



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNSD FF
 CNR FF

Preliminary Issues

Upon review of the Landlord's application for dispute resolution the Landlord wrote the following in the details of the dispute:

Amounts owed for rent are 700 for September, 2200 for October and projected rent 2200 for November. Total of 5,100 in rent owed [sic].

Based on the aforementioned I find the Landlord had an oversight or 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* when completing the application, as they clearly indicated their intention of seeking to recover the payment for occupancy after the effective date of the 10 Day Notice. Therefore, I amend the Landlord's application to include the 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.

Introduction

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

The Landlord filed on October 8, 2014, seeking an Order of Possession for unpaid rent and a Monetary Order for: unpaid rent or utilities; to keep all or part of the security deposit; 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 these Tenants for this application.

The Tenants filed on September 22, 2014, seeking an Order to cancel the notice to end tenancy and recover the cost the filing fee from the Landlord for their application.

The hearing was conducted via teleconference and was attended by the Landlord, and two of the Tenants as noted on the first page of this decision. The Landlord advised that his two witnesses were currently in another room waiting to testify if needed. The

Landlord's witnesses were not called, pursuant to the *Residential Tenancy Branch (RTB) Rules of Procedure # 11*.

During the course of this proceeding A.T. announced that he wanted to bring in a witness to testify. As this witness had not been identified at the beginning of the hearing, I declined to have them added to the hearing, pursuant to the *RTB Rules of Procedure # 11*.

Each person gave affirmed testimony. Each Tenant testified that they received the Landlord's evidence by registered mail. Neither Tenant could "recall" receiving or seeing a copy of the Landlord's application but they did receive a "Notice of Hearing" letter.

The Landlord confirmed receipt of the Tenants' application for dispute resolution and their evidence. The Landlord affirmed that he served each Tenant with one package (4 packages in total) which included copies of his application for dispute resolution, the hearing documents, and his evidence, by registered mail. Canada Post receipts were provided in the Landlord's evidence. The Landlord stated that he was at the post office when they picked up the packages and he took a picture of them at that time.

Based on the above, I accepted the Landlord's affirmed testimony that each Tenant was served with a copy of the Landlord's application for dispute resolution, the hearing documents, and his evidence. Accordingly, I considered all documentary evidence that was before me which had been submitted by the Landlord and the Tenants.

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. Has the Landlord proven entitlement to a Monetary Order?

Background and Evidence

It was undisputed that the parties executed a written tenancy agreement and that tenancy agreement, as provided in evidence, indicated the tenancy was for a lease that was scheduled commence on August 21, 2014 and switch to a month to month tenancy

after August 31, 2015. The written agreement indicates the Tenants were required to pay rent of \$2,250.00 on the first of each month and a security deposit of \$1,100.00.

The Landlord testified that rent was to be reduced or discounted to \$2,200.00 per month if the Tenants agreed to do the yard maintenance. He stated that the Tenants viewed the property on two occasions and told him that they wanted to move into the unit as soon as possible. The Landlord submitted that the Tenants had planned to meet at the unit on August 21, 2014 to conduct the inspection, sign the tenancy agreement forms, pay the rent and move in that same day. He said after they completed the forms the Tenants indicated that they could only pay the security deposit of \$1,100.00 and they did not have the money for rent. The Landlord said he issued them a receipt, as provided in his evidence and clearly shows that \$700.00 rent was owed for August rent, and he told them they could not move in until the rent was paid.

The Landlords confirmed that the Tenants showed up on August 29, 2014 with \$2,200.00, for which a receipt was issued noting \$700.00 was owed for September 1, 2014 rent. He argued that he allowed the Tenants to move into the rental unit with the agreement that they would pay the balance owed for September on September 1, 2014.

The Landlord submitted that when the Tenants failed to pay the balance owed of \$700.00 he personally served 3 of the 4 Tenants with a copy of the 10 Day Notice to end tenancy on September 18, 2014. He noted that a 4th copy of the Notice was left with one of the Tenants to give to R.F. He argued that the Tenants remain in possession of the unit and have not paid the balance owed for September or the full amounts that were due October 1st or November 1, 2014.

