

DECISION

Dispute Codes:

OP, MNR, MNSD, MNDC, FF

Introduction

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for an Order of possession, a monetary Order for unpaid rent and damage or loss, to retain all or part of the security deposit, and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing and affirmed. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process.

Issue(s) to be Decided

Is the landlord entitled to an Order of possession for unpaid rent?

Is the landlord entitled to a monetary Order for unpaid rent and loss of rent revenue?

May the landlord retain the deposit paid?

Is the landlord entitled to filing fee costs?

Background and Evidence

The tenancy agreement commenced on January 1, 1983; rent was \$950.00 and has risen to \$1,733.25 per month, due on the first day of each month. A deposit in the sum of \$475.00 was paid on December 4, 1982.

The tenant acknowledged receipt of a ten (10) day Notice to End Tenancy for non-payment of rent, which had an effective date of September 12, 2010, which was served on September 2, 2010 by posting to her door. The Notice to End Tenancy indicated that the Notice would be automatically cancelled if the landlord received \$1,733.00 within five days of service. The Notice also indicated that the tenants are presumed to have accepted that the tenancy is ending and that the tenants must move out of the rental by the date set out in the Notice unless the tenants file an Application for Dispute Resolution within five days.

The parties agreed that the tenant has paid September rent owed by installments, has been given receipts for use and occupancy only and currently owed \$941.50 in unpaid October, 2010, rent.

The tenancy agreement submitted as evidence included a term requiring payment of rent arrears as a charge against the deposit at the rate of \$2.00 per day.

The landlord offered to work with the tenant in order to maintain the tenancy, but requires a payment agreement. If the payment agreement fails the landlord would then serve the tenant with the Order of possession.

Analysis

I find that the tenants were served with a Notice to End Tenancy that required the tenants to vacate the rental unit on September 12, 2010, pursuant to section 46 of the Act.

Section 46 of the Act stipulates that a tenant has five (5) days from the date of receiving the Notice to End Tenancy to either pay the outstanding rent or to file an Application for Dispute Resolution to dispute the Notice. The tenant acknowledged receipt of the Notice on September 2, 2010, and that she is having some financial difficulties. The tenant did not dispute the Notice. Therefore, pursuant to section 46(5) of the Act, I find that the tenants accepted that the tenancy has ended. On this basis I will grant the Landlord an Order of Possession that is effective **two days after it is served upon the tenants.**

During the hearing I determined that the rent arrears clause of the tenancy agreement is not enforceable. The agreement was signed in 1983 and may well have been enforceable at that time. From the resident ledger submitted as evidence I determined that the tenant has paid 7 individual \$20.00 late fees since December, 2009, which were assigned to the tenant in the absence of a term of the tenancy allowing such a fee. Therefore, pursuant to section 62(3) of the Act, I find that the amount owed to the landlord will be adjusted by the late rent fee payments made by the tenants from December 2009 to September, 2010, in the sum of \$140.00.

The parties agreed to review past late rent fee payments made prior to December 2009, in order to determine if the tenant is entitled to any further rent rebate which can be applied to rent owed. The current Residential Tenancy Regulation which sets the late fee payment rate was established in September 2008.

Therefore, I find that the tenants have not paid October, 2010, rent in the amount of \$801.50, and that the landlord is entitled to compensation in that amount. The Order may be adjusted in value if the parties reach agreement in relation to any additional past late rent fees paid by the tenants.

The parties agreed to meet in order to establish a rent payment plan that meets the satisfaction of both parties. If the parties can agree to a payment arrangement the landlord will not enforce the Order of possession. If rent is not paid according to the agreement, or if the parties fail to reach a payment plan agreement the landlord is at liberty to enforce the order of possession.

The landlord is holding a deposit of \$475.00 plus interest in the sum of \$717.84. Therefore, I find that the landlord may retain from the deposit, the rent owed in the sum of \$801.50 and must disburse the balance as provided by the Act. If the tenancy does not end, I find that the landlord will continue to hold the deposit in trust, to be disbursed as provided by the Act.

The parties may also reach an agreement in which the landlord provides written agreement allowing any rent arrears to be deducted from the deposit, plus interest, as provided by section 21 of the Act; this is at the complete discretion of the landlord. The balance of the deposit would continue to be held in trust by the landlord.

I find that the landlord's application has merit, and I find that the landlord is entitled to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution. The filing fee may be deducted from the deposit held in trust.

Conclusion

The landlord has been granted an Order of possession that is effective **two days after it is served upon the tenant**. This Order may be served on the tenant, filed with the Supreme Court of British Columbia and enforced as an Order of that Court.

I find that the landlord has established a monetary claim, in the amount of \$851.50, which is comprised of \$850.50 in unpaid October, 2010, rent and \$50.00 in compensation for the filing fee paid by the landlord for this Application for Dispute Resolution.

The landlord will be retaining the tenant's security deposit plus interest, in the amount of **\$851.50**, in partial satisfaction of the monetary claim. The balance of the deposit plus interest in the sum of \$341.34 will be disbursed as provided by the Act. If the tenancy continues the landlord will continue to retain any balance of the deposit in trust.

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 26, 2010.

Dispute Resolution Officer