



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes OPU, MNRL, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the Residential Tenancy Act (the "Act") for the following orders:

- an Order of Possession for unpaid rent and/or utilities pursuant to sections 46 and 55 of the Act;
- a Monetary Order for unpaid rent pursuant to section 67 of the Act; and,
- authorization to recover the filing fee for this application from the tenant pursuant to section 72 of the Act;

WF (the "landlord") and GD (the "tenant") appeared at the hearing.

The landlord testified that they served the tenant with the Notice of Dispute Resolution Proceeding and their evidence on April 13, 2023, by sending a copy by registered mail. In support of this, the landlord submitted a receipt containing a Canada Post Tracking Number into evidence. The landlord further testified that they served additional evidence to the tenant by registered mail on April 20, 2023. In support of this, the landlord submitted a Proof of Service document indicating the same and a receipt containing a Canada Post Tracking Number.

The tenant testified that they were out of the country due to a family emergency from March 16, 2023, until April 17, 2023. Upon their return, the tenant received the notifications of registered mail and was informed by the post office that the registered mail packages were no longer there. Further to this, the tenant was able to obtain the registered mail packages from the Post Office on May 3, 2023.

I have considered the tenant's undisputed affirmed testimony indicating that he was out of the country from March 16th, 2023, to April 17th, 2023, and I find it credible. Based on this, I find the tenant has rebutted the deeming provisions of section 90 of the Act and I accept that the Notice of Dispute Resolution and landlord's supporting evidence was not received by the tenant until May 3, 2023.

The tenant testified that they served the landlord with their evidence in response to the landlord's application by email on May 4th, 2023. After some discussion as to the contents of the email, the landlord confirmed receipt of the totality of the tenant's evidence.

Based on the documentary evidence and undisputed affirmed testimony of the parties, I find based on section 71(1)(c) of the Act that the parties were sufficiently served with all required documents in relation to today's hearing.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession based on unpaid utilities?

Is the landlord entitled to a Monetary Order for unpaid utilities?

Is the landlord entitled to recover the filing fee for this application from the tenant?

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 confirmed the following details of the tenancy. The tenancy commenced on October 1, 2016. Monthly rent is \$2,100.00 payable on the first of each month. The Landlord collected a security deposit in the amount of \$900.00 from the tenant, which the landlord continues to hold in trust.

The landlord testified that in November 2022, they sent the tenant an email requesting payment of the excess utilities due for the periods of October 2020 to September 2021 and October 2021 to September 2022. The landlord drew my attention to the document titled, Unpaid Utilities Breakdown (the "Breakdown") which is submitted into evidence. The landlord explained that there are two suites in the house and the tenant is responsible for paying 50% of utilities that are in excess of \$100 at the end of the year.

The landlord explained that they did not charge the tenant the excess utilities fee for two years during the pandemic, but they typically require the tenant to pay the excess utilities annually.

The landlord went on to testify that they met with the tenant on November 28th, 2022, and at this time, the tenant agreed to pay half of the outstanding utilities immediately and pay the remainder of the outstanding utilities in three separate payments in January, February, and March 2023.

The landlord testified that while the tenant made a payment in the amount of \$905.85 on December 1, 2022, the tenant failed to make the agreed upon payments in January or February. Upon contacting the tenant, the tenant refused to make the payments, so the landlord served the tenant with a 30-Day Written Demand to Pay Utilities on February 12, 2023. The 30-Day Written Demand is included in evidence and states, in part, the following:

You currently have an outstanding balance with the utility payment in the amount of \$955 due by Nov 23, 2022. The total utility payment is \$1,860.58 from Oct 2020 to Sept. 2021 and Oct 2021 to Sept. 2022 (\$797.23 + \$1063.35). Please find the attached utility payments breakdown spreadsheet I bookkept and calculated. I also have attached the total of 36 utility statements which are 24 of them from Fortis BC, and 12 of them from BC Hydro for the details information.

You already paid the \$905.85 utility payment on Dec 1, 2022. So the remaining unpaid utility payment is \$955.

The landlord testified that the tenant emailed them on February 26, 2023, and advised them that they would not be making the payments and that they would like the Residential Tenancy Branch to settle the matter. The landlord testified that following the tenant's email of February 26, 2023, they served the tenant with the 10-Day Notice by registered mail on March 15, 2023. The landlord is seeking an Order of Possession and Monetary Order in the amount of \$955.00 for unpaid utilities.

The tenant acknowledged receipt of the 30-Day Written Demand and agreed that they made a payment in the amount of \$905.85 on December 1, 2022, toward outstanding utilities. The tenant testified that they did not pay the remainder of the outstanding utilities because they don't believe it is fair for the landlord to ask for payment of outstanding utilities for 2020 in 2023. The tenant directed my attention to the Residential Tenancy Agreement Addendum (the "Addendum") which is submitted into evidence and states the following regarding rent and utilities:

2. Rental Payment

2.1 The Tenant(s) will provide 12 post-dated checks dated the first day of each month in the amount of \$1,800.00 (one thousand eight hundred dollars) plus \$100 of the gas and the utilities per month, payable to WEI FENG. At the end of year, if average month of the gas and the utilities is more than \$100, the tenant will pay the 50% of the difference. There is a \$80.00 (Eighty dollars) charge for any dishonored checks.

The tenant testified that they have no problem paying the excess utilities annually in accordance with the Residential Tenancy Agreement.

Analysis

Based on the undisputed affirmed testimony of the tenant that they were out of the country when the landlord served them with the 10-Day Notice by registered mail, I find the tenant has rebutted the deeming provisions of section 90 of the Act and I accept that the 10-Day Notice was not received by the tenant until May 3, 2023.

The Addendum requires that “At the end of the year, if the average month of gas and the utilities is more than \$100, the tenant will pay the 50% difference.” I interpret this term to require the landlord to inform the tenant of any excess gas and utilities due for the year at the end of the year.

In this case, after years of not requiring the tenant to pay the excess gas and utilities, the landlord demanded payment from the tenant for the previous two years. Therefore, while the tenant was informed of the excess gas and utilities at the end of the year, for October 2021 to September 2022, the tenant was not informed of the excess gas and utilities for October 2020 to September 2021 until more than a year after the excess gas and utilities would have become apparent to the landlord. Ultimately, I find the landlord did not comply with Addendum term when they waited more than a year to inform the tenant of the excess gas and utilities due for the period of October 2020 to September 2021.

Based on the foregoing, I find it would be unreasonable to uphold the 10-Day Notice. The 10-Day Notice is cancelled and of no force or effect. I decline to consider the monetary claim because the 10-Day Notice is cancelled.

As the landlord was not successful in their application, they are not entitled to recover the filing fee paid for this application from the tenant.

Conclusion

The 10-Day Notice is cancelled and of no force or effect.

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: May 17, 2023

Residential Tenancy Branch