



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NICOMEN VALLE FARM CORP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPRM-DR FFL

Introduction

This hearing dealt with the landlord's application under the *Residential Tenancy Act* (the *Act*) for:

- An order of possession for unpaid rent pursuant to section 55;
- A monetary order pursuant to section 67; and
- Authorization to recover the filing fee from the tenant pursuant to section 72.

Both parties were represented at the hearing and given a full opportunity to be heard, to present their sworn testimony, to make submissions, and to call witnesses. The corporate landlord was primarily represented by its agent RS (the "landlord"). The business owner joined the conference call at the end of the hearing and was given a full opportunity to make additional submissions.

As both parties were present service of documents was confirmed. The tenant confirmed receipt of the 10 Day Notice to End Tenancy (the "10 Day Notice") of February 27, 2018, the landlord's Notice of Dispute Resolution dated December 2, 2018 and evidence. The tenant stated they had not served any evidence. Based on the testimonies I find that the tenant was served with the landlord's materials in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession?

Is the landlord entitled to a monetary award as claimed?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

The parties agreed on the following evidence. The landlord purchased the rental property and assumed the tenancy in September 2016. The terms of the tenancy agreement were that the monthly rent was \$1,500.00 to be paid by the first of each month.

The landlord testified that the tenant failed to pay the full rent from September 2017 onwards and that there is an arrear of \$20,450.00. The landlord was not able to articulate which months the tenant made partial payment and how the total arrear is calculated. The landlord issued the 10 Day Notice dated February 27, 2018 on that date showing an arrear at that time of \$5,550.00.

The tenant testified that they have not paid the full rent but that is because they are paying utility bills for the rental property and the landlords are operating a commercial business utilizing the tenant's utilities. The tenant said that they believe the landlords are benefitting from the utilities provided as their usage is in excess of the monthly rent amount.

The tenant also submitted that they believe this matter to be *res judicata* as there was an earlier hearing under the file number on the first page of this decision regarding the landlord's application for an order of possession on the basis of the February 27, 2018 10 Day Notice.

Analysis

The principle of *res judicata* prevents an applicant from pursuing a claim that has already been conclusively decided.

There was a previous hearing regarding this tenancy under the file number on the first page of this decision on August 23, 2018. In the decision made for that hearing dated August 28, 2018 another arbitrator dismissed the portions of the landlord's application seeking an Order of Possession and Monetary Order with leave to reapply.

As the earlier application was dismissed with leave to reapply, I find that no conclusive decision was made regarding the landlord's application and that there is no principle preventing me from issuing a decision on their application.

Section 26(1) of the Act provides that the tenant must pay the rent when due regardless of whether the landlord complies with the Act. In the case at hand the parties agree that monthly rent is \$1,500.00 payable on the first of each month. The tenant testified that they began making deductions from the rent payment as the landlord was using utilities on the property. Even if the landlord was utilizing the tenant's utilities, a matter that I find there is insufficient evidence to support, the tenant remains obligated to pay the full monthly rent in accordance with the tenancy agreement. The tenant cannot unilaterally make deductions from their rent payment. The tenant may be entitled to a monetary award against the landlord for damages and loss but that does not give rise to the right to pay a lesser amount of rent.

I accept the evidence of the parties that the tenant did not pay the full amount listed as owing on the 10 Day Notice nor did they file an application to dispute the notice. Accordingly, I find that the tenant is conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the corrected effective date of the 10 Day Notice. Therefore, I find that the landlord is entitled to an Order of Possession, pursuant to section 55 of the Act.

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 landlord claimed that the tenant has failed to pay full rent since September 2016 and have not paid any rent since February 2018. The landlord was not able to specify what amounts have been paid for rent and how they calculate the amount of \$20,450.00 which they are seeking. The bank statements submitted into evidence by the landlord show some activity but it is unclear who is making the payments or what they are made towards. I find that the landlord's evidence to be unclear and not sufficient to show that the amount claimed is the actual amount of the rental arrears. I find that the landlord has not met their evidentiary burden and consequently dismiss the portion of the landlord's application seeking a monetary award.

As the landlord's application was not wholly successful I decline to issue an order allowing recovery of filing fees.

Conclusion

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

The balance of the landlord'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: January 14, 2019

Residential Tenancy Branch