



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, OPR

Introduction

This hearing dealt with an Application for Dispute Resolution by Direct Request (the “Application”) that was adjourned to a participatory hearing. The Landlord filed under the *Residential Tenancy Act* (the “Act”), for a Monetary Order for unpaid rent and utilities and for an Order of Possession.

The hearing was convened by telephone conference call and was attended by the Agent for the Landlord (the “Agent”) and the Tenant, both 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.

The Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) state that the respondent must be served with a copy of the Application for Dispute Resolution and Notice of Hearing and I confirmed service of these documents as outlined below.

The Agent testified that the Application and the Notice of Direct Request were sent to the Tenant by registered mail on August 22, 2017, and that these documents were sent by registered mail a second time on September 10, 2017, along with their evidence package and the Notice of Hearing. The Agent provided the registered mail tracking numbers for reference and a print-out from the Canada Post website indicating the package mailed September 10, 2017, was refused by the recipient on September 13, 2017. The Tenant testified that they never received either package and denied refusing any registered mail, however, they confirmed receipt of Notice of Hearing. With the consent of both parties I logged into the Canada Post website and confirmed that the print-out provided by the Agent was correct.

Based on the above, and on a balance of probabilities, I find the Landlord’s testimony and supporting evidence that the Tenant was served the above noted documents by

registered mail reliable and I find that the Tenant was deliberately attempting to avoid service. As a result, I find that the Tenant was deemed served with the Application and the Notice of Direct Request on August 27, 2017, five days after the registered mailing. In any event, I find that the Tenant was also deemed served these documents, along with the Notice of Hearing, on September 13, 2017, the date a registered mail delivery was attempted and refused.

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 confirmed the names of the parties present and noted that although the name given by the Tenant in the hearing bore some resemblance to the name listed on the Application, the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “10 Day Notice”), the tenancy agreement and the other documentation before me for consideration, it was not the same. The Tenant testified that the name on those documents was not their name and confirmed that their full legal name was provided to me at the start of the hearing. The Tenant did not provide any documentary evidence in support of their testimony.

I confirmed with the Tenant that the address listed on the Application, the 10 Day Notice, and the tenancy agreement matched their address. I also noted that the name listed on those documents matched the name written on a rent receipt issued to the Tenant on August 18, 2017, for rent the Tenant acknowledges paying. As a result of the above, and in consideration of the fact that the Tenant attended the hearing in relation to the Application and the 10 Day Notice, I find that the person who appeared in the hearing and the tenant listed on the Application, the tenancy agreement, and the 10 Day Notice are one and the same.

Therefore, I amend the Landlord’s Application for Dispute Resolution to reflect both the tenant’s name in the documentation related to the tenancy and the Tenant’s testimony.

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*?

Is the Landlord entitled to a Monetary Order for unpaid rent pursuant to section 67 of the *Act*?

Background and Evidence

The tenancy agreement in the documentary evidence before me indicates that the month-to-month tenancy began September 1, 2016, and that rent in the amount of \$450.00 is due on the first day of each month. The Tenancy agreement also indicates that a security deposit of \$225.00 was to be paid by the Tenant. The parties agreed that the security deposit was paid by the Tenant as shown in the Tenancy agreement; however, the Tenant disputed the rent amount listed.

The Tenant testified that their copy of the tenancy agreement, which was not submitted for my consideration, shows a monthly rent amount of \$440.00. The Tenant also testified that they have only been paying \$440.00 a month in rent in accordance with their copy of the tenancy agreement.

The Agent testified that the rent amount shown in the tenancy agreement before me is correct, and that when rent in the amount of \$450.00 was not paid as due on August 1, 2017, a 10 Day Notice was served on the Tenant.

The 10 day Notice in the evidence before me, dated August 2, 2017, indicates that as of August 1, 2017, the Tenant owed \$450.00 in rent. The 10 day Notice has an effective vacancy date of August 14, 2016, and states that it was served on the Tenant in person on August 2, 2017.

