



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, OPC, MNRLS, MNDCLS, FFLS, MT, DRI, CNC, CNR,
MNDCT, OLC, LRE, FFT

Introduction

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

The tenant applied for:

- more time to make an application to cancel the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 66;
- cancellation of the landlord’s 10 Day Notice pursuant to section 46;
- cancellation of the landlord’s 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to suspend or set conditions on the landlord’s right to enter the rental unit pursuant to section 70;
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord applied for:

- an order of possession pursuant to section 55;
- a monetary award for unpaid rent, damages and loss 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 gave testimony through their interpreter. The landlord's spouse attended and assisted the landlord in presenting evidence.

As both parties were present service of documents was confirmed. The landlord confirmed receipt of the tenant's application for dispute resolution dated April 20, 2018, their evidence on or about April 27, 2018. The landlord confirmed receipt of the tenant's amendment dated May 8, 2018 on or about that date. The tenant confirmed receipt of the landlord's application for dispute resolution dated May 8, 2018 and the evidentiary materials by registered mail on or about that date. Based on the testimonies of the parties I find that the parties were each served with the respective materials in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the tenant entitled to more time to file their application to dispute the 10 Day Notice? Should the 10 Day Notice be cancelled? If not is the landlord entitled to an Order of Possession?

Should the 1 Month Notice be cancelled? If not is the landlord entitled to an Order of Possession?

Should an order be made regarding a disputed rent increase?

Is either party entitled to a monetary award as claimed?

Should the landlord be ordered to comply with the Act, regulations or tenancy agreement?

Should restrictions be ordered on the landlord's right to enter the rental unit?

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

Background and Evidence

The parties agreed on the following facts. This tenancy originally began in July, 2016 when the parties entered into a tenancy agreement. A copy of the tenancy agreement was submitted into written evidence. The parties entered into a new tenancy agreement in July, 2017 which provided that the monthly rent is \$2,200.00 payable on the first of each month. The landlord accepted a security deposit of \$2,200.00, the equivalent of one month's rent, at the start of the tenancy.

The tenant failed to pay the rent for April, 2018. The landlord issued a 10 Day Notice on April 2, 2018 and put it in the tenant's mailbox. A copy of the 10 Day Notice was entered into evidence. The tenant said that they made payment of the \$2,200.00 arrears to the landlord on April 11, 2018. The landlord informed them verbally that the payment did not reinstate the tenancy and notified them of the 10 Day Notice. The tenant testified that they had not checked their mailbox until April 11, 2018 and were thus unaware of the 10 Day Notice. The tenant said that they were unaware of their rights and it took them until April 20, 2018 to file an application to dispute the 10 Day Notice.

The tenant testified that they did not pay rent for May or June, 2018. The tenant agreed with the landlord's evidence that the arrear for this tenancy is \$4,400.00 as at June 19, 2018 the date of the hearing. The landlord issued subsequent 10 Day Notices on May 3, 2018 and June 1, 2018 for the unpaid rent.

The landlord said that the tenant refused to allow the strata corporation for the building to conduct a fire inspection of the suite and they were charged a \$51.00 cost for revisiting the suite. The landlord submitted into written evidence the correspondence from the strata corporation showing that notice was given of the scheduled inspection and that the tenant failed to allow access.

The tenant submits that the new tenancy agreement of July, 2017 was effectively a rent increase which was made without providing adequate time under the *Act*. The tenant said that they had no choice but to sign the new tenancy agreement as they did not have alternate accommodations.

Analysis

Section 59 of the *Act* allows a time limit established in the *Act* to be extended in *exceptional circumstances*. Policy Guideline 36 goes on to say that "exceptional implies that the reason for failing to do something at the time required is very strong and compelling." Furthermore, the party making the application for additional time bears the onus of putting forward persuasive evidence to support the truthfulness of the reason cited.

Section 46(4) of the *Act* provides that a tenant may dispute a 10 Day Notice within 5 days after the date the tenant receives the notice. Section 46(5) provides that if a tenant does not make an application in accordance with subsection (4) the tenant is

conclusively presumed to have accepted the tenancy ends on the effective date of the notice.

Under the present circumstances the landlord testified that they served the 10 Day Notice on April 2, 2018 by placing it in the mailbox of the rental unit, a method allowed under section 88(f) of the *Act*. The landlord submitted a witness statement in support of their service. Pursuant to section 90(d) of the *Act*, a document is deemed served on the 3rd day after it is left in a mailbox. Therefore, I find that the 10 Day Notice was deemed served on April 5, 2018.

The tenant testified that they did not check their mailbox until April 11, 2018 but I find that a party's willful refusal to pick up their mail does not override the deeming provision. In any event the tenant did not file their application for review until April 20, 2018, well past the 5 days provided under the *Act*.

The tenant said that they had no knowledge of how to respond to the 10 Day Notice. I find their submission to be without merit. The 10 Day Notice provides clearly on its face the time by which a dispute must be filed as well as phone numbers and websites to consult for additional information. The tenant did not make any submission that they required translation services or had any cognitive issues limiting their comprehension. I find that the tenant's excuse as to why they require additional time to file their application to not be exceptional circumstances. The tenant merely says that they are ignorant of the procedure, and while that may be true, I find that is not an exceptional circumstance that would give rise to an extension of time to file an application.

