



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

CNR MNDC OLC PSF
OPR MNR MND FF

Preliminary Issues

Upon review of the Tenant's amended application dated January 14, 2014, the Tenant affirmed that she attended the *Residential Tenancy Branch* to amend her application to dispute a 10 Day eviction Notice and to increase the amount of her monetary claim. She does not know why the box to dispute the 10 Day Notice was not checked off at that time. She requested that I amend her application to include her request to dispute the 10 Day Notice.

The Landlord's Agent, (hereinafter referred to a Agent), stated that he did not dispute the Tenant's request to amend her application because he was prepared to discuss the eviction Notice as part of their application.

Based on the above, I find that neither party will be prejudiced if the Tenant's application is amended to include her request to dispute the 10 Day Notice. Accordingly, her application was amended, pursuant to section 64(3)(c) of the *Act*.

Upon review of the Landlord's application she lists in the details of her claim the amounts she is claiming for unpaid rent for November and December 2013 and January 2014.

Based on the aforementioned I find the Landlord had an oversight or made a clerical error in not selecting the box to seek *money for unpaid rent* when completing the application, as she clearly indicated her intention of seeking to recover the payment for November, December, and January rent in the details of the dispute. Therefore, I amend the Landlord's application to include a request for a monetary order for unpaid rent, pursuant to section 64(3)(c) of the *Act*.

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.

For disputes to be combined on an application they must be related. Not all the claims on each of the Landlord's and Tenant's applications are sufficiently related to the main issue relating to the 10 Day Notice to end tenancy. Therefore, I will deal with the Tenant's request to set aside or cancel the Landlord's 10 Day Notice to End Tenancy and the Landlord's request for an Order of Possession for unpaid rent and Monetary Order for unpaid rent and I dismiss the balance of each of their claims with leave to re-apply.

Introduction

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

The Landlord filed on December 17, 2013, seeking an Order of Possession for unpaid rent or utilities and a Monetary Order for: unpaid rent; and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed on December 5, 2014, amended that application on January 14, 2014, and requested another amended during this proceeding on January 28, 2014, seeking an Order to cancel the notice to end tenancy for unpaid rent.

This hearing dealt with an Application for Dispute Resolution by the Tenants to obtain a Monetary Order for the return of their security deposit.

The parties appeared at the teleconference hearing. The Landlord confirmed receipt of the Tenant's application and evidence. The Tenant confirmed receipt of the registered mail package sent from the Landlord however she denied receiving a copy of the Landlord's application for dispute resolution, the hearing documents, and the two pages of e-mails, which included a photograph.

The Agent affirmed that the Tenant was sent the exact same documents that were sent to the *Residential Tenancy Branch*. I note that the Landlord's evidence package that was sent to the *Residential Tenancy Branch* included a copy of the Landlord's application and hearing documents.

Upon review of the above, I favor the Agent's evidence over the Tenant's evidence because the Agent's evidence was forthright and consistent with the information that is provided to a landlord when they make application for dispute resolution. That is to say that an applicant for dispute resolution is instructed to provide the exact same documents to the respondent as they provide the *Residential Tenancy Branch*.

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 the manner in which the Landlord's evidence bundled and how it was served upon the *Residential Tenancy Act*, I find the Agent's testimony that the Tenant was served the application and hearing documents in the same envelope as "all" the Landlord's evidence to be plausible given the circumstances presented to me during the hearing. Accordingly, I find the Tenant was sufficiently served with the Landlord's application and notice of the hearing being set for the same time as the Tenant's application was to be heard.

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, is the Landlord entitled to an Order of Possession?
3. Is the Landlord entitled to a Monetary Order?

Background and Evidence

The Landlord submitted evidence that the parties entered into a written fixed term tenancy agreement that began on November 1, 2008 and switched to a month to month tenancy after November 1, 2009. Rent is payable on the first of each month in the

amount of \$1,000.00 and on November 1, 2008 the Tenant paid \$500.00 as the security deposit.

