



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR CNR MNSD OLC FF

Introduction

This hearing dealt with an application by both parties pursuant to the *Residential Tenancy Act* ("Act").

The landlords sought:

- an Order of Possession for unpaid rent pursuant to section 55; and
- a Monetary Order for unpaid rent pursuant to section 67.

The tenants sought:

- cancellation of the landlords' 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38;
- an order requiring the landlords to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

All named parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. Landlord D.N. (the landlord) stated that she would be representing the interests of the landlords in this matter. Tenant R.N. (the tenant) stated that he would be representing the interests of both tenants in this matter.

The landlord initially applied under the Residential Tenancy Branch's (the RTB's) Direct Request process on August 17, 2017, when they were informed that the tenants had already filed their own Tenants' Application for Dispute Resolution (Tenants' Application) to dispute the 10 Day Notice. The landlord, upon learning that they would not be able to use the Direct Request process, submitted an Amendment to an Application for Dispute Resolution (the Amendment) on August 18, 2017, to the RTB to request the unpaid rent for September 2017 and October 2017.

The landlord testified that the Landlord's Application for Dispute Resolution (the Landlord's Application), the Amendment and evidentiary package were sent to the tenants by way of

registered mail on August 19, 2017. The landlord provided a copy of the Canada Post Tracking Number to confirm this registered mailing and the tenant confirmed that both tenants received this package. In accordance with sections 88 and 89 of the *Act*, I find that the tenants were duly served with the Landlord's Application, Amendment and evidentiary package.

The landlord acknowledged receiving the Tenant's Application. In accordance with section 89 of the *Act*, I find that the landlords were duly served with the Tenants' Application.

The tenant testified that, although he submitted his evidence to the RTB, he did not provide any evidence to the landlords. Rule 3.14 of the RTB's Rules of Procedure states that documentary evidence that is intended to be relied on at the hearing must be received by the respondent not less than 14 days before the hearing. I find that the tenants did not serve the landlord with their evidence and that the landlords may be prejudiced by this as they did not have a chance to review and respond to the tenants' evidence. For this reason, the tenants' evidence is not accepted for consideration.

The landlord entered into evidence a signed and witnessed Proof of Service document attesting to the fact that the 10 Day Notice was posted to the door of the rental unit at 10:00 a.m. on August 03, 2017. The tenant confirmed receipt of the 10 Day Notice. In accordance with section 88 of the *Act* I find that the 10 Day Notice, identifying \$1,100.00 in rent owing for this tenancy, was duly served to the tenants.

At the outset of the hearing the landlord acknowledged that \$469.20 of the \$1,100.00 of rent owing on the 10 Day Notice was paid by the tenant on August 01, 2017, and that \$630.80 is the balance of unpaid rent that remains owing for August 2017. This amount is already reflected in the landlord's monetary claim.

The landlord testified that the tenants are still in the rental unit and have not made any payments toward the tenancy since the 10 Day Notice was issued.

The landlords' amended application for a monetary award of \$2,830.80 is for the following items:

Item	Amount
Balance of Unpaid August 2017 Rent	\$630.80
Unpaid September 2017 Rent	1,100.00
Unpaid October 2017 Rent	1,100.00
Amended Requested Monetary Order	\$2,830.80

Issue(s) to be Decided

Should the landlords' 10 Day Notice be cancelled? If not, are the landlords entitled to an Order of Possession?

Are the landlords entitled to a monetary award for unpaid rent?

Are the tenants entitled to a monetary award for the return of all or a portion of their security deposit?

Are the tenants entitled to an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62?

Are the tenants 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, including the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

The landlord gave written evidence that this tenancy began on November 01, 2016, with a monthly rent of \$1,100.00 due on the first day of the month. The landlord testified that they continue to retain a \$550.00 security deposit from the tenants in trust.

A copy of the signed 10 Day Notice, dated August 02, 2017, with an effective date of August 12, 2017, was included in the landlord's evidence.

A copy of a Two Month Notice to End Tenancy for Landlord's Use of Property (the Two Month Notice), dated July 10, 2017, with an effective date of October 01, 2017, was also included in the landlord's evidence.

The landlord testified that the tenants only paid a portion of the August 2017 rent on August 01, 2017, in the amount of \$469.20 and deducted \$80.80 for the repair of the tenant's fridge and \$550.00 for the return of the security deposit. The landlord testified that they put the full amount of the monthly rent on the 10 Day Notice even though a portion had been paid by the tenants.

The tenant testified that they received the Two Month Notice in July of 2017 from the landlords, which the tenants have not disputed. The tenant testified that the landlords would not return post-dated cheques for future rent to the tenants, as requested by the tenants upon receiving the Two Month Notice. The tenant testified that the fridge repair was not being addressed in a timely fashion which led to the tenants hiring their own person to complete the repair.

