



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPRM-DR, OPR-DR, FFL, MNDCL

Introduction

This participatory hearing was scheduled for 9:30 a.m. on this date, via teleconference call, as ordered by an Adjudicator on January 6, 2021 in response to the landlords' application for an Order of Possession and Monetary Order for unpaid rent made under the Direct Request procedure.

The landlord appeared for the participatory hearing; however, there was no appearance on part of the tenant. Since the tenant did not appear, I explored service of hearing materials upon the tenant.

The landlords had sent their original proceeding package to the tenant, via registered mail, on December 15, 2020. The landlords provided a copy of a registered mail receipt, including tracking number as proof of service. A search of tracking number shows the package was successfully delivered on December 18, 2020. I was satisfied the tenant was duly served with notification of the landlord's original application.

The landlords sent the Interim Decision of January 6, 2021 and the Notice of Dispute Resolution Proceeding to the tenant via registered mail on January 9, 2021. The landlord provided a copy of the registered mail receipt, including tracking number, as proof of service. A search of the tracking number shows that the registered mail was returned as unclaimed. The landlord confirmed that the tenant continues to occupy the rental unit. Pursuant to section 90 of the Act, a party is deemed to have received documents five days after mailing even if they refuse to accept or pick up their mail. Pursuant to section 90 of the Act, I find the tenant deemed to have received the Interim Decision and the Notice of Dispute Resolution Proceeding five days after mailing, or January 14, 2021. Therefore, I continued to hear this matter without the tenant present.

The landlords had also submitted an Amendment to an Application for Dispute Resolution seeking to increase the monetary claim to include loss of rent up to and including the month of April 2021 and to seek late fees and anticipated court and bailiff costs. The landlords sent the Amendment to the tenant via registered mail on March 16, 2021. The landlords provided a registered mail receipt, including tracking number, as proof of service. A search of the tracking number shows the registered mail was successfully delivered on March 18, 2021.

Pursuant to the Rules of Procedure, an Amendment must be received by the respondent at least 14 clear days before the hearing. I find that sending the Amendment to the tenant on March 16, 2021, and its delivery on March 18, 2021, does not allow the tenant to have the Amendment at least 14 clear days before the hearing and I declined to accept the Amendment that was filed. The amounts not addressed in this decision are dismissed with leave to reapply and may be pursued by filing another Application for Dispute Resolution.

The Rules of Procedure do permit me to amend an application during the hearing where it can be reasonably anticipated by the respondent. Below, I have reproduced Rule 4.2:

4.2 Amending an application at the hearing

In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.

If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

I allowed the application to be amended during the hearing to reflect the landlord's request to recover loss of rent up to and including the month of March 2021 since the landlord affirmed that the tenant has continued to hold possession of the rental unit and has not paid any monies for his continued use and occupation.

The landlord also requested authorization to retain the tenant's security deposit to be used to partially offset the unpaid and/or loss of rent. I permitted this amendment as it does not prejudice the tenant since any Monetary Order issued to the landlords would be reduced by the security deposit.

On another note, the application and the style of cause were amended to correct the names of the landlords to their legal names, as reflected on the BC Assessment notice they submitted for my review.

Issue(s) to be Decided

1. Are the landlords entitled to an Order of Possession?
2. Are the landlords entitled to a Monetary Order for unpaid and/or loss of rent, and if so, the amount?
3. Are the landlords authorized to retain the tenant's security deposit?
4. Award of the filing fee.

Background and Evidence

The parties executed a tenancy agreement in May 2013 for a tenancy that started on June 1, 2013. The landlords collected a security deposit of \$300.00 and the rent was set at \$650.00 payable on the first day of every month.

On July 1, 2017 the landlord signed a second tenancy agreement indicating the rent was \$700.00 although the commencement date for this tenancy was left blank and the tenant did not sign this document.

The landlord testified that the tenant did orally agree to pay rent of \$700.00 per month and he has been paying rent of \$700.00 per month since July 1, 2017. The landlord confirmed that a Notice of Rent Increase was not served upon the tenant.

The landlord testified that for the months of April 2020 through July 2020 the tenant's sister paid the tenant's rent to the landlord. For the months of August 2020 through October 2020 the tenant paid the rent to the landlord in cash. However, the tenant did not pay any rent for November 2020.

The landlord testified that on November 25, 2020 she served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") by posting the notice on the door of the rental unit, in the presence of her son as a witness. The 10 Day Notice has a stated effective date of December 5, 2020 and indicates the tenant failed to pay rent of \$700.00 on November 1, 2020. The landlord provided a signed Proof of Service and a photograph of the 10 Day Notice attached to the door as proof the 10 Day Notice was served.

