



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER MANAGEMENT LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, FFT (Tenant)
 FFL, OPR-DR (Landlord)

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Tenants filed the application October 15, 2019 (the "Tenants' Application"). The Tenants applied to dispute a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated October 08, 2019 (the "Notice") and for reimbursement for the filing fee.

The Landlord filed the application October 22, 2019 (the "Landlord's Application"). The Landlord applied for an Order of Possession based on the Notice and sought reimbursement for the filing fee.

This matter was before a different arbitrator on December 09, 2019 but was adjourned. An Interim Decision was issued. The original arbitrator was not seized of the matter and the adjourned hearing came before me.

The Tenant and Advocate appeared at the hearing. V.S., J.A. and M.H. appeared for the Landlord. I explained the hearing process to the parties. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence. V.S. confirmed receipt of the Tenants' hearing package and evidence. M.H. testified that the evidence was received late. He advised that the Landlord was not taking issue with this. The Tenant confirmed receipt of the Landlord's hearing package and evidence.

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

Issues to be Decided

Tenants' Application:

1. Should the Notice be cancelled?
2. Are the Tenants entitled to reimbursement for the filing fee?

Landlord's Application:

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

Background and Evidence

A written tenancy agreement was submitted as evidence. The parties agreed it is accurate. Rent is due on or before the first day of each month. Both parties agreed rent was \$1,475.00 for October 2019. V.S. testified that the Tenant was also required to pay \$60.00 for parking.

A Notice of Rent Increase was submitted indicating rent was \$1,475.00 as of October 01, 2019. The Notice of Rent Increase includes a note that says, "please add \$60.00 for parking".

The Notice states the Tenants failed to pay \$1,535.00 in rent due October 01, 2019.

There was no issue that the Tenant received the Notice October 08, 2019 posted to the door of the rental unit.

V.S. testified that the Tenant failed to pay rent and the parking fee for October and that these amounts are still outstanding.

The Tenant testified that he paid October rent by bank draft on September 30, 2019. The Tenant testified that the Landlord mailed the bank draft back on October 25, 2019. The Tenant pointed to a copy of the bank draft and two witness statements in evidence.

The Tenant acknowledged that the payment was \$35.00 short and testified that he paid this amount November 01, 2019 by cheque.

The copy of the bank draft submitted is for \$2,625.00. The Tenant testified that this was for the rental unit and his wife's rental unit. The parties agreed rent for the Tenant's wife's unit was \$1,125.00 for October 2019.

The Tenant testified that the issue of the Landlord returning rent has occurred previously and pointed to previous decisions submitted from hearings between the parties. The Tenant submitted that the Landlord's agents mislead the arbitrators. The Tenant submitted that the issues between the parties arose due to a personal conflict.

The Tenant submitted a copy of the bank draft which is dated September 30, 2019. It is made out to the Landlord and is in the amount of \$2,625.00.

The Tenant submitted a signed witness statement from R.T. stating that they went with the Tenant on September 30, 2019 to the Landlord's office. It states that the Tenant showed R.T. the bank draft dated September 30, 2019 made out to the Landlord for \$2,620.00. It states, "he opened the tab and placed the draft in the mail slot" referring to the Tenant. It also states that the Tenant "had other business in the building".

The Tenant submitted a signed witness statement from J.C. stating that they received an envelope from the Landlord in the Tenants' mail October 25, 2019 with a bank draft inside. It states the bank draft was made out to the Landlord and in the amount of \$2,625.00.

In reply, M.H. submitted that it does not make sense that the Tenant would attend the office he did to pay rent on September 30, 2019 when he could have paid rent the next day to the caretaker at the building. M.H. testified that, in the past, the Tenant has claimed to pay rent but really provided an empty envelope.

J.A. testified that he started working for the Landlord in May and that the Tenant usually pays rent at the building.

M.H. submitted that the Tenant is fabricating evidence and using this as a delay tactic because the Tenant does not have the money to pay rent.

M.H. submitted that there is no reason for the Landlord to refuse rent. M.H. denied that arbitrators in previous decisions had found that the Landlord had refused rent. M.H. testified that he had read the previous decisions.

M.H. took the position that the witness statement of R.T. submitted by the Tenant does not state that the witness saw the Tenant drop off the bank draft September 30, 2019 and only states that the witness saw a bank draft.

The agents testified that the Landlord did not receive anything from the Tenant around September 30, 2019.

