



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WILLIAM NEMETZ INVESTMENTS LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR OPC MNR MNDS MNDC FF

Preliminary Issues

At the outset of this proceeding the Tenant introduced herself and spelled her first and last names for me. I questioned why the Landlord had provided two spellings of the Tenant's names. A discussion followed after which the Tenant confirmed that she says her first name as if it is spelled with an "e" and not an "a". There was also a question as to if she has spelled her last name with one "r" or two.

The Landlord pointed out that third different spelling of the Tenant's first name was provided to the fire department as noted on their report provided in the Landlord's evidence. The Landlord requested that the application be amended to include all of the names to avoid technical difficulties in upholding Orders. Therefore, I amended the application in accordance with section 64 (3)(c) of the *Act*.

Introduction

This hearing dealt with an Application for Dispute Resolution filed on March 12, 2013, by the Landlord, to obtain Orders of Possession for unpaid rent, for cause, and for a Monetary Order for: unpaid rent or utilities; to keep all or part of the security deposit; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee from the Tenant for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Should the Landlord be granted an Order of Possession?
2. Should the Landlord be awarded a Monetary Order?

Background and Evidence

The Landlord submitted documentary evidence which included, among other things, copies of: two 10 Day Notices dated March 14, 2013; proof of service documents; the tenancy agreement; a written statement including a chronological list of events; notices of entry; municipal fire and rescue notice of violation; a breach letter; and a 1 Month Notice issued January 28, 2013.

The parties agreed they entered into a fixed term tenancy that began on June 1, 2005 and switched to a month to month tenancy after May 31, 2006. Rent is payable on the first of each month in the amount of \$750.00 per month. Sometime mid May 2005 the Tenant paid \$335.00 as the security deposit.

In the Landlord's written submission she stated that she had received a report from a repair person that the Tenant's rental unit was unsafe due to the amount of possessions, debris and combustibles inside the unit. The Landlord said she contacted the fire department and they conducted an inspection of the rental unit on November 23, 2012. The fire department issued orders to reduce the amount of debris and combustible items. When the fire department re-checked the unit on January 9, 2013 they reported there was "no progress" with their orders to clean up. On January 10, 2013, the Landlord issued the Tenant a breach letter and when the Tenant did not comply she posted a 1 Month Notice to end tenancy for cause to the Tenant's door on January 28, 2013, in the presence of a witness.

The Landlord Testified that at the time she issued the breach letter the Tenant still owed \$100.00 for January 2013 rent. Since issuing the 1 Month Notice the Tenant has stopped paying rent completely. The Tenant currently owes \$100.00 for January 2013 plus all rent for February, March 2013 plus loss of rent for April 2013 (3 x \$750.00) for a total owing of \$2,350.00.

The Landlord advised that on March 14, 2013 at 1:00 p.m. she posted two 10 Day Notices for unpaid rent to the Tenant's door, in the presence of a witness. The Landlord is seeking an Order of Possession immediately so she does not incur fines from the municipality. She is also seeking a Monetary Order for the unpaid rent and loss of rent. She has claimed late payment fees of \$75.00 for January, February, and March (3 x \$25) as well as one NSF fee of \$25.00 for February bounced cheque.

The Tenant confirmed receipt of the Landlord's evidence on April 1, 2013, which she confirmed included copies of the 10 Day Notices and the 1 Month Notice. She claims she received all notices that were posted to her door that pertained to entering her suite but she has never received eviction notices posted to her door.

The Tenant confirmed she was late paying all of her January and February 2013 rent and stated she paid the Landlord \$850.00 by personal cheque on February 26, 2013, but the Landlord has not cashed the cheque for six days.

The Landlord confirmed receipt of the February 26, 2013 cheque and argued that they cashed it but it was returned NSF.

The Tenant stated she does not have the money to pay rent because she is waiting for money from Europe. Upon review of her previous testimony the Tenant stated that she transferred the money out of her bank account when she noticed the Landlord had not cashed her cheque for six days. The Tenant agreed that she has not made a payment toward March or April 2013 rent.

The Landlord pointed out that she had two different witnesses sign the proof of service documents and also took pictures of the 10 Day and 1 Month Notices that were posted to the Tenant's door.

