



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

OPR MNR MNDC FF
CNC MNDC O FF

Introduction

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

The Landlord filed on August 7, 2013 seeking an Order of Possession for unpaid rent and a Monetary Order for: unpaid rent; 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 Tenant filed on July 15, 2013, seeking an Order to cancel a Notice to end tenancy issued for Cause; a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; for other reasons; and to recover the cost of the filing fee. At the outset of this proceeding I confirmed that the Tenant had not paid a filing fee; therefore, I would not be considering his request to recover the filing fee.

The parties appeared at the teleconference hearing 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.

The Landlord submitted documentary evidence which included, among other things, copies of: Canada Post receipts; his written statement; a witness statement; various notes written to the Landlord by the Tenant; the tenancy agreement; photos; and a 10 Day Notice issued July 25, 2013.

The Tenant submitted documentary evidence which included, among other things, copies of: a USB flash drive; receipts for the cost of USB and evidence; photos of his injuries; photos of the rental unit; hospital medical report; Canada Post receipts; statements from his witness; proof that his Income Assistance cheque for the month of July 2013 had been cashed; and his statement of claim.

The Landlord confirmed receipt of the Tenant's evidence but noted that he was not able to view the contents of the USB flash drive. The Tenant argued that he had the USB drive tested before serving it to the Landlord; however, he did not contact the Landlord to determine if the Landlord was able to view the contents after serving it to him.

The *Residential Tenancy Branch Rules of Procedure* # 11.8 stipulates which digital evidence will be accepted and how it may be submitted as follows:

Digital evidence includes photographs, audio recordings, video recordings or other material provided in an electronic form that cannot be readily reproduced on paper.

Digital evidence must be accompanied by a written description and meet the time requirements for filing and service established in Rule 3.1 and Rule 3.5.

The format of digital evidence must be accessible to all parties. Before the hearing, the party submitting the digital evidence must determine that the other party and the Residential Tenancy Branch have playback equipment or are otherwise able to gain access to the evidence. [Emphasis added]

If a party asks another party about their ability to gain access to a particular format, device or platform, the other party must reply as soon as possible and so that all parties have 5 days with full access to the evidence.

If any party is not able to hear or see the digital evidence because it was not provided in an accessible way, the digital evidence may or may not be considered.

Regardless of how evidence is accessed during a hearing, the party providing digital evidence must provide the Residential Tenancy Branch with a copy of the evidence on a memory stick, compact disk or DVD for its permanent files.

In this case part of the Tenant's evidence was provided on a USB storage device which could not be viewed by the Landlord. The Tenant did not contact the Landlord to determine if the Landlord could view it prior to the hearing; therefore, I find the Tenant's USB evidence was not submitted in accordance with 11.8 of the Rules of Procedure, and will not be considered in my decision. I did however consider the rest of the Tenant's evidence and his oral testimony.

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 granted a Monetary Order?
3. Should the Tenant be granted a Monetary Order?
4. Should the Notice to End tenancy issued for Cause be upheld or cancelled?

Background and Evidence

The Tenant's witness testified that he did not see the Tenant fall but that he attended the rental unit afterwards and saw that the entrance was dark. He also stated that he had previously fallen while going into the rental unit and that he simply stood up and brushed himself off. He did not report the fall to the Landlord.

Both parties confirmed that they had entered into a written fixed term tenancy agreement that began on February 20, 2013, and was set to expire on August 31, 2013. Rent is payable on the first of each month in the amount of \$750.00 and on February 20, 2013, the Tenant paid \$375.00 as the security deposit.

The manner in which rent was paid was not in dispute as both parties testified that rent was paid by cheque and sent directly to the Landlord from the Ministry of Social Development. Payments were issued by the Ministry to the Landlord from the onset of the tenancy with the last cheque being issued on June 25, 2013 for the payment month of July 2013.

The Landlord confirmed that on approximately June 25th or 26th he cashed the cheque dated June 25, 2013 that was issued for July 2013 rent. He argued that he gave that rent money to the Tenant because they had previously agreed the Tenant would move out by July 1, 2013. He pointed to a document in the Tenant's evidence which was a written mutual agreement to end the tenancy effective July 1, 2013. He submitted that this document was signed by both parties on either June 13th or 14th and this document confirms he gave the Tenant his \$375.00 security deposit plus \$40.00 in order to have him move out. The Tenant continues to reside in the rental unit and has not paid rent for July or August 2013.

The Landlord testified that he attended a dispute resolution hearing mid July 2013 to obtain an Order of Possession for cause based on a 1 Month Notice he posted to the Tenant's door on May 31, 2013. That application was dismissed with leave to reapply because he had not proven service of the hearing documents. He later found out that he could issue a Notice to end tenancy for previous unpaid rent so on July 25, 2013 he issued a 10 Day Notice for partial rent of \$180.00 that was due on April 1, 2013. He made no effort to collect this money prior to issuing the Notice and waited until his previous attempts to get the Tenant to move had failed.

