Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FF

Introduction

This hearing dealt with the tenants' application (as amended) pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the landlords' 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

The tenants' application was originally set to be heard on 8 May 2015. That hearing time was used to resolve several preliminary issues. A written interim decision dated 12 May 2015 (the Interim Decision) set out the resolution of these preliminary issues. This decision should be read in conjunction with that interim decision.

At the request of counsel, a full day was set aside to hear this matter on the reconvened hearing.

At the reconvened hearing, the landlord MMR appeared. Counsel for the landlords' appeared. Neither tenant appeared. Tenants' counsel appeared. Counsel for both parties were given time to provide submissions. The landlords elected to provide MMR's testimony as evidence. Counsel for the tenants cross examined MMR on her evidence.

In the event I uphold the 10 Day Notice, the landlords seek an order of possession.

History of Tenancy Before This Branch

This tenancy was the subject of an earlier hearing. The tenants provided a copy of the prior decision, dated 19 March 2015, (the Prior Decision) in their evidence.

The prior application was, among other items, to cancel a 10 Day Notice dated 8 January 2015 (the January Notice). That hearing was set to be heard on 13 February 2015. At the February hearing date, the hearing was adjourned to be reconvened on 18 March 2015.

In that hearing, the January Notice was cancelled as the previous arbitrator found that the landlords had failed to prove, on a balance of probabilities, that there were amounts owing in rent.

The previous arbitrator provided the following summary of evidence:

> *Both parties confirmed that the landlord served the tenant with a 10 day notice to end tenancy… the contents of the notice state the tenants failed to pay rent of $33,000.00 that was due on August 1, 2014. …*
> *The tenants disputed the notice of the landlord and that rent was not owed and that there was a credit balance from advance payments of rent to the landlord.*
>
> *The landlord stated that the amount owed on the notice of $33,000.00 is based upon the invoice dated August 31, 2014 that displays a balance owing from July 2014 of $67,920.00 plus $3,600.00 for August 2014 for a total balance owing of $71,520.00.*
>
> *The landlord stated that they are relying on calculations (not included in evidence) that this amount was offset against prepayment of rent.*

The previous arbitrator's analysis of this evidence is summarized at page three of his decision:

> *I find that the landlord has failed to meet his burden of proof to show that the tenants owed rent as of August 1, 2014 for $33,000.00. I reached this conclusion based on the the conflicting evidence of the parties as well as the landlord's own confusion as to the amount of rent arrears and their calculation. The tenants confirmed in their direct testimony that no rent arrears existed and that a credit balance is owed.*

The previous arbitrator did not make any finding as to what, if any, amounts were owed between the tenants and landlords. As well, the previous arbitrator did not make any findings as to the nature of the amounts paid between the parties. The only finding by the previous arbitrator is that the landlords failed to meet their evidentiary burden. As such, I find that I am not bound by the principle of *res judicata* from considering this issue.

Background of Interim Decision

The tenants' filed this application on 26 March 2015. On 1 April 2015, the tenants filed a Notice of Civil Claim in the British Columbia Supreme Court.

This Notice of Civil Claim created an issue of competency of this Branch to render a decision. In particular subsection 58(2)(c) prevents this Branch from making a determination if it is linked substantially to a matter that is before the Supreme Court. Further, the tenants sought various procedural rights beyond those prescribed by the Act, regulations or *Residential Tenancy Branch, Rules of Procedure* (the Rules). In particular, the tenants sought a right of discovery of documents, examinations for discovery, and an in-person hearing.

On 12 May 2015 I made the Interim Decision (with the agreement of counsel) that, I found, permitted me to retain jurisdiction of this matter. In particular, counsel agreed to pretrial discovery and disclosure that extended beyond the requirements of this Branch. A timeline was established for each procedural step.

Preliminary Issue – Tenants' Adjournment Application

On 19 June 2015, the Residential Tenancy Branch (the Branch) received a 66 page fax from the tenants. This fax included evidence and a request for an adjournment. Landlords' counsel did not receive a copy of this fax transmission. Tenants' counsel was not in possession of these documents, although tenants' counsel had been instructed by his clients to seek an adjournment.

