



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNRL-S, FFL

Introduction

This hearing dealt with the landlord's 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;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

As both parties were present during the hearing, service of the landlord's notice of application for dispute resolution was confirmed, in accordance with section 89 of the *Act*.

Issues to be Decided

1. Is the landlord entitled to an Order of Possession for unpaid rent, pursuant to sections 46 and 55 of the *Act*?
2. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
3. Is the landlord entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
4. Is the landlord entitled to 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 landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began in 2005 and is currently ongoing. Monthly rent in the amount of \$848.00 is payable on the first day of each month. This is an oral tenancy agreement.

The landlord testified that the tenants paid a security deposit of \$350.00 which was half of the rent due when the tenancy began. The tenants testified that they paid a security deposit of over \$1,000.00 to the landlord but could not recall how much was actually paid, in what installments or when.

The landlord testified that on April 25, 2019 a 10 Day Notice to End Tenancy for Unpaid Rent with an effective date of May 05, 2019 (the "10 Day Notice") was posted on the tenants' door. The tenants confirmed receipt of the 10 Day Notice on April 25, 2019. The 10 Day Notice states that the tenants failed to pay rent in the amount of \$7,632.00 that was due on April 1, 2019. The tenants did not make an application with the Residential Tenancy Branch to dispute the 10 Day Notice.

On the 10 Day Notice the landlord's name is not stated next to his signature; however, the landlord's name is stated in the body of the 10 Day Notice.

The landlord testified that the tenants failed to pay rent for the following months:

- February, March, April, July, August, September and October 2018; and
- April, May and June 2019.

10 months rent at a rental rate of \$848.00 is \$8,480.00.

The tenants testified that they did not pay rent for the following months:

- February, September and October 2018.

The tenants testified that they withheld rent because the landlord was not completing repairs at the subject rental property in a timely manner. The tenants testified that the landlord authorized them to withhold rent until the repairs were made. The landlord testified that he never authorized the tenants to withhold rent.

The tenants testified that they were not sure if they paid rent for the following months:

- July and August 2018

The landlord testified that he provided the tenants with rent receipts when rent was paid. The tenants entered into evidence rent receipts for May and June of 2018. The tenant entered into

evidence a cheque to the landlord dated December 31, 2017 for January 2018's rent which the landlord confirmed he received. The cheque number on the aforementioned cheque was #28. The tenant entered into evidence a bank statement which states that cheque #26 and #28 cleared on March 10, 2018. The tenants submitted that the cheques that cleared were for March and April 2018 rent.

The landlord testified that the cheque #28 was for January 2018's rent and that the March 10, 2018 date is the date the cheque cleared and did not have anything to do with the date the rent was for. The landlord testified that cheque #26 was the rent cheque from November or December 2017's rent, not March or April 2018. The landlord testified that had the tenants paid rent they would have received a rent receipt: the fact that the tenants did not enter said receipts into evidence supports his testimony that the tenants did not pay rent on the dates stated above. The tenants testified that on May 1, 2019 they tried to pay April and May 2019's rent to the landlord but he refused to accept it. The landlord testified that the tenants attended at his home but demanded that he sign the receipt before giving him the rent cheques. The landlord testified that he refused to sign a receipt before he saw what amount the cheques were made out for. The landlord testified that the tenants have not attempted to pay rent since May 1, 2019.

Analysis

I find that service of the 10 Day Notice was effected on the tenants in accordance with section 88 of the *Act*.

Residential Tenancy Policy Guideline 11 states that an arbitrator is permitted to amend a Notice to End Tenancy where the person receiving the notice knew, or should have known, the information that was omitted from the notice, and it is reasonable in the circumstances. In determining if a person "should have known" particular facts, an arbitrator will consider whether a reasonable person would have known these facts in the same circumstances. In determining whether it is "reasonable in the circumstances" an arbitrator will look at all of the facts and consider, in particular, if one party would be unfairly prejudiced by amending the notice.

I find that the tenant knew or ought to have known the landlord's name which was omitted next to the signature on the 10 Day Notice. The landlord's name was spelled out in an earlier section of the 10 Day Notice and the tenants were aware of the name of their landlord. I find that the tenants are not unfairly prejudiced by amending the notice. Pursuant to section 68 of the *Act*, I amend the 10 Day Notice to include the name of the landlord next to the landlord's signature.

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 tenants were obligated to pay the monthly rent in the amount of \$848.00 on the first day of each month which

they failed to do. Whether or not the landlord completes repairs required by the *Act*, does not excuse the tenants from their obligation to pay rent.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. I find that the tenants have not proved, on a balance of probabilities, that the landlord agreed that they were permitted to withhold rent.

Both parties agreed that the tenants did not pay February 2018's rent. I find that, on a balance of probabilities, the tenants did not pay March or April 2018's rent because cheque #28, which the tenants alleged was for March or April 2018, was actually for January 2018's rent. I find that, on a balance of probability, cheque #26, sequentially earlier than cheque #28, was rent paid for a month prior to January 2018.

Based on the evidence of both parties and the rent receipts entered into evidence by the tenants, I find that the tenants paid May and June 2018's rent. I find that had the tenants paid July and August 2018's rent, they would have been able to provide the rent receipts for those months. On a balance of probabilities, I find that the tenants failed to pay July and August 2018's rent.

Both parties agreed that the tenants have not paid September and October 2018's rent or April, May and June 2019's rent.

Pursuant to section 67 of the *Act*, I find that the tenants owe the landlord \$8,480.00 in unpaid rent.

Section 46(1) of the *Act* states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

Section 46(4) of the *Act* states that within 5 days after receiving a notice under this section, the tenant may

- (a) pay the overdue rent, in which case the notice has no effect, or
- (b) dispute the notice by making an application for dispute resolution.

Based on the evidence of both parties I find that the tenants failed to pay all overdue rent within five days of receiving the 10 Day Notice. Whether or not the landlord did or did not refuse to accept April and May 2019's rent is not relevant as the tenants testified that they did not attempt to pay the entire outstanding sum. I also note that May 1, 2019, when the tenants testified they

attempted to give the landlord April and May 2019's rent, is six days after they received 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 tenant's failure to take either of these actions within five days led to the end of his tenancy on the effective date of the notice.

In this case, this required the tenants to vacate the premises by May 05, 2019, as that has not occurred, I find that 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.

The testimony between the parties regarding the amount of the security deposit is in conflict. In this instance, I prefer the testimony of the landlord over that of the tenants as the tenants were unable to tell me how much the security deposit they paid was, just that it was some figure over \$1,000.00.

Section 72(2) states that if the director orders tenants 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 \$350.00 in part satisfaction of his monetary claim for unpaid rent against the tenants.

As the landlord was successful in his application, I find that he is entitled to recover the \$100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
Overdue rent	\$8,480.00
Filing Fee	\$100.00
Less security deposit	-\$350.00
TOTAL	\$8,230.00

The landlord is provided with this 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.

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.

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 20, 2019

Residential Tenancy Branch