



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

OPR

Introduction

On July 19, 2017, the Landlord filed an Application for Dispute Resolution by Direct Request (the "Application") under the *Residential Tenancy Act* (the "Act"), for an Order of Possession for unpaid rent. A decision was rendered in favor of the Landlord on August 9, 2017, and an Order of Possession was granted to the Landlord effective two days after service on the Tenant.

The Tenant subsequently filed an Application for Review Consideration on August 11, 2017, and a decision was rendered in favor of the Tenant on August 24, 2017, ordering that the hearing be reconvened and suspending the decision and Order of Possession dated August 9, 2017, pending the outcome of the reconvened hearing.

The hearing was reconvened by telephone conference call at 10:30 am on October 3, 2017, and was attended by the agent for the Landlord (the "Agent"), Legal Counsel for the Landlord ("Counsel for the Landlord"), and the Tenant, all of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I confirmed service of the Application, the Notice of Direct Request, and the Notice of Hearing with the parties, as well as the exchange of evidence in accordance with the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure").

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer only to the relevant facts and issues in this decision.

Preliminary Matters

At the outset of the hearing I advised the parties that the purpose of the reconvened hearing was to hear matters in relation to the original Application by the Landlord for an Order of Possession for unpaid rent. I also advised the parties that in my decision I would confirm, vary, or set aside the original decision and order dated

August 9, 2017.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent pursuant to sections 46 and 55 of the *Act*?

Background and Evidence

The tenancy agreement in the documentary evidence before me indicates that the month to month tenancy began on March 1, 2012, and that rent in the amount of \$995.00, was due on the first of each month. In the hearing the parties agreed that these were the correct terms of the initial tenancy agreement.

In the documentary evidence there was also a copy of a settlement agreement between the Landlord and the Tenant dated June 14, 2017, whereby the parties mutually agreed to the following:

- That monthly rent in the amount of \$1,073.30 was due on or before the first day of each month;
- That the 10 Day Notice to End Tenancy for Unpaid rent or Utilities dated April 17, 2017, is withdrawn;
- That the Tenant agrees to permit the landlord to deduct \$100.00 from the Tenant's account credit in full satisfaction of the Landlord's recovery of the cost of the filing fee; and
- That the Tenant acknowledges that any future late payment of rent will result in the Landlord issuing a new 10 day Notice.

In the hearing, the parties agreed that as a result of the settlement agreement noted above, the monthly rent due from the Tenant to the Landlord is \$1,073.30.

The 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10 day Notice"), dated July 6, 2017, indicates that as of July 1, 2017, the Tenant owed \$58.99 in unpaid rent. The 10 day Notice has an effective vacancy date of July 19, 2017, and indicates that it was served on the Tenant on July 6, 2017, by being posted to the door of the Tenant's rental unit.

The parties also agreed that as of July 1, 2017, the Tenant owed \$58.99 in rent. In the hearing the Tenant acknowledged receipt of the 10 day Notice on July 6, 2017, the day it was posted to his door.

The Tenant testified that he is on a fixed income and needed time to gather the amount required for the outstanding rent. The Tenant also testified that they believed they had until July 14, 2017, to pay the rent under the deeming provisions of the *Act*. The Tenant testified that he thought he had secured the full amount owed on July 13, 2017, however, after making

arrangements to pay the manager, he realized that he was \$5.00 short. The Tenant stated that on July 14, 2017, he had secured the entire amount owing and made two attempts to pay the rent by phoning the office and leaving voice messages. The Tenant testified that he did not receive a call back and subsequently paid \$60.00 at the office the following day on July 15, 2017.

Counsel for the Landlord submitted that intent to pay rent is not equivalent to paying rent and that service in fact trumps deemed service. Counsel for the Landlord submitted that the Tenant should therefore be found to have been served the 10 Day Notice on July 6, 2017, the date that they actually received it.

Counsel for the Landlord stated that the Tenant had several options in order to pay the rent in accordance with section 55 of the *Act*, including taking it to the on-site manager, contacting the emergency contact, or paying it at the office for the Landlord. Counsel pointed me to a photo in their documentary evidence which they testified shows the sign posted on the door of the on-site manager. The sign includes office hours for the on-site manager and an emergency contact number. Counsel for the Landlord stated that the emergency contact for the building is located directly across the street from the Tenant's building and that in any event, the office for Landlord is also open Monday to Thursday 8:00 am to 4:00 pm, and Friday 8:00 am to 3:00 pm.

Counsel for the Landlord acknowledged receipt of the \$60.00 from the Tenant, which they stated was for use and occupancy only. In support of their assertion that the funds were accepted for use and occupancy only, Counsel pointed me to a copy of the rent receipt in the documentary evidence which reads "for use and occupancy only".

Both parties agreed that the Tenant has since paid rent for August, September, and October, 2017, however, the parties disagreed on the purpose for which rent was received and accepted by the Landlord. The Tenant testified that they believed that in accepting rent, the Landlords had reinstated the Tenancy. Counsel for the landlord stated that the intention of the Landlord has always been to seek an Order of Possession in relation to the 10 day Notice issued July 6, 2017. In support of this position Counsel pointed to the fact that after receipt of the \$60.00 on July 15, 2017, the Landlord still pursued the Order of Possession. Counsel for the Landlord also pointed to the rent receipts in the documentary evidence before me which state "for use and occupancy only".

Analysis

Section 46 (1) of the *Act* outlines the grounds on which to issue a Notice to End Tenancy for non-payment of rent:

Landlord's notice: non-payment of rent

46 (1) 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 effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

However, section 46(4) and 46(5) of the *Act* also state:

46 (4) Within 5 days after receiving a notice under this section, the tenant may

(a) pay the overdue rent, in which case the notice has no effect, or

(b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit to which the notice relates by that date.

I have reviewed all relevant documentary evidence and oral testimony and in accordance with sections 88 of the *Act*, I find that the Tenant served with the 10 Day Notice on July 6, 2017, they day they acknowledge receiving it. I also find that the Tenant was obligated to pay the monthly rent, on time and in full each month.

Based on the above, and pursuant to section 46(4) of the *Act*, I find that the Tenant had until 11:59 on July 11, 2017, to either pay the rent in full or dispute the 10 Day Notice. As there is no evidence before me to the contrary, I find that the Tenant failed to pay the rent owed in full as outlined above within the five days granted under section 46(4) of the *Act* and did not dispute the 10 Day Notice within that five day period.

Based on the foregoing, I find that the Tenant is conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the effective date of the 10 Day Notice, July 19, 2017.

Further to this, I find that the tenant ought to have known, based on the Landlord's Application, that the Landlord was intending to pursue an Order of Possession based on the 10 Day Notice dated July 6, 2016. Based on this, and the fact that the rent receipts issued to the Tenant clearly state "for use and occupancy only", I do not find that the tenancy was reinstated when the Landlord accepted rent for July-October, 2017.

As a result of the above, I confirm the original decision dated August 9, 2017. However, as both parties agreed that rent has been paid for use and occupancy for the month of October, 2017, I find it necessary to vary the Order of Possession. Therefore I set aside the Order of Possession granted on August 29, 2017 and I grant an Order of Possession to the Landlord effective **1:00 pm on October 31, 2017.**

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the Landlord effective **1:00 pm on October 31, 2017**. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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 3, 2017

Residential Tenancy Branch