



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) pursuant to section 46; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant "WS" (the "tenant"), the landlord, and the landlord's advocate appeared at the hearing. All parties present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that she served the Tenants' Application for Dispute Resolution hearing package ("dispute resolution hearing package"), along with the tenants' evidence, to the landlord. The landlord confirmed receipt of the tenants' dispute resolution hearing package and the tenants' evidence. Therefore, I find that the landlord has been served with the tenants' notice of dispute resolution package, and accompanying evidence, in accordance with the Act.

The landlord testified that he served his evidence package to the tenants, and the tenant confirmed receipt of the evidence.

I note that Section 55 of the Act requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an Order of Possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the Act.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the affirmed testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The relevant aspects of the tenants' claim and my findings around it are set out below.

The parties agreed that the tenancy began on April 01, 2018. The monthly rent was determined to be due on the first day of each month, and the monthly rent was set at \$1,750.00. The current monthly rent owed each month remains at \$1,750.00, payable on the first day of each month. The tenants provided a security deposit in the amount of \$875.00, and a pet damage deposit in the amount of \$100.00, both of which continue to be held by the landlord. The landlord submitted a copy of the written tenancy agreement as evidence.

The landlord testified that the tenants were not permitted to withhold payment of rent owed for the month of January 2019.

The landlord testified that the tenants did not pay the full amount of rent owed for the month of January 2019. The landlord testified that on January 04, 2019, the tenants provided a partial payment in the amount of \$875.00 toward the rent owed for January 2019. The landlord provided that the partial payment represented only half of the monthly rent owed, and that a balance of unpaid rent in the amount of \$875.00 remained outstanding for the month of January 2019. Therefore, the landlord stated that the Notice was issued as a result of the non-payment of the full rent owed for the month of January 2019.

The landlord issued a 10 Day Notice, dated January 07, 2019, which the landlord states was served to the tenant on January 07, 2019, for \$1,750.00 in unpaid rent due on January 01, 2019, with a stated effective vacancy date of January 20, 2019.

The landlord testified that the Notice was served on January 07, 2019 by way of personal service via hand-delivery to the tenant "JB". The landlord provided as evidence a copy of a "Proof of Service of the Notice" form which establishes that the Notice was served to the tenant JB in the presence of a witness. The Proof of Service form establishes that the service of the Notice was witnessed and a name and signature for the witness are included on the form. The tenant "WS" provided affirmed testimony to acknowledge that the tenants received the Notice on January 07, 2019.

The landlord testified that on January 14, 2019, the tenants provided a payment in the amount of \$875.00 for the balance of rent owed for the month of January 2019. The landlord provided as evidence a copy of a receipt which confirmed that the late payment on January 14, 2019 was accepted by the landlord for the purpose of use and occupancy only, and that acceptance of the late payment of rent would not void the Notice dated January 07, 2019.

The landlord testified that he conveyed to the tenant JB that the acceptance of the late rent payment on January 14, 2019 would not reinstate the tenancy. The tenant JB signed the receipt acknowledging that the landlord accepted the late payment for use and occupancy only and that the late payment did not cancel the Notice. The tenant WS provided affirmed testimony that she agreed with this portion of the landlord's testimony and that JB acknowledged that the tenancy was not reinstated.

The landlord testified that after receiving notification that the tenants had filed an application for dispute resolution seeking to cancel the Notice, the parties agreed that the tenants would pay for occupancy of the rental unit pending the dispute resolution hearing scheduled for February 21, 2019.

The landlord provided as evidence a copy of a receipt which establishes that the tenant JB provided payment in the sum of \$1,750.00 on February 01, 2019. The receipt was signed by both the landlord and the tenant JB. The receipt provides that the payment was for the purpose of use and occupancy only, and that acceptance of the payment would not void or cancel the Notice dated January 07, 2019. The receipt stated that the payment would extend the occupancy date to February 28, 2019.

The landlord provided that he conveyed to the tenant JB that the acceptance of the payment on February 01, 2019 would not reinstate the tenancy. The tenant JB signed the February 01, 2019 receipt acknowledging that the landlord accepted the payment for use and occupancy only and that the payment did not cancel the Notice. The tenant WS provided affirmed testimony that she agreed with this portion of the landlord's testimony and that JB acknowledged that the tenancy was not reinstated.

The landlord testified that since the tenants acknowledged receipt of the Notice by hand delivery on January 07, 2019, they had a period of five days to pay the full amount of rent owed for January 2019. The last opportunity for the tenants to pay the rent owed in full was January 12, 2019. The landlord asserted that since the tenants failed to do so, he seeks an Order of Possession.

The tenant WS provided testimony to acknowledge that the tenants received the Notice on January 07, 2019. The tenant asserted that the full amount of rent owed for the month of January 2019 was \$1,750.00. The tenant testified that a partial payment of \$875.00 was provided to the landlord on January 04, 2019, which the landlord confirmed receipt of.

