



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CAPREIT LIMITED PARTNERSHIP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

Landlord: MNR, OPR, MNSD, FF
Tenant: CNR, MNDC

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to an Interim Decision joining the applications.

The landlord filed their application August 26, 2016 pursuant to the *Residential Tenancy Act* (the Act). Their application was originally heard on October 21, 2016 and consequently adjourned to be heard together with the tenant's application on this date. The landlord seeks Orders, as follows:

1. An Order of Possession for unpaid rent in respect to a 10 Day Notice to End for unpaid rent dated **August 02, 2016** – Section 55
2. A Monetary Order for unpaid rent - Section 67
3. To retain the security deposit as set off – Section 38, 67
4. An Order to recover the filing fee for this application - Section 72

The tenant filed their application October 12, 2016 pursuant to the Act for Orders as follows:

1. To cancel the landlord's 10 Day Notice to End for unpaid rent dated **October 04, 2016** – Section 46
2. A Monetary Order for loss – Section 67

Both parties attended the hearing and were given opportunity to mutually resolve their dispute to no avail. The parties were provided opportunity to make *relevant* prior

submission of evidence to the hearing and fully participate in the conference call hearing, and to present *relevant* evidence and *relevant* testimony in respect to their claims. Both parties confirmed submitting and exchanging document evidence. The tenant informed they had submitted 2 additional packages of late evidence, respectively 3 and 1 day before the hearing, and unavailable to the Arbitrator although subsequently reviewed.

Each party was given opportunity to clarify their claims on application. It must be noted that in contrast to the landlord the tenant provided a voluminous amount of document evidence of almost 290 pages to this matter inclusive of an amendment *to the landlord's application file*: an action not available to the tenant. Irrespective, it seeks \$21,000.00. Prior to concluding the hearing both parties acknowledged they had presented all of the *relevant* evidence that they wished to present.

The parties were apprised at the outset of this hearing it is my decision that I will not deal with any of the tenant's monetary claims. For claims or disputes to be combined on an application they must be related. The tenant's monetary claim on application is not at all related to the main issue to be dealt with together. Therefore, I will deal with the tenant's primary reason for their application and request to set aside the landlord's Notice to End Tenancy for unpaid rent, and will dismiss the balance of the tenant's application *with liberty to re-apply*.

The tenant wanted to raise the following as preliminarily to the hearing.

The tenant wanted to inform the Arbitrator they had faxed late evidence days before the hearing which they provided the landlord the day before the hearing. They wanted to inform the Arbitrator of the landlord's purported intimidation of another tenant that had provided information to the applicant in support of their application. I determined that in the course of the proceeding any such evidence presented as necessary and relevant in the proceeding would be considered and factored in the outcome appropriate.

The tenant also wanted to inform the Arbitrator that the landlord's practice is to record communications between them and tenants and in all likelihood was recording the hearing and that recording a hearing is not permitted. The tenant asserted the landlord be required to provide proof they were not recording the hearing. I asked the landlord if they were recording the hearing. The landlord informed that in certain cases they may record phone calls for the purpose of administrating the tenancy. However they denied they were recording this hearing. I accepted their testimony and reminded both parties neither were authorized to record the hearing. The tenant's request was denied.

The tenant further wanted to inform the Arbitrator they had provided information seeking that I consider and extend unspecified accommodation to the tenant as they were unwell, ill, a senior, with multiple and chronic health complications and more recently had been dealing with an upper respiratory infection. Ultimately the tenant simply requested an adjournment of the hearing because of a number of other reasons. The tenant testified that as they were "medically fragile", with chronic medical issues, stressed, and of late with a seasonal illness, they thought they had not submitted the most complete evidence possible or the best evidence possible of them so as to adequately advance their application or defend themselves against the landlord's claims. I apprised the tenant that they were presenting clearly, were forthright, and understandable when speaking directly in their phone. The tenant was reminded that the hearing was proceeding solely on the relevant primary reason for the hearing with the resulting reduction of evidence. The tenant was further reminded that in the past month they had submitted an overabundance in excess of 260 pages of evidence, and additional late evidence. I apprised the tenant that what they were advancing as reason for being unable to proceed on this date did not make sense given the facts at hand. The landlord further objected to an adjournment as prejudicial. The tenant testified that they were able to proceed. The tenant's request for an adjournment was denied. The hearing continued on the merits of the parties respective applications.

Therefore, **the landlord** seeks to end the tenancy pursuant to a 10 Day Notice to End dated August 02, 2016, and unpaid rent; and, **the tenant** seeks to cancel the landlord's 10 Day Notice to End dated October 04, 2016.

Issue(s) to be Decided

Is the landlord's Notice to End dated August 02, 2016 effective to end the tenancy?

Is the landlord's Notice to End dated October 04, 2016 effective to end the tenancy?

Should the landlord's Notices to End be cancelled?

Is the landlord entitled to an Order of Possession?

Is the landlord entitled to a monetary order?

