Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPRM – DR, FFL; CNR, OLC, ERP, PSF, LRE, LAT, FFT

Introduction

On December 7, 2017, an adjudicator appointed pursuant to the *Residential Tenancy Act* (the *Act*) issued an Interim Decision regarding the landlords' application for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

After an *ex parte* hearing using the Residential Tenancy Branch's (the Branch's) direct request process, in her Interim Decision the Adjudicator adjourned the landlord's application to a participatory hearing. I have been delegated responsibility to preside over this matter in the participatory hearing.

The tenant completed his December 7, 2017 application for the following on December 11, 2017, when the tenant paid the filing fee for his application. The tenant's application, as outlined below, was joined to the landlord's application and was properly before me at this hearing:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- authorization to change the locks to the rental unit pursuant to section 70;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70; and

- authorization to recover the tenant's filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and 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 anticipated that the hearing would include consideration of his multiple 10 Day Notices to End Tenancy as well as a 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) that he had issued to the tenant. However, the only Notice to End Tenancy that was part of the landlord's original application to obtain an Order of Possession for unpaid rent was the one issued for unpaid rent owing for November 2017, the subject of the landlord's direct request application for dispute resolution outlined in the Interim Decision of December 7, 2017. As such, and as the tenant had not been properly alerted to the prospect of having to respond to the 1 Month Notice at this hearing or any of the other 10 Day Notices, the principles of natural justice prevented me from considering the landlord's request to obtain an Order of Possession on the basis of the 1 Month Notice as well as any of the earlier 10 Day Notices issued by the landlord.

At the hearing, the landlord asked for authorization to amend his original application for a monetary award of $1,360.00 to include an additional $1,000.00 in unpaid rent that he maintained remained owing from December 2017 and January 2018. As the tenant was clearly aware that rent would also be required for both of these months, I allowed the landlord's application to increase the amount of his requested monetary award from $1,360.00 to $2,360.00, plus the recovery of the landlord's $100.00 filing fee.

At the hearing, considerable time was required to establish whether these applications fell within the jurisdiction of the *Act* and, if that were the case, whether the various documents had been served in accordance with the *Act*.

Based on the time available, it was only possible to consider the most important of the issues identified in the tenant's application, the tenant's application to cancel the 10 Day Notice. The other issues relied on a continuation of the tenancy, and many of them would not normally have been joined to the landlord's application, had the tenant not also applied to cancel the landlord's 10 Day Notice. Under these circumstances, I have exercised the discretion provided to me pursuant to the Branch's Rules of Procedure 2.3 and 6.2, to dismiss those portions of the tenant's claim that I consider to be unrelated to the central issue of whether this tenancy shall continue. This encompasses

everything but the tenant's application to cancel the 10 Day Notice of November 2, 2017, and to recover the filing fee for the tenant's application. The remaining portions of the tenant's application are dismissed without leave to reapply.

Preliminary Issues – Service of Documents

The landlord entered into written evidence a number of 10 Day Notices he claimed to have served to the tenant. The 10 Day Notice cited in the landlord's application for dispute resolution properly before me through the direct request process was one that the landlord testified that he posted on the tenant's door on November 2, 2017. At the hearing, the landlord referenced a Proof of Service document that he said had been signed by Witness BS, attesting to his posting of the 10 Day Notice on the tenant's door on November 2, 2017. Although this document could not be located during the hearing, the landlord and Witness BS gave sworn testimony at the hearing that the landlord posted the 10 Day Notice on the door as declared on November 2, 2017. The landlord also submitted photographs of the 10 Day Notice posted on the tenant's door. The landlord entered written evidence and sworn testimony that the tenant had a practice of leaving these notices on his door, without removing them, and by this method ignoring service of these documents to him.

The tenant testified that there was a lengthy history of the landlord fraudulently claiming to have posted notices on his door. While the tenant said that he had received some notices from the landlord, he denied that the 10 Day Notice was posted on his door on November 2, 2017.

Based on a balance of probabilities, I find that the landlord's evidence and that of his witness more credible than that of the tenant with respect to the posting of the 10 Day Notice on the tenant's door on November 2, 2017. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed to have been served with the landlord's 10 Day Notice on November 5, 2017, the third day after their posting.

The landlord testified that he served the tenant with a copy of his original application for dispute resolution, written evidence packages and notice of this hearing in two registered mailings on November 30, 2017 and on December 15, 2017, the latter of which would have been sent after he received the Interim Decision from the adjudicator. The landlord entered into written evidence and sworn testimony the Canada Post Tracking Numbers to confirm these registered mailings.

