



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, FF, CNR, MNDCT, RP, FFT

Introduction

This hearing dealt with applications from both the tenants and the landlord pursuant to the Residential Tenancy Act (the “Act”).

The tenants apply for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to the landlord to make repairs to the rental unit pursuant to section 33; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord applies for:

- an Order of Possession pursuant to section 55;
- a monetary order for unpaid rent, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants 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 tenant spoke for herself with the assistance of her advocate. As both parties were present service of documents was confirmed. The tenant testified that they were served with the landlord's 10 Day Notice, application for dispute resolution and evidentiary materials. Based on the undisputed testimony I find that the tenants were served in accordance with sections 88 and 89 of the *Act*.

The landlord testified that while he was served with the tenants' application and evidence he received the evidence outside of the timeline provided in the Residential Tenancy Rules of Procedure on May 14, 2018. The landlord also said that he was uncertain which application the tenants' evidence package was for. While the landlord said that the evidence was not served within the deadlines provided in the Rules of Procedure, as the landlord confirmed they were served and has had an opportunity to review the materials, I find that there is no undue procedural prejudice that arises. Therefore, I find that pursuant to Rule of Procedure 3.17 and section 71(c) of the *Act*, the tenants' evidence was sufficiently served for the purposes of the *Act*.

Issue(s) to be Decided

Should the 10 Day Notice be cancelled? If not is the landlord entitled to an Order of Possession?

Is either party entitled to a monetary award as claimed?

Is either party entitled to recover the filing fee for this application from the other?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the parties' claims and my findings around each are set out below.

This tenancy began in April, 2006. The monthly rent is \$1,150.00. The tenant is also responsible for paying the utilities for the rental unit. The landlord could not recall that the tenants paid any deposit at the start of the tenancy. The tenant testified that they paid a security deposit of \$800.00, the equivalent of one full month's rent at the start of the tenancy. The tenant also testified that they paid a \$200.00 pet damage deposit comprised of \$100.00 for each cat they owned at the time.

The parties testified that there was an arrear for rent and utilities and the parties entered into an agreement in February, 2017 that the tenants would make partial payment towards the arrears along with the monthly rent payments. The parties did not document this agreement or the amount of the arrears as at February, 2017. The landlord testified that the arrear at that time was \$6,825.00. The landlord said that the tenants made payments against the amount for several months and the amount remaining from the arrears incurred prior to February, 2017 is \$4,092.20. The landlord submitted into written evidence copies of email correspondence between the parties

where vague reference is made to the tenants' making payments. The tenant disputes that amount and testified that they believed the arrear as at February, 2017 was in the range of \$1,500.00. The tenant testified that they began making monthly payments against this arrear with their rent payment. The tenant testified that they were paying approximately \$300.00 each month against the arrear.

The parties entered into an agreement in April, 2017 to increase the monthly rent to \$1,150.00 monthly commencing August 1, 2017. The agreement signed and dated by the parties was submitted into written evidence. The agreement also provides that the tenants will pay \$350.00 monthly for utilities.

The landlord testified that of the original arrears of \$6,825.00 agreed to in February, 2017 the tenants still owe \$4,092.20 as at the date of the hearing. The landlord testified that the tenants failed to pay rent for April and May, 2018 and there is a rent arrear of \$2,300.00 as at the date of the hearing. The landlord testified that the tenants failed to pay utilities from January to May, 2018 and the amount owing for utilities is \$1,400.00.

The tenant disputes the landlord's calculations. The tenant testified that they have never been presented with utility bills and question the amount the landlord claims is due. The tenant acknowledges that there was an arrear for the tenancy in February, 2017 but disputes the amount stated by the landlord. The tenant acknowledges that they entered into an agreement to set a new rent of \$1,150.00 in April, 2017 but submits that they were forced to accept the new monthly rent lest their tenancy be ended. The tenant testified that they have stopped all payments to the landlord in February, 2018 as they do not accept the landlord's calculation of what is owing for this tenancy.

The tenants seek a monetary award of \$5,000.00. The tenants submit that the amount is calculated based on what they feel is overpayments made to the landlord through the course of this tenancy.

Analysis

Pursuant to section 63 of the *Act*, the Arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. During the hearing the parties discussed the issues between them, turned their minds to compromise and achieved a partial resolution of the issues in dispute.

Both parties agreed to the following final and binding settlement of the following issues currently under dispute at this time:

1. This tenancy will end on 12:00 pm, June 10, 2018, by which time the tenants and any other occupants will have vacated the rental unit.
2. This settlement agreement constitutes a final and binding resolution of the tenants' application to cancel the landlord's 10 Day Notice, and the landlord's application for an order of possession at this hearing.
3. The landlord's 10 Day Notices of March 1, 2018 and March 16, 2018 are cancelled and of no further force or effect. The parties agree that this tenancy will end by way of their mutual agreement.

Both parties testified at the hearing that they understood and agreed to the above terms, free of any duress or coercion. Both parties testified that they understood and agreed that the above terms are legal, final, binding and enforceable, which settle the issue of the cancellation of the landlords' 10 Day Notice.

The parties were not able to come to an agreement in regards to the other aspects of the tenant's claim and I make my finding on those issues.

As this tenancy is ending pursuant to the agreement above I find it unnecessary to make a finding regarding a repair order for the rental unit. This portion of the tenants' application is dismissed without leave to reapply.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. 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 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. The claimant also has a duty to take reasonable steps to mitigate their loss.

