



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the tenant: CNR, CNC, RP, OLC, RR, PSF, FF
For the landlord: OPR, MNR, FF

Introduction

This hearing was convened as the result of the cross applications of the parties for dispute resolution seeking remedy under the Residential Tenancy Act (the "Act").

The tenant applied for an order cancelling a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, an order cancelling the landlord's 1 Month Notice to End Tenancy for Cause, an order requiring the landlord to make repairs to the rental unit, an order allowing a reduction in rent, an order requiring the landlord to provide services or facilities required by law, for an order requiring the landlord to comply with the Act, and for recovery of the filing fee paid for this application.

The landlord applied for an order of possession for the rental unit due to unpaid rent and unpaid utilities, a monetary order for unpaid rent and unpaid utilities, and for recovery of the filing fee paid for this application.

At the beginning of the hearing, neither party raised any issue regarding the service of the other's application or evidence.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties were provided the opportunity to present their evidence orally, refer to documentary evidence submitted prior to the hearing, respond to the other's evidence, and make submissions to me.

I have reviewed the oral and written evidence of the parties before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Preliminary matter-I have determined that the portion of the tenant's application dealing with a request for orders for the landlord and for orders for relief under the Act is unrelated to the primary issue of disputing the Notices. As a result, pursuant to section 2.3 of the Residential Tenancy Branch Rules of Procedure, I dismiss the portion of the tenant's Application for orders for the landlord and for orders for relief under the Act, and dealt only with the tenant's application to cancel a 10 Day Notice and a 1 Month

Notice and the landlord's application seeking an order of possession for the rental unit and a monetary order.

The disposition of the remaining portion of the tenant's application will be addressed at the conclusion of this Decision.

Issue(s) to be Decided

Is the tenant entitled to an order cancelling the Notices and for recovery of the filing fee paid for this application?

Is the landlord entitled to an order of possession for the rental unit, monetary compensation, and to recover the filing fee?

Background and Evidence

The tenancy agreement submitted shows that this tenancy was to begin on April 1, 2014, monthly rent is \$2000, and a security deposit of \$1000 was to be paid by the tenant.

The tenant submitted that due to a delay in moving to the area, she did not move into the rental unit until April 14, 2014.

The monthly rent for April was paid; however, the security deposit was not paid.

The tenancy agreement, which was not on the standard form offered by the Residential Tenancy Branch ("RTB"), was a creation of one of the parties. The landlord submitted that the tenant created the document and the tenant submitted that she only suggested some changes, but that the document was the landlord's tenancy agreement.

As to the term relating to monthly rent and utilities in the tenancy agreement, the provision states that the monthly rent of \$2000 was subject to COLA increases as required during the 4 year fixed term. This provision goes on to state "Plus 2/3 hydro 2/3 TV 2/3 internet and 100% propane". This provision also states that the tenant was to transfer the utilities to her name and that the "landlord will pay tenant for lower suite utilities share, which shall be 1/3 of hydro, tv, internet". (*reproduced as written*)

The parties confirmed that there was no move-in condition inspection report.

Pursuant to the Rules of Procedure, the landlord proceeded first in the hearing to explain or support the Notice to End Tenancy.

Landlord's application-

The landlord stated that the tenant was served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on May 2, 2014 by attaching it to the tenants' door, listing

unpaid rent of \$2000 as of May 1, 2014. The effective move-out date listed was May 20, 2014. The tenant acknowledged receiving the Notice.

The landlord asserted that since the issuance of the Notice, the tenant has failed to pay any rent and now owes \$2000 for June and July each.

The landlord's monetary claim as listed in her application was \$7570.74. Although there was no detailed calculation provided on the application, the attached evidence to the landlord's application provided a breakdown as follows: a security deposit of \$1000, rent for May of \$2000, TV for \$74.26, hydro for April 1-25 for \$227.29, internet for \$50.39, and propane for \$218.80, for a total of \$3570.74.

The additional \$4000, not stated on the breakdown, was a claim for unpaid rent for June and July, as per oral evidence.

The landlord's relevant documentary evidence submitted with her application in support of her claim was the calculation, the 10 Day Notice, a 1 Month Notice, the lease agreement, and a letter from the landlord to the tenant.

The landlord submitted additional, relevant documentary evidence, received by the RTB on July 2, 2014, included a hydro bill for a period of April 26-May 26.

Tenant's response-

The tenant claimed that as she did not move into the rental unit until April 14, her monthly rent payments should not be payable until the 14th day of each month. The tenant submitted that the rental unit had been used by the lower tenants during the first part of April and that the rental unit was not properly cleaned or ready for occupancy when she moved in. The tenant referred to her documentary evidence, which included email communication with the landlord expressing her concerns and requests for repairs.

Due to the state of the rental unit, the tenant submitted that she did not owe the landlord the full amount of monthly rent. The tenant confirmed not paying rent for May on the 1st of May, as the landlord had issued a 1 Month Notice at the end of April, seeking the tenant's eviction and that she had not paid rent for June or July.

