



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPRM-DR, FFL

Introduction

This hearing convened as a Review Hearing pursuant to section 78 of the *Residential Tenancy Act*.

Originally the Landlord applied for an Order of Possession and monetary compensation pursuant to an undisputed 10 Day Notice to End Tenancy for Unpaid Rent and Utilities issued on April 25, 2019 (the "Notice"). The Landlord was successful in the original application; however, the Tenant applied for and was granted Review Consideration of the original Decision and Orders. The presiding Arbitrator granted a Review Hearing and suspended the Decision and Orders.

The Review Hearing was scheduled for teleconference before me at 11:00 a.m. on August 16, 2019. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

At the conclusion of the hearing, the Landlord's Agent stated that she did not receive any evidence from the Tenants. A review of Branch records indicates the only evidence submitted by the Tenants was in support of their Application for Review Consideration and relating to the Tenant, R.J.B.'s medical issues and the Tenants' claim that they overpaid the electrical utility. For reasons which will be addressed later in this my Decision, I find that this evidence is not relevant to the issues before me. No other issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the

respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The parties confirmed their email addresses during the hearing as well as their understanding that this Decision would be emailed to them.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession and monetary compensation based on the Notice?
2. Should the Landlord recover the filing fee?

Background and Evidence

In support of the Landlord's claim, the Landlord's Agent testified as follows. She stated that she has been managing the rental property for her grandmother since April 1, 2018. She stated that the Tenants also moved into the rental unit on April 1, 2018. Monthly rent is \$1,100.00.

Introduced in evidence was a copy of the residential tenancy agreement which indicated that the electricity was included in rent. The Agent stated that shortly after the tenancy began the cost of the electrical utility went up 88%. The Agent further stated that on May 5, 2018 she spoke with the Tenant, R.J.B. and asked the Tenants to pay 1/3 of this cost. The Agent further testified that the Tenants agreed to this proposal "over text" and thereafter paid a portion of the hydro bill save and except for two occasions where the Tenants said they would pay and then never did (including January 2019 and one month "in the beginning"—she was not able to be more specific). Text messages submitted by the Landlord suggest the Tenants agreed to pay 1/3 of the electrical utility.

The Landlord issued the Notice on April 25, 2019 indicating that rent of \$1,100.00 was owed as of April 1, 2019. The Notice further indicates that the Tenants failed to pay utilities as of April 1, 2019; at the hearing before me the Agent confirmed that the information about the utilities was included in error.

The Notice also indicated that it was served in person on April 25, 2019; the Agent testified at the hearing before me that was also in error as the Notice was actually “put in the mailbox” on April 25, 2019. The Agent stated that at the time the Notice was put in the mailbox, the Tenant, R.K.B., was on the property. She also stated that the Tenant, R.J.B.’s, van was outside such that they believed he was there. She confirmed that she was not aware when R.J.B. was in the hospital as the Tenants did not inform them of this.

The Agent testified that the Tenants did not pay the rent within five days of service, nor did they apply to dispute the Notice. The Agent further confirmed that the Tenants have not paid rent for April, May, June, July or August 2019 such that the sum of \$5,500.00 is outstanding for rent.

In response to the Landlord’s claims, the Tenant, R.J.B., testified as follows.

The Tenant confirmed that he moved into the rental property on April 1, 2018. He also confirmed that monthly rent is \$1,100.00.

The Tenant stated that electricity was included in the rent pursuant to the residential tenancy agreement. He further stated that they paid the electricity during the tenancy because they were “bullied into it”. He claimed that the total amount they paid was \$1,600.00 and submitted that based on this amount, which was for less than a year, they believe they paid more than 1/3 of the utility.

The Tenant confirmed that they did not pay the April 2019 rent and further confirmed they have not paid rent since April 2019. He claimed they were told not to pay the rent by a “professional housing company”.

The Tenant claimed that they did not receive the Notice. He stated that he got into a car accident in early March 2019 and has been in hospital since April 2019. He further stated he is still in the hospital due to complications from the accident and that he has in fact lost his leg as a result.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at:

www.gov.bc.ca/landlordtenant.

The Landlord requests an Order of Possession pursuant to sections 46 and 55 of the *Residential Tenancy Act*; those sections provide as follows:

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.

