



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OP MND MNR MNSD MNDC FF – Landlord
 CNR RPP – Tenants

Preliminary Issues

Residential Tenancy Rules of Procedure, Rule 2.3 states that, in the course of the dispute resolution proceeding, if the arbitrator determines that it is appropriate to do so, he or she may dismiss the unrelated disputes contained in a single application with or without leave to reapply.

Upon review of both the Landlord's and the Tenants' applications I have determined that I will not deal with all the dispute issues placed on both applications. For disputes to be combined on an application they must be related.

Not all the claims on these applications are sufficiently related to the main issue relating to the Notice to end tenancy. Therefore, I will deal with the Landlord's requests for an Order of Possession for unpaid rent or utilities; the Landlord's requests for a Monetary Order for unpaid rent or utilities and to recover the cost of the filing fee for their application; and the Tenants' request to set aside, or cancel the Landlord's Notice to End Tenancy issued for unpaid rent or utilities. The remaining claims on each application are dismissed with leave to re-apply.

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the Landlord and the Tenants. The Landlords filed their application July 28, 2015 and the Tenants filed their application on July 21, 2015.

The hearing was conducted via teleconference and was attended by the Landlord and both Tenants. 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.

Despite the Tenants stating that they understood how the proceeding would be conducted the female Tenant continuously spoke to the male Tenant while the male Tenant was submitted his testimony. When I requested that the female stop talking and to stop providing information to the male Tenant while he was testifying, the male

Tenant became noticeably upset and continuously interrupted me while I attempted to provide him further direction. When I requested that the female Tenant stop speaking a second time, I informed both Tenants that if the interruptions continued I would disconnect them from the hearing and continue in their absence. There was one more small interruption; however, the male Tenant dealt with it immediately by asking the female Tenant not to speak until it was her turn.

Each person gave affirmed testimony and confirmed receipt of each other's Application for Dispute Resolution and Notice of hearing documents. Both the Landlord and the Tenants confirmed that neither one submitted documentary evidence in support of or in response to the Applications.

The Tenants testified that they were requesting an adjournment because they were not allowed to submit their documentary evidence because they were a day late. Upon further clarification the Tenants submitted that they attended the Residential Tenancy Branch (RTB) office about 7 days before this hearing and attempted to submit their documentary evidence but the RTB would not take their evidence because it was late. They said that they were told the Arbitrator collected the contents of the file seven days before the hearing and they attended at the RTB five days before hand.

The Tenants asserted that they were late in submitted their evidence because they were having financial difficulty and technical difficulties. They argued that it took them time to save up the money to be able to pay to print their documentary evidence and then they had trouble figuring out how to download the information off of their phone.

The Landlord was given an opportunity to respond to the Tenants' request for adjournment during which the Landlord stated that he did not wish to adjourn these matters.

I explained to the Tenants that the RTB does not refuse evidence. Rather, the RTB accepts all evidence and records the evidence as being on time or as being late. The RTB also creates a record of all interactions with participants.

Upon review of the RTB Record I note that there was only one record of an interaction with the Tenants. That record was recorded on July 22, 2015 at 2:44 p.m. and states in part, that the Tenant came back to the RTB and said that they had picked up their hearing packages the day before and were given a Notice of Hearing Document with a different file number.

The Residential Tenancy Branch Rules of Procedure (Rules of Procedure) 6.4 provides that 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 resolution of the matter in accordance with the objectives set out in Rule 1 [objective];
- 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 of the intentional actions or neglect of the party seeking the adjournment; and
- e) the possible prejudice to each party.

After careful consideration of the above, I declined the Tenants' request for an adjournment. I declined the request in part because the RTB does not refuse evidence, regardless of when it is submitted. Also, there is no record of the Tenants attending the RTB in August or September 2015. Furthermore, the Tenants had over two months to prepare and submit their documentary evidence or to seek assistance through an advocacy group or agent.

I determined that the Tenants' request was not required to provide a fair opportunity to be heard as both Tenants were given full opportunity to present their oral submissions and read from any documentary evidence during the teleconference hearing. That being said, the Tenants stated that they did not have any documents with them. In addition, I concluded that the Tenants would not be prejudiced by refusing to allow the adjournment because neither party submitted documentary evidence; therefore, each Application would be determined based on oral submissions. Accordingly, I proceeded with the hearing as scheduled.

