



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC OPB MNR MNSD O FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed on November 12, 2013, by the Landlord to obtain Orders of Possession for cause and breach of an agreement. The Landlord is also seeking to obtain a Monetary Order for: unpaid rent; to keep the security deposit; for other reasons 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 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. Is the Landlord entitled to an Order of Possession?
2. Is the Landlord entitled to a Monetary Order?

Background and Evidence

The Landlord testified that the Tenant entered into a month to month tenancy that began on June 1, 2013. Rent is payable on the first of each month in the amount of \$1,200.00 and the Tenant paid only \$400.00 of the required \$600.00 security deposit in cash.

The Landlord stated that after the municipality completed an inspection of his property he was required to evict the Tenant and his roommates. As a result, he personally served the Tenant with a 1 Month Notice to end tenancy for cause on September 1, 2013. He later attended the unit and the Tenant requested permission to stay in the unit until the end of October 2013, so the Landlord wrote out a notice stating the Tenant would vacate at the end of October and had the Tenant sign it. A copy of this note was provided in his evidence along with a copy of the 1 Month Notice.

The Landlord confirmed that he was also seeking a monetary order for unpaid rent. He stated that in December 2013, Welfare issued him two cheques, which he has cashed. The first cheque of \$300.00 was received December 5 or 6th, 2013, and the second \$300.00 cheque was received on December 18, 2013. No rent was received for the month of November, 2013; however, the full rent was paid for the previous months.

The Tenant testified that he did not receive the 1 Month Notice for cause until September 5, 2103. He confirmed that he did not make application to have the Notice cancelled and argued that he did not know he had to make an application. He initially stated that he received a 2 Month Notice for Landlord's Use and then immediately changed his testimony to say it was a 1 Month Notice for breach of an agreement.

The Tenant confirmed having a discussion with the Landlord around the beginning of October but he denies signing a paper agreeing to move out. He confirmed receiving this document in the Landlord's evidence and argued that it was not his signature on the document.

The Tenant disputed the Landlord's statement about the security deposit and argued that he paid the full \$600.00 in cash. He stated that he always paid the rent in full until the Landlord went to the welfare office and stopped his and his roommate's cheques. The welfare office called him and asked if it would be okay to issue his cheque directly to the Landlord which is why the Landlord received the payments in the mail in December 2013. He said he could not speak for his roommates' cheque arrangements but he remembers that they paid November 2013 rent late, around the 24th of November, after they all went in and got their cheques restarted. He was not issued receipts for his cash payments.

Analysis

Upon review of the 1 Month Notice to End Tenancy, I find the Notice was served upon the Tenant in a manner that complies with section 89 of the Act.

Section 47(4) of the Act stipulates that a tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

In this case, the Tenant acknowledges receipt of the Notice as of September 5, 2013; therefore, he would have had to file an application for dispute no later than September 15, 2013. The Tenant stated he had not made application to dispute the Notice.

Section 47(5) of the Act stipulates that if a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and (b) must vacate the rental unit by that date.

Section 53(2) of the Act provides that incorrect effective dates of Notices to End Tenancy are automatically changed to the earliest date that complies with the Act. Therefore, in this case the 1 Month Notice to End Tenancy that was issued on September 1, 2013, but not received until September 5, 2013, would have an effective date of **October 31, 2013**.

In addition to the above Notice to end tenancy issued by the Landlord, the evidence included a note allegedly signed by the Tenant, indicating he would be moving out of the rental unit at the end of October, 2013, and the Tenant paid the full amount of rent for the month of October 2013.

Residential Tenancy Policy Guideline # 11 provides that a landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. A Notice to end tenancy may only be withdrawn or abandoned prior to its effective date if consent from both parties is obtained.

I favor the evidence of the Landlord regarding the Tenant's note to move out at the end of October 2013, over the Tenant's evidence; because, the Landlord provided documentary evidence which included the tenancy agreement which display the same signature on the Tenant's note.

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.

I find the Tenant's explanation that he did not enter into an agreement to extend his tenancy to avoid eviction or that he actually paid rent for November 2013, to be improbable. Rather, I find the Landlord's explanation that he agreed to allow the Tenant and his roommates to stay to the end of October 2013 and that no rent was paid for November 2013, to be plausible given the circumstances presented to me during the hearing.

As per the aforementioned, I find this tenancy ended as of the effective date of the Notice to End Tenancy for Cause and the Tenant's Notice, of **October 31, 2013**, and I award the Landlord an Order of Possession.

As noted above this tenancy ended **October 31, 2013**; therefore, I find the Landlord is seeking money for use and occupancy of the unit for November and December 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 for November, December, and up to January 15, 2014, in the amount of **\$3,000.00** (2 x \$1200.00 + \$600.00 for half of January 2014). This amount will be reduced by the \$600.00 already received by the Landlord.

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, the Landlord has the burden to prove the Tenant only paid \$400.00 of the \$600.00 of the security deposit. The Tenant disputed the Landlord's testimony and argued that he paid the full \$600.00. In absence of proof to the contrary, I turned to the written tenancy agreement which indicates the Tenant paid \$600.00 for the security deposit on June 1, 2013. Accordingly, I find the Landlord is currently holding \$600.00 as the security deposit.

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 Tenant's security deposit plus interest as follows:

| | |
|--|--------------------------|
| Use and Occupancy & Loss of Rent | \$3,000.00 |
| Filing Fee | <u>50.00</u> |
| SUBTOTAL | \$3,050.00 |
| LESS: Welfare Payments (2 x \$300.00) | -600.00 |
| LESS: Security Deposit \$600.00 + Interest 0.00 | <u>-600.00</u> |
| Offset amount due to the Landlord | <u>\$1,850.00</u> |

Conclusion

I HEREBY FIND the Landlord is entitled to an Order of Possession effective **Two (2) Days after service upon the Tenant**. 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 Supreme Court and enforced as an Order of that Court.

The Landlord has been awarded a Monetary Order for **\$1,850.00**. 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: January 02, 2014

Residential Tenancy Branch