Based on the undisputed evidence of the parties I find that the tenant was deemed served with the 10 Day Notice on April 5, 2018. The tenant did not file their application for dispute resolution until April 20, 2018. They did not make payment against the arrear until April 11, 2018. I find that the tenant failed to file an application or make full payment within the 5 days provided under the *Act*. Consequently, I find that the tenant is conclusively presumed under section 46(4) of the *Act* to have accepted the tenancy ended on the effective date of the 10 Day Notice, April 15, 2018.

While the tenant did make payment of \$2,200.00 on April 11, 2018 and was issued a receipt that does not specifically indicate that payment was accepted for use and occupancy only, the parties testified that the landlord informed the tenants verbally that the payment did not reinstate the tenancy. I find that the landlord gave clear indication to the tenant that they intended to proceed with seeking an Order of Possession ending this tenancy. Based on the conduct of the parties after the April payment including the

correspondence and documents submitted into evidence, I find that the landlord did not waive their right to enforce the 10 Day Notice.

I issue an Order of Possession in the landlord's favour. As the effective date of the 10 Day Notice has passed I issue an Order effective 2 Days after service on the tenants.

As this tenancy is ending I find it unnecessary to make a finding on the 1 Month Notice or the tenant's application seeking an order restricting the landlord's right to access the rental unit.

The tenant argues that the tenancy agreement of July, 2017 should be considered a rent increase. I find that there is little evidence in support of the tenant's claim. I find that the agreement signed by the parties in July, 2017 is a valid tenancy agreement. Prior to this agreement there was a valid written tenancy agreement where the monthly rent was \$1,850.00. That agreement provides that upon the end of the fixed term the tenancy would continue on a month-to-month basis. I find that the new agreement of July, 2017 is not an instance of a rental increase but the parties entering into a new agreement and setting a new monthly rental amount.

There was no obligation on either party to enter the new agreement of July, 2017. If the parties could not agree on the terms the tenancy would have continued on a periodic basis with a monthly rent of \$1,850.00 until the rent was increased in accordance with the Act. I do not find the tenant's submission that they were forced into the agreement as they did not have time to look for alternate accommodations, to be persuasive. If the tenant did not agree with the terms of the tenancy agreement they simply did not have to sign the agreement. This is not a circumstance where there are successive fixed term tenancies. The original tenancy agreement provides that the tenancy simply becomes a periodic, month-to-month tenancy.

Based on the evidence I find that the tenant understood the terms of the agreement as presented to her. The tenant had the ability to seek legal advice or assistance if she chose to do so. I find that there is no evidence that the written tenancy agreement submitted into evidence is an instance of a rental increase. Therefore, I dismiss this portion of the tenant's application.

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.

The parties gave undisputed evidence that the tenants have failed to pay rent for May and June, 2018 and the arrears for this tenancy is \$4,400.00 as at the date of the hearing. I find that the tenant was obligated to pay rent in the amount of \$2,200.00 each month. I accept the evidence of the parties that the tenant failed to pay rent for May and June, 2018. I accept the evidence that the arrears for this tenancy is \$4,400.00. Accordingly, I issue a monetary award in the landlord's favour in that amount to recover the unpaid rent.

The landlord submitted evidence that the tenant failed to provide the strata corporation with access to the rental unit causing a charge of \$51.00 for a second fire inspection. I accept the landlord's evidence that the tenant failed to abide by the terms of the tenancy agreement and the charge by the strata resulted due to the tenant's violation. Accordingly, I issue a monetary award in the landlord's favour in the amount of \$51.00 for this item.

The tenant seeks an order returning the overpaid security deposit. The parties agree that a security deposit of \$2,200.00, the equivalent of one month's full rent was paid at the start of the tenancy. Pursuant to section 19 of the *Act*, a landlord must not accept security deposit that is greater than $\frac{1}{2}$ of the monthly rent and if such payment is made the tenant may deduct it from rent or recover the overpayment. Therefore, I issue a monetary award in the tenant's favour in the amount of \$1,100.00 for the overpayment of the security deposit.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenants' \$1,100.00 security deposit in partial satisfaction of the monetary award issued in the landlord's favour.

As the landlord's was primarily successful in their application I issue an order that the landlord may recover the filing fee for this application from the tenants.

Conclusion

I grant an Order of Possession to the landlord effective **2 days after service on the tenants**. Should the tenants or anyone 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.

I issue a monetary award in the landlord's favour for \$2,351.00 on the following terms:

Item	Amount
Unpaid Rent May, 2018	\$2,200.00
Unpaid Rent June, 2018	\$2,200.00
Damages for Strata Penalty	\$51.00
Less Overpaid Security Deposit to Tenants	-\$1,100.00
Less Security Deposit	-\$1,100.00
Filing Fee	\$100.00
TOTAL	\$2,351.00

The landlord is provided with a Monetary 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 an Order of that Court.

The balance of the tenant's application is 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: June 19, 2018

Residential Tenancy Branch