



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, CNR, FF

Introduction

This hearing dealt with applications from both parties. The tenants applied to cancel a 10 Day Notice to End Tenancy for Unpaid Rent dated December 7, 2016 (the “10 Day Notice”) under section 46(4) of the *Residential Tenancy Act* (the “Act”). The landlords applied for an order of possession and a monetary order based on the 10 Day Notice. They also sought to retain all or part of the security deposit against unpaid rent and the return of their filing fee.

The male landlord and his daughter attended the hearing. The daughter translated for her father and gave her own submissions and evidence. The male tenant attended the hearing. All parties gave affirmed testimony and were provided the opportunity to present evidence orally and in written and documentary form, to make submissions, and to respond to the submissions of the other party.

Preliminary Issue: Request for an Adjournment

At the outset of the hearing, the male tenant advised that the female tenant is pregnant and had just been hospitalized with complications. He sought an adjournment on the basis that his partner was better informed than he about the issues and the evidence. The landlords did not consent to an adjournment.

Accordingly, I considered the request for an adjournment based on the criteria set out in Rule 7.9 of the Rules of Procedure, which includes the following:

Without restricting the authority of the arbitrator to consider the other factors, the arbitrator will consider the following when allowing or disallowing a party’s request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment

- whether the adjournment is required to provide a fair opportunity for a party to be heard; and the possible prejudice to each party.

After considering the positions expressed by the parties in attendance at the hearing and taking into account the guidance provided by Rule 7.9, I declined the tenant's request for an adjournment. I did so as it seemed unlikely that an adjournment was required to provide the tenants with a fair opportunity to be heard, as they had already submitted their documentary evidence and one of the two tenants was available to participate in the hearing. Additionally, to grant the adjournment would be potentially prejudicial to the landlords' interests, in light of the length of time they say that they have not received rent.

Preliminary Issue: Severing the Claims

Over the course of the hearing it became clear that the parties were at complete odds as to whether rent had been paid. After completing the process of obtaining affirmed testimony from the parties in attendance, I ordered the tenant to speak with his hospitalized partner and to deliver to the RTB any further submissions and, as receipts may not have been issued, any other evidence as to the payment of rent, no later than close of business on Friday, January 20, 2017. Before January 20 the tenants submitted banking records for an account in the name of J.M. and L.M., apparently relatives of one of the tenants.

As set out in more detail below, the tenants had also submitted evidence before the hearing documenting the costs of emergency repairs to the rental unit that they had attempted to claim against the landlord in an earlier hearing. At that earlier hearing, an arbitrator had given them leave to reapply. However, they had not clearly reapplied.

The landlords have not had an opportunity to respond to the tenants' late submitted evidence. The tenants have not properly applied to be reimbursed for repair costs. At this stage I am not able to determine the amount of money that may be owing by one party to the other. Accordingly, and in order to avoid prejudicing the landlords with respect to their request for an order of possession, which is also the most time-sensitive issue, I have chosen to sever the matters before me.

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an application are to be related to one another. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply. I have concluded that the principal issue here is whether the tenancy will continue. The amount of money one party may owe the other, for loss of rent or emergency repairs, is secondary.

Accordingly, in this decision I will limit my consideration to the issues surrounding the landlords' notice to end tenancy and their application to recover the filing fee and retain all or part of the security deposit. I dismiss the remainder of the claims, with leave to reapply.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling the 10 Day Notice?

If not, are the landlords entitled to an order of possession?

Are the landlords entitled to the return of their filing fee?

Are the landlords entitled to retain all or part of the security deposit?

Background and Evidence

The 10 Day Notice is dated December 7, 2016 and seeks unpaid rent of \$4,400.00 and unpaid utilities of \$199.00. The male tenant was unable to confirm the date that he received the 10 Day Notice. The landlords testified that he was served on December 7, 2016 and provided a Proof of Service document signed by a witness confirming that the male tenant had been personally served with the 10 Day Notice on December 7, 2016.

The tenants' application to dispute the 10 Day Notice is dated December 13, 2016.

A copy of the tenancy agreement was submitted in evidence. Both of the tenants have signed the agreement. It shows that the tenancy began on March 15, 2016 as a one year fixed term with an expiry date of March 15, 2017 and with a rent of \$880.00 due on the first of each month. A security deposit of \$440.00 and a pet damage deposit of \$200.00 were paid at the start of the tenancy.

Another application by the tenants to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated October 1, 2016 was heard in November of 2016. In that application the tenants also sought an order to recover the cost of emergency plumbing repairs and the costs of television cable attachment and subscription. An arbitrator made a decision on that application on November 28, 2016; the file number for that decision is on the cover page of this decision. That arbitrator cancelled the 10 Day

Notice dated October 1, 2016 on the basis that the landlords had failed to establish that the tenants had not paid rent. The landlords had not provided copies of receipts or any written accounting of rental payment, and the tenants had testified that the landlords refused to provide receipts for cash.

