



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 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 for an Order of Possession.

The hearing was originally convened by telephone conference call on August 28, 2017, at 10:30 AM and was attended by the Tenants, the Landlord, and the Agent for the Landlord, all of whom provided affirmed testimony. The hearing was subsequently adjourned due to issues relating to the service of the Application, the Notice of Direct Request proceeding, and the evidence package of the Landlord. An interim decision was made on August 31, 2017, and the reconvened hearing was set for October 18, 2017, at 9:00 AM. A copy of the interim decision and the Notice of Hearing was sent to each party by the Residential Tenancy Branch (the “Branch”).

The hearing was convened by telephone conference call on October 18, 2017, at 9:00 AM and due to technical difficulties the hearing at 9:00 was not completed and it was reconvened at 3:00 PM the same day. The Landlords attended both October 18, 2017 hearings at the scheduled time, ready to proceed. The Tenants did not attend either October 18, 2017 hearing. The Landlords 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 respondents must be served with a copy of the Application for Dispute Resolution and Notice of Hearing. As the Tenants did not attend the hearing, I confirmed service of these documents as explained below.

The Landlords provided a witnessed and signed Proof of Service of Notice of Direct Request Proceeding for each of the Tenants as well as affirmed testimony that the Application and the Notice of Direct Request were served on each of the Tenants personally on July 26, 2017. The Landlords also provided affirmed testimony that the Application, the Notice of Direct Request, the original Notice of Hearing, and all of the evidence submitted prior to the first participatory hearing, was sent individually to each of the Tenants by registered mail on August 30, 2017. The Landlords also provided copies of the registered mail receipts for my consideration. As a result, I find that the Tenants were deemed served on September 4, 2017, five days after the registered mailing.

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 the Landlord testified that the amount of outstanding rent has increased since the time the Application was filed, and that the Tenants now owe additional rent for August -October, 2017.

The Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") state under section 4.2, that the Application may be amended at the hearing in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application was made. In the hearing, I advised the Landlord that the Application would be amended to include outstanding rent for August - October, 2017.

The Landlord also requested to amend their Application to include the recovery of the \$100.00 filing fee and the retention of the security deposit to offset any monetary awards that result from this decision. Section 72 of the *Act* states that the Director may order payment or repayment of a fee under section 59(2)(c) [*starting proceedings*] by one party to a dispute resolution proceeding to another party; and that in the case of a payment from a Tenant to a Landlord, the amount may be deducted from any security deposit or pet damage deposit held by the Landlord on behalf of the Tenant. As a result, the Application is amended to include recovery of the filing fee and the retention of the security deposit to offset any monetary awards that result from this decision.

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 monetary compensation for unpaid rent pursuant to section 67 of the *Act*?

Is the Landlord entitled to retain the security deposit pursuant to sections 38 and 72 of the *Act*?

Is the landlord entitled to monetary compensation to recover the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

The tenancy agreement and attached addendum, which were signed by the Landlords and the Tenants on July 17, 2016, indicate that the month-to-month tenancy began August 15, 2016. The tenancy agreement and addendum indicate that rent is due on the first day of each month and that rent was \$2,700.00 a month for the first six months, and \$2,800.00 a month thereafter. The tenancy agreement also indicates that a security deposit in the amount of \$1,350.00 and a pet damage deposit in the amount of \$200.00 were to be paid by the Tenants. In the hearing the Landlords testified that only \$1000.00 was paid by the Tenants towards these deposits, which they still hold.

The Landlords testified that the Tenants did not pay rent when due, and as a result, a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10 Day Notice") was served.

The 10 Day Notice, dated July 7, 2017, indicates that as of July 1, 2017, the Tenants owed \$4,000.00 in unpaid rent. The 10 day Notice has an effective vacancy date of July 17, 2017, and indicates that it was personally served on the Tenants on July 7, 2017. The Landlords also submitted a witnessed and signed Proof of Service Notice to End Tenancy confirming that the 10 Day Notice was served in the manner described above.

In the hearing the Landlords stated that the Tenants have not made any rent payments since the 10 Day Notice was served on them and that they currently owe \$12,400.00 in

rent; \$4,000.00 as of July 1, 2017 (including \$2,800.00 for July and \$1,200.00 brought forward from the previous month), and \$2,800.00 a month for August – October, 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 Tenants were personally served with the 10 Day Notice on July 7, 2017.

Although the tenancy agreement indicates that rent was \$2,700.00 a month for the first six months, and \$2,800.00 every month thereafter, sections 41, 42, and 43 of the *Act* state the following with regards to rent increases:

Rent increases

41 A landlord must not increase rent except in accordance with this Part.

Timing and notice of rent increases

42 (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:

(a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first established under the tenancy agreement;

(b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.

(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.

(3) A notice of a rent increase must be in the approved form.

(4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

Amount of rent increase

43 (1) A landlord may impose a rent increase only up to the amount

(a) calculated in accordance with the regulations,

(b) ordered by the director on an application under subsection (3), or

(c) agreed to by the tenant in writing.

(2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.

(3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.

(4) [Repealed 2006-35-66.]

(5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.

Based on the above and despite the agreement by both parties in the tenancy agreement, a rent increase must not be applied for at least one year after the start of the tenancy. Pursuant to section 42 of the *Act*, I find that the Tenants were only obligated to pay rent in the amount of \$2,700.00 a month. As a result, I find that the Tenants were overpaying their rent by \$100.00 a month effective February 1, 2017, and that they overpaid their rent in the amount of \$400.00 for the rental period up to and including May, 2017.

Although the Landlords did not provide specific information in the hearing as to the amount of rent paid for June 2017, they testified that \$4,000.00 was owed as of July 1, 2017; \$2,800.00 for July rent, and \$1,200.00 brought forward from the previous month. Based on this testimony I am satisfied that the Tenants paid rent in full and in accordance with the tenancy agreement for the rental period up to and including May 2017, and that \$1,600.00 was paid by the Tenants towards June 2017, rent.

Based on the above, I find that at the time the 10 Day Notice was issued, the Tenants owed \$3,400.00 in rent; \$1,100.00 for June 2017, plus \$2,700.00 for July 2017, less the \$400.00 previously overpaid by the Tenants. Although this amount differs from the amount listed on the 10 day Notice, I am satisfied that at least \$0.01 was owed at the time the 10 Day Notice was issued, and as a result, I find that the 10 Day Notice is valid.

As there is no evidence before me to the contrary, I find that the Tenants have 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, I find that the Tenants are 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 17, 2017, and the Landlords are entitled to an Order of Possession.

Based on the above, I find that the Landlords are entitled to the \$3,400.00 in rent owed as of July 1, 2017, plus \$2,700.00 a month in rent for August-October, 2017. Pursuant to section 72 of the *Act*, I also find, that the Landlords are entitled to retain in full, the \$1000.00 security deposit paid by the Tenants to offset any money owed.

As a result of the above, I find that the Landlords are entitled to a Monetary Order in the amount of \$10,600.00; \$11,500.00 for outstanding rent, plus \$100.00 for the recovery of the filing fee, less the \$1000.00 security deposit.

Conclusion

Pursuant to section 55 of the *Act*, I grant an **Order of Possession** to the Landlords effective **two days after service of this Order** on the Tenant. The Landlords are provided with this Order in the above terms and 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 and enforced as an Order of the Supreme Court of British Columbia.

Pursuant to sections 67 and 72 of the *Act*, I grant the Landlords a **Monetary Order** in the amount of **\$10,600.00**. The Landlords are provided with this Order in the above terms and 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 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 23, 2017

Residential Tenancy Branch