



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

For the Landlord: MNDL-S, FFL
For the Tenant: MNDCT, MNSD, FFT

Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* ("Act") by the Parties.

The Landlord filed a claim for:

- an Order of Possession for unpaid rent, further to having served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent in the amount of \$450.00 ("10 Day Notice");
- a Monetary Order for unpaid rent for the Landlord, retaining the security deposit to apply to this claim; and
- recovery of the \$100.00 Application filing fee.

The Tenant filed a claim:

- for more time to apply to cancel the 10 Day Notice;
- for an Order to cancel the 10 Day Notice;
- for compensation for monetary loss or other money owed;
- for authorization for the Tenant to change the lock;
- for an Order to provide services or facilities required by the tenancy agreement or law; and
- for an Order to reduce the rent for repairs, services or facilities agreed upon but not provided.

The Tenant, the Landlord, and an agent for the Landlord, N.S., ("Agent"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process. During the hearing, a witness for the Tenant, E.M., also gave affirmed testimony.

During the hearing the Parties were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"). However, only the evidence relevant to the issues and findings in this matter are described in this decision.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me during the hearing.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary and Procedural Matters

The Parties provided their email addresses at the outset of the hearing and confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

Prior to the Parties testifying in the hearing, I advised them that Rule 2.3 authorizes me to dismiss unrelated disputes contained in a single application. In this circumstance, the Tenant indicated several matters of dispute on her application, the most urgent of which is the application to set aside a 10 Day Notice. I found that not all the claims on the application are sufficiently related to be determined during this proceeding. Therefore, I advised that I would consider only the Tenant's request for more time to apply to cancel the 10 Day Notice, and her application to set aside the 10 Day Notice at this proceeding. Therefore, the Tenant's other claims are dismissed, with leave to re-apply, depending on the outcome of this hearing.

The Agent said that the amount of rent owing at the time the Landlord applied for dispute resolution has changed, given that the Tenant continued to live in the rental unit, despite not having paid full rent. The Agent said the Tenant owes the Landlord \$1,750.00 from December 2019 and January 2020 rent, rather than \$450.00 for November 2019 when the Application was served. The Agent requested that the Landlord's Application for a Monetary Order be increased to this amount to reflect the changing amount of this debt.

Pursuant to Rule 4.2 and section 64(3)(c) of the Act, I amend the Application for dispute resolution to correct the amount of the Monetary Order sought, reflecting the ongoing failure of the Tenant to pay her monthly rent owing. I find no prejudice to the Tenant, as she is aware of how much rent she has or has not paid, therefore, she could have anticipated that the Landlord would claim reimbursement for the full amount of rent owing. Accordingly, after amending the amount Landlord originally claimed, I find it reasonable to amend the amount of the Monetary Order sought by the Landlord from the Tenant from \$450.00 to \$1,750.00, in addition to the Landlord's claim for a \$25.00 late payment fee.

During the hearing, the Tenant was reluctant to give the Landlord her new address; however, she agreed to give the Landlord an alternate address for service. I find that the Landlord has the Tenant's forwarding address for service as of the date of the hearing, January 16, 2020.

Issue(s) to be Decided

- Is the Tenant entitled to More Time to Apply to Cancel the 10 Day Notice?
- Should the 10 Day Notice be confirmed or cancelled?
- Is the Landlord entitled to an Order of Possession?
- Is the Landlord entitled to a Monetary Order, and if so, in what amount?
- Is the Landlord entitled to recovery of the \$100.00 Application filing fee?

Background and Evidence

The Parties agreed that the fixed term tenancy began on September 1, 2019, running to December 31, 2019, and then proceeding on a month-to-month basis. The Parties agreed that the Tenant owed the Landlord a monthly rent of \$1,100.00, due on the first day of each month, and that the Tenant paid the Landlord a security deposit of \$550.00, and no pet damage deposit.

The Parties agreed that the Landlord served the Tenant with a 10 Day Notice in person on November 14, 2019 for unpaid rent of \$450.00. The Parties agreed that the 10 Day Notice was signed and dated November 14, 2019, had the rental unit address, was served on the Tenant in person on November 14, 2019, had an effective vacancy date of November 24, 2019, and stated the ground for the eviction as being that the Tenant did not pay \$450.00 of rent when it was due on November 1, 2019.

TENANT'S CLAIMS

More Time to Apply

Section 47(4) of the Act addresses a tenant's obligations when served with a 10 Day Notice. The section states: "A tenant may dispute a notice under this section by making an application for dispute resolution within 5 days after the date the tenant receives the notice." I find that the Tenant was served in person with the 10 Day Notice on November 14, 2019. As a result, she had until November 19, 2019, to pay the rent owing in full or apply to the RTB to dispute the 10 Day Notice. The Tenant applied to the RTB for dispute resolution on November 27, 2019.

