Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPR MNR MNDC MNSD FF
Tenant: CNR MT DRI LRE OLC RP MNDC

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties. The participatory hearing was held, via teleconference, on October 3, 2019. Both parties applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "*Act*").

Both parties attended the hearing and provided testimony. The Tenant stated that he served the Landlord with his Notice of Hearing and evidence by registered mail on August 11, 2019. The Landlord acknowledged getting this package.

The Tenant submitted a second package of evidence to the Residential Tenancy Branch on September 30, 2019. However, he did not serve this to the Landlord. Given he did not provide the Landlord with a copy in accordance with the Rules of Procedure, I will not consider this second evidence package. Only evidence submitted with the first package will be considered along with oral testimony.

The Landlord stated that he served his Notice of Hearing and evidence in person on August 14, 2019. The Landlord provided a proof of service document to show that he personally served the Tenant on August 14, 2019, with this package, and brought with him two witnesses. Both witnesses signed this document supporting service in this manner. The Tenant denies getting the package and says the Landlord is lying. Having reviewed this matter, I find the Landlord has provided more detailed and compelling evidence showing that he served the Tenant with his Notice of Hearing and evidence. I find it more likely than not that the Landlord served the Tenant on August 14, 2019, and I find he was served on this day.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written

evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Issues

Both parties are seeking multiple remedies under multiple sections of the *Act*, a number of which were not sufficiently related to one another. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

After looking at the list of issues both parties applied for, and based on the evidence before me, I find the most pressing and related issues in this cross-application are related to the payment/non-payment of rent and the order of possession (whether or not the tenancy will continue, or end, based on the Notice issued.) As a result, I exercise my discretion to dismiss, with leave to reapply, all of the grounds in both applications with the exception of the following grounds:

- More time for the Tenant to file the application to cancel the Notice to End Tenancy.
- an order of possession based on a 10-Day Notice (the Notice) for unpaid rent or utilities and whether or not the Tenant is entitled to have this Notice cancelled; and,
- a monetary order for the Landlord for unpaid rent or utilities

Issues to be Decided

- Should the Tenant be given more time to apply to cancel the 10 Day Notice?
- Should the 10 Day Notice to End Tenancy be cancelled?
    - If not, is the landlord entitled to an Order of Possession?
- Is the landlord entitled to a monetary order for unpaid rent or utilities?

Background and Evidence

A Tenancy Agreement was provided into evidence and it shows that the tenancy began on March 1, 2014, and at that time, rent was set at $750.00, due on the first of the month. The Landlord still holds a security deposit in the amount of $375.00.

The Landlord stated that he issued the Tenant a Notice of Rent increase, along with a supporting letter on September 1 of 2016, stating that rent would increase from $750.00 to $825.00 per month as of January 1, 2017. The Landlord provided copies of these Notices of rent increase along with letters supporting why rent was being raised. The second Notice of Rent Increase was issued exactly one year later raising rent from $825.00 to $875.00 as of January 1, 2018. Then, a 3rd Notice of Rent Increase was issued exactly one year later, raising rent from $875.00 to $925.00, as of January 1, 2019. This is what rent is set at currently.

During the hearing, the parties referred to text message conversations about rent increases over the years. The Tenant submitted copies of the text messages to the Tenancy Branch in his second evidence package but copies of these documents were not admissible, as he did not serve them to the Landlord. However, during the hearing the text messages were read aloud, verbatim, and the Tenant confirmed that he sent, the following text to the Landlord on December 12, 2018, and the Landlord confirmed that the Tenant sent this:

“I agree in writing for your records to your rent increase for the year of 2019. Rent for 2018 has been $875.00 per month. I believe that the increase is more than it legally should be but will agree to it this year. I recognize costs for your home have increased more than the Residential Tenancy Act allows as an increase to your Tenants. I have always appreciated your flexibility and cooperation as a Landlord and this increase is a thank you for that. I can also be flexible. January rent is $925.00 per month and I will make a small payment upon receiving my WCB check next week as well as the movie charges for this month.”

The Landlord stated that the Tenant should not be allowed to agree to these increases, and then change his mind when he runs into financial trouble. The Tenant stated that the Landlord has generally been forgiving about occasional late rent payments, and the Tenant acknowledged that he has recently run into issues with his employment.

The Tenant stated that he believes rent should remain at $750.00, which is what it was in 2014 when he moved in, because the Landlord increased rent more than what he should have. The Tenant wants permission to deduct his overpayments from the rent he has failed to pay over the last couple months.

