt from October 1, 2016, for a partial rent payment of \$300.00, indicates that it is being accepted for “use and occupancy only.”

The landlords seek a monetary order of \$184.00 for October 2016 rent as well as recovery of the \$100.00 filing fee.

Analysis

Section 26 of the *Act* requires the tenants to pay rent on the date indicated in the tenancy agreement. The landlord stated that rent is due on the first day of each month, as per the tenancy agreement. Residential Tenancy Policy Guideline 38 states that “three late payments are the minimum number sufficient to justify a notice...” The landlords provided multiple rent receipts from January to October 2016, showing that rent was late more than three times during this tenancy. Accordingly, I find that the tenants were late paying rent at least three times during this tenancy. I find that the landlords’ 1 Month Notice was issued for a valid reason.

The next issue is whether the landlords waived their right to pursue the 1 Month 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 landlords accepted rent after the effective date on the 1 Month Notice, I do not find this to be a waiver of the notice. The landlords did not withdraw this Application to enforce the notice, at any time prior to this hearing. The landlords issued a rent receipt most recently in October 2016 indicating that rent was being accepted for “use and occupancy only.” This is recent evidence of the landlords’ intention to pursue the notice and obtain an order of possession against the tenants.

For the above reasons, and given the conduct of the parties, I find that the landlords did not waive their rights to pursue the 1 Month Notice and did not waive it expressly or impliedly. I find that the landlords did not intend to reinstate this tenancy, despite accepting rent payments after the effective date of the notice.

The tenants have not made an application pursuant to section 47(4) of the Act within ten days of receiving the 1 Month Notice. In accordance with section 47(5) of the Act, the failure of the tenants to file an application within ten days led to the end of this tenancy on August 31, 2016, the effective date on the 1 Month Notice. In this case, this required the tenants and anyone on the premises to vacate the premises by August 31, 2016. As this has not occurred, I find that the landlords are entitled to a two (2) Order of Possession, pursuant to section 55 of the Act. The tenants have not paid rent in full for October 2016 so they are not entitled to possession of the rental unit until the end of the month. I find that the landlords’ 1 Month Notice complies with section 52 of the Act. I issue an Order of Possession to the landlords effective two (2) days after service on the tenants. Should the tenants 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.

As I have issued an order of possession for cause based on the 1 Month Notice, it is not necessary for me to explore the landlords' application for an order of possession for unpaid rent based on the 10 Day Notice. Accordingly, this portion of the landlords' application is dismissed with leave to reapply.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlords for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on landlords claiming compensation for loss resulting from tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

The landlords provided undisputed evidence that the tenant failed to pay rent of \$184.00 for October 2016. I find that the landlords are entitled to the entire month of rent for October 2016, despite the fact that this hearing was held on October 13, 2016, because rent is due on October 1, 2016, as per the tenancy agreement. Further, the landlords may be required to serve the tenants with the order of possession and possibly enforce it, enter the rental unit to inspect and potentially repair any damages and attempt to re-rent the unit. Therefore, I find that the landlords are entitled to \$184.00 in rental arrears from the tenants for the above period.

As the landlords were successful in this Application, I find that they are entitled to recover the \$100.00 filing fee from the tenants.

The landlords continue to hold the tenants' security deposit of \$400.00. Over the period of this tenancy, no interest is payable on the deposit. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlords to retain the \$284.00 from the tenants' security deposit of \$400.00 in full satisfaction of the monetary claim. The remainder of the tenants' security deposit in the amount of \$116.00 is to be dealt with in accordance with section 38 of the *Act*.

Conclusion

I grant an Order of Possession to the landlords effective two (2) days after service on the tenants. Should the tenants 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.

The landlords' application for an order of possession for unpaid rent based on the 10 Day Notice, dated July 27, 2016 is dismissed with leave to reapply.

I order the landlords to retain \$284.00 from the tenants' security deposit in full satisfaction of the monetary claim. The remainder of the tenants' security deposit in the amount of \$116.00 is to be dealt with in accordance with section 38 of the *Act*.

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: October 13, 2016

Residential Tenancy Branch