In support of his application the Landlord submitted documentary evidence that consisted, among other things, copies of: the tenancy agreement, the move in condition inspection report form, the 10 Day Notice, his written submission indicating that the Tenants told him that they would not be paying rent and would not be moving out for several months, and photographs of the outside of the rental unit.

A.T. testified that they paid the Landlord \$2,200.00 cash and that no receipt was received for that payment. He argued that nothing was agreed to in writing for payment of an additional \$700.00 for September 2014 rent. He stated that he was not aware that their tenancy agreement started August 21, 2014 and noted that they did not move into the unit on August 29, 2014; therefore, their initial payment of \$2,200.00 was their full payment for September 2014 rent.

A.T. stated that when they moved into the unit on August 29, 2014, the Landlord had told them they would need to pay \$700.00 for September but after a discussion with all of his roommates they "elected that they would not pay the \$700.00 for the August rent as they were not there". The Tenant pointed to the tenancy agreement # 11 which stipulates the following:

To have and to hold the premises for a 12 month term commencing on the 1st day of September, 2014 and shall end on the last day of August, 2015 at 1p.m.

A.T. continued his argument that they were unaware of the required \$700.00 payment and submitted that all of the Tenants had had enough of the hidden charges when his roommate received notification from the hydro company that they would have to pay the hydro starting from August 21, 2014.

A.T. argued that they never had any intention of occupying the rental unit prior to August 29, 2014. At this point I rephrased the Tenant's testimony and he changed his submission to state that they had initially wanted the unit for as soon as possible after August 14, 2014. He said they changed that plan when they were told that they could not move into the unit until they had the money for the rent. He confirmed that he had been given a copy of the receipt for the security deposit and that it listed the payment of \$700.00 for August. He argued that the Landlord had back dated the tenancy agreement to August 21, 2014, but they did not sign the tenancy agreement papers until August 29, 2014.

At this point of the hearing A.T. proposed a settlement agreement where they would agree to pay the outstanding rent for October and November if the Landlord would agree to let them stay in the unit for another month. After a brief discussion, the Tenant acknowledged he did not have the full \$4,400.00 to pay the Landlord today. Although the Tenant initiated the settlement offer, he began to claim that he did not fully understand the process. The Landlord also confirmed that he was not clear on what a settlement process would be and noted that he was interested in getting possession of the unit as soon as possible and to get it re-rent to prevent further loss of rent.

R.F. testified that they had planned on moving in early, as soon as possible. She stated that the Landlord did tell them that they would have to pay \$700.00 for the prorated rent amount for August and that the Tenants decided that they did not want to pay that so they would move in on August 29, 2014. She initially stated that the only time she was present when money was paid was when they gave the Landlord \$2,200.00 rent for September. She later changed her testimony saying she was present when the security deposit was paid.

In closing, the Landlord summarized that all the papers were signed on August 21, 2014 and the Tenants had planned to move in that day but were surprised when the Landlord would not give them access until the rent had been paid. He said his documentary evidence is clear and supports his position.

Analysis

Section 5 of the *Residential Tenancy Act (RTA)* stipulates that Landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6(3) of the RTA provides that a term of a tenancy agreement is not enforceable if the term is inconsistent with this Act or the regulations, the term is unconscionable, or the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Upon review of the written tenancy agreement I note that there are some terms which are contradictory and that do not comply with the RTA. Specific to the matters before me are the start date of the tenancy as written in the agreement.

The tenancy agreement states as follows:

(At page 1 Line 1)

THIS LEASE is made effective as of the 21st day of August, 2014

(At page 4 Item 11 TERMS)

To have and to hold the premises for a 12 month term commencing on the 1st day of September, 2014 and shall end at the last day of August, 2015 at 1 pm.

In consideration of the foregoing, I find the tenancy agreement does not provide clear information regarding the start date, and therefore that term as written is unenforceable, pursuant to section 6(3) of the RTA.

The *Residential Tenancy Act* defines a “**tenancy agreement**” as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

Section 91 of the Act stipulates that except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia.