Analysis

I favor the evidence of the Landlord over the Tenant's evidence because the Tenant initially argued that her name has always been spelled only one way and then later confirmed that she pronounces her name as the different spelling. Further evidence was pointed out that proved the Tenant provided the fire department a third spelling for her name. The Tenant also provided three different versions of testimony relating to if her February rent was paid. The Landlord's evidence never altered, was forthright, credible, and supported by witnesses statements and pictures that could be provided if needed.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Based on the forgoing I find the Tenant is deemed to have received the 1 Month Notice on January 31, 2013, and both 10 Day Notices on March 17, 2013, three days after they were posted to the Tenant's door. Furthermore, the Tenant affirmed that she received copies of all three Notices by registered mail, as the Landlord's evidence, on April 1, 2013.

When a tenant receives a 1 Month Notice to end tenancy for cause they have ten (10) days to make application to dispute the Notice or the tenancy ends.

In this case the Tenant is deemed to have initially received the 1 Month Notice on January 31, 2013, three days after it was posted to her door, and the effective date of the Notice is **February 28, 2013**, in accordance with section 90 of the Act. The Tenant did not dispute the Notice, therefore, 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, pursuant to section 47(5) of the *Act*.

That being said, upon review of the 1 Month Notice to End Tenancy issued January 28, 2013, I find the Notice to be completed in accordance with the requirements of the Act and I find that it was served upon the Tenant in a manner that complies with the Act. Upon consideration of all the evidence and testimony presented to me, I find the Landlord had valid reasons for issuing the 1 Month Notice and I approve the Landlord's request for an Order of Possession.

I accept the Landlord's evidence that the Tenant has failed to pay the \$100.00 balance owing for January 2013 rent and has failed to pay the \$750.00 February 2013 rent; which I find to be in breach of section 26 of the Act which stipulates that rent is payable in accordance with the tenancy agreement. Accordingly, I award the Landlord unpaid rent of **\$850.00**.

As I have granted an Order of Possession based on the 1 Month Notice there is no need to issue a second Order of Possession based on the 10 Day Notices.

As noted above this tenancy ended **February 28, 2013**, in accordance with the 1 Month Notice. Therefore I find the Landlord is seeking money for use and occupancy for March 2013 and April 2013, not rent.

The Tenant is still occupying the unit which means the Landlord will not regain possession until after service of the Order of Possession and then they will have to work to find replacement tenants and prepare the unit for new tenants. Therefore, I find the Landlord is entitled to use and occupancy and any loss of rent for the entire months of March and April 2013, in the amount of **\$1,500.00** (2 x \$750.00).

The Landlord has claimed an NSF fee of \$25.00 for the February 26, 2013, cheque that was returned NSF. Section 10 of the tenancy agreement provides for NSF charges in accordance with the Regulation. Therefore, I award the Landlord NSF charges of **\$25.00**.

The Landlord is seeking \$75.00 for late payment fees for January, February and March 2013, (3 x \$25.00) in accordance with section 10 of the tenancy agreement. This tenancy ended February 28, 2013, as noted above, therefore the Landlord may not make a claim for late payment fees for March 2013, as this tenancy was no longer in

effect at that time. Accordingly, I award the Landlord late payment fees for January and February 2013 in the amount of **\$50.00**.

The Landlord has been successful with their application; therefore, I award recovery of the **\$50.00** filing fee.

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit plus interest as follows:

Unpaid rent January and February 2013	\$ 850.00
Use & Occupancy & Loss of Rent March & April 2013	1,500.00
NSF fees	25.00
Late payment fees January & February 2013	50.00
Filing Fee	<u>50.00</u>
SUBTOTAL	\$2,475.00
LESS: Security Deposit \$335.00 + Interest 11.85	<u>- 346.85</u>
Offset amount due to the Landlord	<u>\$2,128.15</u>

Conclusion

I HEREBY FIND the Landlord is entitled to an Order of Possession effective **Two (2) Days upon service** to the Tenant. This Order is legally binding and must be served upon the Tenant.

The Landlord has been awarded a Monetary Order in the amount of **\$2,128.15**. This Order is legally binding and must be served upon the Tenant.

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: April 09, 2013

Residential Tenancy Branch

