



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

INTERIM DECISION

Dispute Codes

OPR OPC MNR MNSD MNDC FF
CNC CNR MNDC ERP RP LRE AS RR FF

Preliminary Issues

At the outset of this proceeding the Landlord, S.G., disclosed that she has been called to the bar and is a practising lawyer in the same city as the rental property. She indicated that she practises law in her maiden name S.M. so the style of cause was amended to include S.G.'s maiden name, pursuant to section 64(3)(c) of the Act. She has attended this proceeding in her capacity as Landlord and not as legal counsel.

The Tenant D.H. attended and advised that his co-tenant N.C. would not be attending this proceeding due to an illness. He confirmed that he would be representing himself and N.C. during this proceeding.

Upon review of the Landlords' application for dispute resolution I find the Tenants were properly informed of the Landlords' intent of seeking money owed or compensation for damage or loss under the act regulation or tenancy agreement, for the use and occupancy and any loss of rent for December 2013, as the Landlords wrote in the details of the dispute they were seeking unpaid rent for October, November, and December.

Based on the aforementioned I find the Landlords made a clerical error in not selecting the box *for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement* in addition to selecting the box to claim *unpaid rent*. Therefore I amend the application to include a request for *money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement*, pursuant to section 64(3)(c) of the Act.

Residential Tenancy Rules of Procedures state 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 or adjourn any unrelated disputes contained in a single application.

I have determined that I will not deal with all the dispute issues placed on the Tenants' applications during this convening of the hearing. Not all the claims on this application are sufficiently related to the main issue relating to the Notices to end tenancy.

Therefore, I will deal with the requests to either uphold or set aside the 10 Day Notices to end tenancy; the 1 Month Notice to end tenancy; the Landlords' request for a monetary order for unpaid; and will determine at the end of this decision which matters will be heard at the reconvened hearing.

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlords and by the Tenants.

The Landlords filed their application on December 3, 2103, to obtain Orders of Possession for unpaid rent or utilities and for cause; and, to obtain a Monetary Order for: unpaid rent or utilities; to keep the security deposit; 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 Tenants for their application.

The Tenants filed their initial application on November 7, 2013, to cancel a Notice to end tenancy for unpaid rent; to obtain a Monetary Order for compensation for damage or loss under the Act, regulation or tenancy agreement; to Order the Landlord to make repairs and emergency repairs to the unit, site or property; to suspend or set conditions on the Landlords' right to enter the rental unit; to all the Tenants to sublet the unit; to reduce rent for repairs or services or facilities agreed upon but not provided; and to recover the cost of the filing fee from the Landlords for their application. The Tenants amended their application November 18, 2013 and December 06, 2013 to request to cancel the 1 Month Notice issued for cause and the second 10 Day Notice.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. Although the Tenants had received all of the Landlords' documentary evidence, not all the Landlords' evidence had made it to the *Residential Tenancy Branch* files prior to the commencement of this proceeding. There was an electronic record that the Landlords' last 40 page submission was received by the *Residential Tenancy Branch* on December 12, 2013, however, it was not before me at the time of the hearing. I informed both parties that I would be considering all the evidence that had been received prior to December 18, 2013, when making my decision; pursuant with rule # 11 of the *Residential Tenancy Branch Rules of Procedure*.

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, and respond to each other's testimony. 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 Notices for unpaid rent or utilities issued November 2, 2013, and December 2, 2013, be upheld or cancelled?
- 2) Should the 1 Month Notice to end tenancy issued November 4, 2013, be upheld or cancelled?
- 3) If any of the Notices are upheld, should the Landlords be granted an Order of Possession?
- 4) Have the Landlords proven entitlement to a Monetary Order for unpaid rent?

Background and Evidence

The Landlords testified that the rental house consists of three floors, the upper floor which has a separate entrance, the main floor and the basement. The Landlords were advised in 2012 that the upper floor could not be used as a separate self contained suite as it did not meet municipal requirements; therefore, the upper floor could only be occupied by family members of those who would be occupying the main floor of the house.

