



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes OPR-DR, MNR-DR, 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 based on a 10-Day Notice pursuant to section 55;
- 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.

SL, agent for the landlord and AL, the tenant appeared at the hearing.

The parties confirmed that there were no issues with service of the Notice of Dispute Resolution Proceeding and the landlord's evidence. In accordance with sections 88 and 89 of the Act, I find that the tenant was served with the required documents for the hearing.

SL testified that they received the tenant's evidence by email over the weekend preceding the hearing. SL argued that the tenant's evidence was served late and not in accordance with the Rules of Procedure and should not be considered for the purpose of this hearing.

The tenant testified that they sent their evidence to the landlord twice. The first time was when they uploaded their evidence to the Residential Tenancy Branch. The tenant testified that they were not sure if the landlord received the first email, so they sent it again on Friday, May 19th to two email addresses. The tenant testified that the majority of their evidence is documentation that was provided to them by the landlord and therefore should be considered for the purpose of this hearing.

Rule 3.15 of the Rules of Procedure requires that the respondent's evidence be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. Rule 3.16 of the Rules of Procedure requires that the respondent be prepared to demonstrate to the satisfaction of the arbitrator that each applicant was served with all of their evidence as required by the Act and Rules of Procedure.

While the tenant testified that they sent their evidence by email to the landlord more than seven days prior to the hearing, they have not provided any evidence to confirm this, such as a copy of the email that was sent. Further, neither party provided evidence or testimony to support that the landlord provided an email address to the tenant for service which is required in accordance with section 88(j) of the Act and section 43(1) of the Residential Tenancy Regulation.

Based on the foregoing, I do not accept that the tenant served the landlord with their evidence in accordance with the Act and Rules of Procedure and, on that basis, the tenant's evidence has not been considered for the purpose of rendering a decision in this matter.

Both parties were given full opportunity to be heard, present testimony and make submissions. All parties confirmed they were not recording the hearing pursuant to Rule of Procedure 6.11.

Issue(s) to be Decided

Is the landlord entitled to an order of possession?

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to recover the cost of the filing fee?

Background and Evidence

I have considered the documentary evidence and the testimony of the parties; however, 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 agreed that the tenancy began on August 1, 2020. Rent is \$2,740.00 due on the first day of the month. The landlord collected a security deposit in the amount of \$1,350.00 which they continue to hold in trust. There is a copy of the written tenancy agreement in evidence.

SL testified that the landlord served the 10-Day Notice to End Tenancy on February 6, 2023, by registered mail. The tenant acknowledged receipt of the same but was unsure of the date the 10-Day Notice was received.

Page two of the Notice indicates that the tenant did not pay rent in the amount of \$5,480.00 that was due on February 1, 2023. SL testified that at the time the 10-Day Notice was issued rent was outstanding for the months of January and February 2023. All pages of the Notice were served and submitted into evidence.

SL testified that the landlord received rent for the months of January, February, and March 2023 from the tenant on March 21st, 2023. SL testified that this payment was accepted for use and occupancy only. SL pointed out that at the time the payment for January, February and March was received the landlord had already filed an Application for Dispute Resolution at the Residential Tenancy Branch. SL testified that the tenant has paid rent for April and May 2023 which has also been accepted for use and occupancy only.

SL testified that at the time of the hearing, no rent is outstanding. The landlord is seeking an Order of Possession.

Included in the landlord's evidence is an email from the landlord's agent's company to the tenant dated April 25, 2023, and states:

The RTB Direct request package has been serviced to you via registered mail. For your PAD rent payments is being accepted for use and occupancy only.

In response to SL's testimony, the tenant testified that they did not dispute the 10-Day Notice because they were in contact with an agent for the property managers and they came to an agreement that the tenant would pay all of the outstanding rent after March 20th, 2023. The agent referred to by the tenant was not present at the hearing. The tenant testified that they attended the office on March 21st, 2023, and paid the outstanding rent for January, February, and March 2023. The tenant testified that they have since paid rent for April and May 2023 on time, and they will not be late paying rent again. The tenant testified that they would like the tenancy to continue. The tenant went on to describe that they have found service from their landlord poor over the last couple of years. The tenant submitted that they did not have heat during the month of December and because of that rent was late sometimes. The tenant argued that it is a two-way road, and that they believe that the landlord and tenant should work together.

Analysis

Based on the testimony of the parties, I find that the tenant was served with the 10-Day Notice on February 6, 2023, in accordance with section 89 and 90 of the Act. The 10-Day Notice is deemed to have been received by the tenant on February 11, 2023, the fifth day after it was sent by registered mail.

Section 26(1) of the Act requires tenants to pay rent when it is due under the tenancy agreement whether or not the landlord complies with the Act, regulations, or the tenancy agreement.

Section 46(1) of the Act permits a landlord to end a tenancy if rent is unpaid on any day after the day it is due by issuing a *10 Day Notice to End Tenancy for Unpaid Rent*. A notice to end tenancy given under this section must comply with section 52 (form and content) of the Act. Upon receipt of a notice to end tenancy issued under s. 46 of the Act, a tenant has 5 days to either pay the overdue rent or file an application disputing the notice as per s. 46(4). If a tenant fails to comply with the requirements of the notice, s. 46(5) is triggered such that the tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the rental unit by the effective date of the notice.

The tenant testified that they did not file an application disputing the 10-Day Notice because they had an agreement with an agent for the landlord to pay the outstanding rent after March 20th, 2023. The tenant testified that they had been in contact with an agent for the landlord on numerous occasions about this. SL denied that an agreement was in place between the landlord and tenant and testified that rent was accepted on March 21, 2023, for use and occupancy only. Further, SL noted that the landlord filed an Application for Dispute Resolution seeking a monetary order and order of possession based on the tenant's failure to pay rent for the months of January and February 2023, prior to accepting payment from the tenant on March 21, 2023.

I have considered the tenant's testimony; however, I find their testimony is not sufficient to establish that an agreement was in place such that the landlord should be estopped from obtaining an order of possession in this case. Rather, I find it significant, that the landlord filed an Application for Dispute Resolution seeking a monetary order and order of possession prior to accepting payment from the tenant on March 21, 2023, for use and occupancy only. In my view, this supports on a balance of probabilities that no agreement was in place between the landlord and the tenant such that it would excuse

the tenant from having applied to dispute the 10-Day Notice within the 5-day deadline as required by the Act.

Section 55(2)(c) of the Act permits a landlord to request an order of possession when a notice to end the tenancy has been given by the landlord, the tenant has not made an application to dispute the notice, and the time for making any such application has expired.

In this case, the landlord served the Notice in accordance with the Act. Further, I find that the Notice complies with section 52 of the Act, and the tenant has not made an application to dispute the Notice. As such, it is my finding that the landlord has proven on a balance of probabilities that they are entitled to an order of possession.

A copy of the order of possession is issued with this Decision to the landlord. The landlord must serve a copy of the order of possession upon the tenant.

Section 72 of the Act permits an arbitrator to order payment of a fee by one party to a dispute resolution proceeding to another party. In this dispute, as the landlord was successful in their application the tenant is ordered to pay the landlord \$100.

Section 38(4)(b) of the Act permits an arbitrator to authorize a landlord to retain a tenant's security deposit after the end of a tenancy. As such, the landlord is authorized to retain \$100 of the tenant's security deposit to pay for the filing fee.

Conclusion

The landlord is granted an Order of Possession which will be effective two days after service upon the tenant. The Order of Possession may be filed in and enforced as an order of the Supreme Court of British Columbia.

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: June 1, 2023

Residential Tenancy Branch