



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW HEARING DECISION

Dispute Codes OPR, MNR, MND, FF; CNR, OLC, O, 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; and
- a monetary order for unpaid rent and for damage to the rental unit, pursuant to section 67; and
- authorization to recover the filing fee for his application, pursuant to section 72.

This hearing also dealt with the tenants' first application, filed on September 10, 2016 pursuant to the *Act* for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated September 7, 2016 ("first 10 Day Notice"), pursuant to section 46;
- an order requiring the landlord to comply with the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 62;
- other unspecified remedies; and
- authorization to recover the filing fee for their application, pursuant to section 72.

This hearing also dealt with the tenants' second application, filed on October 18, 2016, pursuant to the *Act* for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated October 11, 2016 ("second 10 Day Notice"), pursuant to section 46;
- an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement, pursuant to section 62;
- other unspecified remedies; and
- authorization to recover the filing fee for their application, pursuant to section 72.

The landlord and his English language translator, JZ (collectively “landlord”) and the two tenants attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord confirmed that his translator had authority to assist him at this hearing. This hearing lasted approximately 94 minutes in order to allow both parties to fully present their submissions and negotiate a settlement of a portion of their applications.

Pursuant to section 64(3)(c) of the *Act*, I amend both of the tenants’ applications to correct the spelling of the landlord’s first name, as the landlord consented to this amendment.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord’s Application to increase the landlord’s monetary claim to include rent of \$1,852.00 for December 2016. The tenants consented to deal with this claim during the hearing.

At the outset of the hearing, the tenants confirmed that they did not require any of the relief in their application, with the exception of their filing fee, as they had already vacated the rental unit. Accordingly, these portions of the tenants’ applications are dismissed without leave to reapply.

Preliminary Issue – Previous Hearings and Service of Documents

A previous participatory hearing was held by a different Arbitrator on November 4, 2016 and a decision was issued on the same date (“previous hearing” and “previous decision”). Both parties attended the previous hearing, which was scheduled to deal with both parties’ applications. The Arbitrator at the previous hearing did not deal with the landlord’s application, he only dealt with the tenants’ first application filed on September 10, 2016. The Arbitrator granted an order of possession to the landlord and dismissed the tenants’ application. The tenants applied for a review of the previous decision.

A new review hearing, due to fraud, was granted by a different Arbitrator, pursuant to a review consideration decision, dated November 28, 2016 (“review consideration hearing” and “review consideration decision”). The review consideration decision ordered a new review hearing of the landlord’s application and the tenant’s first application to be held at the same time as the tenants’ second application filed on October 18, 2016, and already scheduled for December 8, 2016. Both parties were informed by the Residential Tenancy Branch (“RTB”) that all three applications would be heard together at the hearing already scheduled for December 8, 2016.

This decision is entitled “review hearing decision” for ease of reference. However, as noted above, it also deals with the tenant’s second application, which was not the subject of the review consideration decision.

The tenants confirmed receipt of the landlord’s application for dispute resolution hearing package and the landlord confirmed receipt of the tenants’ two applications for dispute resolution hearing packages. In accordance with sections 89 and 90 of the *Act*, I find that the tenants were duly served with the landlord’s application and the landlord was duly served with the tenants’ two applications.

Issues to be Decided

Should the landlord’s two 10 Day Notices be cancelled? If not, is the landlord entitled to an order of possession for unpaid rent?

Is the landlord entitled to a monetary order for unpaid rent and for damage to the rental unit?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

This tenancy began on December 1, 2013, as per the written tenancy agreement, signed by both parties. A copy of the agreement was provided for this hearing. Monthly rent in the amount of \$1,852.00 was payable on the first day of each month. A security deposit of \$900.00 was paid by the tenants and the landlord continues to retain this deposit.

The landlord seeks a monetary order of \$3,095.93 total from the tenants. Both parties also seek to recover the \$100.00 filing fees paid for the three applications.

The landlord seeks \$325.00 in late fees from the tenants. The landlord provided a copy of 13 rent cheques from the tenants which were returned for “funds frozen,” insufficient funds and “payment stopped.” The landlord said that the tenants owe \$25.00 for each cheque because they did not pay rent on time and this fee was provided for in the written tenancy agreement signed by both parties.

The landlord seeks \$1,200.00 to repair a damaged garden at the rental property. The landlord said that he did not know the state of the garden damage at the time of the

hearing and the tenants said that they returned the garden to its original state when they left by December 1, 2016. The landlord said he had not repaired the garden and the above amount is simply an estimate.

The landlord seeks \$1,570.93 plus future amounts for water and sewage utility bills. The landlord said that as per the written tenancy agreement, the tenants were required to pay these amounts in addition to their monthly rent. The landlord confirmed that he issued a written demand in an email, dated November 19, 2015, for unpaid utilities from January 30, 2014 to September 30, 2015, for a total of \$1,117.38. A copy of this email was provided for this hearing. In a further letter, dated October 11, 2016, attached with the landlord's application, the landlord said that there were three additional bills owing after September 30, 2015 for an additional \$453.55 in water and sewage utilities from January 29, 2016 to September 30, 2016. The landlord provided a copy of all of these utility bills. The landlord also claimed for future amounts owing from November 1, 2016 to December 2016, for which he did not have any utility bills.