The landlord testified that after serving the tenant with the 10 Day Notice the tenant did not pay the outstanding rent or file an Application for Dispute Resolution to dispute the 10 Day Notice and he continues to occupy the rental unit without paying any monies for his continued use and occupancy.

The landlord seeks an Order of Possession effective as soon as possible and recovery of unpaid and/or loss of rent for the months of November 2020 through March 2021.

Documentary evidence provided by the landlords includes: the tenancy agreement executed by both parties in 2013; the tenancy agreement that was executed by the landlord only in 2017; the 10 Day Notice; Proof of Service of the 10 Day Notice; photograph of the 10 Day Notice posted to the tenant's door; and, registered mail receipts for mailing of the hearing materials.

Analysis

Where a tenant does not pay rent the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent. When a tenant receives a 10 Day Notice the tenant has five days to pay the outstanding rent to nullify the 10 Day Notice or the tenant has five days to dispute the 10 Day Notice by filing an Application for Dispute Resolution. If a tenant does not pay the outstanding rent or dispute the 10 Day Notice within five days then, pursuant to section 46(5) of the Act, the tenant is conclusively presumed to have accepted the tenancy will end and must vacate the rental unit by the effective date of the 10 Day Notice.

I accept the unopposed evidence before me that the landlord posted a 10 Day Notice to the door of the rental unit on November 25, 2020. Upon review of the 10 Day Notice, I am satisfied it meets the form and content requirements of the Act. Since the 10 Day Notice was posted to the door, the tenant is deemed to have received it three days after posting, or November 28, 2020; and, the effective date automatically changes to read December 8, 2020 pursuant to sections 53 and 90 of the Act. I further find the tenant had until December 3, 2020 to either pay the outstanding rent or file to dispute the 10 Day Notice. Since the tenant did neither, I find the tenant conclusively presumed to have accepted the end of the tenancy effective December 8, 2020. Since the tenant continues to hold possession of the rental unit, I find the landlords entitled to an Order of Possession and I provide the landlords with an Order of Possession effective two (2) days after service upon the tenant.

As for the landlords' monetary claim for unpaid and/or loss of rent, I provide the following findings and reasons.

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations, or tenancy agreement, unless the tenant has a legal right to withhold rent.

Based upon the duly executed tenancy agreement of May 2013, the rent was set at \$650.00 per month. The tenant did not execute a subsequent tenancy agreement and I find the rent did not change to \$700.00 by virtue of a new tenancy agreement. Further, the landlord did not increase the rent in a manner that is required by Part 3 of the Act as the landlords failed to obtain the tenant's written consent to increase the rent by \$50.00 per month and failed to serve the tenant with a Notice of Rent Increase in the approved form with at least three months of advance notice, as required under Part 3 of the Act.

Although the landlord argued the tenant orally agreed and paid the rent increase, such actions are not enforceable as parties cannot agree to violate or contract outside of the Act, as provided under section 5 of the Act.

Part 3 of the Act provides that if a tenant pays a rent increase that was not increased in accordance with the Act, the tenant is entitled to recover the unlawful rent increase by deducting it from rent otherwise payable. Therefore, I find the rent the tenant was legally required to pay was \$650.00 per month and the tenant is entitled to deduct or otherwise recover the additional \$50.00 paid since July 1, 2017. I calculate the net amount of rent payable by the tenant as follows:

Unpaid and/or loss of rent for November 2020 through March 2021
= \$650.00/month x 5 months = \$3250.00

Less rent overpaid:
= \$50.00/month x 39 months (July 2017 through October 2020) = \$1950.00

Rent recoverable by landlords
= \$3250.00 less \$1950.00 = \$1300.00

I award the landlords unpaid and/or loss of rent in the amount of \$1300.00 for the months up to and including March 2021, as calculated above.

I further award the landlords recovery of the \$100.00 filing fee paid for this Application for Dispute Resolution.

I authorize the landlords to retain the tenant's security deposit in partial satisfaction of amounts awarded to the landlords with this decision.

In light of the above, I provide the landlords with a Monetary Order in the net amount of \$1100.00 [\$1300.00 for rent + \$100.00 for filing fee - \$300.00 security deposit] to serve and enforce upon the tenant.

Conclusion

The landlords are provided an Order of Possession effective two (2) days after service upon the tenant.

The landlords are authorized to retain the tenant's security deposit and are provided a Monetary Order in the amount of \$1100.00 for unpaid and/or loss of rent up to and including the month of March 2021.

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: March 30, 2021

Residential Tenancy Branch