Common law has established that oral contracts and/or agreements are enforceable. Therefore, based on the above, I find that the terms of this verbal tenancy agreement are recognized and enforceable under the *Residential Tenancy Act*.

It was undisputed that the parties had discussed that the Tenants would occupy the property as soon as possible and that the Landlord had told the Tenants they would have to pay \$700.00 for the prorated rent.

I favor the evidence of the Landlord, who stated they had attended the rental property on August 21, 2014, with the intent to conduct the move in inspection, sign all documents, and the Tenants would pay the rent and security deposit so they could begin occupying the rental unit immediately. However, the Tenants paid the security deposit but did not have enough money to pay the rent so the Landlord refused to give them possession until they had enough money to pay the rent, as supported by the tenancy documents and receipt provided in the Landlord's evidence.

I find the Tenants' explanation of when the tenancy documents were signed to be improbable. When I consider A.T.'s testimony that the Tenants "elected that they would not pay the \$700.00 for the August rent as they were not there" I find that proof that they had entered into a verbal tenancy agreement for the period of August 21, 2014 to August 31, 2014 for which they were required to pay \$700.00 prorated rent. I further note that although the Tenants argued that their tenancy was for a term that began on September 1, 2014, it was undisputed that they wanted to occupy the unit as soon as possible and did so on August 29, 2014.

Section 16 of the RTA stipulates that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

As per the foregoing, I find the parties entered into a verbal tenancy agreement that commenced on August 21, 2014 and the Tenants were required to pay \$700.00 for August 2014 rent. I further find that the payment may August 29, 2014 of \$2,200.00 paid the August rent in full and prepaid \$1,500.00 towards the September 1, 2014 rent leaving a balance due on September 1, 2014 of \$700.00.

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. If a tenant's application fails then the 10 Day Notice is of full force and effect.

In this case the Tenants received the 10 Day Notice on September 18, 2014 and the effective date of the Notice was **September 28, 2014**, pursuant to section 46(1) of the *Act*. I accept the evidence that the Tenants have failed to pay the rent in the required timeframe and have failed to provide sufficient evidence that would warrant cancelling the 10 Day Notice. Accordingly, I dismiss the Tenants' application to cancel the 10 Day Notice and I approve the Landlord's request for an Order of Possession.

The Tenants have not succeeded with their application; therefore, I decline to award recovery of the filing fee.

The Landlord claims for unpaid rent of \$700.00 that was due September 1, 2014, pursuant to section 26 of the *Act* a tenant must pay rent when it is due in accordance with the tenancy agreement. Accordingly, I grant the Landlord a Monetary Order for **\$700.00**.

As noted above this tenancy ended September 28, 2014, in accordance with the 10 Day Notice; therefore, I find the Landlord is seeking loss of rent for October and November 2014. The Tenants are still occupying the unit and it was undisputed that no money had been paid to occupy the unit for October or November 2014. Therefore, I accept that the Landlord will not regain possession of the rental property until after service and enforcement of the Order of Possession at which time he will have to ready the unit and

find new tenants. Therefore, I grant the Landlord loss of rent from October 1, 2014 to November 30, 2014, in the amount of **\$4,400.00** (2 x \$2,200.00).

The Landlord has succeeded 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 Tenants' security deposit plus interest as follows:

Unpaid Rent September 2014	\$ 700.00
Loss of Rent October 1 – November 30, 2014	4,400.00
Filing Fee	<u>100.00</u>
SUBTOTAL	\$5,200.00
LESS: Security Deposit \$1,100.00 + Interest 0.00	<u>-1,100.00</u>
Offset amount due to the Landlord	<u>\$4,100.00</u>

Conclusion

The Landlord has been granted an Order of Possession effective **Two (2) Days after service upon the Tenants**. In the event that the Tenants do 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 **\$4,100.00**. This Order is legally binding and must be served upon the Tenants. In the event that the Tenants do 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.

I HEREBY DISMISS the Tenants' application, 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: November 07, 2014

Residential Tenancy Branch

