



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MNDC, OLC, OPR, MNR, MDSD & FF

Introduction

The Application for Dispute Resolution filed by the landlord makes the following claims:

- a. An Order for Possession for non-payment of rent
- b. A monetary order in the sum of \$2850 for unpaid rent
- c. An order to keep the security deposit.
- d. An order to recover the cost of the filing fee

The Application for Dispute Resolution filed by the Tenant seeks the following:

- a. An order to cancel the 10 day Notice to End Tenancy dated September 23, 2015
- b. A monetary order in the sum of \$1000.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the 10 day Notice to End Tenancy was served on the Tenant by posting on September 23, 2015. I find that the Application for Dispute Resolution/Notice of Hearing was filed by the Tenant was personally served on the Landlord on September 24, 2015.

The landlord testified that she served the Application for Dispute Resolution/Notice of Hearing by mailing, by registered mail to the Mailing Address (address for service of documents or notices – where the material will be given personally, left, faxed or mailed). A search of the Canada Post tracking service indicates someone other than the tenant signed for it). The address the tenant provided is in his Application is in Vancouver. The tenant resides in Burnaby. The tenant testified he has not received the landlord's application.

Section 89 of the Residential Tenancy Act provides as follows:

Special rules for certain documents

89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
- (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

Section 89 provides that were a landlord wishes to serve a tenant by mailing, by registered mail the landlord may do so by sending a copy of the documents to the address where that person resides or to the forwarding address provided by the tenant. The tenant denied that he received a copy of the landlord's application. I determined the landlord failed to prove service of the Application for Dispute Resolution. I do this with reluctance as the landlord served it by mailing to the address provided in the tenant's application. However, I determined it does not comply with section 89 of the Act as it is not where the tenant resides and is not a forwarding address.. As a result I dismissed the landlord's application with liberty to re-apply.

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenant is entitled to an order cancelling the 10 day Notice to End Tenancy dated September 23, 2015?
- b. Whether the tenant is entitled to a monetary order and if so how much?
- c. Whether the tenant is entitled to an order that the landlord comply with the Act, regulation and/or the tenancy agreement?

Tenant's request to amend his Application:

The Application for Dispute Resolution filed by the tenants seeks a monetary order in the sum of \$1000. The Details state: "Order that the landlord not enter the rental unit without written notice. Monetary damages for entering without notice while tenant was asleep."

At the hearing the tenant sought to amend his application to claim for other violations of the breach of the tenancy agreement by the landlord including no heat and allowing breaking and enters.

Rule 4.2 of the Rules of Procedure provide as follows:

"4.2 Amending an application at the hearing

In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. "

The tenant failed to provide an explanation as to why these claims were not included in the original application or why he did not file an Amendment at an earlier date. One of the fundamental provisions of our legal system is that a respondent must have sufficient notice of the claims being made against them so that they can the respondent has an opportunity to respond. I determined the proposed amendment is not of a type that could be reasonably anticipated. Further, it would greatly prejudice the landlord as the landlord has not had an opportunity to prepare. As a result I dismissed the application of the tenant to amend his application. The tenant retains the right to file a new Application for Dispute Resolution to make these claims. .

Background and Evidence

The parties are uncertain as to when the tenancy started. The landlord testified that she thought that it started in 2007 or 2008. The tenant stated he thought it started in 2010. The present rent is \$950 per month payable in advance. The rent includes utilities. The tenant paid a security deposit of \$450 at the start of the tenancy.

The landlord testified the tenant has failed to pay the rent for the months of September, October, and November and the sum of \$2850 remains outstanding. The landlord testified the failure to pay the rent has put her in an extremely vicarious position as she is unable to pay her mortgage. The tenant admitted he has not paid the rent for that period and failed to provide an explanation as to why.

Tenant's Application to Cancel the 10 day Notice to End Tenancy:

The tenant objected to the 10 day Notice to End Tenancy where it states that \$850 is owed for rent and \$100 is owed for utilities. I determined this is not a sufficient objection as the amount that is alleged to be owed is the amount both parties agreed is owed as of the date of the Notice.

The tenant has made a monetary claim in the sum of \$1000. Section 26(1) of the Residential Tenancy Act provides as follows:

Rules about payment and non-payment of rent

- 26** (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

I determined there is no basis to cancel the Notice to End Tenancy even if the tenant is successful with his monetary claim. Section 26(1) provides the tenant must pay the rent when due whether or not the landlord has complied with the Act, Regulations or tenancy agreement.

As a result I dismissed the tenant's application to cancel the Notice to End Tenancy without leave to re-apply.

Order for Possession:

The Residential Tenancy Act provides that where a landlord has made an oral request for an Order for Possession at a hearing where an arbitrator has dismissed a tenant's application to set aside a Notice to End Tenancy, the arbitrator must grant an Order for Possession. The landlord made this request at the hearing. As a result I granted the landlord an Order for Possession on 2 days notice.

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, the landlord may register the Order with the Supreme Court of British Columbia for enforcement.

Tenant's Application for a monetary order in the sum of \$1000.

The tenant testified the landlord entered his rental unit without notice at around 7:00 p.m. in the evening. He was sleeping at the time. The tenant seeks punitive damages.

The landlord did not dispute she entered the tenant's rental unit. She testified the tenant failed to pay the rent and failed to answer the door and was ignoring her.

Policy Guideline #16 includes the following statements:

Types of Damages

An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. An arbitrator may also award "nominal damages", which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right.

....

An arbitrator does not have the authority to award punitive damages, to punish the respondent.

I determined the landlord has breached the rights given to the tenant under the Act by entering without giving sufficient notice. The explanation given by the landlord is not sufficient. However, the tenant failed to provide proof of an actual loss. I determined this is an appropriate case to make an award in favour of the tenant of nominal damages in the sum of \$50. I dismissed the tenant's claim for punitive damages as an arbitrator does not have the authority to make such an award.

Section 72 of the Residential Tenancy Act provides as follows:

Director's orders: fees and monetary orders

72 (2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other, including an amount under subsection (1), the amount may be deducted

(a) in the case of payment from a landlord to a tenant, from any rent due to the landlord, and

I order that the landlord pay to the tenant the sum of \$50 such sum shall be deducted from rent owed by the tenant to the landlord.

Conclusion:

I dismissed the landlord's claim as the landlord failed to prove sufficient service. I dismissed the tenant's claim to cancel the 10 day Notice to End Tenancy. The landlord requested an Order for Possession. I granted the Order for Possession on 2 days notice. I ordered the landlord pay to the tenant \$50 such sum may be deducted from rent due to the landlord.

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: November 25, 2015

Residential Tenancy Branch

