



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNDC FF
 CNR MNR MNDC RR FF

Preliminary Issues

Jurisdiction

In his written submission the Tenant raised the issue of jurisdiction. He provided affirmed testimony alleging that this matter does not fall within the *Residential Tenancy Act* because their original verbal agreement involved the purchase of the property. He stated that at no time did he enter into a written agreement with the owner to purchase this property. During the course of this proceeding he advised that he found a signed a six page tenancy agreement. Their original tenancy agreement was the hand written note that he provided in evidence which was signed by both parties and his witness.

The Landlord affirmed that he never entered into a written agreement to sell this property. He confirmed that he signed the hand written agreement to enter into a tenancy which allowed the Tenant access to the rental property as of November 5, 2012. He entered into the agreement whereby the Tenant was not required to pay rent from November 5 to December 31, 2012, and that beginning January 1, 2013 the Tenant was required to pay rent in the amount of \$2,500.00 per month.

Based on the foregoing, and in the absence of a written contract to prove the contrary, I found these parties have a landlord / tenant relationship which falls within the jurisdiction of the *Residential Tenancy Act*. Therefore, I accepted jurisdiction and proceeded to hear the merits of each application.

Matters that will be heard

Residential Tenancy Rules of Procedure, Rule 2.3 states that, in the course of the dispute resolution proceeding, if the arbitrator determines that it is appropriate to do so, he or she may dismiss the unrelated disputes contained in a single application with or without leave to reapply.

Upon review of the Tenant's application I have determined that I will not deal with all the dispute issues the Tenant has placed on their application. For disputes to be combined

on an application they must be related. Not all the claims on this application are sufficiently related to the main issue relating to the Notice to end tenancy. Therefore, I will deal with the Tenant's request to cancel the Landlord's Notice to End Tenancy issued for unpaid rent; and I dismiss the balance of the Tenant's claim with leave to re-apply.

Upon review of the Landlord's application I have determined that I will not deal with all the dispute issues the Landlord has placed on their application. Not all the claims on this application are sufficiently related to the main issue relating to the Notice to end tenancy and non payment of rent. Therefore, I will deal with the Landlord's request for an Order of Possession and the Monetary Order for unpaid rent, use and occupancy or loss of rent up to and including June 2013. I dismiss the balance of the Landlord's claim with leave to re-apply.

Service of Evidence

The Tenant and his witness testified that the witness posted their evidence package to the service address door provided by the Landlord on Friday May 24, 2013. This service was witnessed by another party.

The Landlord testified that he did not receive the Tenant's evidence. The Landlord was given the opportunity to adjourn this proceeding to a future date, to allow time for him to obtain the Tenant's evidence, or to proceed at this scheduled hearing. After I reviewed the Tenant's relevant evidence with the Landlord the Landlord chose to proceed with the hearing, as scheduled.

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed on May 8, 2013 to obtain an Order of Possession for unpaid rent and a Monetary Order for: money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; unpaid rent or utilities; and to recover the cost of the filing fee from the Tenants for this application.

The Tenant filed on May 8, 2013 to obtain an Order to cancel the 10 Day Notice for unpaid rent and to recover the cost of the filing fee from the Landlord for his application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the Landlord, 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 10 Day Notice be upheld or cancelled?
2. If upheld, should the Landlord be granted an Order of Possession?
3. Should the Landlord be granted a Monetary Order?

Background and Evidence

The Landlord submitted documentary evidence which included, among other things, copies of: the 10 Day Notice; proof of service document; an e-mail dated May 8, 2013; a monetary order worksheet; and photos of the rental unit.

The Tenant submitted documentary evidence which included, among other things, copies of: three receipts for payment of rent and the security deposit.

The Tenant confirmed receipt of all the evidence provided by the Landlord. However, at the time of this proceeding the Landlord had not received the Tenant's evidence. I explained that I would be considering only evidence relevant to the matters before me which included the three pages that were receipts allegedly signed by the Landlord. The Landlord confirmed that he wanted to proceed with the hearing even though he did not receive this evidence. I have attached copies of the three receipts to this decision to ensure the principles of natural justice are upheld.

The parties confirmed that they entered into a written tenancy agreement which consisted of a handwritten paper dated November 22, 2012, and listed the terms which they both agreed to and signed. The terms of the tenancy stipulated that the Tenant would have access to the rental unit from November 5, 2012, for free, until January 1, 2013. This document indicates that the Tenant paid the Landlord \$5,000.00 which was comprised of \$2,500.00 for the security deposit plus \$2,500.00 for rent for January 1 – 30, 2013. This document was witnessed by a third party and was not in dispute.

The second receipt was dated October 23, 2012 and states the Tenant paid \$2,500.00 for February 1, 2013 rent. The Landlord said that he recalled signing this document.

The third receipt was dated November 22, 2012, and indicates the Tenant paid \$2,500.00 for March 1, 2013 rent. This document has three signatures which are listed as being from the Landlord, Tenant and a witness.

