



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding H.W. ROOMS INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC CNR OPR FFL

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* (the “Act”).

The landlord applied for:

- an Order of Possession for unpaid rent pursuant to section 55; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- cancellation of the landlord’s 1 Month Notice to End Tenancy for Cause (the “1 Month Notice”).

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The corporate landlord was primarily represented by its agent DZ (the “landlord”). The tenant was represented by their advocate.

As both parties were present service of documents was confirmed. The landlord confirmed receipt of the tenant’s application dated November 9, 2018, amendment to the application dated November 15, 2018 and evidentiary materials. Based on the testimony I find that the landlord was served with the application, amendment and evidence in accordance with sections 88 and 89 of the *Act*.

The tenant confirmed receipt of the landlord’s application for dispute resolution dated November 12, 2018 and evidence on November 15, 2018. Based on the testimony I

find that the tenant was served with the landlord's application and evidence on November 15, 2018 in accordance with sections 88 and 89 of the Act.

At the outset of the hearing the landlord testified that they are withdrawing the 1 Month Notice dated October 29, 2018. Accordingly, the tenant withdrew the portion of their application disputing that 1 Month Notice.

Issue(s) to be Decided

Should the 10 Day Notice be cancelled? If not is the landlord entitled to an Order of Possession?

Is the landlord entitled to recover the filing fee from the tenant?

Background and Evidence

While I have turned my mind to all the evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the parties' respective claims and my findings around each are set out below.

The parties agreed on the following facts. The tenant has been an occupant of the rental unit since 2006. The landlord assumed this tenancy in July, 2016. The monthly rent is \$419.00 payable by the first of each month. A security deposit of \$209.50 was paid at the start of the tenancy and is still held by the landlord.

The landlord testified that they served the 10 Day Notice dated November 2, 2018 by posting it on the rental unit door on that day. The landlord said this was done in the evening in the presence of a witness and submitted into documentary evidence a signed proof of service form and photograph of a door with the notice posted. The landlord testified that they recall hearing the tenant discussing with the building manager the 10 Day Notice on November 3, 2018. The landlord said that the tenant had failed to pay the monthly rent and there was an arrear of \$419.00 on that date.

The tenant disputes being served with the 10 Day Notice. The tenant testified that they first saw the 10 Day Notice when it was included in the landlord's evidence package received on November 15, 2018. The tenant testified that upon realizing there was a 10 Day Notice they filed an amendment to dispute the Notice and arranged for full payment of the rental arrear on November 16, 2018.

The landlord testified that they received payment of \$419.00 for the rent on November 16, 2018 but that did not reinstate the tenancy. The landlord returned copies of the rent payment cheques for November and December, 2018 indicating they were accepted for use and occupancy only.

The tenant made submissions regarding the landlord's typical practice of receiving rental payments and attributing them to the correct tenancies. The tenant said that a previous 10 Day Notice was issued in October, 2018 when there was a discrepancy in the rental payment.

Analysis

In accordance with subsection 46(4) of the *Act*, the tenant must either pay the overdue rent or file an application for dispute resolution within five days of receiving the 10 Day Notice. Where a tenant applies to dispute a 10 Day Notice, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 10 Day Notice is based.

In the present case the landlord testified that the 10 Day Notice of November 2, 2018 was served on the same date by posting on the rental unit door. The tenant disputes that the 10 Day Notice was served on that day and said that they first received it as a part of the landlord's evidence on November 15, 2018.

I find the landlord's evidence to be more persuasive. The landlord submitted a signed Proof of Service, a photograph of the notice being posted and gave testimony that the Notice was issued in accordance with procedure. The landlord also testified that the tenant was overheard discussing with the building manager the merit of the 10 Day Notice on November 3, 2018, the day after it was posted. I find that the landlord has provided sufficient evidence to meet their evidentiary burden on a balance of probabilities that the 10 Day Notice was posted on the rental unit door on November 3, 2018.

In accordance with sections 88 and 90 of the *Act*, I find that the tenant is deemed served on November 5, 2018, three days after the 10 Day Notice was posted on the rental unit door. In accordance with section 46(4) of the *Act*, the tenant had within 5 days of November 5, 2018 to either pay the rent arrear in full or file an application for dispute resolution. The tenant did not file their amendment to the application disputing the 10 Day Notice until November 15, 2018 and did not pay the rent in full until

November 16, 2018. I find that the tenant failed to pay the full rent or file their application within the 5 days of deemed service.

I accept the landlord's evidence that the tenant's rent payment on November 16, 2018 and subsequent payment of rent for December, 2018 were accepted for use and occupancy only and did not reinstate the tenancy.

I find that the tenancy ended on the effective date of the 10 Day Notice, November 15, 2018. Therefore, I find that the landlord is entitled to an Order of Possession, pursuant to section 55 of the Act.

As the landlord was successful in their application I find that the landlord is entitled to recover the cost of their filing fee.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain \$100.00 of the tenant's security deposit in satisfaction of the monetary award issued in the landlord's favour. The security deposit for this tenancy is reduced by \$100.00 to \$109.50.

Conclusion

The tenant's application is dismissed.

I grant an Order of Possession to the landlord effective **2 days after service on the tenant**. Should the tenant 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.

The security deposit for this tenancy is reduced by \$100.00 to \$109.50.

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: December 18, 2018

Residential Tenancy Branch