



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NARAMATA BENCHLAND PROPERTIES
LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL, OPR

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on July 10, 2019 (the "Application"). The Landlord sought an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated June 23, 2019 (the "Notice"). The Landlord also sought compensation for damage, to recover unpaid rent and reimbursement for the filing fee.

The Landlord filed an amendment in relation to the Tenant's last name.

The Agent appeared for the Landlord at the hearing. The Tenant appeared at the hearing with A.D. A.D. said she was going to be a witness at the hearing and so left the room until required. The Tenant later advised that he was not calling A.D. as a witness.

The Tenant provided his correct legal name which is reflected in the style of cause. The Agent provided the correct rental unit address which is reflected on the front page of this decision.

The Agent advised that the request for compensation for damage to the rental unit relates to vehicles the Tenant has on the property and a concern that he might not move them at the end of the tenancy. The Tenant has until the end of the tenancy to address this issue. This claim is premature. This claim is dismissed with leave to re-apply if necessary in the future. This does not extend any time limits under the *Residential Tenancy Act* (the "Act").

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence. The Tenant confirmed receipt of the hearing package and evidence although he said he did not receive the Landlord's rent reconciliation. The Agent advised that he did not receive the Tenant's evidence but took no issue with admissibility of it.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered the documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession based on the Notice?
2. Is the Landlord entitled to a Monetary Order for unpaid rent?
3. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The parties agreed on the following. There is a written tenancy agreement between the Landlord and Tenant. The tenancy started in August of 2013 and is a month-to-month tenancy. Rent is \$1,300.00 per month due on the first and fifteenth of each month.

The Agent testified that the Tenant never paid a security deposit. The Tenant testified that he did pay a security deposit.

I did not have a copy of the Notice before me. The Agent testified as follows about the contents of the Notice. It states the Tenant failed to pay \$10,350.00 in rent which was due June 01, 2019. It is dated June 23, 2019 with an effective date of June 23, 2019.

The Agent testified that the manager posted the Notice to the door of the rental unit June 24, 2019. The Tenant testified that he did not receive the Notice. At first, the Tenant testified that he received a photo of the Notice via text. He later said he did not actually see the photo, he was told it was sent to him via text.

The Landlord submitted a Proof of Service in relation to the Notice; however, it only includes the first page of the form. I asked the Agent if he had the second page of the form as I may have allowed the Agent to submit it after the hearing if the Tenant had received it and it was an issue on the RTB's end. However, the Agent could not confirm that he had the second page of the form. Further, the Tenant said he did not have the second page of the form.

In relation to unpaid rent, the Agent testified as follows. The Landlord allowed the Tenant to pay rent late and over time in the past. There was no agreement about this, but the Landlord tolerated it. The Tenant was served with a 10 Day Notice for unpaid rent on two previous occasions; however, the Tenant then paid lump sums towards the outstanding amount. In June, the Tenant was working but made no rent payment. It was made clear to the Tenant June 23, 2019 that the Landlord was no longer permitting late rent payments or the outstanding balance. At present, the Tenant owes \$6,700.00 in rent.

At first, the Tenant testified that \$4,000.00 "or around there" is currently outstanding. The Agent had testified about rent amounts outstanding since 2017. I asked the Tenant if he agreed with the outline and he said, "yeah I guess so". Given this, I again asked the Tenant if he agreed with the Agent that \$6,700.00 is currently outstanding. The Tenant said he did not think it was that high and then said, "but I guess so yup". The Agent testified about amounts and dates of payments made after the Notice was issued including \$2,600.00 on July 02, 2019 or July 03, 2019, \$1,500.00 in mid July and \$1,300.00 on August 15, 2019. The Tenant agreed with these amounts and dates.

The Tenant testified that he did not pay past rent on time because he was not working and the Landlord allowed him to pay late and pay outstanding amounts over time. The Tenant testified that he spoke to someone for the Landlord on the phone around July 02, 2019 or July 03, 2019 and was told he could pay \$1,500.00 every cheque towards the outstanding balance.

Analysis

Pursuant to rule 6.6 of the Rules of Procedure, it is the Landlord who has the onus to prove they are entitled to an Order of Possession based on the Notice and to recover unpaid rent.