At the hearing I read the portions relevant to the adjournment request to counsel. The tenants sought an adjournment for various reasons:

- The tenant SD was required to attend a medical appointment and it was necessary for the tenant DD to accompany the tenant SD to this appointment.
- The tenant DD had not yet been discovered.
- The tenants requested time to conduct a forensic audit.
- The tenant SD's spouse and tenant DD's parent (the family member) had been injured in a fall.

The request included the following submission:

> *Given the utmost importance of these scheduled appointments, follow up examinations, blood work, and surgery in the next few weeks or months; it was strongly recommended by the medical doctor that [SD] is to put her health and medical protocol in priority of the scheduled hearing and any events related to it at this time.*

I was provided with a very brief medical note from a doctor dated 10 June 2015 (the Doctor's Note):

> *This patient cannot attend a Residential Tenancy Board Hearing on June 26th, 2016 due to medical reasons. Also, she needs her daughter [tenant DD] as an escort for her medical appointments.*

MMR provided testimony that SD is not currently residing at the rental unit although DD is.

Tenants' counsel's assistant telephoned landlords' counsel the day before the hearing and spoke to landlords' counsel's assistant. The assistant relayed that the tenants' were seeking an adjournment and asked for consent. The landlords did not provide consent.

Tenants' Counsel's Submissions

Tenants' counsel stated that he had received a call from the tenant DD stating that the tenant SD had cancer and that the family member had a broken ankle. Tenants' counsel stated that he had received the Doctor's Note two days ago by email with instructions not to forward the Doctor's Note to landlords' counsel.

Tenants counsel stated that he was having difficulties securing instructions from his clients. Tenants' counsel asked for an adjournment of fourteen days so that he could seek instructions from his clients.

Landlords' Counsel's Submissions

Landlords' counsel did not consent to the adjournment. Landlords' counsel stated that SS was examined on 3 June 2015. On this date, the tenants delivered banking documents to landlords' counsel. DD was also scheduled to be examined on 3 June 2015, but there was insufficient time. A later date was scheduled for DD, but she did not attend.

Landlords' counsel submitted that the landlords would be prejudiced by an adjournment. The tenants are still occupying the rental unit and no payments have been received.

Landlords' counsel submits that I should draw an adverse inference from DD's failure to attend discovery. Further, the landlords' counsel submits that I should draw an adverse inference from the tenants' failure to disclose all documents as required by the date set out in the agreement contained within the Interim Decision.

Landlords' counsel submits that the medical note from the general practitioner is not sufficient and discloses no reason why the tenants could not appear by telephone. Landlords' counsel submits that, based on MMR's testimony, SD is not in the Lower Mainland to attend any appointment.

Analysis

Rule 6.4 of the Rules sets out the criteria for granting an adjournment:

> Without restricting the authority of the arbitrator to consider other factors, the arbitrator must apply the following criteria when considering a party's request for an adjournment of the dispute resolution proceeding:
>
> (a) the oral or written submissions of the parties;
>
> (b) whether the purpose for which the adjournment is sought will contribute to the objectives set out in Rule 1;
>
> (c) whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding;

(d) the degree to which the need for the adjournment arises out the intentional actions or neglect of the party seeking the adjournment; and

(e) the possible prejudice to each party.

Rule 1 of the Rules sets out the objectives:

> The objective of the Rules of Procedure is to ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants.

This application relates to the 10 Day Notice dated 24 March 2015 (the March Notice). This hearing was originally scheduled to be heard 8 May 2015.

The tenants' request for procedure beyond that provided by the Residential Tenancy Branch necessitated the delay of this matter for seven weeks. My next available hearing day for this matter would have been the last week of August. If an adjournment is granted a disposition on the merits would have resulted in delay of another nine weeks. This is neither efficient nor fair.

