



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNSD FF

Preliminary Issues

Upon review of the Landlord's application for dispute resolution the Landlord attached a monetary order worksheet clarifying his of \$1,950.00 consisted of:

January 2015 Rent \$975
February 2015 Rent \$975

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 for February, which is 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 an Applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed on January 23, 2015, to obtain 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 the Tenant for this application.

The Tenant filed on January 20, 2015, to cancel the 10 Day Notice issued for unpaid rent or utilities.

The hearing was conducted via teleconference and was attended by the Landlord and the Tenant. Each party gave affirmed testimony and confirmed receipt of evidence served by each Landlord.

The Tenant submitted evidence to the Residential Tenancy Branch; however he did not serve that evidence upon the Landlord. Evidence not served upon the other party is a contravention of sections 3.14 and 3.15 of the *Residential Tenancy Branch Rules of Procedure*. Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore, as the Tenant did not serve the Landlord with his evidence, I find that the Tenant's evidence cannot be considered in my decision. I did however consider the Tenant's 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) Should the 10 Day Notice issued January 16, 2015 be upheld or cancelled?
- 2) If the 10 Day Notice is upheld, has the Landlord proven entitlement to an Order of Possession?
- 3) Has the Landlord proven entitlement to a Monetary Order?

Background and Evidence

The undisputed evidence is that the Tenant entered into a one year fixed term tenancy that began on September 1, 2014. Rent of \$975.00 is due on or before the first of each month and on August 19, 2014 the Tenant paid \$500.00 as the security deposit.

The Landlord testified that when the Tenant failed to pay his January 1, 2015 rent the Landlord personally served the Tenant with a 10 Day Notice. The Landlord submitted that he had had a discussion with the Tenant regarding the tenancy ending at the end of January 2015 and that they both signed a mutual agreement to end the tenancy effective January 31, 2015, as provided in his documentary evidence.

The Landlord asserted that the Tenant continues to occupy the rental unit and he has not paid rent for January or February 2015. Therefore, he is seeking the Order of Possession for as soon as possible and the two months unpaid rent.

The Tenant did not dispute the facts that he has not paid rent for January or February or that he received the 10 Day Notice. He asserted that he did not know he was signing a mutual agreement to end his tenancy on January 31, 2015, as he thought he was

simply signing papers for the eviction notice. The Tenant argued that he should not have to pay the full month's rent for February if he was going to have to move in two days.

Analysis

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, pursuant to section 46 of the Act.

The Residential Tenancy Branch Policy Guideline # 11 provides that a landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In this case the Tenant received the 10 Day Notice on January 16, 2015, and the effective date of the Notice was January 26, 2015, pursuant to section 46 of the Act. That being said the evidence supports that both parties signed the mutual agreement to end the tenancy effective January 31, 2015. I do not accept the Tenant's submission that he did not know he was signing a document that would end his tenancy effective January 31, 2015. Rather, I find the Landlord's submission that he discussed the matters with the Tenant and they agreed that the tenancy would end on January 31, 2015, to be reasonable given the circumstances before me.

Base on the above, I find that this tenancy initially ended on the effective date of the 10 Day Notice, on January 26, 2015. Subsequent to the 10 Day Notice effective date, the parties entered into a mutual agreement to reinstate the tenancy until **January 31, 2015**, at which time the tenancy ended and the Tenant was required to vacate the unit. Accordingly, I find the Landlord has met the burden of proof and I grant him an Order of Possession, pursuant to section 55 of the Act.

The Landlord claimed unpaid rent of \$975.00 that was due January 1, 2015, in accordance with section 26 of the Act which stipulates a tenant must pay rent in accordance with the tenancy agreement. Based on the aforementioned, I award the Landlord unpaid rent for January 1, 2015, in the amount of **\$975.00**.

As noted above this tenancy ended **January 31, 2015**, in accordance with the mutual agreement. Therefore I find the Landlord is seeking money for use and occupancy of the unit and not rent for February 2015. The Landlord will not regain possession of the unit until after service of the Order of Possession and will have to find a new tenant. The Landlord is required to mitigate his loss and is therefore required to try and re-rent the unit for as soon as possible. Accordingly, I award the Landlord use and occupancy and any loss of rent for the period of February 1st to February 15, 2015, in the amount of **\$487.50**. If the Landlord suffers additional loss they are at liberty to file another application for that loss.

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 Tenant's security deposit plus interest as follows:

Unpaid January 2015 Rent	\$975.00
Use & Occupancy & loss of rent Feb 1-15/15	487.50
Filing Fee	<u>50.00</u>
SUBTOTAL	\$1,512.50
LESS: Security Deposit \$500.00 + Interest 0.00	<u>-500.00</u>
Offset amount due to the Landlord	<u>\$1,012.50</u>

As I have found this tenancy has ended, as noted above, I find the Tenant's application to cancel the 10 Day Notice is now moot. Accordingly, I dismiss the Tenant's application.

Conclusion

The Landlord has been granted an Order of Possession effective **Two (2) Days after service 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 **\$1,012.50**. 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.

I HEREBY DISMISS the Tenant's 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: February 06, 2015

Residential Tenancy Branch