The undisputed evidence confirmed that the parties entered into a written fixed term tenancy agreement for the main floor and basement of the house. The Tenants signed the tenancy agreement on July 23, 2013, for the term which was to begin on August 1, 2013, and switch to a month to month tenancy after July 31, 2014. Rent was payable on the first of each month in the amount of \$1,200.00 and on July 26, 2013, the Tenants paid \$600.00 as the security deposit. No move in condition inspection report form was completed at that time.

The Landlords submitted that after signing the tenancy agreement they entered into negotiations with the Tenants to allow the Tenants' mother / mother-in-law to move into the upper level; in exchange, the rent would be increased to \$1,500.00 per month and the security deposit increased by \$150.00 for a total deposit of \$750.00. The Landlords pointed to page 22 of their evidence which included an e-mail dated August 21, 2013, which indicates the parties would draw up a new tenancy agreement agreeing to the new, aforementioned, terms. The Landlords indicated this new arrangement would meet

municipal requirements because the upper level would be occupied by the Tenants' family member under one tenancy agreement which would cover the entire house.

The Tenants paid the \$1,500.00 for September 1, 2013, rent and advised the Landlords that their mother-in-law's move-in date would be delayed until she could make her final arrangements to leave her previous unit. When October rent was not paid on time the Landlords engaged in various texting and e-mail communications with the Tenants to make arrangements to collect rent. It was on October 4, 2013, that the Landlords were told that the mother-in-law did not move into the upper level which caused the Tenants financial struggles. After further communications the Landlords agreed on October 10, 2103, to allow the Tenants to pay the full October and November rent of \$3,000.00 on November 1, 2013.

On November 1, 2013 at 9:15 a.m. the Landlords contacted the Tenants and informed them that rent had not been deposited into their account and requested that rent be paid forthwith. The Landlords issued the 10 Day Notice on November 2, 2013 and posted it to the Tenants' door for \$2,400.00 for the October and November 2013 rents (2 x \$1,200.00). At 7:24 p.m. on November 2, 2013, the Landlords received a message from the Tenants indicating that they had not gotten to the bank to pay rent because N.C. had fallen and broken her arm.

The Landlords argued that they found out about a male occupant living in the upper level when they attended the property on November 4, 2013. They determined that the Tenants had represented themselves as owners of the property and sublet the unit without their permission. They posted a 1 Month Notice to end tenancy for cause, for subletting the unit without permission, on November 4, 2013. They noted that in their evidence is a copy of a letter dated November 20, 2013, issued to the male occupant of the upper level of the rental property. This letter confirms that their Tenants had sublet the upper level to this person and had collected a security deposit and rent, without their written permission.

The Landlords stated that when no rent was paid for December 1, 2013, a 10 Day Notice for December was posted to the Tenants' door, on December 2, 2013. They argued that the Tenants have paid no money towards October, November or December rent; therefore, they are seeking a monetary order and an Order of Possession.

The Tenant testified and stated that on November 1, 2013, N.C. made arrangements to meet with the Landlord S.G. on November 2, 2013. It was during that meeting that N.C. gave S.G. \$3,000.00 cash as payment for September and October rent. He pointed to his evidence which included a letter from N.C.'s sister which indicates she was present

and witnessed N.C. pay S.G. the rent. He confirmed that no other evidence was provided to support this payment. He noted that he provided the money to N.C. but does not know the exact details of how it was paid to the Landlords. As for December 2013 rent, the Tenant argued that he attempted to pay his portion of the rent but the Landlord M.G. refused to accept it. He later clarified that he gave the money to N.C. and she attempted to pay M.G. on December 2, 2013.

The Tenant argued that “his tenant” was told by the Landlords not to pay his rent. He confirmed that the person he referred to as “his tenant” was occupying the upper level of the rental house and was not his mother or mother-in-law. The Tenant stated that during this proceeding he was searching through the evidence for an e-mail which gave them permission to have someone other than the mother-in-law move into the upper level; but he could not locate one. He kept referring to an e-mail which indicates simply that the mother-in-law had not yet moved and alleged that the full e-mail had not been provided in the Landlords’ evidence.