The Landlord said he does not remember signing the third receipt for March 2013 rent. He said he recalled the first two documents and argued that the total amount of money received from the Tenant was \$7,500.00 which is the total of the first two documents.

The Landlord testified that he has not received any other money from the Tenant since receiving the \$7,500.00. He has been living outside of the Country and returned briefly one time to deal with the well pump issue before leaving again. On April 29, 2013, he returned to Canada and immediately began to deal with the unpaid rent issue. He has not received payment for March, April, May or June 2013 rents so on May 1, 2013, the 10 Day Notice was personally served to the Tenant's mother.

The Tenant confirmed receipt of the 10 Day Notice and argued that he provided proof that he gave the Landlord a total amount of \$10,000.00 which included rent for March 2013. He confirmed that he has not paid rent for any months following March 2013 and he has continued to occupying the property.

Analysis

When a tenant receives a 10 Day Notice to end tenancy for unpaid rent they have (5) days to either pay the rent in full or to make application to dispute the Notice and prove that they are not required to pay the rent, or the tenancy ends.

In this case the Tenant received the 10 Day Notice on May 1, 2013, and the effective date of the Notice is **May 11, 2013**, in accordance with section 46 of the Act.

Upon review of the 10 Day Notice I find it was not completed in accordance with the Act as it lists an amount in the unpaid utilities that are not unpaid utilities. The amount listed is a loss resulting from the Tenant charging propane to the Landlord's account without his permission. Furthermore, the notice was issued on May 1, 2013 for rent that was due on May 1, 2013. A 10 Day Notice cannot be issued and served on the date that rent is due, because rent is not considered late until the second of the month, the day after it is due. That being said, I find, pursuant to section 62 of the Act, that these errors do not nullify or void this Notice because there was outstanding rent for March and April 2013 which can be considered due as of May 1, 2013.

The Tenant did not pay the rent in accordance with the tenancy agreement, which I find to be a breach of section 26 of the Act. Furthermore, there is no evidence before me

that would justify nonpayment of rent. Therefore, I uphold the 10 Day Notice and dismiss the Tenant's application, without leave to reapply.

Based on the foregoing, I find this tenancy ended on **May 11, 2013**, which is the effective date of the Notice. Therefore, the Tenant must vacate the rental unit to which the notice relates, pursuant to section 46 of the *Act*. Accordingly, I approve the Landlord's request for an Order of Possession.

The Landlord claimed unpaid rent of \$7,500.00 that was due March, April and May 1st, 2013, (3 x \$2,500.00). The Tenant argued that he provided a receipt showing March rent had been paid as they have paid a total amount of \$10,000.00. The Landlord could not recall the third receipt and only recalled receiving payment in the total amount of \$7,500.00. When making a claim the burden to prove the claim lies with the applicant. In this case the Landlord bears the burden to prove the exact of amount of rent received. Notwithstanding his submission that he only recalls receiving \$7,500.00 payment, I accept the receipts submitted by the Tenant that they had paid \$7,500.00 in rent for January, February, and March 2013 plus \$2,500.00 as the security deposit. The remaining claim for unpaid rent was not disputed. Accordingly, I award the Landlord unpaid rent for April and May 2013 in the amount of **\$5,000.00** (2 x \$2,500.00).

As noted above this tenancy ended **May 11, 2013**, in accordance with the 10 Day Notice. Therefore I find the Landlord is seeking money for use and occupancy and/or loss of rent for June 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 he will have to work to find replacement tenants. Therefore, I find the Landlord is entitled to use and occupancy and any loss of rent for the entire month of June 2013, in the amount of **\$2,500.00**.

The Landlord has primarily been successful with their application; therefore I award recovery of the **\$100.00** 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 Tenant's security deposit plus interest as follows:

Unpaid Rent April and May 2013	\$5,000.00
Use and Occupancy & Loss of June 2013 rent	2,500.00
Filing Fee	<u>100.00</u>
SUBTOTAL	\$7,600.00
LESS: Security Deposit \$2,500.00 + Interest 0.00	<u>-2,500.00</u>
Offset amount due to the Landlord	<u>\$5,100.00</u>

The Tenant's application to cancel the 10 Day Notice was dismissed; therefore, I decline to award recovery of their filing fee.

Conclusion

I HEREBY FIND the Landlord is entitled to an Order of Possession effective **Two (2) Days upon service**. This Order is legally binding and must be served upon the Tenant. In the event that the Tenant does not comply with this Order it may be filed with the Supreme Court of British Columbia and enforced as an Order of that Court.

The Landlord has been awarded a Monetary Order in the amount of **\$5,100.00**. This Order is legally binding and must be served upon the Tenant. In the event that the Tenant does not comply with this Order it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The Tenant's application to cancel the 10 Day Notice is HEREBY 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: June 04, 2013

Residential Tenancy Branch

