



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, FF, CNR, MNDC, OLC, RP, PSF, LRE

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent, pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent, dated September 23, 2014 ("10 Day Notice"), pursuant to section 46;
- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62;
- an order to the landlord to make repairs to the rental unit, pursuant to section 33;
- an order to the landlord to provide services or facilities required by law, pursuant to section 65; and
- an order to suspend or set conditions on the landlord's right to enter the rental unit, pursuant to section 70.

The landlord's agent ("landlord") and the tenant attended the hearing set for 1:00 p.m. and were each given a full opportunity to be heard, to present their sworn testimony, to make submissions and to call witnesses. The tenant connected to the hearing late at 1:05 p.m. and briefly disconnected from the hearing from 1:27 p.m. to 1:44 p.m. The hearing lasted approximately 85 minutes.

The landlord gave sworn testimony that a 10 Day Notice, dated September 23, 2014, was personally delivered by him to the tenant at the tenant's rental unit on September 23, 2014 at 6:00 p.m. He attached a signed witness statement as proof of service with his Application. The tenant confirmed that he personally received the 10 Day Notice on September 23, 2014. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was served with the 10 Day Notice on September 23, 2014.

Preliminary Issues

The landlord testified that he served the tenant with his Application for Dispute Resolution hearing package ("Application") on October 6, 2014 via registered mail. He provided a Canada Post receipt and tracking number as proof of service, with his Application. The Canada Post website confirms that a package was mailed out on October 6, 2014 but the recipient did not pick up the package and it was returned to the sender. The tenant testified that he did not receive the landlord's Application. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's Application on October 11, 2014, the fifth day after its registered mailing.

The tenant testified that he served the landlord with his Application for Dispute Resolution hearing package on October 2, 2014 via registered mail. However, the tenant was unsure of the exact date that his application was mailed out and was unable to provide a tracking number or other documentary or testimonial proof, to confirm this mailing. The landlord testified that he did not receive the tenant's application. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was not served with the tenant's application, as required by the *Act*. I make this finding on a balance of probabilities, as the tenant was unable to furnish proof of service and could not recall the exact date of the mailing.

For the reasons outlined below, based on the merits of this claim, rather than the tenant's service issue as outlined above, I make the following findings regarding the tenant's application, on a balance of probabilities. Accordingly, I dismiss the tenant's application for the following claims without leave to reapply for the below reasons and due to the tenancy ending in this matter:

- to cancel the 10 Day Notice;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement;
- an order to the landlord to make repairs to the rental unit;
- an order to the landlord to provide services or facilities required by law; and

- an order to suspend or set conditions on the landlord's right to enter the rental unit.

I dismiss the tenant's application for a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, with leave to reapply, as I have found that the tenant did not serve his application on the landlord.

Accordingly, the decision below deals only with the landlord's application.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to a monetary award for unpaid rent?

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

In his Application, the landlord provided a copy of the written tenancy agreement and testified that this tenancy began on January 1, 2013 on a month-to-month basis. Rent is payable monthly in the amount of \$550.00 on the first day of each month. The landlord testified that the tenant paid a security deposit of \$275.00 on December 20, 2012 and the landlord continues to retain this security deposit in full. The landlord testified that the tenant made rent payments in cash and was issued receipts for all payments. The tenant disputes that receipts were given for all rent payments, stating that he received no receipts for two partial payments that he previously made towards rent.

The landlord testified that the tenant continues to reside in the unit in question. The tenant testified that he was considering vacating the rental unit but needed additional time to find a home. He stated that he was disabled and has difficulty moving around. The tenant's family has been assisting him and he was looking to obtain the assistance of a disability agency, in finding a new home.

The landlord has applied for an Order of Possession for non-payment of full rent for the months of September and October 2014. The landlord testified that the unpaid rent for September 2014 at the time of the 10 Day Notice was \$110.00 and the unpaid rent for

October 2014 is in the amount of \$550.00. He testified that the tenant made a partial cash payment to the landlord of \$440.00 sometime after September 1, 2014 for the September 2014 rent. The tenant testified that he made the cash payment of \$440.00 on September 1, 2014. The landlord testified that a receipt was issued for the above \$440.00 partial payment indicating that it was for "use and occupancy only" on the receipt. The tenant testified that he was not given a receipt for the \$440.00 payment, because it was a partial and not a full payment of rent. The tenant stated that when he was previously short of \$80.00 rent, he was not issued a receipt for the partial payment made, but only when the full payment was made to the landlord.

