



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OP, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was filed by the Landlord under the Residential Tenancy Act (the Act), seeking:

- An Order of Possession based on a 10 Day Notice for Unpaid Rent or Utilities (the 10 Day Notice); and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was originally attended by the agent for the Landlord (the Agent) and both Tenants; however, the Landlord joined the hearing at approximately 10:15 AM. All testimony provided was affirmed. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The Residential Tenancy Branch Rules of Procedure (the Rules of Procedure) state that the respondents must be served with a copy of the Application and Notice of Hearing. As both Tenants, M.S. and L.M. were named as respondents in the Application, I went over service of the above noted documents on both Tenants as explained below.

The Agent stated that the Notice of Dispute Resolution Proceeding, which includes the Application and the Notice of Hearing, was sent to the rental unit by registered mail on December 18, 2020. Although M.S. acknowledged receipt, they stated that the registered mail was addressed only to them, and not to L.M., who no longer resided in the rental unit. L.M. stated that although they eventually received the documents from M.S., they were significantly delayed, and that they were never served with any documentation from the Landlord in relation to the Application in their own name. The Agent acknowledged that only one package was sent, and only in M.S.'s name.

Rule 3.1 of the Rules of Procedure states that the Applicant must serve each of the respondents with the Notice of Dispute Resolution Proceeding, among other things. As the parties acknowledged that L.M. was never served with any documentation from the Landlord in relation to this hearing, including the Notice of Dispute Resolution Proceeding, I find that L.M. was therefore not properly served in accordance with either section 59(3) of the Act or the Rules of Procedure. The ability to know the case against you is fundamental to the dispute resolution process. As a result, I find that it would be a breach of both the Rules of Procedure and the principles of natural justice to proceed against L.M., as they were not served with the Application, the Notice of Hearing, or the Landlord's documentary evidence as required by the Act and the Rules of Procedure. As a result, the hearing therefore proceeded against only M.S., who acknowledged receipt of the above noted documents and raised no concerns with regards to service methods or timelines.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the Tenant M.S., a copy of the decision will be mailed to them at the rental unit. At the request of the Agent, a copy of the decision any orders issued in favor of the Landlord will be emailed to them at the email address provided in the Application.

Preliminary Matters

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the Branch) under Section 9.1(1) of the Act.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession for the rental unit?

Is the Landlord entitled to recovery of the filing fee for the Application?

Background and Evidence

Although the Tenants both stated that the tenancy agreement was not part of the documentary evidence served on M.S. by the Landlord, a copy was submitted for my review and consideration by the Agent. During the hearing I went over the terms of the tenancy agreement and addendum in the documentary evidence before me, and the parties agreed that the terms were correct, with the exception of the amount of rent currently due, which is \$2,870.00. As a result, and with the consent of the parties, I accepted the written tenancy agreement and addendum for consideration. The tenancy agreement, signed on January 9, 2019, states that the fixed term tenancy commenced on January 10, 2019, and that it was set to continue on a month to month (periodic) basis at the end of the fixed term on December 31, 2019. The tenancy agreement states that rent in the amount of \$2,800.00 is due on the first day of each month, that a \$1,400.00 security deposit was required, and that utilities were not included in the cost of rent. The tenancy agreement also states that a 4 page addendum forms part of the tenancy agreement, a copy of which was submitted for my review.

Term 9 of the addendum to the tenancy agreement (the addendum) states that utilities not covered by rent and not to be paid to the Landlord are the responsibility of the Tenants to set up and pay for. It also states that any utility charges to be paid to the Landlord which remain unpaid 30 days after the receipt of a demand letter by the Tenants for their payment, will be treated as unpaid rent and may result in the issuance of a 10 Day Notice. At the hearing the parties agreed that municipal utilities for the rental unit were billed to the Landlord quarterly, and that the Tenants were responsible for the payment of these utilities by way of reimbursement to the Landlord.

The Agent stated that the Tenants did not pay November 2020 rent in the amount of \$2,870.00 and that \$2,027.34 in utilities remained unpaid more than 30 days after the issuance of demand letters for the payment of the utilities and copies of the utility bills. As a result, the Agent stated that the 10 Day Notice was served by placing it in the mailbox for the rental unit on November 2, 2020.

The 10 Day Notice in the documentary evidence before me, signed and dated November 2, 2020, has an effective date of November 12, 2020, and states that \$2,870.00 in rent due on November 1, 2020, is outstanding. It also states that \$2,027.34 in utilities remain unpaid after the issuance of a demand letter for their payment on October 26, 2020.

The Agent stated that the 10 Day Notice was placed in the mailbox for the rental unit on November 2, 2020, and submitted a witnessed and signed proof of service document confirming that the 10 Day Notice was served as set out above. Although the Tenant M.S. acknowledged receipt sometime between November 2, 2020 – November 7, 2020, they could not be sure of the exact date of receipt.