The Agent testified that there was a clerical error on the 10 Day Notice in relation to the effective date, and that the year listed should have been 2017, and not 2016. The Agent also testified that they had a witness present with them on August 2, 2017, when the 10 Day Notice was personally served on the Tenant and submitted a witnessed and signed Proof of Service Notice to End Tenancy indicating that the 10 Day Notice was served in the manner described above. The Tenant disputed that they were served the 10 Day Notice as described by the Agent, but in any event, they confirmed that they received it on August 3, 2017.

The Tenant stated that on August 18, 2017, they paid \$375.00 in rent, for which they received a receipt. A copy of the receipt was submitted by the Agent which confirms that \$375.00 was paid by the Tenant on August 18, 2017, for “use and occupancy only”. The Tenant confirmed that they did not dispute the Notice and stated that they believed they did not have to file for dispute as the Landlord had accepted their \$375.00 payment on August 18, 2017.

The Tenant acknowledged that this amount was not the total amount due and stated that they had also paid rent in the amount of \$440.00 to the Landlord for both September and October, 2017. While the Agent could not confirm whether or not rent had been paid in full for September and October, 2017, they confirmed that the Landlord never intended to reinstate the tenancy when they accepted the partial rent payment from the Tenant.

The Agent stated that although the Landlord is not seeking any money for September or October, 2017, as part of this Application, they are still seeking an Order of Possession in relation to the 10 Day Notice and a Monetary Order in relation to the outstanding \$75.00 in rent owed for August, 2017.

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 section 88 of the *Act*, I find that the Tenant was served with the 10 Day Notice on August 3, 2017, the day they acknowledge receiving it. Based on the testimony of the Agent and supporting written tenancy agreement, and in the absence any documentary evidence to support the Tenants testimony that their rent was \$440.00 a month, I also find that the Tenant was obligated to pay rent in the amount of \$450.00, on the first day of each month.

Although I have considered the Tenant's testimony regarding the payment of rent, ultimately I am not satisfied that the Landlord intended to reinstate the tenancy when they accepted partial payment of rent on August 18, 2017. The rent receipt issued to the Tenant clearly states that the money was accepted for use and occupancy only and after the rent was not paid in full, the Landlord then filed an Application seeking an Order of Possession and a Monetary Order for the outstanding rent.

Section 53 of the *Act* states the following with regards to incorrect effective dates:

Incorrect effective dates automatically changed

53 (1) If a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) or (3), as applicable.

(2) If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

(3) In the case of a notice to end a tenancy, other than a notice under section 45 (3) [*tenant's notice: landlord breach of material term*], 46 [*landlord's notice: non-payment of rent*] or 50 [*tenant may end tenancy early*], if the effective date stated in the notice is any day other than the day before the day in the month, or in the other period on which the

tenancy is based, that rent is payable under the tenancy agreement, the effective date is deemed to be the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement

- (a) that complies with the required notice period, or
- (b) if the landlord gives a longer notice period, that complies with that longer notice period.

Based on the above, I find that the incorrect effective date of the Notice, August 14, 2016, is automatically changed under the *Act* to August 14, 2017.

In the absence of evidence to the contrary, I find that the Tenant has 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. As a result, Tenant is conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the corrected effective date of the 10 Day Notice, August 14, 2017, and the Landlord is entitled to an Order of Possession. In the hearing the Agent agreed that the tenancy could continue until 1:00 PM on October 31, 2017.

Based on the above, I also find that the Landlord is entitled to a Monetary Order in the amount of \$75.00, the balance of rent owed for August, 2017. Pursuant to section 72 of the *Act*. I find that the Landlord is entitled to retain the \$75.00 owed from the security deposit paid by the Tenant; the balance of which is to be dealt with in accordance with the *Act*.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the Landlord effective **October 31, 2017, at 1:00 PM, after service of this Order** on the Tenant. 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.

Pursuant to section 72 of the *Act*. I order that the Landlord retain \$75.00 from the security deposit paid by the Tenant, the balance of which is to be dealt with in accordance with 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 20, 2017

Residential Tenancy Branch