



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, MNRL-S, OPR, FFL

Introduction

This hearing convened as a result of a Landlord's Application for Dispute Resolution, filed on December 30, 2019, wherein the Landlord sought an Order of Possession and monetary compensation based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities issued on December 10, 2019 (the "Notice"), authority to retain the Tenant's security deposit and recovery of the filing fee.

The hearing of the Landlord's application was scheduled for teleconference at 9:30 a.m. on March 2, 2020. Initially, only the Tenant and the Landlord's witness, A.M., called into the hearing. A.M. confirmed that he was only present to provide evidence of service of the Application package on the Tenant and did not have evidence with respect to the merits of the Landlord's Application. At 9:41 a.m., just as I was about to dismiss the Landlord's application for his failure to attend, the Landlord called in.

The Tenant called into the hearing such that service of the Landlord's Application package was not at issue; as such, the Landlord's witness, A.M., disconnected from the hearing.

Th Landlord and the Tenant were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the

evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession and monetary compensation based on the Notice?
2. Should the Landlord be authorized to retain the Tenant's security deposit?
3. Should the Landlord recover the filing fee?

Background and Evidence

The Landlord testified that this tenancy began May 1, 2013; monthly rent is \$400.00. The Landlord confirmed that the Tenant did not pay a security deposit.

The Landlord testified that the Tenant pays rent by cheque.

The Landlord claimed the Tenant did not pay rent for December 2019.

The Tenant alleged in his response materials that he paid the December 2019 rent on November 21, 2019. The Landlord denied this. The Tenant also submitted that upon receiving the Notice, the Tenant gave a second cheque to the Landlord's mother. The Landlord testified his mother did not take any cheque from the Tenant. When I asked the Landlord if his mother would be testifying, the Landlord stated that she was "sleeping".

The Landlord issued the Notice on December 10, 2019 indicating the sum of \$400.00 was owing as of December 1, 2019. The Landlord stated that his son served the Tenant by posting the Notice to the rental unit door on December 10, 2019.

In response to the Tenant's allegation that the Landlord refused to accept his rent, the Landlord stated, "why would I refuse rent?"

On the Application the Landlord claimed the sum of \$1,300.00 including \$400.00 for December 2019, \$400.00 for January 2020, and \$400.00 for loss of rent for February 2020, as well as recovery of the \$100.00 filing fee.

The Landlord confirmed that the Tenant provided six post dated cheques for January, February, March, April, May and June 2020.

In response to the Landlord's claim, the Tenant testified that he paid the December rent on November 21, 2019 by leaving the cheque at the Landlord's door, which is upstairs as the Landlord's unit is above the Tenant's in the same building. The Tenant confirmed that he has been paying his rent this way for seven years.

The Tenant testified that his mother pays his rent for him as he is disabled. He further testified that on December 11, 2019 he received the Notice, which was the first communication he received from the Landlord about his December rent.

The Tenant testified that on the same day (December 11, 2019) and after receiving the Notice, the Tenant went straight to his mother, and they went to the bank to cancel the December 1, 2019 cheque. The Tenant and his mother then went back to the house and handed the replacement cheque to the Landlord's mother. In support the Tenant provided a signed statement from his mother wherein she confirms service of the cheque as well as the fact the Tenant provided six post-dated cheques for January-June 2020. The Tenant also provided documentary evidence from the bank confirming the first December 2019 rent cheque was cancelled at a cost of \$20.00 and a replacement cheque was issued.

The Tenant stated that to date, the Landlord has not cashed the December rent replacement cheque. The Tenant further stated that the Landlord cashed the January and February 2020 cheques.

The Tenant stated that due to difficulties he has had with the Landlord over this payment, he drafted a receipt for the Landlord's signature. A copy of the receipt was provided in evidence.

The Tenant testified that in the first year that he lived in the rental unit he tried to pay by electronic transfer and the Landlord refused. He further noted that to pay by electronic transfer would require some measure of cooperation from the Landlord which, at this point, he feels is unlikely. The Tenant noted that the Landlord has been trying to evict him for two years, has been unsuccessful in all his attempts, has been chastised by the B.C. Supreme Court and by the Residential Tenancy Branch, and continues to be a "nightmare Landlord". The Tenant provided copies of the prior Decisions in evidence before me.

The Tenant confirmed that he requires a rent receipt from the Landlord for his disability payments; confirming that he paid rent in December in the amount of \$400.00.

