



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, FF; CNR, ERP, RP, PSF

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; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the Act for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an order to the landlord to make repairs to the rental unit pursuant to section 32;
- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33; and
- an order to the landlord to provide services or facilities required by law pursuant to section 65.

Both tenants attended the hearing. The landlord attended the hearing. All in attendance 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 landlord elected to call one witness ML.

The landlord admitted receipt of the tenants' dispute resolution package. The tenants' admitted service of the landlord's dispute resolution package.

Tenant's Late Evidence

The tenant BD testified that the tenants served the landlord with additional evidence by registered mail on 11 January 2016. The landlord stated that she had not yet received this evidence. The tenants provided me with a tracking number that confirmed that the package had not yet been delivered. Evidence served by registered mail is deemed received the fifth day after its mailing.

Some of this evidence was in support of the tenants' application while parts were in response to the landlord's application.

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be submitted not less than 14 days before the hearing. Rule 3.15 sets out that an applicant must receive evidence from the respondent not less than seven 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 3.14 and the definition of days, qualified by the words "not less than", the last day for the tenants to file and serve additional evidence in support of their application was 31 December 2015. In accordance with rule 3.15 and the definition of days, the last day for the tenants to file and serve evidence in reply to the landlord's application was 8 January 2016.

The tenants' evidence was deemed served 16 January 2016. The landlord had not yet received the evidence by the hearing.

Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 allows me to admit late evidence where it is new, relevant, and not available at the time evidence was due. In addition, 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.

The tenants' evidence consists of a two page submission, a one page payment summary and photographs. This evidence was available so as to be served on time. The tenants could have provided their evidence on time, but did not. The landlord is entitled to examine the evidence before me so that she may respond to it. The landlord

would be unduly prejudiced if I were to consider evidence that she had not examined. On this basis, I am excluding the tenants' late evidence.

The parties were informed of this decision at the hearing.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession? Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenants?

Are the tenants entitled to an order that the landlord make repairs to the rental unit? Are the tenants entitled to an order that the landlord make emergency repairs to the rental unit? Are the tenants entitled to an order to the landlord to provide services or facilities required by law?

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 both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began in late January or early February 2015. Monthly rent of \$700.00 is due on the fifteenth. The landlord does not hold a security deposit.

On 15 November 2015, the landlord personally delivered the 10 Day Notice to the tenants. The tenants admitted receipt of the 10 Day Notice. The 10 Day Notice was dated 15 November 2015 and set out that the tenant had failed to pay \$700.00 in rent that was due 15 October 2015.

The landlord testified that the tenants paid rent for February, March, and July. The landlord testified that the tenants did not pay rent for April, May, June, August, September, October, November, December and January. The landlord applied for eight months' rent arrears in the amount of \$5,600.00 calculated on the following basis:

Item	Amount
April Rent	\$700.00
May Rent	700.00
June Rent	700.00

September Rent	700.00
October Rent	700.00
November Rent	700.00
December Rent	700.00
January Rent	700.00
Total Monetary Order Sought	\$5,600.00

The landlord has not supplied any ledger or banking records that can confirm her testimony. The landlord testified that the tenants would promise to pay rent, but then not deliver.

The tenants testified that they paid rent for all months except September, October and November. The tenants testified that they could provide electronic payment tracking information for their rent payments. The tenants testified that they were withholding rent amounts so that they could carry out plumbing repairs. In particular the tenants testified that the plumbing to their toilet did not work. The tenants testified that they conducted \$170.00 in emergency repairs. The landlord denied receiving any receipts for these repairs. The tenants did not provide copies of the receipts.

The tenants testified that when the landlord delivered the 10 Day Notice they offered to pay the landlord \$700.00. The landlord refused to accept the amount. The landlord denies that the tenants offered any amount. The tenants admit that as at 15 November 2015, the tenants owed rent totalling \$2,100.00.

ML testified that he heard a telephone call between the landlord and tenants at some point in November. In that call the tenants admitted that they owed the landlord rent arrears and promised to pay it quickly. ML could not testify as to the amount of the rent arrears.

