



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

FFL MNDCL-S OPC

Introduction

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- an Order of Possession for repeated late payment of rent pursuant to section 55;
- a monetary order for unpaid utilities in the amount of \$3,094.00 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant and landlord BD attended the hearing (although the tenant was 16 minutes late) and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenants testified, and the landlord confirmed, that the tenants served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenants confirmed, that the landlord served the tenants with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Landlord BD testified that the tenant was personally served the notice of dispute resolution form and evidence on July 20, 2019. I find that the tenant was served with this package on this date with sections 88 and 89 of the Act.

The tenant did enter any documents into evidence.

Issue(s) to be Decided

Is the landlord entitled to:

- 1) an order of possession;
- 2) a monetary order for the tenant's non-payment of rent; and
- 3) recover their filing fees?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting June 15, 2014. The tenancy agreement states that monthly rent was \$850.00 plus 1/4 of utilities and is payable on the first of each month. The tenant paid the landlords a security deposit of \$500.00. The landlords still retain this deposit.

The tenant testified that monthly rent was raised from \$850.00 to \$900.00, in contravention of the Act. However, the tenant testified that she has not made any application to contest the rent increase.

Utilities

The tenant also testified that utilities are included in her monthly rent. She denied that the landlords ever asked her to pay any portion for utilities.

Landlord DB testified that the tenant has not paid her portion of the monthly utilities for the entire duration of the tenancy. She testified that she has repeatedly asked the tenant to pay her share of the utilities, but the tenant has always put her off. She provided no documentary evidence in support of this claim. She provided a copy of her BC Hydro account history, which shows that the landlords have paid \$3,603.14 for hydro from July 2014 to March 2019. She argues that the tenant is obligated to pay 25% of this amount, per the tenancy agreement.

Late Payment of Rent

Landlord DB testified that the tenant has been repeatedly late in paying her monthly rent. She testified that the tenant was late paying rent for June, July, August, and September 2019.

Landlord DB testified that she received the tenant's September rent cheque on September 6, 2019 but has not yet cashed the cheque.

The landlords previously obtained an application for an order of possession against the tenant in April 2019. However, the landlord testified that following the hearing but before they received a copy of the order of possession, they accepted monthly rent payments from the tenant. Landlord DB testified that she attempted to have the order of possession enforced by the Supreme Court but was advised that it was no longer unenforceable.

Landlord DB testified that she issued a One Month Notice to End Tenancy for Cause (the "**Notice**") on June 27, 2019 listing the reason for issuing the Notice as "tenant is repeatedly late paying rent". The Notice lists an effective date of July 27, 2019. She testified that she posted it on the door of the rental unit.

The tenant did not file an application to contest the Notice.

The tenant testified that she sent her September rent to the landlords via regular mail on August 29, 2019. She is not sure when the landlords received it. She testified that she sent the August rent to the landlord via registered mail and provided a Canada Post tracking number in support of this (reproduced on the cover of this decision). However, Canada Post's website does not show any package assigned to that tracking number.

The tenant testified that she always pays her rent but did admit that it is often two or three days late.

Analysis

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

In this case, the landlords bear the onus to prove the allegations they are making.

I find that the tenant is deemed served with the Notice on June 30, 2019, three days after it was posted on the rental unit door. I find that the Notice meets the form and content requirements of section 52 of the Act. I find that the corrected effective date of the Notice is July 30, 2019.

Section 47(1)(b) states

Landlord's notice: cause

47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

[...]

(b) the tenant is repeatedly late paying rent;

[...]

(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not 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 by that date.

I find that the tenant failed to make an application for dispute resolution to contest the Notice pursuant to section 47(4) of the Act. Accordingly, I find that the tenant is conclusively presumed to have accepted that the tenancy ended on July 30, 2019.

As such, I grant the landlords an order of possession, effective September 30, 2019 at 1:00 pm.

If the landlords cash the tenant's cheque for September rent, I find that, absent an express written statement to the contrary for the landlords, the acceptance of such

money would be for the tenant's use and occupancy of the rental unit only and would not function to invalidate the order of possession.

In any event, Policy Guideline 38 states that three late payments are the minimum number sufficient to justify a notice under section 47. I find that the tenant was late in paying June, July, and August rent, which meets the requirement of Policy Guideline 38. As such, it is unlikely that the tenant would have been successful in opposing the Notice, had she filed an application for dispute resolution.

Utilities

I find that the tenancy agreement requires that the tenant pay 25% of monthly utilities. I find that during the course of the tenancy, the landlords have paid \$3,603.14 in utilities. I find that during the course of the tenancy the tenant has paid no part of this amount.

However, based on the documentary evidence before me, I cannot find that the landlords ever made a demand for payment of the utilities. I would have expected copies of letters, notes, emails, or text messages sent to the tenant seeking payment of the tenant's share of the utilities. No such correspondence was entered into evidence. While landlord DB testified she demanded repayment, the tenant testified that no such demands were made. With no documentary evidence to support either party's testimony, I find that the landlords have failed to discharge their evidentiary burden to prove that they made demands for repayment of the utilities.

I find that the landlords, during the course of the tenancy, never asked for repayment of the utilities (I will not speculate as to the reasons). I find that such conduct amounts to a waiver of the landlords' right to enforce the clause on the tenancy agreement which obligates the tenant to pay 25% of the monthly utilities, per Policy Guideline 11, which states:

Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights.

By not insisting on payment of the utilities, or taking steps to enforce their rights, over the course of four years, I find that the landlords have demonstrated an intention to the tenant to waive their right to collect money for utilities.

As such, I find that the landlords are not entitled to a monetary order for unpaid utilities.

As the landlord has been successful in obtaining the order of possession, I order that they may recover the filing fee (\$100.00) for this application from the tenant. Pursuant to section 72(2), I order that the landlords may deduct this amount from the security deposit. They must deal with the balance of the security deposit (\$400.00) in accordance with the Act.

Conclusion

Pursuant to section 55 of the Act, I order that the tenant deliver full and peaceable vacant possession and occupation of the rental unit to the landlords by September 30, 2018 at 1:00 pm. This order may be filed and enforced in the Supreme Court of British Columbia.

Pursuant to section 72 of the Act, the landlords may retain \$100.00 of the security deposit representing repayment of their filing fee.

I dismiss the landlords' application for a monetary order for unpaid utilities.

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: September 16, 2019

Residential Tenancy Branch