In the hearing, the Tenant said that at the time she received the 10 Day Notice, she was working as a lane closure technician for traffic control. She said:

My seniority made it that I was very busy quite often. I worked 10 to 16 hours a day. I would be dispatched out and must be available 24 hours a day, seven days a week. Around that time, I was called out to [a distant location]. I didn't want to quit my job, but I couldn't apply [for RTB dispute resolution] at the same time. On November 14 I was not doing very well. I tried to put together the application for arbitration and was rather emotional, as a serious incident happened at work.

The Agent said that he believed the Tenant was using delay tactics to suspend her eviction and that her "extenuating circumstances" are not valid.

The Tenant had the Witness call into the hearing, and he gave affirmed testimony. The Witness said:

We're in a line of work where we get called out at irregular times – called out to far parts of the province and get stuck there for days. [The Tenant] has been struggling to keep up with the paper work, with work, looking after her mother; she's been struggling to meet all of their requirements, make application, get all the stuff in. She doesn't have enough money to do the photocopying; she's overwhelmed. We've been overwhelmed for several months over a series of overwhelming things in her life. The allegation that she filed late for stalling tactics wouldn't come to mind to her to do that – it wouldn't occur to her to do something like that.

I advised the Parties that I would rule on this matter after the hearing; therefore, we proceeded with the Landlord's claim to explain why I should confirm, rather than cancel the 10 Day Notice, as the burden of proof is on the party serving the eviction notice.

LANDLORD'S CLAIMS

The Agent set out the following dates on which he said key events occurred:

Date	Event in Tenancy
November 1	\$1,100.00 rent due, but not paid by the Tenant;
November 9	Tenant said she would send rent by November 11;
November 12	Tenant paid \$650.00 towards November rent owing;
November 14	Agent hand-served the 10 Day Notice on the Tenant;
November 19	Deadline to pay rent owing or apply for dispute resolution expired;
November 23	We received a cheque from the Tenant for \$450.00;
November 24	The Tenant did not move out on effective vacancy date;
November 27	Agent and Tenant applied for dispute resolution on the same day;
December 1	\$1,100.00 December's rent due and not paid by the Tenant;
December 2	Agent served the Tenant with another 10 Day Notice;
December 6	The Tenant dropped off a \$450.00 cheque and a note offering to pay \$100.00, and requesting to use the security deposit for the rest of December's rent – Landlord rejected this proposal;
December 6	Landlord sent dispute resolution package to Tenant via registered mail;
January 2	Landlord informed by Strata that Tenant had told them she was moving out that day or the next;
January 3	At 3 pm I went with Landlord, knocked on door and found that Tenant had left the unit. There are a couple of her furniture items left in there.

The Agent said that the tenancy was for a fixed term for four months, and then it would have operated as a periodic or month-to-month tenancy after December 31, 2019. The Agent said the Tenant paid her rent in September and October 2019; however, her November rent was not paid on November 1, 2019, when it was due. The Agent said the Tenant paid \$650.00 on November 12, 2019, and gave the Agent a cheque for the remaining \$450.00 on November 23, 2019.

The Agent said the Tenant also failed to pay her rent on December 1, 2019, when it was due, and he served her with another 10 Day Notice on December 2, 2019. He said the Tenant dropped off a cheque for \$450.00 on December 6, 2019, with a note saying she would pay another \$100.00, and requesting that the Landlord use the Tenant's security deposit for the rest of the rent owing in December. The Agent said the Landlord rejected this proposal for using the security deposit to pay rent.

The Parties agreed that the Tenant moved out of the rental unit on January 2, 2020. However, the Agent said the Tenant had not given the Landlord notice of the Tenant's intent to vacate the unit on December 31, 2020. The Agent said: "We have not seen the evidence of any proper notice, so we feel that January rent is owing, as well."

The Tenant said that she gave her notice in the December 6, 2019 letter in which she asked the Landlord to use the security deposit to cover the rest of her December rent owing. The Tenant did not submit a copy of this letter for my consideration.

The Landlord has claimed \$25.00 in late rent payment in December 2019, pursuant to section 7(1)(d) of the *Residential Tenancy Act* Regulation. The Tenant said she does not think this is allowed.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

TENANT'S CLAIMS

More Time to Apply

The effective vacancy date in the 10 Day Notice was November 24, 2019, and the Tenant applied for dispute resolution at the RTB on November 27, 2019. RTB Policy

Guideline #36 ("PG #36") states the following:

Notice to End

Application for Arbitration Filed After Effective Date

An arbitrator may not extend the time limit to apply for arbitration to dispute a Notice to End if that application for arbitration was filed after the effective date of the Notice to End.