I find this tenancy is characterized by poor documentation and unreliable recollection of the parties. The parties gave conflicting testimonies regarding several aspects of this tenancy and the corollary agreements arising from this tenancy. Consequently, where the parties' evidence is in dispute I must make a finding of credibility. In making my finding I have considered the parties' testimonies, their content and demeanor as well as whether it is consistent with how a reasonable person would behave under

circumstances similar to this tenancy. I have also considered the documentary evidence submitted by the parties and whether they are consistent with the testimonies provided.

As regards the deposits for this tenancy I find the landlord's evidence that no deposits were paid to be more credible than that of the tenants. While the tenant testified that a security deposit and pet damage deposit were paid there is no documentary evidence of such payment being requested or paid. The tenancy agreement submitted into written evidence has a section where the parties could have documented any security deposit required and the portion of the agreement is silent. The tenancy agreement records that the tenant is allowed two cats as pets but there is no record that a pet damage deposit is required. Furthermore, I find the tenant's testimony that the equivalent of one full month's rent was paid as a security deposit to not have the air of reality. Pursuant to section 19 of the Act, a landlord may not require or accept a security deposit that is more than $\frac{1}{2}$ of one month's rent. I find the tenant's testimony to be unconvincing, not supported in any documentary evidence and without the air of reality. I accept the landlord's testimony that no security deposit or pet damage deposit was paid for this tenancy.

The parties agree that there was an arrear as at February, 2017. The parties disagree on the amount of the arrear at that time, what payments were made against the arrears and the current amount of the arrear. The landlord testified that the current amount of the arrears is \$4,092.20 as shown on the 10 Day Notice issued March 16, 2018. The landlord also submitted into written evidence copies of correspondence where the parties reference a debt, though there is no clear indication of the amount. The landlord submitted into written evidence their calculations of what is owing after payments made by the tenant.

I find there is insufficient evidence in support of the amount that the landlord claims is owing for this tenancy. The onus is on the applicant to show that there is a loss and to verify the actual monetary amount of the loss. I find the landlord's submissions to not be supported in independent documentary evidence. The calculations and figures submitted by the landlord are generated by the landlord. There is no documentation from February, 2017 where the parties state what the arrears is at that time. The tenant testified that they made payments against the arrears but were not informed what the running balance was after each payment. The tenant testified that as at the date of the hearing they have still not received clear information from the landlord regarding the arrear and question the landlord's calculations as they are not supported by other documentation.

I find that the landlord has not provided sufficient evidence in support of their monetary claim for \$4,092.20. I find that the parties do not agree on the original arrear as at February, 2017, and there is a lack of any documentary evidence showing the details of any agreement the parties entered. While there are some references to payments that were made by the tenant to the landlord I find that the contents of these correspondence to be vague and unilluminating. The landlord's figures are generated from the landlord's own calculations which appear to have been prepared after the original agreement was entered in February, 2017 and therefore provides little value in determining the original intention. Based on the totality of the evidence I find that there is insufficient evidence in support of the figure the landlord claims. Consequently, I dismiss this portion of the landlord's application.

I accept the parties' undisputed testimonies that the tenants have made no payments for rent or utilities since February, 2018. I find that the parties entered into a new tenancy agreement in April, 2017. Under this new agreement the rent was established as \$1,150.00 and the tenants agreed to pay the utilities at a rate of \$350.00 each month. While the tenant said that they felt they had no choice but to sign this agreement I find that there is no evidence that the agreement was not entered into freely and knowingly. As such I find that the tenants were obligated to pay \$1,150.00 on the first of each month for rent and \$350.00 each month for utilities. I accept the testimonies of the parties that the tenants have not made any payment since February, 2018. I accept the landlord's submission that the arrear for this tenancy arising out of the unpaid rent and utilities from February, 2017 to the date of the hearing is \$3,700.00.

I do not find the tenant's submissions that they have overpaid the rent previously or that they are entitled to withhold the rent due to the condition of the rental unit to have any basis in the evidence. Pursuant to section 26(1) of the *Act*, a tenant must pay rent when it is due regardless of whether or not the landlord has complied with the *Act*, regulations or tenancy agreement. I find that the tenants were obligated to make payment pursuant to the agreement entered in April, 2017. I accept the evidence that the tenants failed to make any payment after February, 2018. I accept the landlord's evidence that the arrears for this tenancy is \$3,700.00. Accordingly, I issue a monetary award in the landlord's favour in that amount.

I find that there is insufficient evidence in support of the tenant's monetary claim. The tenant submits that they have paid rent in excess of what is owed but I find that this is not supported in documentary evidence or the oral submissions. The tenant could not

articulate how they calculated that they have suffered a loss of \$5,000.00. The figure does not correspond to any particular payment or series of payments. The tenant did not provide any information on how they came to this figure. Consequently, as there is insufficient evidence in support of the tenant's application for a monetary award I dismiss this portion of the tenant's application.

As neither party was wholly successful in their application I decline to issue an order that either party may recover the filing fee.

Conclusion

To give effect to the settlement reached between the parties and as advised to both parties during the hearing, I issue the attached Order of Possession to be served on the tenants by the landlord **only** if the tenants and any other occupants fail to vacate the rental premises by 12:00 p.m. on June 10, 2018. Should the tenants 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 in the amount of \$3,700.00 for unpaid rent and utilities. 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 an Order of that Court.

The balance of the landlord's application is dismissed without leave to reapply.

The tenant's application is dismissed without leave to reapply in its entirety.

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: May 23, 2018

Residential Tenancy Branch