



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 583230 BC LTD,
ROYAL LEPAGE CITY CENTRE
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNDC, FF

Introduction

This hearing dealt with the landlords' 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;
- a monetary order for unpaid rent and for damage to the unit pursuant to section 67;
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

The landlords' application was filed 31 March 2015. The tenant has not filed any application for dispute resolution.

The tenant appeared. The landlords' agent (the agent) appeared. Both parties were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The agent testified that the landlords served the tenant with the dispute resolution package on 2 April 2015 by registered mail. The landlords provided me with a Canada Post tracking number that showed the same. The tenant acknowledged service of the dispute resolution package and the landlords' evidence. The tenant testified that he had time to review the landlords' evidence. On the basis of this evidence, I am satisfied that the tenant was served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

The agent testified that the landlords served the tenant with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) on 18 March 2015 by registered mail. The landlords provided me with a Canada Post tracking number that

showed the same. The tenant acknowledged that he received the notice. On the basis of this evidence, I am satisfied that the tenant was served with the 10 Day Notice pursuant to section 88.

Preliminary Issue – Tenant's Late Evidence

The agent testified that he received the tenant's evidence on 8 May 2015. This evidence was received by the Residential Tenancy Branch on 8 May 2015.

Rule 3.15 sets out that an applicant must receive evidence from the respondent not less than 7 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.15 and the definition of days, the last day for the tenant to file and serve evidence in reply to the landlord's application was 5 May 2015.

This evidence was not served within the timelines prescribed by rule 3.15 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, the agent acknowledged that he had received the tenant's evidence and had time to review it. On this basis I find that there is no undue prejudice to admitting the tenant's evidence in spite of its late service. Thus I exercise my discretion to admit this late-served evidence.

Preliminary Issue – Amendment to Landlords' Application

Paragraph 64(3)(c) allows me to amend an application for dispute resolution.

At the hearing, the agent asked to amend this application to include unpaid rent for May. As the tenant reasonably ought to have known that these amounts were owed, I have allowed the amendment as there is no undue prejudice to the tenant.

Preliminary Issue – Prior Application and Hearing

This tenancy was subject of an earlier application (filed 16 January 2014) that proceeded by way of direct request. A decision the earlier application was provided 27 January 2014. In that proceeding, the previous arbitrator found that the landlords had proven its entitlement to a monetary order in the amount of \$3,514.50 and an order of possession. The agent testified that the landlords and tenant worked out a payment plan for the monetary order under which the tenancy would continue. The agent testified that the tenant made some payment towards the past monetary order, but accumulated further rent arrears.

Res judicata is the legal doctrine preventing, among others, the rehearing of an issue that has been previously settled by a judicial decision. There are three elements to this doctrine:

- an earlier binding decision has been made on the issue,
- a final judgment on the merits has been made, and
- the involvement of the same parties.

In this case, there is a final and binding earlier decision between these parties on the amount of rent that owing as at 16 January 2014. A monetary order in the amount of \$3,514.50 was issued in respect of that application. The landlords are not permitted to reclaim that amount as the issue has been disposed. The previous order stands.

Issue(s) to be Decided

Are the landlords entitled to an order of possession for unpaid rent? Are the landlords entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Are the landlords entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlords' claim and my findings around it are set out below.

The tenant initially moved into the residential property in 2010. The current tenancy is governed by a tenancy agreement signed by the parties on 1 March 2012. Rent is payable on the first of the month. Monthly rent was initially \$1,100.00. Rent was increased to \$1,147.00. Current rent is \$1,175.00. The agent testified that the landlord continues to hold the tenant's security deposit in the amount of \$550.00, which was collected at the beginning of this tenancy.

The tenant testified that as recently as March 2015, he provided services to AK, who is the brother of the shareholder of the number company landlord. The tenant testified that he has not received payment for this work. In addition, the tenant testified that his tools were stolen from the worksite. The tenant testified that AK stated that he would be compensated for the loss. The tenant testified that the standing agreement between him and AK was to reduce the amounts from rent. The tenant testified that he spoke to AK after the issuance of the 10 Day Notice and AK told the tenant not to worry about the notice and that they would work it out.

The tenant testified that amount awarded in the prior monetary order is not owed as he was not paid for services rendered in 2013 and 2012. The tenant provided me with invoices for the work he completed. In addition, the tenant provided me with papers prepared by an architect, which set out the deficiencies in the property that required repairs.

The agent submitted that the services provided are unrelated to the tenant's obligation to pay rent.

The landlords provided me with a ledger of amounts paid and owed since 1 January 2014. The agent testified that he has received two payments from the tenant that are not accounted for on the ledger her provided me. The agent provided me with testimony regarding payments received from the tenant:

- on or about 7 April 2015, the landlords received \$1,147.00 from the tenant; and
- on or about 5 May 2015, the landlords received \$1,000.00 from the tenant.

The agent testified that these amounts were received by electronic transfer and that no receipts were issued to the tenant.

