



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, ERP, FFT, OPRM-DR, FFL

Introduction

This hearing dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* (the *Act*). The landlords identified Tenants AD and JD as the Respondents in their 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 tenants pursuant to section 72.

Tenant JLED and Tenant JD identified Landlord JK (the landlord) as the Respondent in their application for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33; and
- authorization to recover their 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.

At the commencement of the hearing, I checked the spelling of the tenants' names, which were not consistent between the two applications. Tenant JLED (the tenant) confirmed that the spelling of the tenants' names as provided in the tenants' application was correct. With Landlord JK's permission, I changed the spelling of the tenants' names to those appearing above in the landlords' application.

The tenant gave undisputed sworn testimony that the landlord first attempted to provide the tenants with an oral 1 Month Notice to End Tenancy for Cause. As a notice of this type must be on the prescribed Residential Tenancy Branch form, I advised the parties that the landlords' attempt to issue a 1 Month Notice has no legal effect and was not before me.

As the tenant confirmed that the landlord handed the tenants a 10 Day Notice on December 4, 2017, I find that the 10 Day Notice was duly served to the tenants on that date by the landlord in accordance with section 88 of the *Act*.

The landlord submitted two amendments to the initial application for a monetary award of \$650.00 for rent outstanding from December 2017. The landlord's first amendment increased the requested monetary award to \$2,600.00 for rent owing for December 2017 and January 2018. The landlord's second amended application increased the requested monetary award to \$3,900.00 to reflect the landlord's anticipated loss of rent for February 2018.

The tenant confirmed that the landlord handed him a copy of the landlord's dispute resolution hearing package, including the landlord's original application for a monetary award of \$650.00 on December 14, 2017. The tenant also confirmed that the landlord handed him an amended application seeking a monetary award of \$2,600.00 on or about December 22, 2017. He said that the female tenant was in attendance when these notices were provided to him, that she had received them, and that she had authorized him to represent her interests in this matter. I find that the tenants were duly served with both the original application for dispute resolution and the initial amendment on December 14 and December 22, 2017, in accordance with section 89 of the *Act*.

Although the tenant denied having received an additional amendment from the landlord on January 8, 2018, as claimed by the landlord, he said that he was aware that the landlords were seeking an increased monetary award of \$3,900.00 to reflect rent owing for the months of December 2017 and January 2018, as well as anticipated rent that will become owing for February 2018. As the landlord said that the increase in the request of the monetary award to \$3,900.00 was only submitted because it was unclear if the tenants would vacate the rental unit before February 1, 2018, I have only considered the first of the landlord's amendments to the original application. The landlords are at liberty to reapply for a monetary award for February 2018, in the event that the tenants' overholding of the rental unit leads to losses on their behalf for that month.

The landlord confirmed that the tenants' dispute resolution hearing package placed at the back door of the landlord's residence was received by the landlords. Neither party was certain as to when this package was left for the landlord. Based on the sworn evidence of the parties, I find that the landlord was duly served with the tenants' dispute resolution hearing package in accordance with section 89 of the *Act*.

The landlord and Landlord GK testified that the landlord handed the tenant a copy of the landlord's written evidence on January 8, 2018. The tenant denied having received written evidence from the landlord. As there was no need to consider the landlord's written evidence because there was no significant disagreement as to the parties' sworn testimony, it was unnecessary to make a finding on whether this evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Should the landlord's 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? Should the landlord be required to undertake emergency repairs? Are either of the parties entitled to recover their filing fees for their applications?

Background and Evidence

The parties agreed that this month-to-month tenancy for a basement rental unit commenced on November 11, 2017. The landlord and her family live above the tenants. Although the parties agreed that there was a written tenancy agreement for this tenancy and the landlords submitted a copy of parts of this agreement into written evidence, only the tenants' names were on the first page of this agreement. Both parties agreed that monthly rent of \$1,300.00 is due on the first of each month, payable in advance. The landlord continues to hold the tenants' \$600.00 security deposit paid on November 9, 2017.