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. Following is a summary of the submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Should the 10 Day Notice to end tenancy be upheld or cancelled?
2. Has the Landlord proven entitlement to Monetary Compensation?

Background and Evidence

Agreed Upon Facts

The Landlord and Tenants entered into a written six month fixed term tenancy agreement that began on March 15, 2015. Rent of \$800.00 is due on or before the first of each month and the Tenants paid \$400.00 as the security deposit.

The Landlord served the Tenants a 10 Day Notice to end tenancy which was received by the Tenants on or around July 16th or 17th, 2015. The 10 Day Notice was issued due to the \$400.00 owed for July 1, 2015 rent.

Sometime at the beginning or during the tenancy Income Assistance began sending the Landlord a payment of \$400.00 as a portion of the Tenants' \$800.00 monthly rent.

The Landlord's Testimony

The Landlord submitted that there was still \$800.00 rent outstanding. As a result the Landlord wished to proceed with his application for an Order of Possession and a Monetary Order.

The Landlord argued that the \$400.00 for July 2015 has never been paid. He stated that he received a total of \$800.00 for August consisting of the \$400.00 Income Assistance cheque he received near the end of July plus \$400.00 cash received from the Tenant sometime during the first week of August.

The Landlord stated that he did not give a receipt for July rent because it was not paid in full. He asserted that it was his practice to only issue one receipt when the full \$800.00 had been paid. As a result he issued a receipt for August 2015 and no receipts have been issued for July and September because there is still \$400.00 outstanding for each month for a total owing of \$800.00.

The Landlord testified that he had not yet received the \$400.00 Income Assistance cheque for October 2015.

The Tenants' Testimony

The Tenants testified that they paid the Landlord the \$400.00 owed for July 2015 when they paid him \$400.00 cash in early August 2015. When I asked the Tenants which date they made that payment they stated that they were looking through their receipts to try and find that one.

The Tenants continued with their submission and stated that they were extremely late in paying their August rent. They said they came up with the money around the 5th, 6th, or 7th of August and they gave the \$400.00 to the Landlord on a Friday. When I asked where they were when they gave the Landlord that cash they stated that they were at their rental unit.

The Tenants continued with their submission and then stated that they gave \$200.00 to the Landlord's mother when they passed her in the driveway on a Wednesday. The male Tenant said had the full \$400.00 at that time but that he purposely held onto the remaining \$200.00. The Tenant asserted that remaining \$200.00 owed for July was given to the Landlord in the back yard of the rental house on Sunday on the Landlord's day off work.

The Tenants argued that they never received receipts from the Landlord. They later stated that they did not receive receipts since July 2015. They then argued that they

took a receipt book to the Landlord and stood there while the Landlord completed the receipts so they could submit a proof of address to Income Assistance. I asked the Tenants to look at their receipt book and provide dates for me at which time the Tenants stated that they did not have that receipt book or any other receipts with them at that time.

The Tenants stated that they began to hold their payments for rent because they were not getting receipts. They said they began to say “you give me a receipt and I’ll pay you rent”.

The Tenants confirmed that they had not paid the \$400.00 owed for September 2015 and continued with their arguments that July and August 2015 rents were paid in full sometime during the first week of August 2015. They argued that they have withheld their rent payment because they have been uneasy and unrestful due to ongoing vandalism to their possessions and vehicles.

Analysis

The *Residential Tenancy Act* (the *Act*) stipulates provisions relating to these matters as follows:

Section 1 of the *Act* defines a “**tenancy agreement**” as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

Section 91 of the *Act* stipulates that except as modified or varied under this *Act*, the common law respecting landlords and tenants applies in British Columbia.

Regarding the 10 Day Notice

Section 26 of the *Act* stipulates that a tenant must pay rent in accordance with the tenancy agreement.

Section 46(1) of the *Act* provides that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

Section 46(4) of the *Act* stipulates that within 5 days after receiving a notice under this section, the tenant may pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution.

Regarding the Request for an Order of Possession

Section 55 (3) of the *Act* states that the director may grant an order of possession before or after the date when a tenant is required to vacate a rental unit, and the order takes effect on the date specified in the order.

Regarding the request for a Monetary Order

Section 7 of the *Act* provides as follows in respect to claims for monetary losses and for damages made herein:

- 7(1) If a landlord or tenant does not comply with this *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Regarding Filing Fee

Section 72(1) of the *Act* stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) [*starting proceedings*] or 79 (3) (b) [*application for review of director's decision*] by one party to a dispute resolution proceeding to another party or to the director.