The tenant testified that he agreed he owed \$110.00 for September 2014 rent and \$550.00 for October 2014 rent. He stated that he had financial difficulty paying the rent. The tenant testified that the landlord's agent, D, would not take his rent payments for September and October 2014, totalling \$660.00, when offered by the tenant on or before October 1, 2014, as he could not recall the exact date. The tenant testified that the landlord's agent, D, told him that he would not take his rent payment because the landlord was trying to evict him. As per the tenant's testimony, the landlord's agent, D, also told the tenant that the landlord agreed to forego payment of unpaid September and October 2014 rent totalling \$660.00 for this same reason. The tenant elected not to provide witness testimony from the landlord's agent, D, who was not present at this hearing. He further did not provide other documentary evidence to support his position. The landlord testified that he was not offered any payments by the tenant for the \$660.00 in unpaid rent for September and October 2014, as he would have accepted any payments and issued receipts "for use and occupancy only" to the tenant for such payments.

The landlord confirmed that no further payments have been made by the tenant towards rent, to date.

The landlord testified that he is not seeking unpaid rent from the tenant for November 2014 in the amount of \$550.00.

The landlord is seeking to retain all or a portion of the tenant's security deposit of \$275.00, which he continues to hold.

The landlord is also seeking to recover the filing fee of \$50.00 for his application from the tenant.

Analysis

The tenant failed to pay the full rent of \$550.00 for September 2014 within five days of being deemed to have received the 10 Day Notice. Although a partial payment of \$440.00 was made in September 2014, no further payments have been made by the tenant, to date. Further, the partial payment made in September 2014, was accepted for "use and occupancy only," which did not reinstate the tenancy. The tenant admitted in his testimony that he owes \$110.00 in outstanding rent for September 2014 but stated that he attempted to pay the landlord who refused to take his payment. Although the tenant made an application on September 26, 2014, pursuant to section 46(4) of the *Act*, within five days of being deemed to have received the 10 Day Notice, I find that it was not served by the tenant on the landlord, as required by Section 89 of the *Act*. As noted earlier in this decision, I have dismissed the tenant's application to cancel the 10 Day Notice, without leave to reapply. Even if I would have found proper service of the tenant's application on the landlord, I prefer the evidence of the landlord, on a balance of probabilities, that the tenant did not attempt to pay the outstanding \$110.00 for September 2014 rent and it remains unpaid.

In accordance with section 46(5) of the *Act*, the failure of the tenant to pay the full amount of rent by September 28, 2014, five days after receiving the 10 Day Notice on September 23, 2014, led to the end of this tenancy on October 3, 2014, the effective date on the 10 Day Notice. In this case, this required the tenant and anyone on the premises to vacate the premises by October 3, 2014. As this has not occurred, I find that the landlord is entitled to a 10 day Order of Possession.

The tenant admitted in his testimony that he owes unpaid rent of \$550.00 for October 2014 but stated that he attempted to pay the landlord who refused to take his payment. Again, I prefer the evidence of the landlord, on a balance of probabilities, that the tenant did not attempt to pay \$550.00 for October 2014 rent and it remains unpaid.

Accordingly, the full monthly rent of \$550.00 for September and October 2014, totals \$1,100.00. I have accounted for the partial payment made by the tenant to the landlord in September 2014, totalling \$440.00. Therefore, I find that the landlord is entitled to rental arrears outstanding in the amount of \$660.00 from the tenant.

The landlord testified that he continues to hold the tenant's security deposit of \$275.00. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the tenant's security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$50.00 filing fee paid for this application.

Conclusion

I dismiss the tenant's application for a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement with leave to reapply. As I have found that the tenant did not serve the landlord with his application package, he is at liberty to make another application for dispute resolution if he intends to pursue the above claim.

I dismiss the remainder of the tenant's application without leave to reapply.

I grant an Order of Possession to the landlord effective **ten (10) days after service of this Order** on the tenant. Should the tenant or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a monetary order in the landlord's favour in the amount of \$435.00 against the tenant as follows:

September 2014 Rent	\$550.00
October 2014 Rent	550.00
Less Partial Payment in September 2014	-440.00
Less Security Deposit	-275.00
Recovery of Filing Fee for this application	50.00
Total Monetary Award	\$435.00

The landlord is provided with a monetary order in the amount of \$435.00 in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial 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: November 17, 2014

Residential Tenancy Branch