In her November 28, 2016 decision, the arbitrator also dismissed the tenants' application for a monetary order for the cost of emergency plumbing repairs and cable costs because the tenants had not provided their receipts to the landlords or the Residential Tenancy Branch ("RTB") in advance of the hearing. That arbitrator granted both parties the right to re-apply.

In advance of this hearing the landlords submitted rent receipts for April to July 2016. Also in evidence were bills for television services addressed to the landlords (who reside upstairs) indicating certain "TV On Demand" charges that the landlords say are attributable to the tenants. The tenant testified that after the landlords stopped providing cable services, which were included in the tenancy agreement, the tenants started paying \$750.00 per month rather than \$880.00 to compensate for the fact that they were required to pay for installation and subscription of their own cable service.

The tenants submitted an invoice for plumbing services an invoice for door repair and a receipt dated January 3, 2017 for rent in the amount of \$700.00 attributable to January, reading "\$50.00 still outstanding." The landlord's daughter stated that the tenants had written this receipt and required one of her parents to sign it, and that although the tenants had paid this amount for January, rent for August – December, inclusive, remains overdue. This receipt is clearly in a different handwriting than the others, and the signature is clearly different than the handwriting on the receipt itself or those submitted by the landlords.

Analysis

Section 46 of the Act provides that a landlord may end a tenancy if rent is unpaid on any day after it is due by giving notice to end the tenant effective on a date no earlier than 10 days after the tenant receives the notice. Under subsection (4), the tenant has 5 days after receipt of the notice to pay the overdue rent or dispute the notice by making an application for dispute resolution, failing which the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice.

This 10 Day Notice was dated and served on December 7, 2016, and the tenants applied on December 13, 2016 to dispute it. The Rules of Procedure define "days" and make clear that in this situation the first day is excluded and the last included. The

tenants are therefore outside of the five day timeline permitted by s. 46. The tenants did not apply for more time to file their application to dispute.

The tenants appear to be saying that all of their rent up to and including December was paid, such that they met the requirement under s. 46(5) to pay the monies owing even before the 10 Day Notice was issued. I do not need to issue a decision on this portion of the tenant's claim because the male tenant also gave undisputed testimony that rent was not paid in full every month. He stated that after the landlords cut off cable service to the rental unit, the tenants unilaterally started paying \$750.00 rather than \$880.00 to adjust for this loss. This is not permitted under the Act. Section 26 requires that a tenant pay rent in full when it is due whether or not the landlord is complying with the Act or the tenancy agreement, subject to certain limited exceptions, none of which apply to cable television services. The proper course of action would have been to reapply for dispute resolution in order to obtain an order requiring the landlord to compensate them for these costs, as they originally did in November. No such application is before me today for these costs, however.

The tenants did not apply to dispute the 10 Day Notice or pay the amounts owing in full within the five days allotted to them. The failure of the tenants to take either of the above actions within five days led to the end of this tenancy on December 17, 2016, the effective date on the 10 Day Notice. The tenants and anyone on the premises were required to vacate the premises by that date. As this has not occurred and as the landlords' 10 Day Notice complies with section 52 of the Act, I find that the landlords are entitled to a two (2) day order of possession.

As the landlords have been successful in their application, I allow them to recover their \$100.00 filing fee for their application.

To give legal effect to this decision, I allow the landlords to retain \$100.00 from the remaining portion of the tenants' security deposit. The remainder of the tenants' security deposit and pet damage deposit are to be addressed in accordance with the provisions of the Act.

Conclusion

The tenants' application for an order cancelling the 10 Day Notice is dismissed.

I allow the landlords' application for an order of possession based on the 10 Day Notice of December 7, 2016. I grant the landlords the attached two (2) day order of possession. Should the tenants or any occupants on the premises fail to comply with

this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

The landlords are allowed a monetary award of \$100.00 to compensate them for the recovery of their filing fee. To give legal effect to this award, I order the landlords to retain \$100.00 from the retained value of the tenants' security deposit.

The remainder of the landlords' requests for monetary relief, including the application for authorization to retain the remaining portions of the security and pet damage deposits are dismissed with leave to reapply.

Both parties are at liberty to reapply with respect to those portions of their monetary claims that have not been included in my findings or in the previous arbitrator's decision. All documentary evidence with respect to the monetary claims must be submitted to the RTB and served on the opposing party as part of any new application.

This decision is final and binding on the parties, unless otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 1(1) of the *Residential Tenancy Act*.

Dated: January 27, 2017

Residential Tenancy Branch