Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER EVICTION SERVICES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF; CNR, OLC, FF, O

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, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the landlords' 10 Day Notices to End Tenancy for Unpaid Rent (the 10 Day Notices) pursuant to section 46;
- an order requiring the landlords to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- authorization to recover her filing fee for this application from the landlords pursuant to section 72; and
- an "other" remedy.

The tenant appeared with her agent. The landlords' agents 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 landlords consented that, in the event I grant an order of possession, the order of possession would be effective no earlier than one o'clock in the afternoon on 31 March 2016.

The tenant's request for an "other" remedy and an order that the landlords comply relate to a determination of the status of the fixed-term tenancy agreement and the landlords' ability to end the tenancy on the basis of the two-month notice provided 15 November 2015 (the two-month notice).

Preliminary Issue – Amendment to Application

At the hearing, the agent ZA stated that she had incorrectly identified herself as a "tenant" in the tenant's application for dispute resolution. The agent ZA asked to be removed as a tenant. The landlords' agent SA consented to this amendment and agreed that only the tenant RD was the "tenant" for the purposes of this tenancy.

Preliminary Issue – Service of Documents

The parties acknowledged service of each other's documents with the exception of the tenant's bank statements.

On or about 15 February 2016, the tenant delivered six pages of documents to the Residential Tenancy Branch. These documents included six pages of bank records, which the tenant submits as evidence that she withdrew her rent payments in cash.

The tenant did not provide this evidence to the landlords. I am permitted by rule 3.17 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) to admit evidence that otherwise does not accord with the service provisions of the Rules:

> Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC office in accordance with the Act or Rules …may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.
>
> The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.
>
> Both parties must have the opportunity to be heard on the question of accepting late evidence.

> If the arbitrator decides to accept the evidence, the other party will be given an opportunity to review the evidence. The arbitrator must apply Rule 7.8 [*Adjournment after the dispute resolution hearing begins*] and Rule 7.9 [*Criteria for granting an adjournment*].
>
> [emphasis added]

The landlords did not consent to the late evidence. Rule 3.17 of the Rules sets out that I may admit late evidence where it does not unreasonably prejudice one party or result in a breach of natural justice.

Further, the BC Supreme Court noted in *Owers v Viskaris*, 2012 BCSC 1534 at paragraph 42, that "litigants, especially self-represented ones, sometimes make a mistake that calls for some reasonable accommodation where it does not cause significant prejudice to the other party or to the fairness of the hearing process".

The central issue to this dispute is whether or not the tenant paid rent for October, November, and December. The landlords have provided testimony that the tenant did not pay rent. The tenant has provided testimony that she did. There is little corroborating evidence for either version of events. The landlords ask me to infer from the absence of receipts for October, November, and December that no rent was collected. The tenant asks me to infer that rent was paid in full by the failure of the landlords to mention any rent arrears in the two-month notice. The agent SA also asked me to infer that the tenant did not pay rent from the lack of bank statements showing cash withdrawals.

Where there is conflicting testimony, it is necessary to make a finding of credibility. Corroborating evidence can assist with this. As this evidence may be critical for showing that the tenant did, in fact, pay rent as required under the tenancy agreement, I find that it is necessary to admit the evidence despite of its imperfect service. It is preferable to decide applications on the best evidence—this is especially true where there are credibility issues.

In order to ameliorate any prejudice to the landlords, the landlords were permitted to provide a written reply to the documents. The prejudice to the landlords is further reduced as the timeline for response still allowed for ample time to provide this decision in advance of the proposed date for possession by the landlords of 31 March 2016.

The tenant agreed to provide the additional evidence to the landlords on the day of the hearing. The landlords' agent SA agreed to fax a copy of this evidence to the

Residential Tenancy Branch along with any response to the tenants' evidence on or before 16 March 2016.

I find that I do not need to reconvene the hearing pursuant to rules 7.8 and 7.9 of the Rules for the purpose of hearing the landlords' submissions on the tenant's evidence as they provided those submissions in writing.

Preliminary Issue – Evidence in Language Other than English

I was provided with three recordings: two audio and one video. The recordings are primarily in either Hindi or Punjabi with some English. I was not provided with translations of the recordings. I do not understand either Hindi or Punjabi.

The agent SA informed me that she could not understand the content of the recordings. The agent SA admitted that the agent RB could understand the language in the recordings. At all times the agent SA was able to find out the contents of the recordings from her client.