The tenant testified that she understood that the tenants had a period of five days after receipt of the Notice to provide payment of the full amount of rent owed for the month of January 2019 in order to cancel the Notice. The tenant testified that she understood that the last day for the tenants to provide the full payment of rent owed in order for it to fall within the five-day period was January 12, 2019. The tenant provided affirmed testimony stating that the tenants did not pay the full amount of rent owed for January 2019 by January 12, 2019.

The tenant testified that the balance of unpaid rent owed for the month of January 2019, in the amount of \$875.00, was paid on January 14, 2019, for which the landlord issued a receipt acknowledging that the late payment was being accepted for use and occupancy only and that the late payment would not void or cancel the Notice.

Analysis

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

Section 26(1) of the Act provides the following:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenant WS provided affirmed testimony to acknowledge that the tenants received the Notice on January 07, 2019. Therefore, in accordance with section 46(4) of the Act, the tenants had a period of five days after receipt of the Notice to pay, in full, the balance of unpaid rent owed for the month of January 2019 in order to cancel the Notice dated January 07, 2019. The five day period translated to January 12, 2019 being the last day on which the tenants could pay the unpaid rent in full in order to cancel the Notice in accordance with section 46(4) of the Act.

The tenant WS provided affirmed testimony in which she stated that tenants did not pay the full amount of rent owed for the month of January 2019 by January 01, 2019. I accept the testimony of the landlord which depicts that the tenants were not permitted to withhold any portion of the monthly rent owed for the month of January 2019, either in accordance with the Act or by mutual agreement between the parties.

Therefore, the landlord had leave under section 46 of the Act to issue a 10 Day Notice for non-payment of rent owed for the month of January 2019.

The tenant WS provided sworn testimony that the tenants did not pay the full rent owed for the month of January 2019 by January 01, 2019, and further testified that the tenants did not pay the full amount of rent owed for the month of January 2019, in the amount of \$1,750.00 by January 12, 2019, after receiving the Notice on January 07, 2019.

Based on the testimony provided by the parties, I find that after receiving the 10 Day Notice, the tenants did not pay the rent owed in full within the five days granted under section 46(4)(a) of the Act. I further find that the tenants failed to prove that they had grounds to withhold payment of the rent in accordance with section 26(1) of the Act.

The landlord has provided evidence to demonstrate that the tenants did subsequently provide payment, in the amount of \$875.00, on January 14, 2019 to satisfy the full amount of rent owed for the month of January 2019. However, the payment was not provided within five days of receipt of the Notice. The landlord provided a receipt to the tenants indicating that the payment was accepted for use and occupancy only, and that the Notice was not deemed to be cancelled or voided. I find that the receipt issued by the landlord sufficiently notified the tenants that the tenancy had not been reinstated and that the late payment on January 14, 2019 did not void or cancel the Notice.

Based on the foregoing, 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 Notice, January 20, 2019.

Accordingly, I dismiss the tenant's application to cancel the 10 Day Notice dated January 06, 2019.

The landlord accepted payment from the tenants, in the amount of \$1,750.00 for occupancy of the rental unit for the month of February 2019. The landlord provided a receipt to the tenants indicating that the payment was accepted for use and occupancy only, and that the Notice was not deemed to be cancelled or voided. I find that the receipt issued by the landlord sufficiently notified the tenants that the tenancy had not been reinstated and that acceptance of payment for occupancy on February 01, 2019 did not void or cancel the Notice.

Section 55 of the *Act* provides that if a tenant applies to dispute a notice to end tenancy, an Arbitrator is required to issue an Order of Possession if the tenant's application is dismissed, and if the notice complies with section 52 of the *Act*

Section 52 of the *Act* outlines the form and content required for a notice to end tenancy issued under the *Act*. I have reviewed the 10 Day Notice dated January 07, 2019 and find it complies with section 52 of the *Act* in form and content.

I have dismissed the tenant's application to dispute the 10 Day Notice and found the 10 Day Notice complies with section 52 of the *Act*. Therefore, pursuant to section 55 of the *Act*, I issue the landlord an Order of Possession for the rental unit.

I also note that I accept the testimony of the landlord that the tenants had no authority to withhold rent and that the tenants never paid the outstanding rent. Therefore, section 46(3) and 46(4)(a) of the *Act* do not apply.

Although the effective date of the 10 Day Notice has now passed, the tenants have provided payment for occupation of the rental unit during the month of February 2019. Therefore, I find that the tenants are entitled to occupy the rental unit until the end of February 2019. Accordingly, the Order of Possession takes effect by 1:00 p.m. on February 28, 2019.

The landlord will be given a formal Order of Possession which must be served on the tenants. If the tenants do not vacate the rental unit by 1:00 p.m. on February 28, 2019, the landlord may enforce this Order in the Supreme Court of British Columbia.

Conclusion

The tenants' application is dismissed in its entirety, without leave to re-apply.

Pursuant to section 55 of the Act, I grant an Order of Possession to the landlord effective at **1:00 p.m. on February 28, 2019**, which should be served on the tenants. 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.

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: February 21, 2019

Residential Tenancy Branch