The tenants seek repairs to the front door handle, plumbing, and doors.

Analysis

The tenants admit that rent for September, October and November have not been paid to the landlord. The tenants testified that they were entitled to deduct amounts from rent for emergency repairs that they have conducted; however, the tenants have not provided receipts in support of this claim. Further, the tenants submit that they are entitled to withhold amounts from rent on the basis that the rental unit provided is inadequate. The tenants testified that they tried to provide the landlord with \$700.00, but this amount was refused.

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.

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.

On the basis of the evidence before me, I find that the tenants have not provided sufficient evidence to show, on a balance of probabilities, that they were entitled to deduct any amount from rent on the basis of subsection 33(7) of the Act. The tenants have not alleged any other of the above-noted reasons.

The tenants admit that as at 15 November 2015 they owed rent in the amount of \$2,100.00. I find that, as at 15 November 2015, the tenants had rent arrears of in the amount of \$700.00 for each of 15 September 2015 and 15 October 2015. The tenants say that they attempted to pay the landlord \$700.00. If the landlord had taken this amount it would have been applied to the rent arrears for September. In order to cancel the 10 Day Notice issued 15 November 2015, the tenants would have had to pay their arrears for September and then the \$700.00 owing under the 10 Day Notice. Even if the landlord had taken the tenants' \$700.00 payment at that time, the 10 Day Notice would have not been cancelled.

As the tenants have failed to pay their rent in full when due, I find that the 10 Day Notice issued 15 November 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 landlord was entitled to possession of the rental unit on 25 November 2015, the effective date of the 10 Day Notice. As this date has now passed, the landlord is entitled to an order of possession effective two days after it is served upon the tenant(s).

The tenants admit that they have rent arrears totalling \$2,100.00. The landlord has testified that the tenants have rent arrears totalling \$5,600.00; however, the landlord testified that the tenants failed to pay rent for April, May, June, August, September, October, November, December, and January. The landlord's application sets out that the tenants have rent arrears for April, May, June, September, October, November, December, and January. The landlord has not provided any accounting or ledgers that support the payments she has received. As the landlord's testimony conflicts internally (with respect to the amount of arrears) and externally with her application without a ledger or some other form of documentary evidence in support, I do not find the landlord's evidence as to the amount of arrears credible. On this basis, I prefer the tenants' evidence that the total arrears were \$2,100.00. I find that the landlord is entitled to this amount. I issue a monetary order in the landlord's favour in the amount of \$2,100.00, to enable the landlord to recover unpaid rent from the tenants.

The tenants have not applied for any rent reduction or compensation for the diminished value in the tenancy for the alleged deficiencies. Without such an application before me, I cannot order any compensation or offset in the tenants' favour for the condition of the rental unit. There is no basis under the Act for the tenants to unilaterally deduct amounts from rent on the basis of the condition of the rental unit.

As the tenancy is ending, I decline to make any order for repairs or order the landlord provide any services or facilities; however, the landlord is cautioned that if she enters into a subsequent tenancy she is obliged to provide a rental unit in a condition that complies with the Act.

The landlord paid an increased application fee as her application sought a monetary order in excess of \$5,000.00. The landlord has not been successful for the full amount of her claim. Accordingly, I am exercising my discretion to award the landlord the filing fee she would have paid (\$50.00) for an application for monetary order of \$2,100.00.

Conclusion

The tenants' application to cancel the 10 Day Notice is dismissed without leave to reapply. The remainder of the tenants' application is dismissed as the tenancy is ending and these issues are now moot.

The landlord is provided with a formal copy of an order of possession. 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.

I issue a monetary order in the landlord's favour in the amount of \$2,150.00 under the following terms:

Item	Amount
Unpaid September Rent	\$700.00
Unpaid October Rent	700.00
Unpaid November	700.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	\$2,150.00

The landlord is provided with this order 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 subsection 9.1(1) of the Act.

Dated: January 18, 2016

Residential Tenancy Branch