J.A. testified that the Tenant paid November rent, plus a further \$35.00 towards October rent, on November 01, 2019.

In reply, the Tenant testified that it was not unusual for him to pay rent at the location he did and that he works in the area of the Landlord's office.

It is my understanding that there is some outstanding rent from past months that has been dealt with in past decisions. At this hearing, the parties agreed that the only issue before me is whether the Tenant paid October rent. The parties confirmed the issue is not outstanding rent from previous months.

I have reviewed the decisions from prior hearings between these parties and note the following.

On File Number 1, the evidence was that the Landlord returned rent the Tenant attempted to pay on November 20, 2017 as noted at paragraph 1 on page 2. The evidence was that the Landlord did not accept rent from the Tenant for November, December, January and February of 2017 and 2018 as noted at paragraph 3 of page 2.

At paragraph 6 of page 4 the arbitrator stated:

I do not find the landlord's conduct in returning the money order or refusing any subsequent rent payment to be reasonable.

At paragraph 2 of page 5 the arbitrator stated:

I accept the tenant's evidence that they attempted to pay the rental arrears on November 20, 2017 and were refused...the continued existence of the arrears on this account is a consequence of the landlord's own conduct in refusing to accept payment.

On File Number 2, the Tenant sought to cancel 10 Day Notices dated November 06, 2018 and December 06, 2018. In relation to the December 06, 2018 notice, the Tenant testified that he put a money order in the mail slot of the caretaker's door. The Tenant called a witness to confirm this. The Agent for the Landlord testified that the Landlord received an empty envelope but no money order from the Tenant. The Tenant testified that he later found the money order in his mail.

I note the following comments of the arbitrator:

From page 6:

The findings of the Arbitrators in the February 2018 and May 2018 decisions noted above tend to paint the landlord/tenant relationship as difficult...

From page 7:

Second, it is inconsistent with common sense that the Tenant would go to the cost and trouble of having a money order drafted at a bank for which to pay the rent and then place an empty envelope in the mail slot on the caretaker's door. I find the Tenant's credibility in this regard is further supported by the affirmed statement of the witness, BN, about this matter.

Further, I find the Landlord's documented proclivity to not accept the Tenants' rent payments, which was found by the respective Arbitrator to be unreasonable, raises questions in my mind about the Landlord's motivations about this tenancy.

Based on the evidence before me overall, I find the Tenants to be more credible than the Landlord and their evidence more reliable than that of the Landlord. Accordingly, I believe the Tenant's evidence that he provided the Landlord with the December 2018 rent, parking and additional payment in the amount of \$2,625.00 and I find it was delivered to the Landlord on time.

I find it more likely than not that the Landlord slipped the Tenants' December money order in one of the flyers and into the Tenants' mail slot. As a result, I find that the 10 Day Notice issued by the Landlord to the Tenants in December 2018 was unsubstantiated by the Landlord's oral and written submissions and is, therefore, cancelled and of no effect, pursuant to Section 46. The Landlord must accept payments from the Tenant for December 2018.

At the end of the hearing, M.H. asked that I consider ordering the Tenant to pay rent in person to the caretaker if the Notice is cancelled and the tenancy is continuing. The Tenant agreed with this but then wanted to add further conditions. I told the parties I would consider this request in my written decision.

Analysis

Section 26(1) of the *Residential Tenancy Act* (the "*Act*") requires tenants to pay rent when it is due under the tenancy agreement unless they have a right to withhold it under the *Act*.

Section 46 of the *Act* allows a landlord to end a tenancy when tenants fail to pay rent. The relevant portions of section 46 state:

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.

(emphasis added)

Pursuant to rule 6.6. of the Rules of Procedure, it is the Landlord who has the onus to prove the grounds for the Notice.

There is no issue that the Tenant received the Notice October 08, 2019. The Tenants filed the dispute October 15, 2019. The five-day deadline for filing the dispute would

have been October 13, 2019; however, this was a Sunday. October 14, 2019 was a holiday. Therefore, the Tenants had until October 15, 2019 to file the dispute pursuant to the definition of “days” outlined in the Rules of Procedure.

There is no issue that the Tenants were required to pay \$1,475.00 in rent by October 01, 2019.

In relation to the parking fee, I find this is a separate fee and not part of the rent payment based on the tenancy agreement and Notice of Rent Increase. I find this given the tenancy agreement does not show that a parking fee is included in rent. Further, the Notice of Rent Increase clearly shows rent is \$1,475.00 and that parking is a separate fee of \$60.00. The Landlord cannot end a tenancy under section 46 of the *Act* for non-payment of the parking fee given it is a separate fee. The \$60.00 parking fee should not have been included on the Notice.