The landlord's 10 Day Notice identified \$650.00 owing as of December 4, 2017. The tenant confirmed that the tenants have not paid any portion of the amount identified as owing in that Notice. The tenant said that the tenants offered to allow the landlord to keep their security deposit and pay rent to the landlord prior to the landlord's issuance of the 10 Day Notice. The tenant maintained that the landlord's actions in attempting to issue a 1 Month Notice, which the landlord explained to them was to allow the landlord's family to use the property themselves, entitled them to refrain from paying rent for the last month of their tenancy. The tenant noted that a properly executed notice to end

tenancy for landlord's use of the property should have been issued on an approved 2 Month Notice to End Tenancy for Landlord's Use of Property.

The tenant did not dispute the landlord's claim that the tenants have not paid anything to the landlord for this tenancy since the 10 Day Notice was issued to them. The landlord requested a monetary award for unpaid rent of \$1,300.00 for each of December 2017 and January 2018.

The landlord testified that a witness who was available for this hearing if necessary could attest to the landlord's claim that a new washer and dryer were purchased and brought to the rental unit and installed there on November 18, 2017. The tenants' application alleged that a functioning washer was not available to the tenants during their tenancy.

Analysis

The tenants failed to pay the rent identified as owing in the 10 Day Notice in full within five days of receiving that Notice. 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." At the hearing, the tenant confirmed that there was no decision issued by an arbitrator appointed under the *Act* allowing them to withhold paying their rent on December 1, 2017, when it became due. Although the landlord attempted to issue a 1 Month Notice orally, the tenant knew that there was no legal effect to such a Notice by the landlord and advised the landlord that a written notice was required. The tenants' attempt to allow the landlord to keep their security deposit in partial payment of rent owing does not satisfy the requirement of section 26(1) of the *Act* requiring rent to be paid when it is due or that rent properly considered owing at the time of the issuance of the 10 Day Notice needs to be paid within five days of receiving the 10 Day Notice.

Under these circumstances and as the tenant confirmed that no payments have been made to the landlords for December 2017 or January 2018, I find that the landlords are entitled to an Order of Possession for unpaid rent. At the hearing, the landlord testified that she was seeking an Order of Possession to take effect before the end of January. I find that the landlord is entitled to an Order of Possession to take effect by 1:00 p.m. on January 31, 2018, the date specified by the landlord at this hearing. The landlords will be given a formal Order of Possession which must be served on the tenant(s). If the

tenants do not vacate the rental unit by 1:00 p.m. on January 31, 2018, the landlord(s) may enforce this Order in the Supreme Court of British Columbia.

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.

In this case, there is undisputed evidence that the tenants have not paid anything towards their rent for December 2017 or January 2018. Under these circumstances and in accordance with section 67 of the *Act*, I allow the landlords' application for a monetary award of \$1,300.00, for each of these two months.

Although the landlord's application does not seek to retain the tenants' 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.

As the landlords were successful in their application, I find that the landlords are entitled to recover the \$100.00 filing fee paid for their application from the tenants.

It remains possible that the landlords may be able to mitigate the tenants' exposure to the landlords' loss of rent for February 2018 in accordance with section 7(2) of the *Act*, by renting the premises out to new tenants or making use of the rental unit themselves. For that reason and because there were questions raised regarding the landlords' service of the second amended application to the tenants, the landlords are at liberty to apply for loss of rent for February 2018.

The tenants' application is dismissed without leave to reapply. In so doing, I note that the application for emergency repairs is moot, given that this tenancy is ending within a few days.

Conclusion

The landlords are provided with a formal copy of an Order of Possession effective by 1:00 p.m. on January 31, 2018. Should the tenant(s) 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 under the following terms, which allows the landlords to recover unpaid rent and their filing fee, and to retain the tenants' security deposit:

Item	Amount
Unpaid December 2017 Rent	\$1,300.00
Unpaid January 2018 Rent	1,300.00
Less Security Deposit	-600.00
Recovery of Filing Fee for Landlords' Application	100.00
Total Monetary Order	\$2,100.00

The landlords are provided with these Orders in the above terms and the tenant(s) must be served with this Order as soon as possible. Should the tenant(s) 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 tenants' application is dismissed without leave to reapply.

The landlords are at liberty to apply for additional losses they incur as a result of this tenancy, including loss of rent they may experience for February 2018.

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 25, 2018

Residential Tenancy Branch