After careful consideration of the foregoing and on a balance of probabilities I find as follows:

The undisputed evidence was the rental unit had been occupied by the Tenants since March 15, 2015, and the Tenants were required to pay \$800.00 on or before the first of each month as rent. Neither party submitted a copy of the written tenancy agreement into evidence. In the presence of the undisputed testimony, I accept that these parties entered into a tenancy agreement, verbal or written, and I find that the terms of that tenancy agreement are enforceable pursuant to sections 1 and 91 of the *Act*.

In this case the Tenants received the 10 Day Notice sometime around July 16 or 17, 2015; therefore, given the benefit of the doubt, the effective date of the Notice was **July 27, 2015**. The Tenants filed their application to dispute the Notice on June 21, 2015, within the required 5 day period.

In this matter the Tenants bear the burden to prove they paid their July 2015 rent in accordance with section 26 of the *Act* or in accordance with the 5 day required timeframe listed on the 10 Day Notice. Therefore, the Tenants need to establish that they paid the outstanding \$400.00 no later than July 21, 2015.

I favored the Landlord's testimony that the \$400.00 owed for July 2015 was never paid and that he received \$400.00 from Income Assistance at the end of July for August and a total of \$400.00 cash which was received during the first week of August 2015. I

favoured the Landlord's oral evidence over the Tenants' oral evidence because the Landlord's submission was forthright and credible.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I found the Tenants' contradictory or ever changing explanations of how they paid the \$400.00 owed for July plus the \$400.00 for August to be improbable. The Tenants initially stated that the \$400.00 for July was paid to the Landlord on a Friday and then they changed their story to say they paid \$200.00 to the Landlord's mother on a Wednesday and the Landlord was paid the balance on a Friday. As the Tenants continued to talk they changed their testimony again and said the Landlord was paid on a Sunday on his day off of work. When I consider the Tenants' submissions regarding their adjournment request and how they are suffering financial hardship I find it improbable that they were able to pay the Landlord or the Landlord's mother a total of \$800.00 during the first week of August. Rather, the Landlord's submission that a total of \$400.00 cash was paid to him in the first week of August to be plausible given the circumstances presented to me during the hearing.

Even if the \$400.00 that was paid in the first week of August 2015 was applied to the outstanding July 2015 rent it would not reinstate the tenancy because the \$400.00 was not paid by July 22, 2015, which was the 5 day time limit set out in the 10 Day Notice. Furthermore, I find that given the circumstances discussed during this hearing and the applications filed for Dispute Resolution, the Tenants were well aware of the Landlord's intention of continuing to seek an Order of Possession to end this tenancy.

Based on the above, I find there was sufficient evidence to prove the merits of the 10 Day Notice, pursuant to sections 46 of the *Act*. Accordingly, I dismiss the Tenants' application to dispute the Notice and I grant the Landlord's application and award him an Order of Possession, pursuant to section 55 of the *Act*.

The undisputed evidence was that \$400.00 was still owed for September 2015 rent and the Landlord testified that August 2015 rent was paid in full. Furthermore, the Landlord should be receiving an Income Assistance payment of \$400.00 today or tomorrow. Therefore, in absence of a tenant ledger, receipts, or any other documentary evidence to prove the exact dates when payments were received and the balance owed, I decline

to award a monetary order for unpaid rent at this time. Instead, I dismiss the Landlord's application for a monetary order for unpaid rent with leave to reapply.

The Landlord has partially succeeded with their application; therefore, I award partial recovery of the filing fee in the amount of **\$25.00**, pursuant to section 72(1) of the Act.

Conclusion

The Tenants were not successful with their application to dispute the Notice and their application was dismissed, without leave to reapply.

The Landlord's request for a Monetary Order for unpaid rent was dismissed, with leave to reapply. The Landlord was successful with his request for an Order of Possession and awarded recovery of \$25.00 of his filing fee.

The Landlord has been issued an Order of Possession effective **Two (2) Days after service upon the Tenants**. In the event that the Tenants do not comply with this Order it may be filed with the British Columbia Supreme Court and enforced as an Order of that Court.

The Landlord may withhold **\$25.00** of the Tenants' security deposit as full payment of the onetime award for partial recovery of the filing fee.

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: September 25, 2015

Residential Tenancy Branch