As to the utilities, the tenant submitted that the television was not working and that she and her family only had use of the internet for a few days, before the landlord's daughter came and removed the equipment.

Analysis

Landlord's Application:

Under section 26 of the Act, a tenant is required to pay rent in accordance with the terms of the tenancy agreement and is not permitted to withhold rent without the legal right to do so. A legal right may include the landlord's consent for deduction; authorization from an Arbitrator or expenditures incurred to make an "emergency repair", as defined by the Act. As the tenant has not submitted evidence under Sec. 33 of the Act that any alleged repairs were necessary for the health and safety reasons or that there were any emergency repairs which were urgent, she has not met this criteria.

Where a tenant fails to pay rent when due, the landlord may serve the tenant with a 10 Day Notice for Unpaid Rent, pursuant to section 46 of the Act. Upon receipt of the 10 Day Notice, the tenant must pay the outstanding rent or dispute the Notice within five days. In this case, I find that the tenant disputed the Notice within business five days; however, when a Notice is disputed, the tenant must be able to demonstrate that they did not owe the landlord rent or had some other legal right to withhold rent.

In the case before me, I find the landlord submitted sufficient oral and documentary evidence that the tenant owed the landlord rent when the Notice was issued and that she did not pay all of the rent owed to the landlord within five days of receiving the Notice.

Therefore, I find the tenancy has ended due to the tenant's failure to pay rent and the landlord is entitled to regain possession of the rental unit.

I find that the landlord is entitled to and, rather than grant the landlord an order of possession for the rental unit for an effective move-out date within 2 days of service of the order upon the tenant, I therefore grant an order of possession for the rental unit effective on July 27, 2014, at 1:00 p.m., which is a date discussed by the landlord at the hearing as an acceptable move-out date.

I have not considered the merits of the landlord's 1 Month Notice, as I have granted her an order of possession for the rental unit based upon the 10 Day Notice.

I find the landlord submitted sufficient evidence that the tenant owes the amount of \$6000 for unpaid rent through July 2014.

As to the landlord's request for monetary compensation for unpaid utilities of \$570.74, I find the term in the written tenancy agreement as described above, is not expressed in a manner that clearly communicates the rights and obligations under it. For instance, the term did not specifically state or require that the tenant pay 2/3 of the stated utilities or to whom the utilities would be paid. Further I find the term requiring the tenant to put the utilities in her name and to share those costs with the lower tenant to be an

unconscionable term. I further find that the term in this provision providing for COLA increases in rent is contrary to the section of the Act dealing with rent increases.

Therefore I find the term regarding the payment of utilities does not comply with section 6 of the Act, is therefore not enforceable, and I therefore dismiss her request for unpaid utilities of \$570.74, as described in her monetary claim.

As to the landlord's monetary claim of \$1000 for the tenant's security deposit, I advised the landlord that this was not an appropriate claim as the security deposit is held in trust for the tenant during the tenancy and is not considered monetary compensation to the landlord. I therefore dismiss her monetary claim for \$1000 for the tenant's security deposit.

I find the landlord is entitled to recovery of the filing fee paid for this application of \$50.

Due to the above, I therefore find that the landlord is entitled to a monetary award in the amount of \$6050, comprised of a rent deficiency of \$6000 through July 2014, and the \$50 filing fee paid by the landlord for this application.

Tenant's application:

Due to the above, the tenant's application for dispute resolution seeking a cancellation of the Notice is dismissed without leave to reapply as I find the 10 Day Notice to End Tenancy issued by the landlord has been supported by the landlord and is therefore valid and enforceable.

It was not necessary to consider the tenant's request to cancel the landlord's 1 Month Notice, as I have granted the landlord an order of possession for the rental unit.

As to the tenant's request for request for orders for the landlord and for orders for relief under the Act, which was dismissed due to being unrelated to the primary issue of whether or not this tenancy would continue, the dismissal is without leave to reapply, as the tenancy is ending.

As I have dismissed the tenant's application, I likewise decline to award her recovery of the filing fee paid for this application.

Conclusion

The landlord's application has been granted in part.

I grant the landlord a final, legally binding order of possession for the rental unit, which is enclosed with the landlord's Decision and should be served upon the tenant. Should the tenant fail to vacate the rental unit pursuant to the terms of the order, this order may be filed in the Supreme Court of British Columbia for enforcement as an order of that Court. The tenant is advised that costs of such enforcement are recoverable from the tenant.

As I have found that the landlord is entitled to a monetary award of \$6050, I grant the landlord a final, legally binding monetary order pursuant to section 67 of the Act for the amount of \$6050, which I have enclosed with the landlord's Decision.

Should the tenant fail to pay the landlord this amount without delay after being served the order, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court. The tenant is advised that costs of such enforcement are recoverable from the tenant.

The tenant's application is dismissed, without leave to reapply.

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: July 9, 2014

Residential Tenancy Branch