Background and Evidence

The undisputed relevant evidence in this matter is as follows. The tenancy began December 01, 2015 as a written tenancy agreement of which I have benefit of a copy. The payable monthly rent is \$1250.00 due in advance on the 1st day of each month. Both parties agreed the tenant's rent was in greater part satisfied up to September 2016 rent other than a \$45.00 shortfall due to a tenant reduced rent payment in June 2016. However, both parties testified agreeing that presently the rent for October, November and December 2016 remains unpaid in the sum of \$3786.25 inclusive of an authorized rent increase as of December 01, 2016.

The disputed relevant evidence follows. The landlord claims they gave the tenant a 10 Day Notice to End for Unpaid rent and Utilities (10 Day Notice) on August 02, 2016 stating the tenant owed the landlord \$70.00 which the landlord provided was in major part for unpaid June 2016 rent of \$45.00, and the balance of \$25.00 for an administrative fee permitted by the tenancy agreement due to non-sufficient funds respecting a failed electronic payment from the tenant's account. The tenant testified they never received this 10 Day Notice to End. The landlord testified they cannot provide a copy of this Notice.

The evidence is that from the outset of the tenancy the payment of rent was agreed within the tenancy agreement to be by an electronic payment or transfer of funds characterized in the tenancy agreement as "Payment by EFT". The parties initially agreed to utilize a *debit* arrangement in which the landlord would receive the majority of

rent via this arrangement and the tenant would supplement the balance of rent by a 3rd party cheque. The tenant provided a copy of a *pre-authorized debit* (PAD) agreement dated April 14, 2016 signed by the tenant containing banking details authorizing the landlord and the tenant's financial institution to debit the tenant's account in the amount of \$1050.00. The landlord provided a copy of a different PAD agreement dated April 28, 2016 signed by the tenant containing their banking details and a voided cheque authorizing the landlord and the tenant's financial institution to pay the landlord from the tenant's account in the full amount for rent: \$1250.00.

On the due date for October 2016 rent the landlord's accounting indicated they did not receive all of the payable rent and issued the 10 Day Notice dated October 04, 2016 stating the tenant owed the sum of \$270.00, comprised of the previously referenced \$70.00 (June 2016 rent of \$45.00 and the balance of \$25.00 for an administrative fee for insufficient funds) and \$200.00 rent for October 2016. The landlord testified the following day on October 05, 2016 they discovered the tenant had stopped the PAD agreement intended to satisfy the greater portion of rent for October 2016. The landlord provided into evidence the tenant's rent ledger itemizing that the tenant owed rent.

The tenant acknowledged they stopped the agreement and ultimately did not satisfy any of the rent owed to October 2016. The tenant explained that if they did not stop the agreement it, "would continue to expose my bank account to an unacceptable level of risk . . . and because my efforts over the past 4 months to resolve the issue with the landlord have been unsuccessful". The tenant explained the landlord would not abide by the parties' agreed terms respecting the PAD agreement, and then the landlord would not resolve problems consequently created by them despite attempts by the tenant to engage the landlord to review certain discrepancies. The tenant testified the unresolved issue resulted in them incurring a charge for insufficient funds in their account and not being able to access all their funds because their account would be overdrawn due to the landlord's receiving from their account more than what they had agreed. The landlord testified they were authorized to receive all rent of \$1250.00. The tenant acknowledged that as a result of their stop to the PAD agreement the entire rent

for October 2016 went unpaid and filed for dispute resolution. The tenant further acknowledged that rent has also not been paid for November or December 2016.

The landlord argued that rent via electronic payment is the parties agreed method of payment for the rent within the tenancy agreement and that this term cannot be changed. The tenant argued the landlord does not have a right to the payment of rent solely by electronic means and the landlord's purported inconsiderate actions were unfair to the tenant.

The landlord would like to recover unpaid rent. The tenant does not dispute the unpaid rent but wants to be ultimately compensated for the landlord's lack of co-operation and what the tenant deems abusive practices in the assumed amount of \$21,000.00.

Analysis

All references to the relevant legislation and other resources can be accessed from the Residential Tenancy Branch website at www.gov.bc.ca/landlordtenant.

I have reviewed and considered all of the *relevant* evidence in this matter in respect to the itemized issues. On preponderance of all the relevant evidence submitted, and on balance of probabilities, I find as follows.

Landlord's application / claim

The parties do not agree if a 10 Day Notice to End for Unpaid Rent and Utilities dated August 02, 2016 was given to the tenant. Neither party could provide a copy of the Notice. In the absence of such evidence I accept the tenant may have not satisfied all of the owed rent at that time of \$45.00. Regardless, the landlord bears the burden to provide evidence to support their application seeking to end the tenancy based on a Notice to End dated August 02, 2016 and in this respect they have not. In the absence of the respective Notice to End upon which the landlord seeks to base their application I am unable to determine if the 10 Day Notice to End, claimed by the landlord to have been served to the tenant is valid to end the tenancy. As a result I must **dismiss** the landlord's application seeking to end the tenancy.

Tenant's application / claim

I accept the tenant is deemed to have received the 10 Day Notice to end for unpaid rent October 07, 2016 and filed their application within the required time to do so.