The tenant confirmed having received the November 30, 2017 mailing on December 1, 2017. In accordance with sections 88 and 89 of the *Act*, I find that the tenant was duly served with this initial package of material on December 1, 2017.

The tenant denied having received the second of the landlord's registered mailings, although he was in attendance at the hearing and knew what the landlord had applied for in his application. Canada Post's Online Tracking System confirms that the landlord sent the tenant a registered mail package on December 15, 2017. Canada Post attempted to deliver this package on December 18, 2017, leaving notice cards for the tenant on that date and again on December 29, 2017.

Under these circumstances and in accordance with sections 88, 89 and 90 of the *Act*, I find that the tenant was deemed to have received the second of the landlord's packages on the fifth day after their registered mailing, December 20, 2017.

As the landlord confirmed receipt of the tenant's dispute resolution hearing package and copies of etransfers from his bank and a receipt handed to him by the tenant on December 15, 2017, I find that the landlord was duly served with that package on that date in accordance with sections 88 and 89 of the *Act*.

Issues(s) to be Decided

Do these applications fall within the jurisdiction of the *Act*? If so, 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? Are either of the parties entitled to recover their filing fees from one another?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, receipts, bank statements, text messages, emails and miscellaneous documents, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of these applications and my findings around each are set out below.

The tenant lives in one of five bedrooms in a rental building that the landlord in turn leases from the owner of this property. This accommodation is used exclusively for staff of a restaurant that appears to be owned or partially owned by the landlord. The parties agreed that the tenant sub-leases this accommodation from the landlord who is himself a tenant. The landlord does not live in this rental building. The tenant and the others

residing in this building are described as roommates, but each pay Landlord JMG $500.00 in monthly rent. The landlord maintained that the tenant started living in this rental property in late April 2017; the tenant claimed that he did not start his tenancy there until May 15, 2017.

The landlord entered into written evidence a copy of the only written agreement between the parties, a document entitled a Staff Accommodation Agreement (the SAA). The parties signed this SAA on July 23, 2017 and July 25, 2017. In the SAA, the rental property is described as being for staff accommodation for employees of the BL Restaurant, and was to be used as a residence exclusively for full-time employees of the BL Restaurant. Upon resignation or termination from employment with that restaurant, the residents were to vacate the residence within three days.

The SAA is variously referred to in that document as a " roommates agreement" and includes many provisions that would not normally be found in a standard residential tenancy agreement. There are also frequent references in the SAA to a Lease Agreement, which was to take precedence over the SAA in the event that there were differences between the wording of these two agreements. The landlord clarified during the hearing that the Lease Agreement is his own tenancy agreement with the owner of this property. He did not enter into written evidence a copy of the Lease Agreement.

The parties agreed that at one point the tenant worked for the restaurant in question, and as such qualified for this accommodation. They provided conflicting evidence as to when the tenant stopped working there. At one point, the tenant testified that he worked at the restaurant part-time until December. He later corrected this testimony to September 2017. When the landlord searched through his records and determined that the tenant's last pay stub was issued for work performed on August 5, 2017, the tenant did not dispute the landlord's testimony in this regard, saying that he must have been mistaken.

The landlord's 10 Day Notice issued on November 2, 2017 identified rent of $500.00 owing for November 2017. The landlord's amended application for a monetary award of $2,360.00 included the following amounts, which the landlord maintained remain outstanding (plus the filing fee for his application):

Item	**Amount**
Unpaid June 2017 Rent	$360.00
Unpaid September 2017 Rent	500.00
Unpaid November 2017	500.00

Unpaid Rent December 2017	500.00
Unpaid Rent January 2018	500.00
Total Monetary Order Requested	**$2,360.00**

The parties agreed that the landlord did not take immediate action to evict the tenant as per the terms of the SAA when the tenant stopped working at the restaurant. The landlord confirmed the tenant's claim that the landlord initially allowed the tenant to remain in the rental property until he could find another place, as long as he continued to pay the required monthly rent. The landlord said that he commenced issuing a series of 10 Day Notices when the tenant failed to pay rent when it was due. The landlord explained that a number of the etransfer payments the tenant made could not be negotiated because the tenant did not provide him with a proper password to access these payments.

The tenant testified that he has made a series of etransfers and cash payments to the landlord and that the only amount truly owing at this point is his January 2018 rent, which he intended to pay shortly after this hearing. The tenant said that the landlord was responsible for the difficulties in accessing the tenant's etransfer payments.