When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Section 46 of the *Act* allows a landlord to end a tenancy when a tenant has failed to pay rent. Section 46 states in part:

46 (1) 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...

(4) 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.

(5) If a tenant **who has received** a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit to which the notice relates by that date...

[emphasis added]

Further, section 55 of the *Act* states:

(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution...

(b) a notice to end the tenancy **has been given** by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;

[emphasis added]

In relation to service of the Notice, the Agent testified that the manager posted it to the door of the rental unit June 24, 2019. The Tenant denied receiving the Notice.

The Landlord submitted a Proof of Service; however, it only includes the first page of the form. The second page of the form contains the information required to support service such as a signed witness statement about service. In the absence of the second page, the Proof of Service is of no evidentiary value.

The Landlord did not submit any other evidence of service.

Given the conflicting testimony about service of the Notice, and lack of evidence from the Landlord in support of service, I am not satisfied the Notice was served on the Tenant by posting it on the door of the rental unit.

I acknowledge that there is evidence the Notice was sent to the Tenant via text message. This is not a form of service permitted by the *Act*. The Tenant said he never actually saw the photo of the Notice. There is no evidence before me that he did.

In the circumstances, I am not satisfied the Notice was served on the Tenant as required by sections 46 and 55 of the *Act*. Therefore, the Landlord is not entitled to an Order of Possession based on the Notice. This claim is dismissed without leave to re-apply.

In relation to unpaid rent, section 26(1) of the *Act* requires a tenant to pay rent in accordance with the tenancy agreement unless they have a right to withhold rent under the *Act*.

Based on the testimony of the parties, I find the Tenant is required to pay \$1,300.00 in rent each month by the fifteenth of each month.

I accept the testimony of the Agent that \$6,700.00 in rent is currently outstanding. The Agent was able to provide testimony about specific rent amounts paid and outstanding as of specific dates. The Tenant agreed with the Agent's outline of amounts owing since 2017 and of payments made since the Notice was issued. Given this, I find the Agent's testimony reliable.

I did not find the Tenant's testimony about outstanding rent reliable. Given his testimony and answers as outlined, I am not satisfied the Tenant was doing anything

more than guessing at what amount is currently outstanding. The Tenant did not explain why he agreed with the Agent's testimony about specific amounts paid and outstanding yet initially disagreed with the current amount outstanding. The Tenant used phrases such as "or around there" and "I guess so" which indicates to me that he does not actually know what amount of rent is outstanding. The Tenant did not provide a basis for his belief as to what is currently outstanding. The Tenant did not submit evidence to support his position about what is currently outstanding. The Tenant gave differing testimony when asked the same question about the amount currently outstanding. I find the Tenant's last answer about there being \$6,700.00 outstanding to be an acceptance that this is accurate.

In the circumstances, I find \$6,700.00 in rent is outstanding.

The Tenant testified that rent is outstanding because he was not working. This is not a basis under the *Act* to fail to pay rent as required under the tenancy agreement.

The Tenant testified that someone for the Landlord agreed he could pay \$1,500.00 per cheque over time. The Agent denied that there was or is an agreement between the parties that the Tenant can continue to pay rent late. I do not accept that the Landlord agreed to the Tenant not paying the outstanding rent or paying it over time. I would expect such an agreement to be in writing given the importance of paying rent in a tenancy. The Tenant has not submitted evidence to support his position on this issue.

The Tenant did not submit that he had any other authority under the *Act* to withhold rent. I find the Tenant did not have such authority.

I find the Tenant owes the Landlord \$6,700.00 in outstanding rent. I find the Landlord is entitled to recover this amount.

Given the Landlord was partially successful, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Tenant owes the Landlord \$6,800.00. I issue the Landlord a Monetary Order in this amount pursuant to section 67 of the *Act*.

Conclusion

The Landlord is not entitled to an Order of Possession based on the Notice.

The Landlord is entitled to monetary compensation in the amount of \$6,800.00 and I issue the Landlord a Monetary Order in this amount. This Order must be served on the Tenant and, if the Tenant does not comply with the Order, it may be filed in the Provincial Court (Small Claims) 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 *Act*.

Dated: September 03, 2019

Residential Tenancy Branch