Analysis

Ending a tenancy is a significant request and may only be done in accordance with the *Residential Tenancy Act*. A landlord who seeks to end a tenancy for unpaid rent pursuant to section 46 of the *Act* bears the burden of proving the reasons for ending the tenancy.

The Landlord claimed the Tenant failed to pay the December rent. This was disputed by the Tenant.

The Tenant testified that he is disabled and as such his mother writes his rent cheques. He further testified that he has been paying his rent for seven years by providing cheques or cash to the Landlord at the Landlord's residence, which is above the Tenant's in the same building. The Tenant stated that he provided his rent cheque to the Landlord on November 21, 2019. Upon receiving the Notice, the Tenant went to his mother's. At her suggestion, the two of them went to the bank, cancelled the first cheque which had been provided on November 21, 2019, and obtained a replacement cheque. The Tenant and his mother then went back to the rental property where the Tenant gave the Landlord's mother the replacement cheque as well as the post-dated cheques for January through June 2020.

The Landlord claimed he received the post-dated cheques but did not receive the replacement cheque for the December 2019 rent.

On balance, I prefer the Tenant's testimony regarding the payment of his December 2019 rent. I accept his testimony that he provided the Landlord with his December rent cheque on November 21, 2019. I find it likely the Landlord simply refused to cash the December rent cheque in an attempt to end this tenancy.

I also accept the Tenant's evidence that upon receiving the Notice he immediately provided the Landlord with a replacement cheque. I am persuaded by the documentary evidence provided by the Tenant that he and his mother attended the bank on that same day, cancelled the cheque which had been provided on November 21, 2019 and obtained a replacement cheque. This is supported by the Tenant's testimony, the statement from his mother, as well as the documents provided by the bank. It is also

notable that the Landlord received the post-dated cheques and has applied them to the January and February 2020 rent.

During the hearing before me the Landlord asked “why would I refuse rent?”; in response I say the Landlord refused rent as yet another attempt to end this tenancy.

The parties have filed five separate applications since November 23, 2018 (the file numbers for those applications are included on the cover page of this my Decision.) In all but the current application, the issues have related to the Landlord’s attempt to end the tenancy for his use pursuant to section 49 of the Act. The most recent application was heard before me on September 27, 2019; and by Decision dated October 9, 2019, the Tenant’s Application to cancel a 2 Month Notice to End Tenancy for Landlord’s Use. In that Decision I set out the following procedural history:

This tenancy has been the subject of B.C. Supreme Court proceedings as well. The history of these proceedings are aptly detailed in the May 13, 2019 B.C. Supreme Court Decision of the Honourable Mr. Justice Davies; the relevant portions of that Decision are reproduced as follows:

[3] The history of this matter is somewhat complicated.

[4] On October 5, 2018, the landlord provided the tenant with a two-month notice to end tenancy for the landlord’s use of the property pursuant to s. 49(3) of the Act on the basis that his son, who is 26 years old, and who lived with him at the time, planned to move into the petitioner’s rental unit.

[5] The petitioner applied for dispute resolution arguing that that the notice should be cancelled because the landlord did not have an honest intention to move his son into the rental unit and based also upon a submission that he and the landlord had an oral agreement that the petitioner would be a long-term tenant.

[6] The hearing of that first notice before the Residential Tenancy Branch occurred on November 23, 2018.

[7] The arbitrator, Arbitrator Wellman, issued a decision granting the tenant’s application to cancel the first notice on the basis that the respondent failed to prove that he had a good faith intention to move his son into the rental unit.

[8] The decision read:

As the landlord’s “good faith” was questioned regarding the issuance of the Notice, I considered that the only submission that the Landlord provided was his own testimony that his son was going to move in. I find that the Landlord could have provided further evidence to prove beyond a balance of

probabilities that, his son in, good faith, was intending to move into the rental unit in accordance with s. 49 and 51 of the Act. As such, I find that the Landlord has failed to provide sufficient evidence that the reasons for the issuance of the Notice were valid. As a result, I cancel the Notice and order the tenancy to continue until it is ended in accordance with the Act.

[9] The respondent landlord was unsatisfied with that decision and applied to have it reviewed. On December 6, 2018, Arbitrator Holloway issued a reconsideration decision dismissing the respondent landlord's application for reconsideration. In dismissing that application the Arbitrator stated:

I find the new evidence submitted on this application for review is more in the nature of an attempt to reargue the same matters that were before the arbitrator at the original hearing. The review process is not intended to provide a party with an opportunity to present additional evidence that was available but not presented at the original hearing in order to strengthen arguments that were considered but rejected by the arbitrator at the original hearing. In this case the arbitrator rejected the good faith intention of the landlord.