The Tenant confirmed receipt of the 10 Day Notice by registered mail. He did not make application to have this 10 Day Notice cancelled; rather, he applied to have the 1 Month

Notice cancelled which he received posted to his door back on June 3, 2013. He stated that he did not know why he waited to apply to have the 1 Month Notice cancelled.

The Tenant testified that he did not move out of the rental unit on July 1, 2013, as previously agreed, because he had to cancel his plans to travel to his parent's after the Landlord cashed his July rent cheque. He argued that the Landlord kept the money he cashed from the June 25, 2013 Income Assistance cheque so his July rent was paid, so this would have allowed him to continue living in the rental unit. He confirmed that his rent was not paid for the month of August and that he continues to reside in the rental unit pending the outcome of this proceeding.

The Tenant submitted that he had several problems with the exterior motion lights not working. He alleged that he had verbally reported the problem to the Landlord on many occasions and nothing was done to fix the problem. He later found out that there was a light switch inside the upper floor where the Landlord would turn on and off to control his exterior motion lights. He said he argued with the Landlord about keeping the light switch turned on so he could see late at night when he took his dog out to go to the bathroom. He said he continued to pay money to buy batteries for his flashlight and he was tired of spending his food money on batteries to see so he chose not to use his flashlight anymore. He confirmed he never put his concerns about the lighting in writing and he never made an application for dispute resolution to seek assistance with this issue. Instead, he attempted to install Christmas lights to increase the light but that did not work for long.

Then on June 28, 2013, he went outside around 11:00 p.m. or 12:00 p.m. to take his dog out and he fell down the stairs because the light was not working. He argued that he suffered injuries as a result of this fall but did not go to the hospital right away because he wanted to wait until he could compile his evidence for his claim. He said he waited until his friend could come over and take pictures and video of the area. He stated the stairs were not maintained properly which caused him to trip in the dark and fall. He went to the hospital the next day, as supported by his medical reports provided in his evidence.

The Tenant submitted a statement of claim for \$25,000.00 which included claims for punitive damages, pain and suffering, payment for scars, injuries suffered by his dog, future vet bills, loss of access to the washer and dryer, and for spoiled food due to the power being turned off. The Tenant said he could not provide testimony about all of the items listed on his claim because his daughter created this list but said he should be compensated for the his injuries, the spoiled food, and loss of use for the washer and dryer for the month of August because he has been washing his clothes in the bathtub.

The Landlord stated that the Tenant has filed a claim against his house insurance so he did not understand why he could make another claim here. He argued in his written statement that this fall was staged in retaliation against him making the Tenant move out. He said the Tenant did not inform him of the alleged fall until five days after it allegedly occurred, on the morning of July 3, 2013, when he received a note from the

Tenant demanding two days hotel, a round trip ticket on Grey Hound, and cab fare. Then on the afternoon of July 3rd he received another note which indicated the Tenant had filed a claim against his house insurance.

The Landlord stated he does not recall the Tenant ever complaining about the motion light, in fact there are three lights located around the house so there is plenty of light. He confirmed that there is a light switch upstairs that controls the motion lights but this switch is left on 24/7 and is never turned off.

The Landlord confirmed that he turned the power off but that it was for only 1 ½ to two hours at the most and not forty or fifty hours as claimed by the Tenant. He said he had to turn the power off because he was replacing a breaker switch and two lights. He acknowledged that he did not give the Tenant notice of this power outage but argued that it was not off long enough to spoil food.

The Landlord stated that the Tenant had access to the washer and dryer in July and that his access was cut off as of August 1, 2013 because the Tenant continues to refuse to move out.

The Tenant confirmed that he delayed a few days before telling the Landlord about his fall because he wanted to compile evidence to sue the Landlord before the Landlord had a chance to fix anything.

Analysis

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Landlord's Claim

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 or the tenancy ends.

In this case the Tenant received the 10 Day Notice on approximately July 27, 2013; therefore, the effective date of the Notice is **August 6, 2013** in accordance with section 90 of the Act. The Tenant did not pay the outstanding rent and did not dispute the 10

Day 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 46(5) of the Act. Accordingly, I approve the Landlord's request for an Order of Possession for unpaid rent.

In determining the matter of whether the July 2013 rent payment was returned to the Tenant I turned to the following test:

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.

Upon review of all of the evidence before me I favor the testimony of the Tenant who said the Landlord cashed the June 25, 2013 cheque and kept the money over the Landlord's testimony where he claimed he gave the cash to the Tenant, without putting the transaction in writing. I favored the Tenant's evidence in part because I find the Landlord's explanation about the alleged transaction to be improbable given the circumstances explained to me during this proceeding. I make this finding in part because weeks earlier the Landlord had given the Tenant his security deposit and \$40.00 and put that transaction in writing. Also, the Landlord issued a 10 Day Notice for unpaid rent on July 25, 2013, almost one full month after cashing the July rent cheque, and he did not include an amount for the alleged unpaid July rent. I further note that the Landlord did not lock the Tenant out of the laundry room until August 1, 2013, when August rent was not paid. Therefore, I find there to be insufficient evidence to support the Landlord's claim for unpaid rent for July 2013, and that claim is dismissed, without leave to reapply.

