



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPRM-DR, FFL

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the *Act*), I was designated to hear an application regarding the above-noted tenancy. The landlord applied for:

- an order of possession for unpaid rent, pursuant to sections 46 and 55 of the *Act*;
- a monetary order for unpaid rent, pursuant to sections 26 and 67 of the *Act*; and
- recovery of the filing fee, pursuant to section 72 of the *Act*.

The landlord and the two tenants (WM and AB) 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 in attendance, I confirmed that there were no issues with service of the landlord's application for dispute resolution and evidence. The tenants confirmed receipt of the landlord's application package. In accordance with sections 88 and 89 of the *Act*, I find that the tenants were duly served with the application and evidence.

Preliminary Issue – Amendments

Section 64(3)(c) of the *Act* states that subject to the rules of procedure established under section 9 (3) [director's powers and duties], the director may amend an application for dispute resolution or permit an application for dispute resolution to be amended.

Section 4.2 of the Residential Tenancy Branch Rules of Procedure (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.

The landlord's original application claimed unpaid rent in the amount of \$850.00. Since filing for dispute resolution, the landlord testified that the amount of rent owed by the tenant has increased to \$1,550.00.

I find that in this case the fact that the landlord is seeking compensation for all outstanding rent, not just the amount outstanding on the date the landlord filed the application, should have been reasonably anticipated by the tenants. Therefore, pursuant to section 4.2 of the Rules and section 64 of the Act, I amend the landlord's application to include a monetary claim for all outstanding rent in the amount of \$1,550.00.

During the hearing the tenant A.B. spelled her last name slightly differently than it is spelt on the landlord's application for dispute resolution. This discrepancy was not noticed in the hearing and it is not entirely clear which spelling is correct. Out of an abundance of caution, pursuant to section 64 of the Act, I amend the landlord's application for dispute resolution to include both versions of the tenant's last name.

Also during the hearing both parties agreed that the tenants live in the lower unit of the house, and the landlord lives in the main unit. Pursuant to section 64 of the Act, I also amend the landlord's application for dispute resolution to change the tenancy address to lower unit of the original address provided.

Issues to be Decided

- Is the landlord entitled to obtain an order of possession, pursuant to section 46 and 55 of the Act?
- Is the landlord entitled to a monetary order for unpaid rent pursuant to sections 26 and 67 of the Act?
- Is the landlord entitled to the recovery of the cost of the filing fee under the Act pursuant to section 72 of the Act?

Background and Evidence

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

The parties agreed that the tenancy started in October 2017. At first, only tenant WM lived in the rental unit, and shortly after tenant AB moved in. Rent was \$800.00, and later increased to \$850.00, due on the 1st of each month. At the outset of the tenancy a security deposit of \$400.00 was paid. There was no pet deposit. The landlord still holds the security deposit.

The parties also agreed that the 10 day notice to end tenancy for unpaid rent or utilities (the Notice), dated September 05, 2019, was personally served. The Notice indicates an effective move-out date of September 15, 2019. The tenants continue to reside at the rental property.

The present application was filed on September 16, 2019.

The landlord testified that:

- She served the tenants with both pages of the Notice on September 05, 2019;
- On September 05, 2019 the rent in arrears was the month of September (\$850.00). The tenants did not pay October's rent, but paid \$1,000.00 on October 23, 2019. The landlord informed the tenants that the \$1,000.00 payment was for use and occupancy only and that she planned on enforcing the Notice;
- November's rent was not paid;
- Current arrears are \$1,550.00 (\$700 from the balance of October and \$850 from November's rent);
- She did not issue a receipt for the tenants' payment on October 23, 2019 in cash because she could not find them;
- She served a two month notice to end tenancy for landlord's use of property (the "Two Month Notice") in May 2019, but did not ask for an order of possession regarding that notice. The tenants did not move out on the effective date of the Two Month Notice.

The tenants testified that:

- They were served only the front page of the Notice in September 2019, but could not remember the exact date;
- September's rent was not paid because they were entitled to one month's free rent pursuant to the Two Month Notice;
- There are rental arrears. However, later AB testified October's rent was paid just before October 01, 2019 and \$1,000.00 was paid just before November 01 2019. Both these payments were in cash and no receipt was issued;
- AB was never disrespectful with the landlord.

Neither party entered into evidence a copy of the Two Month Notice.

The landlord provided page 01 of the 10 day notice to end tenancy, her bank statements for the month of September 2019 showing no cash deposits were made, a witnessed proof of service document pertaining to the Notice and a direct request worksheet.

Analysis

Section 88 (a) of the Act states:

How to give or serve documents generally

88 All documents, other than those referred to in section 89 [special rules for certain documents], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

(a) by leaving a copy with the person;

Based on the testimony of the parties, I find that the landlord personally served the Notice on the tenants. I find that this meets the service requirements set out at Section 88 (a) of the Act.

There is a conflicting testimony regarding the Notice (RTB form 30). The landlord says she served both pages of the notice, and the tenants say the landlord only served them with the first page of the Notice.

A useful guide in regard to conflicting testimony, and 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.

In this case, the landlord's testimony was more precise and clearer, providing specific dates of the events discussed. I therefore accept the landlord's version that the two pages of the notice were served.

Sections 46(4) and (5) of the Act state:

Landlord's notice: non-payment of rent

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.

(2)A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.

[...]

(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.

Section 46(5) of the Act is mandatory, and I do not have discretion as to its application. Based on the parties' testimony I find that, although the tenants participated in the hearing, the tenants did not file an application to dispute the Notice within 10 days of receiving it or pay the rent stated as outstanding on the Notice, within five days of receiving it. Therefore, the tenants are conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice (September 15, 2019) and must move

out of the rental unit. As this has not occurred, I find that the landlord is entitled to an order of possession effective November 30, 2019, pursuant to section 55 of the Act.

The landlord affirmed that she received \$1,000.00 in cash on October 23, 2019 for use and occupancy of her rental suite and this was the only payment she received since September 01, 2019. The tenants at first affirmed the rental arrears, but later affirmed they paid October and November's rent in cash. No receipt was issued, and no precise dates of payment were given.

The landlord's testimony was once again more precise and clearer, providing a specific date of the cash payment received. I therefore accept the landlord's testimony that the tenants are in arrears for a total of \$1,550.00 (\$700 from the balance of October's use and occupancy and \$850 from November's use and occupancy).

I find the Two Month Notice to be of no force or effect as the tenancy continued after the effective date of that notice and the landlord did not seek to have it upheld. As such I find that the tenants were required to pay rent on the first day of every month, including September 2019 and were not entitled to one free month's rent.

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. Pursuant to section 26(1) of the Act, I find that the tenants were obligated to pay the monthly rent in the amount of \$850.00 on the first day of each month. Based on the testimony of the landlord I find that the tenants did not pay rent in accordance with section 26(1) of the Act and owe the landlord \$1,550.00 in unpaid rent from October and November 2019.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for this application, pursuant to section 72 of the Act.

Conclusion

I grant an order of possession to the landlord effective on November 30, 2019, at 1:00 PM. 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. The landlord must serve this order on the tenants as soon as possible.

Pursuant to sections 67 and 72 of the Act, I grant the landlord a monetary order in the amount of \$1,650.00 for unpaid rent and for the recovery of the filing fee for this

application. 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.

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: November 27, 2019

Residential Tenancy Branch