The Landlord stated that he served the Tenant with the 10 Day Notice on August 2, 2019, for unpaid rent in the amount of $925.00. The Landlord provided a proof of service into evidence which shows that he brought two witnesses, who both signed the proof of service, to show that the Tenant was served, in person with the 10 Day Notice on August 2, 2019. The Tenant denies that the Landlord served this Notice, on this date, and stated the only 10 Day Notice he got was one on August 1, 2019, which is invalid because it was issued on the same day rent was due, rather than the day after. The Tenant did not provide a copy of the August 1, 2019, 10 Day Notice into evidence.

The Tenant stated that he submitted his application to cancel the Notice "within the acceptable 10 days window". The Tenant stated that he went to file his application at our office on August 10, 2019, @3:35 pm, but wasn't able to speak to someone as it was busy. The Tenant stated that he went back on August 11, 2019, and since this was within the 10 day window, his application should be accepted. The Tenant then stated that maybe he filed the application on August 8, 2019, but he conceded that he is a "little confused on the dates". Both parties agree that no rent has been paid since July 2019, and no payments were made for August, September and October 2019. The Landlord is seeking an order for the Tenant to pay rent for these 3 months, as well as the order of possession.

Analysis

First, I will address the issue of how much rent was, and whether the Tenant had overpaid monthly rent, due to an illegal rent increase. Since a rent overpayment would allow the Tenant to withhold this amount from what he owes in the current month (at the time the Notice was issued in August of 2019), I find this must be analyzed first.

I note the tenancy has gone on for a several years, and there were several years where no rent increase was given or agreed to (rent remained the same for the first couple years of the tenancy), followed by some years where rent appears to have gone up above what the allowable rent increase amount would have been under the regulations. There is no evidence that the Tenant disputed any of the rent increases at the time they happened in the past, either with the Landlord or our office. Although the mere payment of the increased amount of rent does not necessarily equate to an agreement the rent increase, I note there is more evidence to consider in this case.

I note the parties both agreed in the hearing that the Tenant sent, and the Landlord received a text message (as outlined above). This message was spelled out verbatim in the hearing, and the Tenant agreed he sent it. The Landlord also agrees he got it and went off the assumption that all was well with the rental increase amounts. I find it

important to note that it appears the Tenant explicitly agreed in writing to the Landlords increases. Specifically, the Tenant summarized what he was paying at the time he sent that text message ($875.00), as well as saying what rent was going to increase to ($925.00). The Tenant also stated that he was aware of the tenancy regulations limiting rent increases imposed by the Landlord. However, he also indicated that he was grateful for the Landlord's flexibility in general, and was committed to also being flexible and he subsequently agreed to the rental amounts he was paying, as well as the increase. I find the Tenant and the Landlord agreed, in writing, to the rent increases imposed up until 2019, to $925.00 per month. I find the Tenant has not overpaid rent up until the time the 10 Day Notice was issued, and I find current rent is $925.00.

In determining that the Tenant agreed to the rent increase, and provided this to the Landlord via text message (in writing), I was guided, in part, by the definition provided by the Black's Law Dictionary Sixth Edition, which defines "writing" as "handwriting, typewriting, printing, photostating, and every other means of recording any tangible thing in any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof". I find that a text message meets the definition of written as defined by Black's Law Dictionary.

I was further guided by section 6 of the *Electronics Transactions Act,* which stipulates that a requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is accessible by the other person in a manner usable for subsequent reference, and capable of being retained by the other person in a manner usable for subsequent reference. Text messages are capable of being retained and used for further reference.

I also note the following section of the Residential Tenancy Act:

> **Amount of rent increase**
>
> **43** (1)A landlord may impose a rent increase only up to the amount
>
> (a)calculated in accordance with the regulations,
>
> (b)ordered by the director on an application under subsection (3), or
>
> **(c)agreed to by the tenant in writing.**

Although the Tenant has now taken the position that rent should be reset to what it was initially set at in 2015, due to the rental amounts being higher than the allowable annual increases (therefore making the increases invalid), I find the text message he sent on

December 12, 2018, was an agreement that he sent, in writing, to the Landlord, to deviate from the annual rent increase limitations.

Next, I turn to the Tenant's request to have more time to file his application to cancel the 10-Day Notice.

Although the Tenant has stated that the Notice was served to him on August 1, 2019 (suggesting that more than one Notice was issued), I note he has not provided a copy of this Notice into evidence. Since rent was not due until midnight on August 1, 2019, that Notice would not have been valid, even if it was provided into evidence, as rent was not overdue at that point and a Notice issued on August 1, 2019 would have been premature. The only Notice provided into evidence was the one from the Landlord which shows that he signed an served it on August 2, 2019. As this is the only Notice I have a copy of, this is the only Notice I will make a decision upon.