I have listened to the recordings, and have heard testimony from the parties as to the content of the recordings. The parties' testimonies do not conflict as to the content of the recordings. I accept the parties' testimony as to the content of the recordings. Insofar as the recordings are in English, that evidence is before me.

Issue(s) to be Decided

Should the landlords' 10 Day Notices be cancelled? If not, are the landlords entitled to an order of possession? Are the landlords entitled to a monetary award for unpaid rent and for loss arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Are the landlords entitled to recover the filing fee for this application from the tenant?

Is the two-month notice valid? Is the tenant entitled to an order requiring the landlord to comply with the Act, regulation or tenancy agreement? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and testimony, 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 landlords' cross claim and my findings around each are set out below.

This tenant began occupancy of the rental unit in 2010. The parties have entered into several successive, fixed-term tenancies. The most recent tenancy agreement was entered into on 11 August 2015 for a tenancy beginning 1 September 2015 and ending 1 September 2016. Current monthly rent is $1,500.00 and is due on the first. The landlord MB continues to hold the tenant's original security deposit in the amount of $650.00, which was collected at the beginning of this tenancy.

I was provided with a copy of the most recent tenancy agreement. There is a handwritten addendum at clause 2 that reads "*If we need empty this house we give you time at least 2 monts*" (as written). Clause 3 indicates that heat and electricity are included in the cost of rent.

The tenant's rent has historically been paid in part by the Ministry of Social Development and Social Innovation (the Ministry) and in part by the tenant. The Ministry would pay $510.00 and the tenant would pay the remaining amount in cash (most recently $990.00) to the landlord MB directly.

The agent ZA testified that on or about 13 November 2015, the landlord MB's agents attended at the rental unit to conduct some roof repairs. The tenant testified that she called the agent RB to attend at the rental unit. The tenant testified that RB attended at the rental unit in mid-November 2015 with a worker. The tenant testified that the worker said that it would cost $4,000.00 to $5,000.00 to fix the roof.

On or about 15 November 2015, the landlord MB delivered the two-month notice to the tenant. The letter's subject read, "To move [tenant] from this rental unit for the reason of fixing plumbing fixtures and renovating the interior of the unit." The letter demanded possession on or before 1300 on 31 December 2015. The agent ZA submitted that the fact that the landlord MB attempted to use the two-month notice at this time and failure to raise any issue of unpaid rent in that notice indicates that rent was current at that time.

The landlords admit that they served the tenant with the two-month notice. The landlords state that they are not pursuing that notice.

On 24 November 2015, the tenant and landlord MB had a conversation in which the landlord MB indicated that he wanted the tenancy to end because of the proposed renovations. The agent ZA testified that the conversation was not acrimonious as one

would expect if the tenant had rent arrears of nearly $2,000.00. Further, ZA testified that there is no mention of any arrears in this conversation. The landlords did not provide evidence that contradicts the content of this conversation.

The two-month notice was followed by a demand letter by a lawyer. I was provided with a letter dated 26 November 2015 from the landlord MB's lawyer to the tenant. The letter sets out that the landlord MB has provided notice and demanded possession on 31 December 2015. There was no mention of unpaid rent in that letter.

The agent ZA testified that on 29 November 2015, the tenant's son paid the landlord MB $990.00 in cash. The tenant provided an audio recording to substantiate this. In that recording a male voice can be heard counting out money. The landlords did not provide evidence to otherwise explain the recording.

On 11 December 2015 the landlord MB served the tenant with the first 10 Day Notice in person. The first 10 Day Notice was dated 11 December 2015 and set out an effective date of 31 December 2015. That notice set out that the tenant had failed to pay $2,970.00 in rent that was due 1 December 2015.

On 15 January 2016, the agent SA served the tenant with a second 10 Day Notice by posting that notice to the tenant's door. The second 10 Day Notice was dated 15 January 2016 and set out an effective date of 25 January 2016. That notice set out that the tenant had failed to pay $3,480.00 in rent that was due 1 January 2016.

The agent RB testified that the tenant did not pay her cash portion for rent for each of October, November and December. The agent RB testified that the 10 Day Notice was delivered as the tenant did not pay her rent and did not accept that she had to move.