The Landlords argued that there is no evidence to prove there was a telephone conversation on November 1, 2013, between S. G. and N.C. to arrange a meeting on November 2, 2013. S.G. denies attending a meeting at the rental unit on November 2, 2013, and noted that there is evidence provided of a message on November 2, 2013 at 7:24 p.m. sent by the Tenants which clearly states that they did not get to the bank yesterday to deposit rent. That message makes no mention of a meeting which allegedly took place earlier that day when rent was supposedly paid; rather it is an excuse or explanation as to why rent was not paid. S.G. read a series of text messages and e-mails into evidence and noted how there are no references of the \$3,000.00 cash payment.

In closing, the Tenant said he was prepared to pay “his portion” of the rent separate from his tenant’s portion if he only knew what that amount should be. At that time the hearing time was about to expire and I informed both parties that I would be issuing an interim decision and would be reconvening the hearing to a future date to hear any remaining issues. I informed them that the interim decision would be sent out separately from the notices of reconvened hearing.

Both parties were instructed not to submit additional evidence and not amend their applications, as I will not consider any more amendments or evidence. If either party has reason to seek dispute resolution for any other matters they are at liberty to make application for a new proceeding, which cannot be attached to this proceeding.

Analysis

Section 1 of the Act defines a landlord, in relation to a rental unit, to include any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
 - (i) permits occupation of the rental unit under a tenancy agreement, or
 - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) **a person, other than a tenant occupying the rental unit, who** [emphasis added]
 - (i) is entitled to possession of the rental unit, and
 - (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
- (d) a former landlord, when the context requires this;

In this case the evidence supports the Tenants knew the upper level could not be rented out under a separate tenancy and that only their family member could reside in that unit. Despite that knowledge the Tenants entered into a tenancy agreement for occupation of the upper level of the rental home, with an unrelated third party, and without the Landlords written consent.

An occupant is defined in the *Residential Tenancy Policy Guideline Manual*, section 13 as follows: where a tenant allows a person who is not a tenant to move into the premises and share the rent, *the new occupant has no rights or obligations under the original tenancy agreement*, unless all parties (owner/agent, tenant, occupant) agree to enter into a tenancy agreement to include the new occupant as a tenant.

Based upon the aforementioned, I find the third party whom the Tenants allowed to occupy the upper level of the rental house does not meet the definition of a tenant; rather he is an occupant; and therefore, the *Residential Tenancy Act* does not govern that arrangement.

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*.

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.

In this case, I favor the evidence of the Landlords over the evidence of Tenants pertaining to whether a \$3,000.00 cash payment for October and November 2013 rent, was made on November 2, 2013, by N.C. I favor the Landlords evidence because it was forthright and credible and consistent with the documentary evidence before me. The only documentary evidence provided by the Tenants in support of the alleged payment was a letter written by N.C.'s sister. This letter holds very little evidentiary weight for the following reasons: (1) it was written by the Tenant's sister; (2) it states that:

"On Nov 2nd/2013 I was at N... home visiting with the children. While I was there N... landlord came to get her rent money, sometime midday. I witnessed N... giving her landlord money at her front door".

and (3) this statement is contrary to the documentary evidence dated November 2, 2013 at 7:24 p.m. which indicates the Tenants had not gotten to the bank yesterday to deposit rent because of a fall suffered by N.C.; there is no mention of rent being paid earlier that day. The alleged meeting or payment was not supported by any other documentary evidence, such as phone records; text messages; e-mails; bank withdrawal receipts. Additional documentary evidence was provided which makes no mention of this alleged meeting or payment. Furthermore, at the end of December 18, 2013 hearing the Tenant admitted that he had not paid "their portion" of the December 2013 rent.

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.