The Landlord provided proof of service showing that he, and two witnesses attended the rental unit to serve the Tenant, in person, on August 2, 2019. This proof of service was signed by the two witnesses. Although the Tenant denies getting this Notice, I find the Landlord has provided a more compelling account of what occurred. I have placed more weight on the Landlord's evidence with respect to when and how the 10 Day Notice was served. I find it more likely than not that the Landlord served the Tenant with the 10 Day Notice on August 2, 2019.

Section 26 of the *Act* states that the Tenant has 5 days to pay all outstanding rent, or file an application for dispute resolution (with a valid reason rent was not paid). There is no evidence the Tenant paid the outstanding amount ($925.00 for August rent) and I find the Tenant did not have the right to withhold this amount. Further, the Tenant did not file an application to cancel the 10 Day Notice until August 8, 2019. I note the Tenant *stated* he attended our office on August 7, 2019, (on the 5th and last day allowable to dispute a 10 Day Notice) and could not get in because it was busy. However, he also stated he came on August 10, 2019, and later stated that he was a "little confused on the dates". I find the Tenant provided an unclear account of when he actually attended the office to apply.

I note the following Rule of Procedure:

> **2.6 Point at which an application is considered to have been made**
> The Application for Dispute Resolution has been made when it has been submitted and either the fee has been paid or when all documents for a fee

> waiver have been submitted to the Residential Tenancy Branch directly or through a Service BC Office. The three-day period for completing payment under Rule 2.4 is not an extension of any statutory timelines for making an application.

I note the application was not submitted until August 8, 2019, the time his application, and fee waiver was submitted in person at our office. At this time he also asked for more time to make this application. In consideration of the Tenant's request for more time to apply for cancellation of the 10 Day Notice, I turn to the following section of the *Act*:

Section 66 of the *Act* states the director may extend a time limit established under the *Act* only in exceptional circumstances. Residential Tenancy Policy Guideline #36 states that "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend the time limit. The Guideline goes on to say that exceptional implies that the reason for failing to do something at the time required is very strong and compelling.

I find the Tenant has provided insufficient evidence that any of his circumstances are exceptional, such that it warrants extra time to file an application.

As a result, I find that the Tenant is not entitled to more time to make an Application to cancel the Notice and his late Application to cancel the Notice to End Tenancy is therefore dismissed.

As the Tenant's Application is dismissed, I must now consider if the Landlord is entitled to an Order of Possession pursuant to sections 55 of the *Act.* Under section 55 of the Act, when a Tenant's application to cancel a notice to end tenancy is dismissed and I am satisfied that the Notice to end tenancy complies with the requirements under section 52, I must grant the Landlord an order of possession. Section 52 of the *Act* requires that any notice to end tenancy issued by a landlord must be signed and dated by the landlord, give the address of the rental unit, state the effective date of the notice, state the grounds for ending the tenancy, and be in the approved form.

I find that the 10 Day Notice issued by the Landlord meets the requirements for form and content and the Landlord is entitled to an order of possession. The Order of Possession will be effective 2 days after it is served on the Tenant.

Next, I turn to the Landlord's request for a monetary order based on unpaid rent and utilities. Based on the testimony and documentary evidence, and on a balance of probabilities, I find as follows:

Section 26 of the *Act* confirms that a tenant must pay rent when it is due unless the tenant has a right under the *Act* to deduct all or a portion of rent.

The Tenant does not dispute that he withheld rent for August, September and October of 2019. The Tenant believed he was entitled to withhold this. However, as stated above, I find the Tenant was not legally entitled to withhold this amount. I find the Tenant owes rent, at $925.00 per month, for these 3 months.

Section 72 of the *Act* gives me authority to order the repayment of a fee for an application for dispute resolution. Since the Landlord was substantially successful in this hearing, I order the tenant to repay the $100. Also, pursuant to sections 72 of the *Act*, I authorize that the security deposit, currently held by the Landlord, be kept and used to offset the amount of rent still owed by the tenant. In summary, I grant the monetary order based on the following:

Claim	**Amount**
Cumulative unpaid rent August – Oct 2019	$2,775.00
Other:	
Filing fee	$100.00
Less:	
Security Deposit currently held by Agent	($375.00)
TOTAL:	**$2,500.00**

Conclusion

The landlord is granted an order of possession effective **two days after service** on the tenant. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

The landlord is granted a monetary order pursuant to Section 67 in the amount of **$2,500.00**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be 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: October 04, 2019

Residential Tenancy Branch