The tenants knew over two weeks ago that there was a conflict with this hearing. The tenants did not take any steps to communicate this issue to the Branch or the landlords. By failing to communicate at all, the tenants have failed to act prudently by minimising the prejudice to the landlords.

The tenants did not seek consent to the adjournment request from the landlords or landlords' counsel prior to this hearing. The tenants had seven weeks of notice that this hearing was scheduled for today. I am not persuaded by the Doctor's Note or the tenants' written submissions that both of the tenants were prevented from attending a hearing that was scheduled for an entire day. There is no explanation provided as to what, if any, appointment was scheduled for today or why this appointment had to be scheduled for this particular day. Furthermore, there is no explanation of why the tenant DD was prevented from attending this hearing.

While I am sympathetic to the tenant SD's health issues and understand her desire to focus on her health, this application cannot wait the "few weeks or months" that her health condition seems to require of her.

Conclusion on Adjournment Request and Order for Evidence and Submissions

For the above reasons, the tenants' adjournment request is denied.

In order to mitigate the prejudice caused to the tenants by the denial of their adjournment request, I sought consent from counsel as to a procedure for receiving written evidence after this hearing. With counsel's consent I made the following orders pursuant to Rule 3.19:

1. The tenants may provide one affidavit each setting out their evidence in this matter. I will consider this affidavit evidence along with the tenants' written submissions. These affidavits and written submissions must be received by counsel for the landlords and the Residential Tenancy Branch no later than 1600 on 3 July 2015. Any submissions after this date will not be considered.

2. If the tenants elect to provide evidence or submissions, the landlords are permitted to provide reply submissions. Any written submissions on behalf of the landlords must be received by counsel for the tenants and the Residential Tenancy Branch no later than 1600 on 10 July 2015.

These orders were conveyed to both counsel present at the hearing.

The tenants did not provide any affidavit evidence. I did not receive any relevant submission from the tenants although I did receive miscellaneous photographs and some letters. The tenants also asked for advice from me. I cannot provide any advice to the tenants and suggest that they contact their counsel.

The landlords did not provide reply submissions.

Issue(s) to be Decided

Should the landlords' 10 Day Notice be cancelled? If not, are the landlords entitled to an order of possession? Are the tenants entitled to recover the filing fee for this application from the landlords?

Background and Evidence

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

This tenancy began in 2012. Monthly rent is $3,600.00. At the beginning of the tenancy MMR owned the rental unit. In the summer of 2014, ownership of the rental unit transferred to the landlords. MMR now has a lease for the premises with the landlords.

Both MMR and the tenant SD were defrauded by PL. PL purported to operate a religious based charity that would educate and support orphans (the Charity). MMR testified that she advanced approximately $1,000,000.00 to PL. MMR has lost her home and her savings. MMR testified that PL told her that he had $37,000,000.00 in his control that was located in Ontario, but that he wanted to transfer it to British Columbia in order to commence work with the Charity. PL asked MMR if she knew of any good people that could sit on the board of the Charity.

In August 2012, SD became a board member of the Charity. As part of their board participation, members of the board were asked to disburse various sums to PL. PL told the members that this money was necessary to secure legal advice and pay for legal fees associated with a trial in Ontario.

In December 2012 MMR witnessed a guarantee of SD's payments to the Charity in the amount of $55,384.00. PL guaranteed this loan.

In January 2013, PL fled the province. The tenant SD took the position that MMR is personally responsible for the guaranteed amounts. MMR testified that she agreed to allow SD and DD to stay in the rental unit as compensation for this guarantee.

On 3 April 2014, MMR wrote to SD by email informing her that MMR had discharged the amount owing under the guarantee. On 27 June 2014, SD wrote to MMR claiming that the tenant SD was owed an additional $50,532.00.

The tenants claim they have advanced $205,640.00 in prepaid rent. MMR for the purpose of this hearing is prepared to accept that she received $47,837.00 as prepaid rent.