The tenant testified that she would always pay her rent in cash a few days before the first of each month. The tenant testified that she has not received receipts over the course of the tenancy and that when she asks for receipts, the landlord refuses to provide them. The tenant testified that she always pays her rent on time. The tenant testified that no rent is outstanding and she has never withheld any amount from rent.

The agent SA testified that there are no prior orders of this Branch and the landlords are not aware of any reason that would entitle the tenant to deduct any amount from rent. The landlords admit that rent for January, February and March has been paid in full.

The agent SA submits that there is no trickery and this is why the corporate landlord has provided receipts that were available. The agent SA testified that when she looked in the receipt book there were no receipts for October, November or December.

The agent ZA testified that the landlords have never provided receipts in the past. The tenant denied that she received the receipts in the ordinary course of the tenancy. The tenant only received the receipts when they were provided as evidence in the course of these applications.

I was provided with text messages between the agent RB and the tenant. The relevant messages are detailed below:

- RB to tenant on 24 November 2015: *You are agree to move so that's why I sent the paper.we give the notice to the downstairs as wall tomorrow….I have to move you because for major renovation inside*
- Tenant to RB on 24 November 2015: *sorry [RB] I went to the tenancy board and they say we can't move because we signed a 1 year lease…I showed the lease and I even told them that you said you wanted to do renovations, but they still said no because we have a 1 year lease…and I did not agree to move…[RB] please give me a rent receipt for my rent and my utilities for December 1st. thank you.*
- RB to tenant on 24 November 2015: *6 months ago I told you we gonna fix everthins inside the house and then you should moov for while , then you are agree with us you said ok let me know when now our house wall under your kitchen almost dead any time fell down because water leaking upstair….Check the contract peper where you sign by my hand wrinting you agree to move and you sign check one more time .your daughter is threating me.*

[as written]

The text messages do not mention any rent arrears. The agent ZA submits that as the amount alleged to be owing is quite large, it is reasonable to assume the landlord MB would have texted the tenant about the debt if there was one.

The landlords provided copies of receipts acknowledging cash payments:

- I was provided with a receipt dated 31 December 2014 in the amount of $890.00 for rent due 1 January 2015.
- I was provided with a receipt dated 31 January 2015 in the amount of $890.00 for rent due 1 February 2015.
- I was provided with a receipt dated 1 March 2015 in the amount of $890.00 for rent due 1 March 2015.
- I was provided with a receipt dated 31 March 2015 in the amount of $890.00 for rent due 1 April 2015.
- I was provided with a receipt dated 30 April 2015 in the amount of $890.00 for rent due 1 May 2015.
- I was provided with a receipt dated 31 May 2015 in the amount of $890.00 for rent due 1 June 2015.
- I was provided with a receipt dated 1 July 2015 in the amount of $890.00 for rent due 1 July 2015.
- I was provided with a receipt dated 1 August 2015 in the amount of $890.00 for rent due 1 August 2015.
- I was provided with a receipt dated 1 September 2015 in the amount of $890.00 for rent due 1 September 2015.

The tenant provided me with a copy of her bank statements from a credit union. The statement is for transactions spanning 30 June 2015 to 29 February 2015. The following cash withdrawals are of note:

- 30 September 2015 cash withdrawal of $1,111.65;
- 30 October 2015 cash withdrawal of $1,270.00;
- 27 November 2015 cash withdrawal of $1,111.00

There are similar withdraws made in December, January, and February

The landlords submit that these amounts are not clearly for rent as they do not exactly match the tenant’s cash-rent amount.

The landlords provided copies of the landlord MB’s business account (ending 3250) statements for 17 December 2014 through 17 December 2015. The business account does not show any deposits that correspond with the tenant’s cash rent amount at any

time. There were no deposit slips provided for cash deposit amounts. The only deposits recorded were cheques from the Ministry.

The landlords submitted that historically the tenant had contributed one half of the utilities.

The tenant testified that she has complied with the landlord's demands for utilities even though the utilities are supposed to be included in the tenancy agreement. The agent ZA testified that when the tenant would refuse to pay for utilities on the basis that they were included in the tenancy agreement, the landlord would tell her to move out.

I was provided with an invoice dated 24 December 2015 in the amount of $109.56 for natural gas.