For example, if a Notice to End has an effective date of 31 January and the tenant applies to dispute said Notice to End on 1 February, an arbitrator has no jurisdiction to hear the matter ***even where the tenant can establish grounds that there were exceptional circumstances***. In other words, once the effective date of the Notice to End has passed, there can be no extension of time to file for arbitration.

[emphasis in original]

As a result, I do not have the jurisdiction to grant the Tenant more time to apply for dispute resolution in this set of circumstances. As a result, I find that the Tenant did not apply to cancel the 10 Day Notice on time; therefore, I dismiss the Tenant's Application wholly without leave to reapply.

LANDLORD'S CLAIMS

Section 26 of the Act confirms that a tenant must pay rent when due under a tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent.

Section 21 states that "unless the landlord gives written consent, a tenant must not apply a security deposit or a pet damage deposit as rent." As such, I find that the Landlord was within his right to refuse to apply the security deposit to the December 2019 rent owing by the Tenant.

Further, section 46 of the Act permits a landlord to take steps to end a tenancy when rent remains unpaid on any day after the day it is due by issuing a notice to end tenancy for unpaid rent. A tenant has five days after receipt of a notice to end tenancy for unpaid rent to pay the overdue rent or dispute the notice by applying for dispute resolution.

Failure to pay the overdue rent or dispute the notice results in the conclusive presumption that the tenancy ends on the effective date of the 10 Day Notice.

Section 7(1)(d) of the *Residential Tenancy Act* Regulation states:

7 (1) A landlord may charge any of the following non-refundable fees:

...

(d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;

...

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

The effective vacancy date of the 10 Day Notice was November 24, 2019; however, the undisputed testimony before me is that the Tenant continued to live in the rental unit until January 2, 2020. As a result, the Landlord was not able to re-rent the unit in December or January. Accordingly, I find that the Landlord has demonstrated an entitlement to a monetary award of \$650.00 for unpaid rent in December 2019 and \$1,100.00 for unpaid rent in January 2020 for a total of \$1,750.00. Based on the evidence before me overall, I grant the Landlord with a monetary award of **\$1,750.00**. Given his success, I find the Landlord is entitled to recovery of the \$100.00 Application filing fee.

The Agent did not direct me to, and I could not find a section of the tenancy agreement, which states that the Tenant must pay the Landlord a \$25.00 late payment fee; therefore, I dismiss this claim as being inconsistent with section 7(2) of the Regulation.

As rent was not paid when due, I find that the Landlord is entitled to an Order of Possession; however, as the Tenant moved out of the rental unit on January 2, 2020, the Landlord indicated that he no longer needed an Order of Possession.

I also find that this claim meets the criteria under section 72(2)(b) of the Act to be offset against the Tenant's security deposit of \$550.00 in partial satisfaction of the Landlord's monetary award. I authorize the Landlord to retain \$550.00 of the Tenant's security deposit in partial satisfaction of the monetary award.

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of **\$1,300.00**, which is calculated as follows:

<u>Claim</u>	<u>Amount</u>
Unpaid rent December 2019	\$ 650.00
Unpaid rent January 2020	\$1,100.00
Filing fee:	\$ 100.00
<u>LESS security deposit:</u>	<u>(\$ 550.00)</u>
<u>TOTAL:</u>	<u>\$1,300.00</u>

Conclusion

The Tenant's Application for more time to apply to the RTB for dispute resolution is dismissed, without leave to reapply, as the Tenant applied to cancel the 10 Day Notice after the effective vacancy date had passed, which is in contravention of PG #36. The Tenant's Application to cancel the 10 Day Notice is dismissed without leave to reapply, as the Tenant applied for dispute resolution beyond the five-day deadline set out in section 46 of the Act. The Tenant's other claims relate to an ongoing tenancy and are, therefore, dismissed without leave to reapply.

As the Tenant has moved out, the Landlord did not request an Order of Possession to serve on the Tenant.

The Landlord is awarded recovery of \$1,750.00 in unpaid rent, and recovery of the \$100.00 Application filing fee. The Landlord is authorized to retain the Tenant's \$550.00 security deposit in partial satisfaction of this award. The Landlord is granted a Monetary Order of **\$1,300.00** for the remaining amount of the award owing by the Tenant. This Monetary Order may be filed in and enforced as an Order of the Provincial Court of British Columbia (Small Claims).

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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: January 17, 2020

Residential Tenancy Branch