The landlord testified that they told the tenants that the post-dated cheques would be returned at the end of the tenancy. The landlord testified that they had sent a person to repair the fridge in a timely fashion but that the tenant would not allow this person to complete the repairs. The landlord testified that they sent a second person to repair the fridge after the first person was denied access but that the tenant had already had the repair completed by the time the second

person arrived at the unit, contrary to the landlord's instructions to the tenants to allow the landlords to handle the repair.

The tenant states that no notice was given by the landlords for entry to the unit for the initial repair attempt. The tenant testified that the tenants have bought a new home and are going to vacate the rental unit by September 18, 2017.

Analysis

I find that the tenants disputed the 10 Day Notice within five days of receiving it in accordance section 46 (4) of the *Act*.

Section 26 of the *Act* requires a tenant to pay rent to the landlord regardless of whether the landlord complies with the *Act*, regulations or tenancy agreement, unless the tenant has a right to deduct all or a portion of rent under the *Act*.

Section 38 of the *Act* establishes that a landlord is only obligated to address the security deposit after the tenancy has ended and the tenants have provided their forwarding address in writing to the landlords. As this tenancy has not yet ended, I find that the tenants acted without legal authority to reduce the amount of their August 2017 rent payment by the amount of their security deposit. I also find that the tenants' application to recover the security deposit is premature at this time. I dismiss the tenants' application for a return of their security deposit.

Section 33 of the *Act* allows for a tenant to complete an emergency repair when the landlord has not completed the emergency repair in reasonable amount of time. Section 33(1) of the *Act* defines emergency repairs as made when the repair is urgent, necessary for the safety of anyone or for the preservation of use of residential property and made for the purpose of repairing major leaks in pipes or roof, damaged or blocked water or sewer pipes or plumbing repairs, primary heating system, damaged or defective locks that give access to a rental unit, electrical systems or in prescribed circumstances, a rental unit or residential property. I find that the emergency repair completed by the tenants does not match the definition of what constitutes an emergency repair in accordance with section 33 of the *Act*.

I find that the tenants acted without legal authority in reducing the amount of their August 2017 rent payment by the amount of their fridge repairs and their security deposit.

Based on the landlord's evidence and testimony of both parties, I accept that the tenants failed to pay the full balance of the monthly rent within five days of receiving the 10 Day Notice. In accordance with section 46(5) of the *Act*, the failure of the tenants to pay the full balance of the monthly rent within five days led to the end of this tenancy on August 16, 2017, the corrected effective date on the 10 Day Notice. In this case, the tenants and anyone on the premises were required to vacate the premises by August 16, 2017. As this has not occurred, I find that the landlords are entitled to a two (2) day Order of Possession.

For these reasons, the tenants' application to cancel the 10 Day Notice is dismissed. As the tenants have not been successful in their Application, I also dismiss the tenants' request to recover the filing fee.

Section 49 of the *Act* establishes that a landlord may issue a Two Month Notice upon the sale of the property and when the purchaser indicates in writing that the purchaser intends on occupying the rental unit. Section 51(1) of the *Act* stipulates that a tenant who receives a notice to end tenancy under section 49 of the *Act* is entitled to the equivalent of one month's rent payable under the tenancy agreement and allows a tenant to withhold one month's rent, generally the last month of the tenancy. I find that the landlord's 10 Day Notice does not affect the tenants' right to withhold one month's rent, pursuant to sections 49 and 51 (1) of the *Act*. For this reason, I dismiss the landlords' application for a monetary award for unpaid rent owing for September 2017.

Section 26 of the *Act* requires a tenant to pay the rent when it is due under the tenancy agreement. I find that the rent for October 2017 is not due until October 01, 2017, and that the landlord is not entitled to October 2017 as I am issuing the landlords with an Order of Possession and the tenants are ending their tenancy prior to when rent would become due. For the above reasons, the portion of the Landlord's Application seeking unpaid rent for October 2017 is also dismissed.

Based on the written evidence and sworn testimony of the landlord and the tenant, I find that the landlords are entitled to a monetary award of \$630.80 for unpaid rent owing for this tenancy for August 2017.

Although the Landlord's Application does not seek to retain the tenant's security deposit, using the offsetting provisions of section 72 of the *Act*, I allow the landlords to retain the tenants' security deposit plus applicable interest in partial satisfaction of the monetary award. No interest is payable over this period.

Conclusion

I dismiss the Tenants' Application in its entirety, without leave to reapply.

I grant an Order of Possession to the landlords effective **two days after service of this Order** on the tenant(s). Should the tenants or any occupant 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.

Pursuant to section 67 of the *Act*, I grant a monetary Order in the landlords' favour under the following terms, which allows the landlords to recover unpaid rent and to retain the tenants' security deposit:

Item	Amount
Unpaid August 2017 Rent	\$630.80
Less Security Deposit	-550.00
Total Monetary Order	\$80.80

The landlords are provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: September 22, 2017

Residential Tenancy Branch