



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's application filed November 24, 2016 seeking an order of possession and a monetary order based on a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice"). The landlord also sought to retain the security deposit and to recover the filing fee.

Both the landlord and the two tenants attended the hearing and gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions.

At the outset of the hearing the landlord advised that she had sent additional evidence to the Residential Tenancy Branch the morning of the hearing, and had left copies of that additional evidence under the door of the rental unit the same morning. I had not received that evidence by the time of hearing, and the tenants denied having received it. Because this evidence was not delivered within the timelines set out in the Rules of Procedure, because the landlord did not assert that it could not have been delivered earlier, and because there was no opportunity to review it in advance of the hearing, it was not considered. I have decided this matter in the landlord's favour without the benefit of the landlord's late evidence in any event.

Also at the outset of the hearing one of the tenants advised that he had emailed the Residential Tenancy Branch additional evidence in early December. He stated that this evidence consisted of a screenshot of his bank account showing that an email transfer to the landlord initiated in early November, 2016 was "pending." The Residential Tenancy Branch does not receive evidence by email, and I had not received the tenant's screenshot. The tenant also stated that he had not delivered it to the landlord. Accordingly, the tenant's additional evidence has not been considered either. I would

have decided this matter in the same way even with that evidence as it has been described by the tenant. This is dealt with in more detail below.

It was not advisable to adjourn the matter in order to allow for the consideration of new evidence, as the relationship between the landlord and the tenants, who reside on the same property, is clearly toxic. Both the landlord and the two tenants agreed that the tenancy should end. The parties argued and spoke over one another during the telephone conference. They also accused one another of various forms of misconduct.

At the outset of the hearing I confirmed with the landlord that her signature was on the 10 Day Notice, in the space meant for confirming service, and I confirmed that both tenants' signatures were on the tenancy agreement and that the landlord had served both tenants with copies of her application.

Issues to be Decided

Is the landlord entitled to an order of possession?

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to an order authorizing her to retain the security deposit?

Is the landlord entitled to return of the filing fee?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed term tenancy began on October 1, 2016, with an end date of May 15, 2017. Monthly rent, due on the first, is \$1,300.00. A security deposit of \$650.00 was paid at the beginning of the tenancy and remains in the landlord's possession.

The landlord issued the 10 Day Notice on November 2, 2016, for outstanding November rent. The tenants agreed that it was received personally by one of them on the same date. It had an effective date of November 7, 2016, which is less than the 10 days required after the date of service.

Although they admit that November rent was not paid on time, the tenants testified that they attempted to pay it on November 6, 2016, after receipt of the 10 Day Notice. One of the tenants testified that he sent November arrears by e-transfer as he usually does, and that the transfer initially showed as "pending." He further testified that the transfer

was still showing as “pending” on or about December 14, 2016, when he last checked, and that the amount transferred via email has become unavailable to him. The tenants acknowledge that November’s rent has not been received by the landlord: they know that it has not been received, because they have not received an email confirming her acceptance of the etransfer.

The landlord testified under oath that she did not refuse or otherwise block the tenants’ November 6 etransfer. The tenants say that they have had great difficulty communicating with the landlord, that she has refused to respond to their texts or speak with them personally. There is no question that communication has broken down between the parties. The landlord testified that she has not received any texts from the tenants asking if they might pay rent in another way. The tenants say that the landlord has made clear she will not accept cash.

The parties agree that December rent has not been paid. The tenants stated that they were withholding December’s rent on legal advice because of plumbing issues in the rental unit. However, they have not submitted that the November rent was withheld because of emergency repairs.

Analysis

The tenants appear to be suggesting that they should not be penalized for nonpayment of rent while their etransfer is still pending. However, s. 26 of the Act provides that a tenant must pay rent when it is due. In circumstances such as these, where the rent is already late and the tenants must pay the arrears within 5 days of receipt of a 10 Day Notice or face eviction, it is incumbent upon the tenants to take whatever steps are necessary to pay those arrears.

The tenants could have investigated and corrected the delay via their financial institution as soon as they realized there was a delay in the transfer. They could have also paid the arrears by some other means. Although the monies that were supposed to have been transferred to the landlord may not have been available to them, they were also aware that the landlord had not received any money. The tenant testified that the landlord would not speak to them or respond to their texts, and that she had made clear she would not accept cash. Nevertheless, there were other options available to the tenants for paying the November arrears within the 5 day time limit, including certified cheque or money order.

Section 46 of the Act provides that a landlord may end a tenancy if rent is unpaid on any day after it is due by giving notice to end the tenancy effective on a date no earlier than

10 days after the tenant receives the notice. Under subsection (4), the tenant has 5 days after receipt of the notice to pay the overdue rent or dispute the notice, failing which the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice.

As the 10 Day Notice was served on November 2, 2016, and as the tenants did not actually pay rent within 5 days of that date, the tenants are thus conclusively presumed to have accepted that the tenancy ended on the effective date of the 10 Day Notice.

The landlord has confirmed that her signature is on the 10 Day Notice. I therefore accept that it is compliant with s. 52, with the exception of the effective date, which is automatically changed under s. 53. Section 46(1) of the Act requires that the effective date of a 10 Day Notice be no earlier than 10 days after the date the tenant receives the notice. Here, the tenants received the 10 Day Notice on November 2, so the corrected effective date is November 12, 2016. Accordingly, the tenancy ended on November 12, 2016. Because the tenants have not paid rent for December, I find that the landlord is entitled to a two (2) day Order of Possession, pursuant to section 55 of the Act.

Section 7(1) of the Act provides that a tenant who does not comply with the Act, regulation or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. The parties agree that rent is outstanding for November and December. Accordingly, the landlord is entitled to \$2,600.00 for these two months. As the successful party, the landlord is also entitled to return of the filing fee in the amount of \$100.00 pursuant to s. 72. I authorize the landlord to retain the security deposit of \$650.00 currently in her possession in partial satisfaction of the amount owing. The landlord is thus entitled to a monetary order against the tenants in the amount of \$2,050.00.

The tenants may have a claim against the landlord under the Act for damage or loss arising from breach of the Act. Any such claim may be brought by separate application.

Conclusion

I grant an Order of Possession to the effective two (2) days after service of the Order. This Order must be served 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.

I issue a monetary Order in the landlord's favour in the amount of \$2,050.00 against the tenants. The tenants must be served with this Order as soon as possible. Should the tenants 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 final and binding on the parties, unless otherwise provided under the Act, and 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