



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH POOL XIV LP & METCAP LIVING MANAGEMENT INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

For the landlord: OPR MNR MNSD FF
For the tenant: CNR MNDC OLC FF

Introduction

This hearing was convened as a result of the cross-applications of the parties for dispute resolution (the “applications”) under the *Residential Tenancy Act* (the “Act”). The landlord applied for an order of possession for unpaid rent or utilities, for a monetary order for unpaid rent or utilities, to retain the tenant’s security deposit, and to recover the cost of the filing fee. The tenant applied to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated July 8, 2017 (the “10 Day Notice”), for an order directing the landlord to comply with the Act, regulation or tenancy agreement, for a monetary order in the amount of \$18,720.00 for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee.

Legal counsel for the landlord (the “counsel”), two agents for the landlord (the “agents”), the tenant and a support person for the tenant attended the teleconference hearing. The hearing process was explained to the parties, and the parties were given an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their relevant evidence orally and in documentary form prior to the hearing, and make submissions to me. I have reviewed all evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Although the parties confirmed receiving documentary evidence from the other party, the counsel for the landlord stated that the video links the landlord could not open and that the second package from the tenant was served late which indeed it was and violated the timelines set out in the Rules of Procedure. As a result, I have not considered the late evidence submission submitted by the tenant which was the second package of documentary evidence.

Preliminary and Procedural Matter

Rule 2.3 of the Residential Tenancy Branch Rules of Procedure authorizes me to dismiss unrelated disputes contained in a single application. In this circumstance the tenant indicated several matters of dispute on the Application for Dispute Resolution, the most urgent of which is the application to set aside the 10 Day Notice. I find that not all the claims on the tenant's Application for Dispute Resolution are sufficiently related to be determined during this proceeding. I will, therefore, only consider the tenant's request to set aside the 10 Day Notice, the tenant's request to recover the cost of the filing fee, and the landlord's application at this proceeding. The balance of the tenant's application is **dismissed, with leave to re-apply**.

Issues to be Decided

- Should the 10 Day Notice be cancelled or upheld?
- Is the landlord entitled to an order of possession under the *Act*?
- Is the landlord entitled to a monetary order under the *Act*, and if so, in what amount?
- If the tenancy is ending, should the tenant's security deposit be offset from the amount owing to the landlord, if any?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. The parties agreed that a fixed term tenancy began on January 1, 2017. Monthly rent of \$1,590.00 is due on the first day of each month. The tenant paid a security deposit of \$795.00 which has accrued no interest and which the landlord continues to hold.

Counsel confirmed that the landlord is seeking unpaid rent for July 2017, and is also seeking loss of August and September 2017 rent, plus the NSF fees of \$25.00 for July and August and late fees of \$25.00 for July, August and September of 2017.

The tenant testified that June 2017 was his last payment of rent and that he has not paid July, August or September 2017 rent. The tenant affirmed that he withheld rent due to construction related issues in the building. The tenant also confirmed that since being served with the 10 Day Notice, he has not paid rent.

Regarding the 10 Day Notice, the tenant confirmed being served with the 10 Day Notice on July 8, 2017 and disputed the 10 Day Notice on July 10, 2017. The effective vacancy date listed on the 10 Day Notice is July 22, 2017. The tenant continues to occupy the rental unit.

An agent testified that two NSF fees of \$25.00 per NSF fee for the months of July and August are owed by the tenant. In addition, the agent stated that the tenant owes \$25.00 for late fees pursuant to section 10 of the tenancy agreement which supports that an amount of \$25.00 will be assessed for all late payments of rent. Counsel confirmed that the landlord is seeking \$25.00 for late fees for the months of July, August and September of 2017.

Analysis

Based on the testimony of the parties and the documentary evidence before me, and on the balance of probabilities, I find the following.