(2) A notice under this section must comply with section 52 [*form and content of notice to end tenancy*].

(3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(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.

(6) If

(a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and

(b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

Order of possession for the landlord

55 (1) If a tenant makes an application for dispute resolution to dispute a

landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

(a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and

(b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

(a) a notice to end the tenancy has been given by the tenant;

(b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;

(c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

(c.1) the tenancy agreement is a sublease agreement;

(d) the landlord and tenant have agreed in writing that the tenancy is ended.

(3) The director may grant an order of possession before or after the date when a tenant is required to vacate a rental unit, and the order takes effect on the date specified in the order.

(4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 [*Resolving Disputes*],

(a) grant an order of possession, and

(b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

After consideration of the testimony and evidence before me and on a balance of probabilities I find as follows.

I find the Tenants failed to pay rent for April 2019. I further find the Landlord served the Notice by placing it in the mailbox on April 25, 2019. Section 90 of the *Act* provides that documents served in this manner are deemed served three days later. While the

Tenant, R.J.B., may have been hospitalized during the time the Notice was served, I find that the Tenant R.K.B. was able to accept service of the Notice. Accordingly, and pursuant to section 90 I find that the Tenants were served the Notice on April 28, 2019.

The Notice informed the Tenant that they had five days in which to pay the outstanding rent or in which to apply to dispute the Notice; this is based on section 46(4) as reproduced above. The Tenants conceded that they did not pay the outstanding rent and did not apply to dispute the Notice. As such, and pursuant to section 46(5) the Tenants are conclusively presumed to accept the end of the tenancy.

Section 46(3) provides that a 10 Day Notice may be found to be ineffective if the tenant is permitted to deduct the unpaid portion from their rent; there are only four such permissible situations under the *Act*:

1. the landlord has accepted more than one half the month's rent as a security deposit or pet damage deposit (s. 19(2));
2. the tenant has paid for emergency repairs (s. 33(7));
3. the tenant has paid rent pursuant to an illegal rent increase (s. 43(5); or,
4. the tenant has an order from an Arbitrator authorizing them to reduce their rent.

The Tenants submit that they paid for the electrical utility contrary to the tenancy agreement which provides that this utility is included in rent. The Landlord submits the parties agreed the Tenants would pay one third of the total monthly cost. In any event of this, the payment of an electrical utility is not one of the four exceptions noted above such that the Tenants were not authorized to withhold rent.

Section 26 of the *Act* provides that a tenant must pay rent when rent is due, even in the event the Landlord is in violation of the *Act*, *Regulations*, or the tenancy agreement. As such, even in the event the Tenants are correct and they were not required to pay a share of the electrical utility, they cannot withhold rent. The proper course is for the Tenants to make an application to Residential Tenancy Branch for an Order that the Landlord comply with the tenancy agreement and for monetary compensation, or a rent reduction, for the overpayment of the utility (if in fact they are not obligated to pay this sum pursuant to the alleged agreement).

I therefore find the Landlord is entitled to an Order of Possession pursuant to sections 46 and 55 of the *Residential Tenancy Act*. This Order will be effective two days after

service on the Tenants and must be served on the Tenants and may be filed and enforced in the B.C. Supreme Court.

The undisputed evidence is that the Tenants have not paid rent since April 2019. I therefore find the Landlord is entitled to monetary compensation in the amount of **\$5,600.00** including unpaid rent for April, May, June, July and August 2019 as well as recovery of the \$100.00 filing fee. The Landlord is granted a Monetary Order for this amount and must serve the Order on the Tenants. Should the Tenants not pay, the Landlord may file and enforce the Order in the B.C. Provincial Court (Small Claims Division).

Should the Tenants wish to pursue monetary compensation from the Landlord for the alleged overpayment of the electrical utility, they are at liberty to do so. Similarly, I grant the Landlord leave to reapply for further monetary compensation related to this tenancy.

Conclusion

The Landlord's request for an Order of Possession and monetary compensation pursuant to the Notice is granted. The Landlord is also entitled to recover the filing fee.

This Decision and related Orders confirms (with a variation as to the amount of monetary compensation awarded pursuant to the Monetary Order) the Original Decision and Orders made May 24, 2019.

This Review Hearing 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: August 21, 2019

Residential Tenancy Branch