The issue here is whether the Tenants paid rent for October.

I am satisfied the Tenant paid the Landlord \$2,625.00 by bank draft on September 30, 2019. The Tenant’s testimony on this point is supported by the copy of the bank draft and witness statement of R.T.

I am satisfied the Tenants received the bank draft back in their mail October 25, 2019. This is supported by the witness statement of J.C. This further supports the Tenant’s version of events in relation to October rent. It contradicts the testimony of the Landlord’s agents on this point.

The Landlord has not provided compelling evidence or submissions that cause me to question the reliability or credibility of the bank draft evidence, witness statement of R.T. or witness statement of J.C., all of which support the testimony of the Tenant. The Landlord’s agents did not provide a compelling basis to support the assertion that the Tenant is fabricating evidence.

M.H.’s submission that it does not make sense that the Tenant would pay rent at the location he did is not a compelling argument. The Tenant provided a reasonable explanation for paying at the location he did. Further, the witness statement of R.T. supports that the Tenant had other business at the location. M.H.’s submissions on this point are not sufficient to overcome the evidence submitted by the Tenant which supports that the Tenant paid rent September 30, 2019.

M.H. testified that the Tenant has claimed to pay rent in the past but instead provided the Landlord an empty envelope. I understand this to be a reference to File Number 2. The Arbitrator did not accept that this occurred as is clear from the portion of the decision outlined above.

M.H. submitted that there is no reason for the Landlord to refuse rent. M.H. testified that he had read the prior decisions and denied that arbitrators had previously found that the Landlord had refused rent. Arbitrators have previously found that the Landlord refused rent from the Tenant as is clear from the portions of the decisions from File Number 1 and 2 outlined above. I agree that there is no reason for the Landlord to refuse rent; however, it is clear the Landlord has done so in the past.

M.H. submitted that R.T. only saw a bank draft. This is not accurate as is clear from the portion of R.T.'s witness statement outlined above.

Given the evidence submitted, I accept the testimony of the Tenant and am satisfied he paid October rent on September 30, 2019. Given the above, I do not accept the testimony of the Landlord's agents that the Landlord did not receive October rent.

I acknowledge that there is an issue in relation to the amount paid September 30, 2019 as the portion paid for the rental unit was \$1,500.00. The Tenant owed \$1,475.00 for rent and \$60.00 for parking for a total of \$1,535.00. There is no issue that the Tenant paid the remaining \$35.00 on November 01, 2019. I have considered this and am not satisfied the Tenant failed to pay \$35.00 of the rent as the Tenant paid rent and parking together and the Notice includes rent and parking together. The Tenant paid \$1,500.00 which exceeds the October rent amount. As stated, the Notice should not include parking as it is a separate charge and the Landlord cannot end the tenancy pursuant to section 46 of the *Act* for failure to pay parking.

I am satisfied the Tenant paid October rent by October 01, 2019 as required. The Landlord did not have authority to issue the Notice pursuant to section 46 of the *Act* for non-payment of rent. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

Given the Tenants were successful, I award the Tenants reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, the Tenants can deduct \$100.00 from one future rent payment.

Given the Landlord was not successful, I decline to award the Landlord reimbursement for the \$100.00 filing fee.

M.H. asked that I consider ordering the Tenant to pay the caretaker directly. I decline to do so as it is the actions of the Landlord that are an issue here, it is not how the Tenant is paying rent that is an issue.

Given the history between these parties, as outlined in the previous decisions on File Numbers 1, 2 and 3, the Landlord is cautioned as follows. The Landlord is to accept the Tenants' rent payments in the future. If the Landlord returns rent payments to the Tenants in the future, it may be determined by an arbitrator at a future hearing that this money is not recoverable by the Landlord as the Tenants will have paid rent. Further, it is open to the Tenants to seek compensation for a breach of their right to quiet enjoyment if there is a pattern of the Landlord issuing notices to end tenancy without authority under the *Act* to do so or contrary to RTB decisions. Breaches of the *Act* can also lead to further action by the RTB Compliance and Enforcement Unit.

Conclusion

The Tenants' Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*. The Tenants can deduct \$100.00 from one future rent payment.

The Landlord's Application is dismissed without leave to re-apply.

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: January 10, 2020

Residential Tenancy Branch