The tenants said that the landlord waived his right to claim these amounts because they were only given notice for the first time to pay these amounts on November 19, 2015, almost two years after their tenancy had begun on December 1, 2013. In a response email, dated November 20, 2015, the tenants said that they had received the landlord's utility bills, they would make "payment arrangements" and respond to the landlord "soon." The tenants then contacted the RTB and learned about their rights, stating that they decided not to pay these amounts to the landlord.

Analysis

Settlement of Some Issues

Pursuant to section 63 of the *Act*, the Arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. During the hearing, the parties discussed the issues between them, turned their minds to compromise and achieved a resolution of a portion of their dispute.

Both parties agreed to the following final and binding settlement of a portion of their applications:

1. The tenants confirmed that they vacated the rental unit on December 1, 2016 and both parties agreed to the landlord obtaining an order of possession effective on December 9, 2016 to enforce the end of this tenancy;

2. The landlord agreed that his first and second 10 Day Notices were cancelled and of no force or effect;
3. The tenants confirmed that they left the rental unit keys for the landlord in a secure mailbox on the rental property and the landlord agreed to retrieve the keys from this mailbox;
4. The landlord agreed that the tenants have paid all rent owed for this tenancy until December 31, 2016 and that no further rent was payable by the tenants to the landlord;
5. Both parties agreed that the tenants' security deposit of \$900.00 will be dealt with in accordance with section 38 of the *Act*;
6. Both parties agreed to bear the cost of the \$100.00 filing fees paid for their applications.

These particulars comprise a full and final settlement of a portion of this dispute. Both parties affirmed at the hearing that they understood and agreed to the above settlement terms, free of any duress or coercion. Both parties affirmed that they understood that the settlement terms are legal, final, binding and enforceable, settling a portion of this dispute.

Decision regarding Landlord's Monetary Claims

When a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the landlord must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I award the landlord \$325.00 in late fees. I find that the landlord provided sufficient documentary evidence in the form of bank documents confirming that there were dishonoured cheques, funds frozen and payments stopped for rent cheques issued by the tenants to the landlord. I find that the tenants did not pay rent on time and they owe the landlord late fees. The landlord provided for this \$25.00 monthly fee on the last

page of the written tenancy agreement, as required by sections 7(1)(d) and (2) of the *Regulation*.

I dismiss the landlord's claim for \$1,200.00 for damage to a garden at the rental unit, with leave to reapply. I find that the landlord's claim is premature. As the landlord has not seen the garden since the tenants vacated, he does not know the full extent of any possible damage at the time of this hearing. If the landlord wishes to pursue this claim against the tenants in the future, he is required to file a new application for dispute resolution and pay a new filing fee.

I dismiss the landlord's claim for \$1,570.93 for past and future water and sewage utilities for this tenancy, without leave to reapply. I find that these utilities were included in the tenants' rent for this rental unit. Although the written tenancy agreement indicates "all utilities & services extra," I find that the landlord waived his right to obtain these utility amounts from the tenants, as his conduct demonstrates that he did not attempt to notify or collect these amounts from the tenants until almost two years after the tenancy began. The landlord waited until November 19, 2015 to enforce utility payments payable beginning on January 30, 2014. I find that the tenants initially agreed to pay for these amounts on November 20, 2015, which they ultimately did not do, because they were unaware of their rights and obligations under the *Act*, until they obtained some information from the RTB. I find that any future amounts for water and sewage utilities are not recoverable by the landlord from the tenants.

Conclusion

This review hearing decision and orders replace the previous hearing decision and previous order of possession, both dated November 4, 2016.

The previous hearing two-day order of possession is cancelled and of no force or effect.

To give effect to the settlement reached between the parties and as advised to both parties during the hearing, I issue the attached Order of Possession to be used by the landlord **only** if the tenant(s) and any other occupants fail to vacate the rental premises by 1:00 p.m. on December 9, 2016. The landlord is provided with this Order in the above terms and the tenant(s) must be served with this Order in the event that the tenant(s) and any other occupants fail to vacate the rental premises by 1:00 p.m. on

December 9, 2016. 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.

The landlord's first and second 10 Day Notices are cancelled and of no force or effect.

I issue a monetary order in the landlord's favour in the amount of \$325.00 against the tenant(s). 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. As the parties were meeting to perform a move-out inspection immediately after the hearing on December 8, 2016, and this decision was issued on December 19, 2016, the landlord may already have returned the security deposit to the tenants at the time of this decision. Therefore, I issue this monetary order to avoid any complications with offsetting the security deposit. Both parties have agreed that the tenants' security deposit of \$900.00 will be dealt with in accordance with section 38 of the *Act*.

The tenants' application for an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement and for other unspecified remedies is dismissed without leave to reapply.

Both parties must bear the cost of the \$100.00 filing fees paid for their applications.

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: December 19, 2016

Residential Tenancy Branch