Therefore, on a balance of probabilities, I find the Tenants' explanation of how \$3,000.00 of rent was allegedly paid in cash on November 2, 2013, to be improbable, based on the submissions before me. Rather, I find the Landlords' argument that the Tenants have failed to pay rent for October, November, and December, 2013, to be plausible given the circumstances presented to me during the hearing.

Section 14 of the Act stipulates as follows:

- (1) that a tenancy agreement may not be amended to change or remove a standard term.
- (2) provides that a tenancy agreement may be amended to add, remove or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment.
- (3) The requirement for agreement under subsection (2) does not apply to any of the following:
 - (a) a rent increase in accordance with Part 3 of this Act;
 - (b) a withdrawal of, or a restriction on, a service or facility in accordance with section 27 *[terminating or restricting services or facilities]*;
 - (c) a term in respect of which a landlord or tenant has obtained an order of the director that the agreement of the other is not required.

I accept the evidence before me that the parties mutually agreed to increase the rent to \$1500.00 per month to accommodate the mother-in-law moving into the upper level. This agreement was not put in writing and signed by all parties. Furthermore, the mother-in-law did not move into the upper level. Therefore, I revert to the written tenancy agreement signed by both parties, which stipulates rent is \$1,200.00 per month and includes possession of the main floor and basement of the house.

Landlords' Application

Upon review of the two 10 Day Notices to end tenancy for unpaid rent and the 1 Month Notice to End Tenancy for Cause, I find these Notices to be completed in accordance with the requirements of the Act and I find that they were served upon the Tenants in a manner that complies with the Act.

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 Tenants are deemed to have received the first 10 Day Notice on November 5, 2013, three days after it was posted to their door, and the effective date of the Notice is **November 15, 2013**, in accordance with section 90 of the Act.

I find the evidence supports that the Tenants did not pay the rent within the five day period. Although they have applied to dispute the 10 Day Notices; they have not met the burden to prove relief from their requirement to pay rent. Therefore, the Tenants were 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.

The Landlords issued the first 10 Day Notice seeking unpaid rent of \$2,400.00 which was due November 1, 2013 (2 x \$1,200.00). The Tenants failed to pay rent in accordance with the tenancy agreement which is a breach of section 26 of the *Act*. Accordingly, I award the Landlords a Monetary Award for unpaid rent of **\$2,400.00**.

As noted above this tenancy ended **November 15, 2013**, in accordance with the 10 Day Notice. Therefore I find the Landlords are seeking money for use and occupancy of the unit for December 2013, not rent. The Tenants are still occupying the unit which means the Landlords will not regain possession until after service of the Order of Possession and they will have to work to find replacement tenants. Therefore, I find the Landlords are entitled to use and occupancy and any loss of rent for the entire month of December 2013, in the amount of **\$1,200.00**.

As I have awarded an Order of Possession based on the 10 Day Notice issued November 2, 2013; there is no need to analyze the remaining 10 Day Notice or the 1 Month Notice. Furthermore, there is no need to issue additional Orders of Possession as this tenancy has been ordered to end.

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

Any deposits currently held in trust by the Landlord are to be administered in accordance with Section 38 of the *Residential Tenancy Act*.

Tenants' Application

As noted above I have upheld the 10 Day Notices and ended the tenancy. Accordingly, I dismiss the Tenants' application to cancel all three Notices, without leave to reapply.

The Tenants' requests for orders to have repairs, emergency repairs, suspend landlords' access or right to enter the unit, allow them to sublet, and future reduced rent,

are all moot now as this tenancy has been ordered to end in accordance with section 55 of the Act.

The only outstanding item from these cross applications is the Tenants' request for a \$500.00 monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, which will be discussed at the reconvening of this proceeding.

Conclusion

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

The Landlords has been awarded a Monetary Order in the amount of **\$3,650.00** (\$2,400.00 + \$1,200.00 + \$50.00). This Order is legally binding and must be served upon the Tenants.

Notices of the reconvened hearing will be mailed out separately to each party. 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: December 19, 2013

Residential Tenancy Branch