The parties agreed that neither Tenant disputed the 10 Day Notice and that M.S. continues to reside in the rental unit, although L.M. has moved out. The parties provided conflicting testimony with regards to whether or not the November rent was ever paid, with M.S. stating that it was paid by email money transfer to the Landlord between November 7, 2020 – November 9, 2020, and the Agent and Landlord stating that it was not. Despite this disagreement, the parties agreed that rent for December 2020 – March 2021 had been sent to the Landlord by email money transfer and that the Landlord had refused this rent. When I asked the Landlord why they refused to accept these subsequent rent payments, the Landlord stated that it was because the 10 Day Notice had already been served and they wanted to end the tenancy.

The Agent stated that demand letters were served on September 12, 2019, and October 26, 2020, along with copies of the outstanding utility bills. Copies of the utility bills and demand letters were submitted for my review. The September 12, 2019, demand letter states that \$1,387.20 in outstanding utilities are owed and the October 26, 2020, demand letter states that \$2,027.34 in outstanding utilities are owed. The Agent stated that the demand letter on October 26, 2020, includes the \$1,387.20 shown in the September 12, 2019 demand letter, which was never paid, as well as additional amounts not yet billed at the time of the previous demand letter.

The Tenants did not deny receipt of the above noted demand letters and utility bills and acknowledged that they simply did not pay them as they were on fixed incomes and had insufficient funds to do so. They also stated that they were short on roommates and that the Landlord had prevented them from acquiring new ones, which further impacted their ability to pay the outstanding utility bills.

Analysis

Based on the tenancy agreement and addendum in the documentary evidence before me and the affirmed testimony of the parties at the hearing, I am satisfied that the Tenants were required to pay the Landlord, after service of a demand letter and copies of the utility bill(s), for municipal utilities related to the rental unit, which were billed to the Landlord.

Based on the proof of service document and the affirmed testimony of the parties, I am satisfied that the 10 Day Notice was placed in the mailbox for the rental unit on November 2, 2020, and received shortly thereafter by M.S. Pursuant to section 90(d) of the Act, I therefore deemed the 10 Day Notice served on November 5, 2020.

Section 46(1) of the Act states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice. Section 46(6) of the Act states that if a tenancy agreement requires the tenant to pay utility charges to the landlord, and the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them, the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

Further to the above, section 46(5) of the Act states that if a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution within 5 days after receiving the notice, in accordance with subsection (4), the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.

At the hearing the parties agreed that the Tenants neither disputed the 10 Day Notice nor paid any amount towards the amount shown on the 10 Day Notice for outstanding utilities. Pursuant to section 46(6) of the Act, I find that the outstanding utilities, or at least the \$1,387.20 covered by the September 12, 2019, demand letter, qualify as outstanding rent. As the Tenants did not pay this amount or dispute the 10 Day Notice within 5 days after it was deemed received on November 5, 2020, I therefore find that the Tenants were conclusively presumed, pursuant to section 46(5) of the Act, to have accepted the end of the tenancy in compliance with the 10 Day Notice and required to vacate the rental unit by the corrected effective date of November 15, 2020, which I find was automatically corrected under section 53(2) of the Act based on the deemed service date for the 10 Day Notice.

Based on the above, I find that M.S. has been overholding the rental unit since the tenancy ended on November 15, 2020, and as the 10 Day Notice complies with section 52 of the Act, I therefore find that the Landlord is entitled to an Order of Possession for the rental unit pursuant to section 55(2)(b) of the Act. As both the corrected effective date of the Notice, and the requested effective date for the issuance of the Order of Possession by the Landlord at the hearing, March 23, 2021, have passed, I therefore

order, pursuant to section 68(2)(a) of the Act, that the Order of Possession will be effective two days after service.

As the Landlord was successful in their Application, I also grant them recovery of the \$100.00 filing fee, pursuant to section 72(1) of the Act. Pursuant to section 72(2)(b) of the Act, the Landlord is permitted to retain this amount from the Tenants' security deposit, or to recover this amount by way of the attached Monetary Order issued pursuant to section 67 of the Act, but not both.

Conclusion

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlord effective **two days after service of this Order** on the Tenant M.S. The Landlord is provided with this Order in the above terms and the Tenant M.S. must be served with **this Order** as soon as possible. Should the Tenant M.S. fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Order in the amount of \$100.00, issued pursuant to section 67 of the Act, but not both.

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of **\$100.00**. The Landlord is provided with this Order in the above terms and the Tenant M.S. must be served with this Order as soon as possible. Should the Tenant M.S. fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court. In lieu of serving and enforcing the Monetary Order, the Landlord is also permitted, pursuant to section 72(2)(b) of the Act, to retain \$100.00 from the Tenants' security deposit, should they wish to do so.

Although this decision has been rendered more than 30 days after the close of the proceedings, section 77(2) of the Act states that the director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period in subsection (1)(d). As a result, I find that neither the validity of this decision and the associated orders, nor my authority to render this decision, is affected by the fact that this decision and the associated orders were rendered more than 30 days after the close of the proceedings.

This decision is made on authority delegated to me by the Director of the Branch under Section 9.1(1) of the Act.

Dated: April 13, 2021

Residential Tenancy Branch