The Tenant testified that she was initially sent an e-mail telling her that the Landlord wanted her to move out as of February 1, 2014 because the Landlord was going to sell the rental unit. No official eviction notice was issued with this e-mail.

The Tenant stated that shortly after receiving the above mentioned e-mail she received a 10 Day Notice to end tenancy. She stated that she had the Notice in front of her and that it was signed by the Landlord on December 9, 2103 and that she found that Notice taped to her door on the same date. The Notice was issued indicating that the Tenant had not paid \$1,000.00 in rent that was due on November 1, 2013.

The Agent testified that they had provided evidence of the Tenant's NSF rent cheques from October, November, and December, 2013. He argued that as of today's date the Tenant owes \$4,000.00 in unpaid rent as she did not replace the NSF cheques and has not paid January 2014 rent (4 x \$1,000.00).

The Tenant confirmed that she has not paid rent for November and December 2013, or January 2014. She argued that after the October 2013 cheque was returned she sent the Landlord an e-mail transfer. The Tenant indicated that she had not paid rent because she had paid over \$3,000.00 in repairs to this unit. She confirmed that she did not have the Landlord's written permission to paint the unit and did not have the Landlord's permission to conduct repairs.

The Tenant stated that she has made arrangements to vacate the unit by February 1, 2014 and that she would like to enter into an agreement with the Landlord to stay until then.

The Agent said he would be willing to let the Tenant stay in the unit until January 31, 2014 if she was going to pay the outstanding rent. If no rent was going to be paid then he wanted an Order of Possession for as soon as possible.

The Tenant stated that she did not have any money to pay the Landlord rent because she is currently out of work.

Analysis

Tenant's Application

I have reviewed all documentary evidence and accept that the Tenant was served with the 10 Day Notice to end tenancy. The notice was received by the Tenant on December 9, 2013, and the effective date of the notice is **December 19, 2013**, pursuant to section 46 of the *Act*.

By the Tenant's own admission, she has not paid rent for November and December 2013 or for January 2014. Accordingly, I accept the evidence before me that the Tenant has failed to pay the rent owed in full within the 5 days granted under section 46 (4) of the *Act*.

Based on the foregoing, I find the Tenant has provided insufficient evidence to cancel or set aside the 10 Day Notice. Therefore, I dismiss her application to dismiss the Notice, without leave to reapply.

Notwithstanding my finding that the Tenant was sufficiently served with the Landlord's application for dispute resolution, section 55 of the *Act* provides that an Order of Possession must be provided to a Landlord if a Tenant's request to dispute a Notice to End Tenancy is dismissed and the Landlord makes an oral request for an Order of Possession during the scheduled hearing. Accordingly, I approve the Agent's request for an Order of Possession for as soon as possible.

Landlord's Application

The Landlord's request for an Order of Possession has been granted, as noted above.

The Landlord claimed unpaid rent of \$2,000.00 which was due November 1, 2013 and December 1, 2013 (2 x \$1,000.00). The undisputed evidence is the Tenant failed to pay rent in accordance with the tenancy agreement, which is a breach of section 26 of the *Act*. Accordingly, I award the Landlord a Monetary Award for unpaid rent of **\$2,000.00**.

As noted above this tenancy ended **December 19, 2013**, in accordance with the 10 Day Notice. Therefore I find the Landlord is seeking money for use and occupancy of the unit for January 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 they 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 January 2014, in the amount of **\$1,000.00**.

The Landlord did not make application to claim for unpaid rent for October 2013, therefore, I dismiss the Agent's request for October 2013 rent, without leave to reapply.

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

Conclusion

I HEREBY FIND that the Landlord is entitled to an Order of Possession effective **two days after service on 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 **\$3,050.00** (\$2,000.00 + \$1,000.00 + \$50.00). 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 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: January 28, 2014

Residential Tenancy Branch