Section 26 of the Act, and Residential Tenancy Regulation **Schedule: 5** (comprising the standard terms in a tenancy agreement), state as follows (**relevant emphasis mine**).

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.

(2) A landlord must provide a tenant with a receipt for rent paid in cash.

(3) Whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not

(a) seize any personal property of the tenant, or

(b) prevent or interfere with the tenant's access to the tenant's personal property.

(4) Subsection (3) (a) does not apply if

(a) the landlord has a court order authorizing the action, or

(b) the tenant has abandoned the rental unit and the landlord complies with the regulations.

Payment of rent

5 (1) The tenant must pay the rent on time, unless the tenant is permitted under the Act to deduct from the rent. If the rent is unpaid, the landlord may issue a notice to end a tenancy to the tenant, which may take effect not earlier than 10 days after the date the tenant receives the notice.

(2) The landlord must not take away or make the tenant pay extra for a service or facility that is already included in the rent, unless a reduction is made under section 27 (2) of the Act.

(3) The landlord must give the tenant a receipt for rent paid in cash.

(4) The landlord must return to the tenant on or before the last day of the tenancy any post-dated cheques for rent that remain in the possession of the landlord. If the landlord does not have a forwarding address for the tenant and the tenant has vacated the premises without notice to the landlord, the landlord must forward any post-dated cheques for rent to the tenant when the tenant provides a forwarding address in writing.

In this matter I find the evidence is that the parties originally agreed on electronic payment of funds to pay the rent and the tenant effectively breached that term of the agreement by placing a stop to the electronic payment agreement and did not otherwise pay the rent. It is not reasonable for a tenant to intentionally stop paying the rent altogether and then undertake to dispute the notice given them for not paying that rent.

The landlord insists that rent payments must only be by electronic means as a term in the tenancy agreement. The tenant refused to pay by electronic means once the arrangement became a problem for them. It must be known that the Act and Regulations do not specify the terms for payment and the terms for payment is not a standard term in the tenancy agreement. Parties may agree on the terms for the payment of rent and may place it in writing.

I accept the tenant's argument that the landlord cannot refuse payment of rent if not by electronic means. Especially if the tenant is under threat of eviction of losing their tenancy, a landlord cannot refuse other forms of payment such as, cash (legal tender) or an assured payment instrument such as certified cheque, bank draft or money order. Electronic transfers or electronic payment are merely one way to pay.

I understand the landlord's position: that the parties agreed to payment of rent by electronic means and the consequent importance that the landlord places on the terms of the agreement. However, I do not accept their argument that the method of payment of the rent must always be by electronic means once written in the tenancy agreement. I do not accept their argument the tenancy agreement cannot be altered. During a tenancy it is available to landlord's and tenants to *mutually agree in writing* to change or alter any term other than a standard term provided the change does not contradict or change any right or obligation under the Act or respective Regulation. This would include the ability to alter a term governing a method of payment for the rent. I find it did not help matters at hand for the parties to not agree to a change or for the landlord to not agree to alternate means to receive rent.

The landlord's 10 Day Notice to End Tenancy for Unpaid Rent dated October 04, 2016 states the tenant owed \$270.00 in unpaid rent. An administrative fee of \$25.00 was included however it is not *rent*. I find the evidence is that the tenant owed only \$245.00 in unpaid rent. As a result of this discrepancy, *but moreover because of all of the above*, I find the landlord's Notice to End dated October 04, 2016 is not valid to end the tenancy. Based on this Notice the landlord is not entitled to an Order of Possession. **I Order** the Notice to End dated October 04, 2016 is cancelled and of no effect, with the result that the tenancy continues.

The balance of the *relevant* evidence in this matter establishes it is undisputed by the parties there is unpaid rent to date owed the landlord in non-compliance with the Act, or tenancy agreement resulting in the tenant owing the landlord unpaid rent for June, October, November and December 2016. Pursuant to Section 65 of the Act it is appropriate **I Order** that the arrears in rent for June 2016 and October to December 2016 must be paid as follows. I find this conflict and the resulting legal dispute has been unreasonably mutually driven to excess. I find it was available to both parties to avoid placing the tenancy in jeopardy. As a result, I find that both parties are accountable for the sum of filing fees in this matter, with the further result that the landlord is allowed half their filing fee: \$50.00.

Calculation for Monetary Order

| | |
|--|------------------|
| June 2016 unpaid rent | \$45.00 |
| October 2016 unpaid rent | \$1250.00 |
| November 2016 unpaid rent | \$1250.00 |
| December 2016 unpaid rent - as increased | \$1286.25 |
| Filing fee to landlord | \$50.00 |
| unpaid rent owed to landlord | \$3881.25 |

I grant the landlord a **Monetary Order** under **Section 67** of the Act for the amount of **\$3881.25**. If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

Conclusion

The tenant's application, in relevant part has been granted. The balance is dismissed with leave to reapply.

The landlord's application for an Order of Possession has been dismissed. The landlord is given a Monetary Order pursuant to unpaid rent.

This Decision is final and binding on both parties.

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: December 21, 2016

Residential Tenancy Branch