The Tenant did not dispute that he owed the Landlord \$180.00 for a short payment of April 2013 rent. Therefore, in the presence of undisputed testimony, I award the Landlord for April 2013 unpaid rent in the amount of **\$180.00**.

The Tenant readily admitted that he continues to reside in the rental and has not paid rent for August 2013. I find this to be in breach of section 26 of the Act. Accordingly, I award the Landlord unpaid rent for August 2013 in the amount of **\$750.00**.

The Landlord has filed seeking compensation for September 2013 rent. The Landlord has the onus to re-rent the unit as soon as possible; therefore, I find this claim to be

premature. If the Landlord suffers a loss for September rent due to future actions by the Tenant, then the Landlord is at liberty to make a future claim for such a loss.

The Landlord has been partially successful with their application; therefore I award partial recovery of the filing fee in the amount of **\$25.00**.

The Landlord has been awarded a monetary amount in the amount of (\$180.00 + \$750.00 + \$25.00) **\$955.00**.

Tenant's Claim

In this case the Tenant received the 1 Month Notice on June 3, 2013, but he did not file his application to dispute the Notice until July 15, 2013. When a tenant receives a 1 Month Notice to end tenancy for Cause they have (10) days to make application to dispute the Notice or the tenancy ends. Accordingly, I dismiss the Tenant's request to cancel the 1 Month Notice.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

In many respects the covenant of quiet enjoyment is similar to the requirement on the landlord to make the rental units suitable for occupation which warrants that the landlord keep the premises in good repair. For example, failure of the landlord to give notice that the power will be shut off could be seen as a breach of the covenant of quiet enjoyment because the Tenant's use of power would be denied during that time.

In this case, the Tenant has the burden to prove he suffered a loss due to an extended period of time when his power was shut off. The undisputed evidence before me was verbal testimony that the power was shut off without notice for a short period of 1 ½ to 2 hours.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Accordingly, I accept the undisputed evidence that the power was shut off for a period up to two hours, without proper notice. Therefore, I award the Tenant loss of quiet enjoyment in the amount of **\$5.00**, in accordance with section 67 of the *Act*.

There is insufficient evidence to support that the Tenant suffered a loss for the cost of spoiled food. Therefore, his claim for spoiled food is dismissed without leave to reapply.

Section 27 stipulates that a landlord must not terminate or restrict a service or facility if that service or facility is essential to the tenant's use of the rental unit as living accommodation or providing the service or facility is a material term of the tenancy agreement.

The undisputed testimony was the Tenant was locked out of the Laundry room since August 1, 2013. As noted above, this tenancy ended August 6, 2013, the effective date of the 10 Day Notice. Therefore, the Tenant suffered a loss of services for six days (August 1 – August 6, 2013), and is therefore entitled to compensation. Accordingly, I award the Tenant compensation for the loss of laundry services in the amount of **\$20.00**, in accordance with section 67 of the Act.

The Tenant has claimed \$5000.00 for punitive damages relating to a fall that allegedly occurred at the rental unit on June 28, 2013. This dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of the *Residential Tenancy Act*. The *Residential Tenancy Act* does not provide for claims for punitive damages; therefore, I decline to hear this claim for want of jurisdiction.

Residential Tenancy Policy Guideline # 16 stipulates that an Arbitrator may award aggravated damages when a party proves they have been wronged or have suffered an injury caused by a wrongdoer's willful or reckless indifferent behavior.

The remainder of the Tenant's claim relates to pain and suffering or aggravated damages for alleged injuries suffered by the Tenant and his dog due to an alleged fall. As noted above, an applicant who claims for damages must prove the other party violated the Act, regulation, or tenancy agreement; and the party making the application did whatever was reasonable to minimize the damage or loss.

In this case, I find there is insufficient evidence to prove the Landlord was notified of the Tenant's concern about a lack of lighting or that the motion lights were being turned off. Furthermore, I note that the Tenant delayed in telling the Landlord of the alleged fall for five days, and the Tenant made no attempt to rectify the situation during that time. Accordingly, I find the Tenant did not mitigate the potential for loss. I further find that there is insufficient evidence to prove the Landlord displayed willful or reckless indifferent behavior which caused the Tenant to suffer an injury. Furthermore, there is insufficient evidence to prove the Tenant suffered a loss due to the Landlord's violation of the Act. Therefore, I dismiss the Tenant's claim for aggravated damages, without leave to reapply.

The Tenant has been awarded monetary compensation in the amount of (\$5.00 + \$20.00) **\$25.00**.

Monetary Order – I find that the monetary claims listed above meet the criteria under section 72(2)(b) of the Act to be offset against each other as follows:

Landlord's monetary award	\$955.00
Less the Tenant's monetary award	<u>-25.00</u>
Offset amount due to the Landlord	<u>\$930.00</u>

Conclusion

The Landlord is issued an Order of Possession effective **Two (2) Days upon service**. This Order is legally binding and must be served upon the Tenant. In the evidence 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 **\$930.00**. 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.

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: August 19, 2013

Residential Tenancy Branch