[10] Eleven days after the issuance of that review consideration decision, the respondent landlord issued a second two-month notice to end the tenancy for the landlord's use of property. He again did so under s. 49(3) of the Act again stating that he intended to move his son into the rental unit.

[11] The petitioner again applied for dispute resolution with the Residential Tenancy Board seeking to cancel the second notice.

[12] On February 5, 2019, a second dispute resolution hearing concerning the petitioner's application to cancel the second notice was heard.

[13] During that second hearing the respondent's son attended as a witness and testified that he intended to move into the rental unit. The respondent provided no other additional evidence.

In the second dispute resolution hearing Arbitrator Selbee found that the Landlord was not precluded from issuing another 2 Month Notice to End Tenancy for Landlord's use.

On Judicial Review, the Honourable Mr. Justice Davies found Arbitrator Selbee's Decision to be patently unreasonable for the following reasons:

[19] ...

- 1) The second notice to terminate was issued for exactly the same reasons as the first notice.*

- 2) *The validity of the first notice had been determined against the position of the landlord.*
- 3) *There was a determination of a lack of good faith.*
- 4) *That first decision resulted in a reconsideration which was also resolved against the landlord.*
- 5) *The facts had not changed in any way when the second notice was issued.*
- 6) *In my view, the second notice to end the tenancy was an abuse of the process of the Residential Tenancy Branch in an attempt to do an end run on the first decision.*

The Tenant advised that days following receipt of the Supreme Court Judicial Review Decision he received the July Notice.

In the October 9, 2019 Decision I cautioned the Landlord as follows:

The Landlord is cautioned however, against issuing another notice for the purposes of his son residing in the rental unit unless he has clear and compelling evidence that circumstances have changed significantly, and to such an extent that reasons for ending the tenancy are not the same as they were when he issued the October 5, 2018, December 17, 2018 and July 24, 2019 Notices.

Within two months of receipt of the October 9, 2019 Decision, the Landlord claims the Tenant failed to pay his December 2019 rent. As noted above, I do not accept the Landlord's testimony in this regard and find that he refused or neglected to cash the Tenant's December 2019 rent cheque.

Even in the event I accepted the Landlord's evidence that the Tenant failed to pay the December 2019 rent when it was due, I would have cancelled the Notice pursuant to section 46(4)(a) as I accept the Tenant's evidence that immediately upon receiving the Notice he provided a replacement cheque to the Landlord; for clarity I reproduce the relevant portions of section 46 of the *Act* as follows:

- 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

...

For these reasons I dismiss the Landlord's request for an Order of Possession based on the Notice. The tenancy shall continue until ended in accordance with the Act.

The evidence confirms the Landlord has post dated cheques for the months January through June 2020. The Landlord is cautioned that he must cash those cheques when rent is due and may not delay cashing them as an attempt to end this tenancy.

The Landlord requested monetary compensation in the amount of \$1,300.00.

I accept the Tenant's evidence that he paid \$20.00 to cancel the first December 2019 rent cheque and will incur a further \$20.00 to cash the second December 2019 rent cheque. **I therefore authorize the Tenant, pursuant to section 65(1), to withhold \$40.00 from his December 2019 as compensation for these costs, which I find were incurred due to the Landlord's failure to cash the Tenant's December rent cheques. The Tenant may therefore pay the sum of \$360.00 to the Landlord for his December 2019 rent.**

I also Order the Landlord to provide the Tenant with a rent receipt for December 2019 in the amount of \$400.00, recognizing I have authorized the Tenant to withhold \$40.00 due to the Landlord's actions.

The evidence confirms the Tenant paid his January and February 2020 rent such that the Landlord is not entitled to a Monetary Order for those amounts.

The Landlord's request for authority to retain the Tenant's security deposit is also dismissed.

As the Landlord has been wholly unsuccessful in his application, I also deny his request for recovery of the filing fee pursuant to section 72 of the Act.

Conclusion

The Landlord's Application is dismissed in its entirety.

The Tenant may reduce his December 2019 rent by \$40.00 pursuant to section 65(1) of the Act. Upon payment of the balance of \$360.00, the Landlord must provide the Tenant with a receipt for payment of the December 2019 rent in the amount of \$400.00.

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: March 4, 2020

Residential Tenancy Branch