



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OLC, 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 10 Day Notice) pursuant to section 46;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenant confirmed that they were handed the 10 Day Notice by the landlord on August 4, 2019, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*. As the landlord confirmed that they received a copy of the tenants' dispute resolution hearing package by registered mail well in advance of this hearing, I find that the landlord was duly served with this package in accordance with section 89 of the *Act*. Since both parties confirmed that they had received one another's written evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

At the commencement of the hearing, the landlord gave undisputed sworn testimony that they issued a series of breach letters to the tenant during August 2019, followed by a 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) on September 27 or

28, 2019. The effective date of that Notice was October 31, 2019. The tenant testified that they had not applied to cancel the 1 Month Notice.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Should any other orders be issued with respect to this tenancy? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

The landlord gave undisputed sworn testimony that the tenants moved into this rental unit in October 2015 with another couple. After six weeks, the other couple vacated the premises and the landlord entered into a new one-year fixed term Residential Tenancy Agreement with the tenants that ended in mid-November 2016. Upon the expiration of that one-year fixed term, the tenancy continued as a month-to-month tenancy. Monthly rent was set at \$1,350.00, payable in advance on the first of each month. The landlord continues to hold the \$675.00 security deposit that was paid by the tenants when they first moved into this rental unit. Although the landlord did not obtain the tenants' written authorization to retain any portion of that security deposit, nor apply for dispute resolution for an order enabling the landlord to keep that deposit, the landlord retained it after the landlord considered that tenancy ended as the landlord maintained that there had been damage to the rental unit during that tenancy.

The landlord said that Tenant SS contacted the landlord to advise that they had moved out of the rental unit in April 2019. As Tenant SS wanted to be taken off the tenancy agreement and remove some of their possessions from the rental unit, the landlord arranged for a joint move-out condition inspection with Tenant SS on August 4, 2019. Although Tenant BH (the tenant) was apparently not alerted to this joint move-out condition inspection, the landlord and Tenant SS intended to end Tenant SS's involvement in this tenancy as of August 4, 2019.

When the landlord inspected the rental unit with the tenants on August 4, 2019, the landlord discovered that there had been damage to the rental unit, which exceeded the amount of the tenants' security deposit. Although the landlord did not receive any written notice to end tenancy from Tenant SS, the landlord's provision of a new one-year fixed term Residential Tenancy Agreement (the Agreement) to the tenant identifying Tenant HL as the sole tenant on August 4, 2019 ended the previous joint

tenancy with both tenants as of that date. The tenant signed this new Agreement that was to cover the rental period from August 1, 2019 until July 31, 2020. Although the tenant signed this new Agreement, they objected to the landlord's increase in the monthly rent from \$1,350.00 to \$1,400.00, as the tenant maintained that they were still covered by the previous rental agreement calling for a monthly rent of \$1,350.00.

As rent for August 2019 was already due by August 4, 2019, the tenant provided the landlord with a payment of \$1,000.00 on August 4, 2019. The landlord advised the tenant that \$700.00 of the tenant's payment would be applied to the new security deposit for the fixed term Agreement they had just entered into. The tenant disputed the landlord's action, maintaining that the monthly rent for August 2019 remained at \$1,350.00, and that the landlord had no authority to retain their existing \$675.00 security deposit and apply \$700.00 of the tenant's rent payment to a new \$700.00 security deposit for the fixed term tenancy entered into on August 4, 2019. The tenant committed at that time to provide the landlord with what the tenant considered to be the remaining \$350.00 of rent owing for August 2019 as soon as they had this money available.

The landlord handed the tenant the 10 Day Notice on August 4, 2019, identifying \$1,100.00 as the amount then owing for rent that became due on August 1, 2019, as per the terms of their new Agreement. The landlord explained that only \$300.00 of the tenant's \$1,000.00 payment on August 4, 2019 was applied against the \$1,400.00 that the landlord considered owing for August 2019 as \$700.00 needed to be applied against the security deposit for this new tenancy. This resulted in the \$1,100.00 identified in the 10 Day Notice. The parties agreed that the tenant paid \$350.00, the amount that the tenant considered owing on August 10, 2019. The landlord asserted that \$750.00 remains owing from August 2019, plus a \$50.00 late payment fee for that month.

The tenants' application also maintained that the landlord had been harassing the tenant by entering the rental unit without the tenant's permission to conduct the joint move-out condition inspection on August 4, 2019, when this tenancy was not actually ending.