10 Day Notice – Firstly, as the tenant confirmed that they had not paid the amounts as claimed by the landlord and I find the tenant has breached section 26 of the *Act* which states:

Rules about payment and non-payment of rent

- 26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act,** the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

[My emphasis added]

Although the tenant alleges noise impacted his quiet enjoyment in his application, that is not a right under the *Act* and there was no documentary evidence submitted to support that the tenant has a monetary order authorizing the withholding of rent. Therefore, whether the landlord complied with the *Act* or not, the tenant still must pay the monthly rent and has the ability to seek remedy under the *Act* for any loss of quiet enjoyment etc. but is not authorized to simply withhold rent as they feel entitled to do so. Therefore, **I dismiss** the tenants' Application to cancel the 10 Day Notice **without leave to reapply** due to insufficient evidence. Section 55 of the *Act* applies and states:

Order of possession for the landlord

- 55 (1)** If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, **the director must grant to the landlord an order of possession of the rental unit if**
- (a) **the landlord's notice to end tenancy complies with section 52 [form and content of notice to end tenancy], and**
 - (b) **the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.**

[My emphasis added]

As a result and taking into account that I find the 10 Day Notice complies with section 52 of the *Act*, I grant the landlord an order of possession effective **two (2) days** after service on the tenant as the tenant continues to occupy the rental unit without paying rent or money for use and occupancy. I find the tenancy ended on July 22, 2017 which was the effective vacancy date listed on the 10 Day Notice.

Monetary claim - Pursuant to section 26 of the *Act*, a tenant must pay rent when it is due in accordance with the tenancy agreement. Based on the above, I find that the tenant has failed to comply with a standard term of the tenancy agreement which the parties agreed required that rent is due monthly on the first of each month. The tenant continues to occupy the rental unit. The landlord will not regain possession of the unit until after service of the order of possession. I find the landlord has met the burden of proof and I find the landlord has established a monetary claim of **\$4,895.00** comprised as follows:

ITEM DESCRIPTION	AMOUNT AWARDED
1. Unpaid July 2017 rent	\$1,590.00
2. Loss of August 2017 rent	\$1,590.00
3. Loss of September 2017 rent	\$1,590.00
4. NSF fee for July 2017	\$25.00
5. NSF fee for August 2017	\$25.00
6. Late fee for July 2017	\$25.00
7. Late fee for August 2017	\$25.00
8. Late fee for September 2017	\$25.00
TOTAL	\$4,895.00

I do not find the landlord's request for August and September amounts to be prejudicial to the tenant as I find the tenant would know or ought to have known that by not paying any amount of money for August and September and that by continuing to occupy the rental unit, that the landlord would be requesting those amounts at the hearing as a notice to end tenancy was served in July 2017.

As the landlord has succeeded with their application, I grant the landlord the recovery of the **\$100.00** filing fee.

Monetary Order – I find the landlord has established a total monetary claim of **\$4,995.00** comprised of \$4,895.00 for items 1 through 8 described above, plus the recovery of the cost of the \$100.00 filing fee.

Pursuant to section 72 of the *Act*, I authorize the landlord to retain the tenant's full security deposit of \$795.00 which includes no interest in partial satisfaction of the landlord's monetary claim. I grant the landlord a monetary order pursuant to section 67 of the *Act*, for the balance owing by the tenant to the landlord in the amount of **\$4,200.00**.

Conclusion

The tenant's application to cancel the 10 Day Notice and to recover the cost of the filing fee is dismissed, without leave to reapply, due to insufficient evidence.

The landlord's application is successful. The tenancy ended on July 22, 2017. The landlord has been granted an order of possession effective two (2) days after service on the tenant. The tenant must be served with the order of possession and the order of possession may be filed in the Supreme Court of British Columbia to be enforced as an order of that court.

The landlord has established a total monetary claim of \$4,995.00 as described above. The landlord has been authorized to retain the tenant's full security deposit of \$795.00 which has accrued no interest in partial satisfaction of the landlord's monetary claim. The landlord has been granted a monetary order pursuant to section 67 of the *Act*, for the balance owing by the tenant to the landlord in the amount of \$4,200.00. This order must be served on the tenant and may be filed in the Provincial Court (Small Claims) 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: September 29, 2017

Residential Tenancy Branch