



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes OPR, OPB, MNR, MND, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent, for damages to the rental unit, to recover the filing fee for this proceeding and to keep all or part of the Tenant's security deposit in payment of those amounts.

The Landlord said she served the Tenant with the Application and Notice of Hearing on November 18, 2009 by registered mail. Based on the Landlord's evidence, I find that the Tenant was served as required by s. 89 of the Act and the hearing proceeded in the Tenant's absence.

Issues(s) to be Decided

1. Is the Landlord entitled to end the tenancy?
2. Are there arrears of rent and if so, how much?
3. Is the Landlord entitled to compensation for damages to the rental unit and if so, how much?
4. Is the Landlord entitled to keep all or part of the Tenant's security deposit?

Background and Evidence

This fixed term tenancy started on October 1, 2009 and expires on October 1, 2010. Rent is \$830.00 per month (which includes \$75.00 for utilities) payable in advance on the 1st day of each month. The Tenant paid a security deposit of \$375.00 on November 2, 2009.

The Landlord said the Tenant had arrears of rent for November 2009 of \$300.00 and did not pay rent for December 2009 when it was due. As a result, on December 2, 2009, the Landlord served the Tenant in person with a 10 Day Notice to End Tenancy for Unpaid Rent dated December 2, 2009. The Landlord said she received a cheque from the Tenant by regular mail on December 8, 2009 for \$1,160.00 in full payment of the rent arrears. The Landlord also said that the post mark on the envelope containing the cheque was dated December 7, 2009.

The Landlord also claimed that when the Tenant moved in, she backed her RV into a chain link fence on the rental property and damaged it. The Landlord said that the

Tenant agreed to fix the fence in mid-October 2009 but did not repair it properly. The Landlord also said that she had a fencing company inspect the fence and an agent of that company confirmed that additional repairs were required. The Landlord claimed that she advised the Tenant that the fence needed further repairs and the Tenant agreed to take care of them. The Landlord said that after 10 days the Tenant still had not fixed the fence so she had the fencing company repair it on December 7, 2009 at a cost of \$206.91.

The Landlord admitted that she did not do a condition inspection report at the beginning of the tenancy but argued that she gave the Tenant a report and asked her to complete and return it. The Landlord said that when the Tenant failed to return the report, she asked the Tenant do an inspection on November 9, 2009 but the Tenant would not agree.

Analysis

Section 46(4) of the Act states that **within 5 days of receiving** a Notice to End Tenancy for Unpaid Rent or Utilities, a Tenant must either pay the overdue rent or apply for dispute resolution. If a Tenant fails to do either of these things, then under section 46(5) of the Act, they are conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice and they must vacate the rental unit at that time. Consequently, the Tenant would have had to pay the amount indicated on the Notice or apply to dispute that amount **no later than December 7, 2009**.

However, I find that the Tenant mailed a cheque to the Landlord on December 7, 2009. Section 90 of the Act states that an item sent by regular post is deemed to be received by the recipient five days after it is posted. The Landlord, however, claimed that she received the Tenant's cheque on December 8, 2009 and as a result, I find that the Tenant paid the overdue rent on December 8, 2009.

I note that in some written submissions provided by the Tenant, she claimed that she did not want to pay rent in cash on December 2, 2009 because the Landlord did not have a receipt. The Tenant also argued that it was the Landlord's responsibility to collect the rent and that she did not have the Landlord's address. However, s. 26(1) of the Act states in part that "a Tenant must pay rent when it is due under the tenancy agreement whether or not the landlord complies with the Act or tenancy agreement." This means that the Tenant was responsible for ensuring that her rent payment was received by the Landlord no later than the 1st day of each month. Furthermore, both the tenancy agreement and the 10 Day Notice set out the Landlord's address and for that reason, I find that the Tenant knew or should have known where to deliver her rent payment.



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As a result, I find that the Tenant did not pay the overdue rent within 5 days of receiving the 10 Day Notice dated December 2, 2009 and did not apply to dispute that Notice. Consequently, I find pursuant to s. 55(2)(b) of the Act that the Landlord is entitled to an **Order of Possession to take effect on December 31, 2009 at 1:00 p.m.**

Sections 23 and 35 of the Act say that a Landlord must complete a condition inspection report at the beginning of a tenancy and at the end of a tenancy in accordance with the Regulations and provide a copy of it to the Tenant. The purpose of having both parties participate in a move in condition inspection report is to provide evidence of the condition of the rental unit at the beginning of the tenancy so that the Parties can determine what damages were caused during the tenancy. In the absence of a condition inspection report, other evidence may be adduced but is not likely to carry the same evidentiary weight especially if it is disputed.

Having reviewed all of the evidence including and written submissions of the Tenant, I find on a balance of probabilities that the chain link fence was damaged by the Tenant. I also find that the Tenant made an attempt to repair the fence but that it was not adequate to correct the damage.

However s. 7(2) of the Act requires a party to take reasonable steps to mitigate their losses. I find that the Landlord did not give the Tenant a reasonable opportunity to make additional repairs to the fence. In particular, there is no evidence that the Landlord advised the Tenant that if repairs were not done within 10 days that she would have them done professionally and claim the cost from the Tenant. Furthermore, in the absence of a move in condition inspection report, I find that there is insufficient evidence that the fence was in good condition at the beginning of the tenancy. For all of these reasons, I find that the Landlord is not entitled to compensation for the cost of repairing the fence and that part of her application is dismissed without leave to reapply.

I find that Landlord is entitled to recover her \$50.00 filing fee for this proceeding and I order pursuant to s. 72 of the Act that she may deduct that amount from the Tenant's security deposit. The Tenant argued in her submissions that the Landlord was required to return her security deposit however, s. 38 of the Act states that a Landlord is not obligated to return a deposit until 15 days after the later of the end of the tenancy or the date the Landlord receives the Tenant's forwarding address in writing. Consequently, I make no order for the return of the balance of the Tenant's security deposit.

Conclusion

The Landlord's application for compensation for damages and unpaid rent is dismissed. An Order of Possession to take effect on December 31, 2009 at 1:00 p.m. has been



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issued to the Landlord. A copy of the Order must be served on the Tenant and may be enforced in 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: December 29, 2009.

Dispute Resolution Officer