Analysis

I should first note that the issues that have occurred after the tenants applied for dispute resolution are not ones that I can consider as part of this application. Alleged breaches that have occurred leading to the landlord's issuance of the 1 Month Notice were not

part of the tenants' application and are not before me. The tenants have asked for the issuance of orders with respect to whether or not the new Agreement entered into between the landlord and the tenant took precedence over the existing tenancy agreement entered into between the landlord and the tenants. This determination as to whether the previous tenancy has ended may very well have an impact on whether there was any need for the tenant to pay a new security deposit to the landlord or whether the existing security deposit from the previous tenancy needed to be returned to the tenants. There is no application before me with respect to the return of the security deposit from the previous tenancy, which is reliant on a determination by an arbitrator as to whether the previous tenancy has ended.

Section 26(1) of the *Act* establishes that “a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.” Section 46(1) of the *Act* establishes how a landlord may end a tenancy for unpaid rent “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.” Section 46 (4) (b) of the *Act* provides that upon receipt of a 10 Day Notice to end tenancy the tenant may, within five days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant makes such an application, as occurred on August 9, 2019, the onus shifts to the landlord to justify, on a balance of probabilities, the reasons set out in the 10 Day Notice.

In this case, I find that there is sufficient written evidence and sworn testimony to establish that the previous tenancy, which included Tenant SS as one of the tenants, ended on August 4, 2019, when the landlord conducted the joint move-out condition inspection with that tenant. Tenant SS did not need the tenant's permission to remove themselves from the responsibilities and liabilities associated with this tenancy with the landlord's consent. By entering into a new one-year fixed term Agreement, the tenant and the landlord gave their written authorization that the tenant was the only person accepting the rights and responsibilities of a tenant from August 1, 2019 until July 31, 2019. As such, I find that the previous tenancy between the landlord and tenants ended on August 4, 2019, the date when the landlord and the tenant signed their new Agreement.

Even though the tenant signed a new fixed tenancy Agreement on August 4, that was to have taken effect on August 1, 2019, I find that by that date rent of \$1,350.00 was already owing for the month of August 2019, as per the terms of the previous tenancy

agreement with both tenants. As such, I find that the correct monthly rent for August 2019 for this rental unit was \$1,350.00. Monthly rent changed to \$1,400.00 as of September 1, 2019, the next month when rent became due.

I find that the landlord had no authorization from the tenant to apply \$700.00 of the payment the tenant made on August 4, 2019 towards a security deposit for the new Agreement they entered into on that date. By that date, monthly rent of \$1,350.00 was already owing as per the previous tenancy agreement with both tenants. If the landlord believed that the tenant had not paid the security deposit, the landlord could have issued a 1 Month Notice to the tenant seeking an end to the newly established tenancy for a failure to pay the required security deposit. Thus, I find that instead of \$1,100.00 in unpaid rent owing, the amount identified on the landlord's 10 Day Notice, that only \$350.00 was owing as of that date. Although I find that the landlord identified the wrong amount owing on the 10 Day Notice, by the tenant's own admission there remained \$350.00 owing for the month of August 2019 as of that date.

While the tenants applied to cancel the 10 Day Notice within the five day period for doing so, the tenant's payment of \$350.00 on August 10, 2019, was not within the five day period granted under paragraph 46 (4)(b) of the *Act* for the 10 Day Notice issued on August 4, 2019. Accordingly, I dismiss the tenant's application to cancel the 10 Day Notice.

Section 55(1) of the *Act* reads as follows:

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.

Section 46(2) of the *Act* also requires that "a notice under this section must comply with section 52 [form and content of notice to end tenancy]."

I am satisfied that the landlord's 10 Day Notice entered into written evidence was on the proper RTB form and complied with the content requirements of section 52 of the *Act*.

For these reasons, I find that the landlord is entitled to an Order of Possession that will take effect by 1:00 p.m. on October 31, 2019, the same date when the landlord's 1 Month Notice was to take effect. This is because the landlord has accepted payments from the tenant enabling the tenant to use and occupy the rental unit for the months of September and October 2019. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit by that time and date, the landlord may enforce this Order in the Supreme Court of British Columbia.

As was noted during the hearing, as a determination still needed to be made as to whether the previous tenancy between the tenants and the landlord remained in effect and the tenants did not include an application for a monetary award in their application for dispute resolution, I am unable to make any determinations as to monetary entitlement arising out of the security deposit paid by the tenants when their tenancy began. The tenants are at liberty to apply to recover the security deposit from the previous tenancy which ended on August 4, 2019.

Since the tenants' application has been dismissed, I make no orders with respect to the recovery of their filing fee.

Conclusion

I dismiss the tenants' application to cancel the 10 Day Notice. The landlord is provided with a formal copy of an Order of Possession effective at 1:00 p.m. on October 31, 2019. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I also dismiss the remainder of the tenants' application.

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 11, 2019

Residential Tenancy Branch