Analysis - Jurisdiction

The SAA is by no means a standard residential tenancy agreement. While it purports to be an agreement between roommates, the sole contractual agreement is between JCG as the landlord and each of the restaurant's staff who reside there. Thus, there is an individual contractual relationship between JCG and the individuals who live in the building. Thus, this is not a "roommates agreement" and JCG is not one of the roommates. Rather, the SAA establishes expectations for the interaction between those renting rooms from JCG in this building, as well as more standard features typical of a residential tenancy agreement requiring the tenant to pay the landlord $500.00 in monthly rent in exchange for permission to reside there. Some of the provisions of the SAA, particularly the requirement that the tenant can only remain in the residence while he is a full-time employee of the restaurant and that the tenant must vacate the residence within 3 days of ending full-time employment, extend far beyond what could legally be included in a residential tenancy agreement that falls within the jurisdiction of the *Act*. Section 6(3) of the *Act* establishes that such provisions are not enforceable.

I find that the SAA on its own, without any clarification through sworn testimony of the parties, is sufficiently unclear to raise the possibility that the relationship between the

two parties in these applications lies beyond the jurisdiction of the *Act*. However, the sworn testimony of the parties has convinced me that the SAA reflects an actual tenancy agreement that the parties have established that does fall within the *Act*. The tenant testified that his earnings from the restaurant were separated from any provision of rent that he was to pay in exchange for accommodation. Despite the unusual features of the SAA that would not be enforceable under the *Act*, the parties have entered into a written contractual agreement whereby the parties agreed that the tenant was to pay $500.00 each month in exchange for defined and exclusive accommodation for a room in this rental property.

I am satisfied that there has been an oral agreement between the parties establishing a residential tenancy that falls within the jurisdiction of the *Act*. The SAA provides written confirmation of the existence of this contractual relationship between the parties, and may, in fact, be a form of a residential tenancy agreement on its own. For these reasons, I have proceeded on the basis that I have jurisdiction to consider the applications before me.

Analysis – Notice to End Tenancy for Unpaid Rent

The landlord's 10 Day Notice issued on November 2, 2017, alleged that $500.00 in unpaid rent was owing as of that date. Although the tenant applied to cancel that 10 Day Notice, he did not complete his application until December 11, 2017, well after the five day time limit for filing such an application. As noted above, the tenant maintained that the landlord did not post the 10 Day Notice on his door on November 2, 2017, as was claimed by the landlord and the landlord's witness.

Since the tenant clearly missed the deadline for filing his application to cancel the 10 Day Notice of November 2017, the issue before me narrows to whether the tenant did in fact pay rent for November 2017, within five days of having been deemed to have been served with the landlord's 10 Day Notice on November 5, 2017.
The landlord provided sworn testimony supported by written evidence that the tenant made an etransfer payment of $500.00 on November 8, 2017. He maintained that no password was provided to the landlord to access this payment, and the payment was eventually cancelled by November 14, 2017, as he could not access these funds. He entered into written evidence a document from his bank confirming that the tenant had cancelled this payment.

The tenant said that he had written proof that he had made payments throughout his tenancy. He did not provide copies of these specific payment documents as written

evidence for this hearing. The tenant testified at one point that he paid cash to the landlord for his rent for November and December, but that the landlord failed to issue him receipts for these payments. Later in the hearing, the tenant said that he made an etransfer of his November 2017 rent to the landlord, but the landlord refused to accept this payment, leading to the tenant's eventual decision to cancel this payment. Although the tenant provided written evidence regarding bank transactions from June until November 2017, the significance of this document was somewhat unclear, there were no specific references to the landlord in this document and the document does not match with the tenant's own sworn testimony that he paid rent for November 2017 in cash.

At the hearing, the landlord noted the considerable inconsistencies in the tenant's sworn testimony. He also gave sworn testimony that he has not even seen the tenant in person since early November, which would call into question the tenant's claim that he paid cash directly to the landlord for November and December 2017. The landlord also noted that the tenant's own written evidence confirmed that the landlord had issued a written (or emailed) receipt for one cash payment from the tenant for $500.00 in rent received from the tenant on July 31, 2017 at 5:35 p.m. The landlord maintained that this represented the only cash payment he has accepted from the tenant during this tenancy and that the tenant's own written evidence confirmed that the landlord had a proven record of providing receipts for cash payments. The landlord said that he does not usually accept cash payments for rent, as a written record of such payments is his preferred method of obtaining rent.