On 24 March 2015, the landlords served the 10 Day Notice to the tenants. The 10 Day Notice set out that the tenants had failed to pay $28,800.00 in rent. The 10 Day Notice set out an effective date of 15 April 2015. I was provided with invoices to tenants from landlord dated 1 August 2014 to 31 March 2015 totalling $28,800.00 (eight months at a rate of $3,600.00/mo).

On 1 April 2015, the tenants filed the Notice of Civil Claim. That claim set out that tenants were owed $71,300.00. On 8 May 2015, the tenants claimed they were owed $47,142.22.

On 29 May 2015, and as part of the prehearing discovery process, MMR disclosed her complete banking records from November 2011 to present. The tenants did not disclose any additional documents by this date.

On 3 June 2015 discovery of MMR and SD took place. At this time additional documents were produced. At SD's discovery she was asked to identify which documents establish cash payments detailed as undocumented in DH's affidavit. SD has not provided this accounting.

In the examination for discovery on 3 June 2015 the tenant SD made the following admissions:

- SD did not make any payments for the period 1 August 2014 to 1 March 2015 as SD takes the position that this rent was all prepaid.
- SD was unaware of DD making any payments over the same period.
- As of 11 December 2012 SD alleged MMR owed to her $55,000.00.
- As of 8 May 2015 the amount of prepaid rent still owing was $47,142.22.
- The tenants accounting of prepaid rent includes "expenses" associated with these advances.

- SD admits to being a board member in December but state that the appointment was not valid as someone else was already occupying the position.
- SD admits to "maxxing" out all of her credit cards to advance funds to MMR and the Charity.

Analysis

This is a sad situation: Two people who believed they were acting to better the lives of children in need have been defrauded by a third party, PL.

On the basis of MMR's testimony and the documents before me, I find that the evidence, at most, documents some loan arrangement made between the parties. The submission from the tenants that these amounts are prepaid rent strains credulity in the context of a landlord-tenant relationship: The amount is a debt unrelated to the parties' relationship as landlords and tenants. I have no jurisdiction to make any decisions regarding the debt and as such, I make no findings on the amount of the debt owed or owing between SD and MMR.

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.

There are various provisions of the Act that permit a tenant to deduct amounts from rent:

- Subsection 19(2) permits a tenant to deduct amounts from rent to recover the excess amounts of a security deposit that did not comply with the Act.
- Subsection 33(7) permits a tenant to deduct amounts from rent for the costs of emergency repairs.
- Subsection 43(5) permits a tenant to deduct the amount of a rent increase which did not comply with the Act from rent.
- Subsection 51(1.1) permits a tenant to deduct one month rent where the landlord has issued a notice to end tenancy pursuant to section 49.
- Subsection 65(1) and subsection 72(2) permit a tenant to deduct rent to recover an amount awarded in an application before this Branch.

There are no other deductions from rent permitted under the Act or regulations. There is no provision for the tenant to deduct a personal debt from rent. The tenants have not provided any evidence that they were entitled to deduct amounts from rent as permitted under the Act.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

The tenant SD admits that she has not paid any amount as rent since before August 2014. To the best of the tenant SD's knowledge, DD has not paid any amount in rent over the same period.

As the tenants has failed to pay their rent in full when due, I find that the 10 Day Notice issued 24 March 2015 is valid and dismiss the tenants' application to cancel the 10 Day Notice without leave to reapply. As the tenants' application to cancel the 10 Day Notice is dismissed, the landlords were entitled to possession of the rental unit on 15 April 2015, the effective date of the 10 Day Notice. As this date has now passed, the landlords are entitled to an order of possession effective two days after it is served upon the tenant(s).

As the tenants have not been successful in their application, they are not entitled to recover their filing fee from the landlords.

Conclusion

The tenants' application is dismissed.

At the hearing, the landlords requested an order of possession if the tenants' application for cancellation of the 10 Day Notice was dismissed.

I grant an order of possession to the landlord effective **two days after service of this order** on the tenant(s). Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

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: July 15, 2015

Residential Tenancy Branch