



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL, OPR, FL

Introduction

This hearing dealt with the landlords' amended application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for unpaid rent, pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent, pursuant to sections 26 and 67; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

Both landlords and tenant Y.B. (the "tenant") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Landlord D.M. (the "landlord") testified that the tenant was served the notice of dispute resolution package by registered mail on November 4, 2018. The landlord provided the Canada Post Tracking Number to confirm this registered mailing. The tenant confirmed receipt of the dispute resolution package on November 6-7, 2018. I find that the tenants were served with this package in accordance with section 89 of the *Act*.

Preliminary Issue- Landlord's Amendments

The landlord testified that the tenant was served an amendment package increasing the monetary claim from \$350.00 to \$2,375.00 via registered mail on November 15, 2018. The landlord provided the Canada Post Tracking Number to confirm this registered mailing. The tenant testified that he did not receive the amendment package.

The landlord testified that the original application sought to collect \$350.00 in unpaid rent for the month of October 2018 and that the Amendment sought to also collect unpaid rent for the month of November 2018 and an unpaid security deposit in the amount of \$675.00.

I find that the landlord is entitled to rely on the deeming provisions in the *Act*. I find that if the tenants did not retrieve their registered mail after receiving the original notice of dispute resolution from the landlord, it is likely that service was intentionally avoided. I find that the

landlords' amendment package was deemed served on the tenants on November 20, 2018, five days after its mailing, in accordance with section 88 and 90 of the *Act*.

At the hearing the landlord sought to further amend his application to include a claim for December 2018 rent which he testified remains outstanding.

Section 4.2 of the Rules states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

In this case the landlord is seeking compensation for unpaid rent that has increased since he first applied for dispute resolution, I find that the increase in the landlord's monetary claim should have been reasonably anticipated by the tenant. Therefore, pursuant to section 4.2 of the Rules and section 64 of the *Act*, I amend the landlords' application to include a monetary claim for the alleged non-payment of rent from October to December 2018.

Tenant's Application for Adjournment

In the hearing the tenant requested that the hearing be adjourned because he claimed that the evidence he requires to prove his claim is not currently available. Rule 7.8 of the Residential Tenancy Branch Rules of Procedure states that either the applicant or the respondent or their agent may request at the hearing that it be adjourned.

Rule 7.9 (Criteria for granting an adjournment) establishes the criteria the director will consider when determining a request for an adjournment. Considerations for a request to adjourn include:

- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

I find that the possible prejudice to the landlord outweighs all of the other considerations as a further delay in the proceeding could result in significant financial loss to the landlord. I therefore decline to adjourn today's hearing.

I informed both parties, that pursuant to section 79 of the *Act*, a decision or an order of the director may be reviewed if a party has new and relevant evidence that was not available at the time of the original hearing.

Issue(s) to be Decided

1. Are the landlords entitled to an Order of Possession for unpaid rent, pursuant to sections 46 and 55 of the *Act*?
2. Are the landlords entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
3. Are the landlords recover the filing fee from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlords' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on October 1, 2018 and is currently ongoing. Monthly rent in the amount of \$1,350.00 is payable on the first day of each month. A security deposit of \$675.00 was paid by the tenant to the landlord. The tenant was originally supposed to pay a pet deposit in the amount of \$675.00; however, this was not paid. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The landlord testified that on October 14, 2018 the tenants were served with a 10 Day Notice to End Tenancy for Unpaid Rent with an effective date of October 26, 2018 (the "10 Day Notice") via registered mail. The landlord provided the Canada Post Tracking Number to confirm this registered mailing. The tenant testified that he did not receive the 10 Day Notice and that the first time he became aware of it is when he received the notice of dispute resolution from the landlord.

The landlord testified that the tenant did not pay rent on October 1, 2018 when it was due. The landlord testified that the tenant paid \$1,000.00 towards October 2018 rent on October 25, 2018. The landlord testified that the tenant has not paid any rent since October 25, 2018.

The tenant testified that he paid November and December 2018's rent via e-transfers. The tenant did not submit anything into evidence showing proof of payment. The tenant testified that his bank account was shut down due to fraud and that 3.5 weeks ago the bank told him it would take 4 weeks to get his banking records. The tenant did not enter anything into evidence stating same to be true.

Analysis

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

The tenant testified that he paid his rent in November and December 2018 via e-transfer; however, he did not submit any banking or e-mail records to prove the above. The tenant testified that he was not able to get his banking records because his account was shut down due to fraud; however, he did not provide a letter from his banking institution confirming possible fraud.

I find that the tenant's testimony is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. Where the testimony of the landlord and the tenant differ, I accept the testimony of the landlord over that of the tenant.

While the tenant testified that he did not receive the 10 Day Notice, I find that the landlord is entitled to rely on the deeming provisions in section 88 of the *Act*. I find that if the tenant did not pick up his registered mail, it was in an attempt to avoid service. I find that service of the 10 Day Notice was effected on the tenant on October 19, 2018, five days after its mailing, in accordance with section 88 of the *Act*.

I accept the landlord's testimony that the tenant did not pay \$350.00 of October 2018's rent and did not pay any rent in November or December 2018.

I find that the tenants failed to pay the October 2018 rent within five days of receiving the 10 Day Notice. The tenants have not made application pursuant to section 46(4) of the *Act* within five days of receiving the 10 Day Notice. In accordance with section 46(5) of the *Act*, the tenants' 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 tenants to vacate the premises by October 26, 2018, as that has not occurred, I find that pursuant to section 55 of the *Act*, 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 tenants. If the tenants do not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

As I have found that this tenancy has ended, I find that the landlord is not entitled to receive the pet damage deposit from the tenants.

Section 26(1) of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*. I find that the tenant was obligated to pay the monthly rent in the amount of \$1,350.00 on the first day of each month from October to December 2018 which they failed to do. Pursuant to section 67 of the *Act*, I find that the tenants owe the landlord \$3,050.00 in unpaid rent.

As the landlords were successful in their application, I find that they are entitled to recover the \$100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Section 72(2) states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit due to the tenants. I find that the landlord is entitled to retain the tenants' entire security deposit in the amount of \$675.00 in part satisfaction of their monetary claim for unpaid rent against the tenant.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenants**. 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 to the landlords under the following terms:

Item	Amount
October rent	\$350.00
November rent	\$1,350.00
December rent	\$1,350.00
Filing Fee	\$100.00
Less security deposit	-\$675.00
TOTAL	\$2,475.00

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 landlord 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.

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: December 10, 2018

Residential Tenancy Branch