



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF

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 and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, pursuant to section 67;
- authorization to retain all or a portion of the tenants' 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 tenants, pursuant to section 72.

The two tenants did not attend the hearing, which lasted approximately 15 minutes. The landlord attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The landlord testified that he personally served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent, dated February 21, 2015 ("10 Day Notice") on the same date. In accordance with sections 88 and 90 of the *Act*, I find that the tenants were served with the landlord's 10 Day Notice on February 21, 2015.

The landlord testified that the tenants were personally served with two separate copies of the landlord's application for dispute resolution hearing package ("Application") on March 3, 2015. In accordance with sections 89 and 90 of the *Act*, I find that the tenants were served with the landlord's Application on March 3, 2015.

Issues 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 or for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?

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

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

Background and Evidence

The landlord testified that this month to month tenancy began on December 1, 2013. Monthly rent in the amount of \$950.00 is payable on the first day of each month. A security deposit of \$475.00 was paid by the tenants and the landlord continues to retain this deposit. The landlord provided a copy of the tenancy agreement with his Application. The landlord testified that the tenants are still residing in the rental unit.

The landlord issued the 10 Day Notice, indicating that rent in the amount of \$950.00 was due on February 1, 2015. The notice indicates an effective move-out date of March 3, 2015.

The landlord confirmed that \$950.00 for February 2015 rent was paid on March 25, 2015. The landlord also stated that \$250.00 towards March 2015 rent was paid on March 25, 2015. The landlord testified that a further \$100.00 towards March 2015 rent was paid on April 2, 2015. The landlord stated that he did not issue receipts to the tenants for these payments but he advised them verbally that they had to vacate the rental unit because rent was not paid in full.

The landlord confirmed that \$600.00 for March 2015 rent and \$950.00 for April 2015 rent is unpaid by the tenants. The landlord indicated that he has suffered a loss of rent for the entire month of April 2015, as the rent is due on the first day of the month as per the tenancy agreement and the tenants have not paid any rent for this month. The landlord stated that he may have to enforce an order of possession if he is successful in obtaining one, he has to enter the rental unit to assess any damage, and he may have to clean the rental unit and repair any damage, as he intends to re-rent the rental unit.

The landlord is also seeking to recover the \$50.00 filing fee for this Application from the tenants.

Analysis

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day Notice:

A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- *whether the receipt shows the money was received for use and occupation only.*
- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

The landlord provided undisputed evidence at this hearing, as the tenants did not appear. The tenants failed to pay the full rent due on February 1, 2015, within five days of receiving the 10 Day Notice. Although the tenant paid the full amount owing for February 2015 rent after the effective date of March 3, 2015, the landlord made it clear

to the tenants that they were required to vacate the rental unit because they did not pay the rent in full.

Although the landlord accepted the rent payments after filing and serving his Application upon the tenants, I do not find this to be a waiver of the 10 Day Notice. The landlord gave undisputed sworn testimony that he spoke with the tenants after serving his Application, and that he advised the tenants of his intentions to end this tenancy because the tenants had not paid their rent in full. The landlord did not withdraw his Application at any time prior to this hearing, the landlord did not cancel the hearing, and the tenants had sufficient notice of the hearing. The tenants did not appear at this hearing to present their position. They did not provide any evidence for this hearing. The tenants did not allege any express or implied waiver of the 10 Day Notice.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive his rights to pursue the 10 Day Notice and he did not waive the 10 Day Notice, whether expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting rent payments after the effective date stated on the 10 Day Notice. The tenants have continued to occupy the rental unit while owing rent for March and April 2015.

The tenants have not made an application pursuant to section 46(4) of the *Act* within five days of receiving the 10 Day Notice. In accordance with section 46(5) of the *Act*, the failure of the tenants to either pay the full rent or make an application within five days led to the end of this tenancy on March 3, 2015, the effective date on the 10 Day Notice. In this case, this required the tenants and anyone on the premises to vacate the premises by March 3, 2015. As this has not occurred, I find that the landlord is entitled to a 2 day Order of Possession.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss. The landlord provided undisputed evidence that the tenants failed to pay rent of \$600.00 for March 2015. Therefore, I find that the landlord is entitled to \$600.00 in rental arrears for the above period.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the

party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove, on a balance of probabilities, that the tenants caused a loss of rent for April 2015.

The tenants were required to vacate the rental unit by March 3, 2015. As per the landlord's evidence, the tenants continue to reside in the rental unit, causing loss to the landlord under section 7(1) of the *Act*. However, the landlord is required to mitigate his loss as per section 7(2) of the *Act*. Rent of \$950.00 was due on April 1, 2015. The tenants did not make any payments towards this outstanding rent. Therefore, I find that the landlord is entitled to \$950.00 for a loss of rent for the entire month of April 2015. I make this finding because the landlord may have to serve the tenants with the order of possession, possibly enforce the order of possession, examine the rental unit, repair any potential damage, and advertise and attempt to re-rent the unit.

The landlord continues to hold the tenants' security deposit of \$475.00. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the tenants' security deposit of \$475.00 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 the Application.

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenants. Should the tenants 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 \$1,125.00 against the tenants as follows:

Item	Amount
Unpaid March 2015 Rent	\$600.00
April 2015 Loss of Rent	950.00

Less Security Deposit	-475.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Award	\$1,125.00

The landlord is provided with a monetary order in the amount of \$1,125.00 in the above terms and the tenant(s) must be served with this Order as soon as possible. Should the tenant(s) 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: April 08, 2015

Residential Tenancy Branch