The agent testified that the rental arrears total \$2,553.00. Based on the ledger and the testimony of payments, total current rent arrears that have accumulated in excess of the prior monetary order total \$1,569.00:

Item	Amount
1.Jan.2014 Balance Arrears	\$3,514.50
1.Jan.2014 Rent	1,147.00
7.Jan.2014 Payment	-1,147.00
27.Jan.2014 Payment	-500.00
28.Jan.2014 RTB Monetary Order	-3,514.50
1.Feb.2014 Rent	1,147.00
4.Feb.2014 Payment	-874.00
7.Feb.2014 Payment	-574.00
1.Mar.2014 Rent	1,147.00
5.Mar.2014 Payment	-1,147.00
1.Apr.2014 Rent	1,147.00
2.Apr.2014 Payment	-574.00
8.Apr.2014 Payment	-400.00
1.May.2014 Rent	1,147.00
9.May.2014 Payment	-1,247.00
1.Jun.2014 Rent	1,147.00
10.Jun.2014 Payment	-1,147.00
1.Jul.2014 Rent	1,147.00
9.Jul.2014 Payment	-1,000.00
15.Jul.2014 Payment	-147.00
1.Aug.2014 Rent	1,147.00
15.Aug.2014 Payment	-47.00
15.Aug.2014 Payment	-1,000.00
1.Sep.2014 Rent	1,147.00
10.Sep.2014 Payment	-573.00
1.Oct.2014 Rent	1,147.00
21.Oct.2014 Payment	-574.00
1.Nov.2014 Rent	1,147.00
18.Nov.2014 Payment	-300.00
18 Nov.2014 Payment	-300.00
1 Dec.2014 Rent	1,147.00
5.Dec.2014 Payment	-1,000.00
5.Dec.2014 Payment	-47.00
1.Jan.2015 Rent	1,147.00

8.Jan.2015 Payment	-947.00
1.Feb.2015 Rent	1,147.00
6.Feb.2015 Payment	-1,147.00
1.Mar.2015 Rent	1,147.00
6.Mar.2015 Payment	-1,147.00
1.Apr.2015 Rent	1,175.00
8.Apr.2015 Payment	-1,147.00
1.May.2015 Rent	1,175.00
5.May.2015 Payment	-1,000.00
Total Rent Arrears	\$1,569.00

The agent submitted at the hearing that if I grant an order of possession in this matter, the landlords would agree to an order of possession dated 31 May 2015.

Analysis

It remains for me to determine whether the landlords are entitled to an order of possession for the tenant's failure to pay rent and to determine if the landlords are entitled to a monetary order for unpaid rent.

The tenant failed to pay the outstanding rent within five days of receiving the 10 Day Notice. The tenant has not made application pursuant to subsection 46(4) of the Act within five days of receiving the 10 Day Notice. In accordance with subsection 46(5) of the Act, the tenant's failure to take either of these actions within five days led to the end of his tenancy on the effective date of the notice. In this case, this required the tenant to vacate the premises by 2 April 2015, the corrected effective date of the 10 Day Notice.

However, the landlords have accepted payments after the effective date of the 10 Day Notice. This raises a concern that the tenancy may have been reinstated. As a result the issue of waiver arises. The concept of waiver is discussed in *Residential Tenancy Policy Guideline*, "11. Amendment and Withdrawal of Notices":

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.

As at the date of the 10 Day Notice, that is 18 March 2015, the tenant had arrears totaling \$1,366.00. By 5 May 2015, the tenant had paid rent for all of March and paid \$781.00 towards April's rent. The agent testified that the landlords did not issue any receipts to the tenant in respect of these payments. The tenant testified that he had been told not to worry about the 10 Day Notice. The tenant did provide evidence as of 8 May 2015, which seems to indicate that he understood that this proceeding was going ahead.

I find, on a balance of probabilities, that by accepting payment from the tenant beyond the effective date of the 10 Day Notice, the landlord has waived the right to enforce the 10 Day Notice by reinstating the tenancy. The landlords' application for an order of possession is dismissed without leave to reapply. The tenancy will continue until it is ended in accordance with the Act.

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

Residential Tenancy Policy Guideline, "1. Landlord & Tenant – Responsibility for Residential Premises" states:

The landlord and tenant may enter into a separate agreement authorizing the tenant to provide services for compensation or as rent.

The tenant testified that he has an agreement with the numbered company landlord's principal and his agent AK that service provided to the principal and the agent AK will be deducted from rent. The tenant testified that he provided services to the principal and AK as recently as 21 March 2015, after the date the 10 Day Notice was issued. The agent did not dispute that work was provided, but submitted that any amount owing would be dealt with separately and not as part of rent. The tenant provided invoices for services that were provided in the past and provided me with work orders from the

architect supervising the project. I accept the tenant's evidence that he completed work for the principal and AK on or about 21 March 2015.

As a result of this evidence regarding the provision of services, I find that the landlords have failed to show, on a balance of probabilities, what amount is currently outstanding. I dismiss the landlords' claim for a monetary order for unpaid rent and losses under the Act, regulations or tenancy agreement.

As the landlords have been unsuccessful, the landlords are not entitled to recover their filing fee from the tenant.

Conclusion

The landlords' application is dismissed. The tenancy will continue until it is ended in accordance with the Act.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: May 15, 2015

Residential Tenancy Branch