The landlords claim for $3,024.78:

Item	**Amount**
Unpaid October Rent	$990.00
Unpaid November Rent	990.00
Unpaid December Rent	990.00
Utilities	54.78
Total Monetary Order Sought	**$3,024.78**

Analysis

Clause 3 of the tenancy agreement sets out that utilities are included as part of rent. The boxes are clearly marked. The tenant's evidence is that she has consistently protested payment of utilities, but that the landlord MB demands payment and tells the tenant to leave when she protests. I accept that the tenant paid amounts towards utilities under protest and that these payments do not amount to waiver of her rights under the tenancy agreement. I find that the tenant is not obliged to pay any additional amount towards utilities and that utilities are included in her rent amount. The landlords attempt to recover amounts in respect of utilities is dismissed.

Fixed-term tenancy is defined in section 1 of the Act:

> "fixed term tenancy" means a tenancy under a tenancy agreement that specifies the date on which the tenancy ends;

A plain reading of the tenancy agreement indicates that the tenancy is a fixed-term tenancy. The agreement does not specify that the tenancy ends at the end of the fixed

term. This is clearly evident at clause 2 of the agreement where the end date of the tenancy is specified.

There are only three ways in which a landlord may unilaterally end a tenancy under the Act:

- section 46 of the Act;
- section 47 of the Act; and
- section 49 of the Act.

The two-month notice appears to be an attempt to end the tenancy pursuant to section 49 of the Act. Pursuant to paragraph 49(2)(c) of the Act a fixed-term tenancy may not be ended by way of a notice issued pursuant to section 49 prior to the completion of the fixed term.

Clause 2 of the tenancy agreement contains a handwritten addendum that the landlord may end the tenancy with two months' notice.

Subsection 5(1) of the Act prohibits contracting out of the provisions of the Act and Regulations. Any term that attempts to contract out is of no effect. The handwritten addendum at clause 2 of the tenancy agreement is an attempt to contract out of the Act and is of no effect.

I find that the landlords may not end the tenancy pursuant to a notice issued pursuant to section 49 if the Act prior to the completion of the fixed term. The landlords are ordered to comply with these provisions.

The landlords attempted to end the tenancy pursuant to section 46 of the Act by way of the 10 Day Notices. A landlord may end a tenancy pursuant to a 10 Day Notice where a tenant fails to pay his or her rent.

In this case, the tenant testified that she has paid her rent for the three months at issue. The landlords' evidence is that the tenant has not.

Where there are conflicting versions of an event, I am required to make a finding of credibility. The often-cited test of credibility is set out in *Faryna v Chorny,* [1952] 2 DLR 354 (BCCA) at 357:

> The real test of the truth of the story of a witness… must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The landlord MB attempted to unlawfully end the tenancy in November 2015 pursuant to the two-month notice. There was no mention that the tenant was in arrears in any communication by way of text massage or from the landlord's counsel. The tenant's son is clearly heard on recording (dated 29 November 2015) counting out an amount equivalent to the tenant's December rent. The landlords did not provide any evidence to explain that the money being counted was in respect of some other debt or provide any other explanation. The banking records provided by both parties are equivocal and I put no weight in them. An absence of receipts in the landlord's control does not prove that the tenant's failed to pay rent. On this basis, the version of events in harmony with the preponderance of the probabilities that a practical and informed person would recognize as reasonable is that the tenant did pay her rent in full. I find that the landlords' version of events was a contrived attempt to end the tenancy when the tenant correctly pointed out that the landlords' prior attempt to end the tenancy using the two-month notice was unlawful.

The 10 Day Notices are cancelled the tenancy will continue. The landlords are not entitled to an order of possession.

As I have found that the tenant paid her rent in full the landlords are not entitled to a monetary order.

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

As the tenant was successful in this application, I find that the tenant is entitled to recover the $50.00 filing fee paid for this application.

Paragraph 72(2)(a) of the Act sets out:

> If the director orders a party to a dispute resolution proceeding to pay any amount to the other...the amount may be deducted...in the case of payment from a landlord to a tenant, from any rent due to the landlord...

The tenant may elect to deduct $50.00 monetary order from a future month's rent. Payment of the net amount of rent will satisfy the tenant's obligations pursuant to section 26 of the Act.

Conclusion

The landlords' application is dismissed without leave to reapply. The tenant's application is granted in full.

The 10 Day Notices are cancelled. The tenancy will continue until it is ended in accordance with the Act.

I issue a monetary order in the tenant's favour in the amount of $50.00.

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: March 21, 2016

Residential Tenancy Branch