During the course of the hearing, the tenant seemed uncertain and unclear on a number of key aspects of this dispute. For example, his testimony regarding when he ceased working at the restaurant changed from December 2017 to September 2017, and eventually agreed that his last day of work at the restaurant was on August 5, 2017, only 11 days after the last of the parties signed the SAA. Of more direct concern to the payment of rent issues were the inconsistencies in the tenant's sworn testimony regarding when and how he paid rent for November 2017. The tenant's written evidence was less clear than that of the landlord and made no direct reference to the landlord. By contrast, I found the landlord's sworn testimony aligned with his written evidence and even some of the tenant's own written evidence.

After considering the written evidence and based on a balance of probabilities, I find that the landlord's evidence with respect to the payment of rent for November 2017 more consistent and credible than that offered by the tenant. I find that the landlord's provision of a written receipt for rent paid by the tenant on July 31, 2017 supports the

landlord's sworn testimony that he issued receipts for cash payments when they were made. I find that the tenant bears responsibility for failing to pay November 2017 rent to the landlord in a way that would be successful. As such, I find that the tenant did not pay the $500.00 in rent identified as owing in full within five days of being deemed to have received the 10 Day Notice.

Section 46(1) of the *Act* establishes how a landlord may end a tenancy for unpaid rent "by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice." Section 46(2) of the *Act* requires that "a notice under this section must comply with section 52 *[form and content of notice to end tenancy]*." I find that the landlord's 10 Day Notice complied with the form and content required by section 52 of the *Act*. The tenant has not made application pursuant to section 46(4) of the *Act* within five days of being deemed to have received the 10 Day Notice nor do I find that the tenant paid the amount identified as owing in that Notice within five days of being deemed to have received that Notice. In accordance with section 46(5) of the *Act*, the tenant's failure to take either of these actions within five days led to the end of his tenancy on the corrected effective date of the notice. In this case, this required the tenant to vacate the premises by November 15, 2017.

For these reasons, I dismiss the tenant's application to cancel the landlord's 10 Day Notice, which was filed well beyond the time frame for doing so, and allow the landlord's application for an end to this tenancy on the basis of the 10 Day Notice. I find that the landlord is entitled to a 2 day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

Analysis – Landlord's Application for a Monetary Award

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to

comply. Section 26(1) of the *Act* establishes that "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."

As was noted above, at the hearing the landlord requested an additional $1,000.00 in rent that has become owing since he applied for dispute resolution. This was added to the total of $1,360.00 in rent he maintained was owing from June, September and November 2017. However, the landlords' Monetary Order Worksheet identified rent owing for June, August and November 2017. The landlord also provided confusing statements about which month he applied the tenant's payments toward.

Given the conflicting testimony of the parties and the documents provided, I rely on the amount identified in the landlord's 10 Day Notice as the best and most reliable evidence of the amount of rent owing as of November 2, 2017 when that Notice was issued. In that Notice, the landlord correctly or incorrectly identified $500.00 in rent owing as of that date. I allow the landlord's application for a monetary award for unpaid rent of $500.00 for each of November and December 2017, and $500.00, which remained owing as of the date of the hearing for January 2018. In making this decision, I find that it more likely than not that the tenant did not make a cash payment he claims to have made in December 2017. By that date, and after having received the landlord's 10 Day Notice and application for dispute resolution, the tenant clearly knew that the landlord had concerns about his payment of rent. I find that any reasonable person under those circumstances would have demanded a written receipt for a cash rental payment, which the landlord denies having received. In the event that the tenant has paid January 2018 rent since the date of this hearing, the landlord would not be allowed to collect on the monetary award of $500.00 for January 2018.
As the landlord was successful in this application, I find that the landlord is entitled to recover the $100.00 filing fee paid for this application. Since the tenant's application was unsuccessful, he bears responsibility for his own filing fee.

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. Should the tenant 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 under the following terms, which allows the landlord to recover unpaid rent and his filing fee:

Item	**Amount**

Unpaid November 2017	$500.00
Unpaid Rent December 2017	500.00
Unpaid Rent January 2018	500.00
Landlord's Filing Fee	100.00
Total Monetary Order	**$1,600.00**

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

The tenant's application to cancel the 10 Day Notice and to obtain recovery of his filing fee is dismissed without leave to reapply. As this tenancy is ending shortly and the other actions requested in the tenant's application have become moot, those segments of the tenant's application are also dismissed without leave to reapply.

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: January 09, 2018

Residential Tenancy Branch