



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, OPL, MNRL-S, FFL

Introduction

This hearing dealt with two landlord applications pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for unpaid rent, pursuant to sections 46 and 55;
- an Order of Possession for landlord's use of property, pursuant to section 49;
- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord's interpreter also attended the hearing.

Both parties agree that the tenant was personally served with the landlord's first application for dispute resolution in November of 2020. I find that the tenant was served in accordance with section 89 of the *Act*.

Both parties agree that the tenant was served with the landlord's second application for dispute resolution via registered mail, though neither provided testimony on when the documents were served. I find that the tenant was served in accordance with section 89 of the *Act*.

Issues

1. Is the landlord entitled to an Order of Possession for unpaid rent, pursuant to sections 46 and 55 of the *Act*?

2. Is the landlord entitled to an Order of Possession for landlord's use of property, pursuant to section 49 of the *Act*?
3. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
4. Is the landlord entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
5. Is the landlord entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*?

Background and Evidence

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

Both parties agree that the subject rental property has an upper and lower suite. The parties do not agree on what suite the tenant initially moved into; however, both agree that the tenant is currently responsible for rent for the entire house in the amount of \$2,300.00. The tenant testified that she moved into the upper unit in 2008 or 2009 and rent was \$1,600.00 per month and she paid the landlord a security deposit of \$800.00. The landlord testified that the tenant moved into the lower suite and paid a security deposit of \$500.00. Neither party submitted any documentary evidence to support their testimony. A tenancy agreement was not entered into evidence.

Both parties agree that the landlord personally served the tenant with a Two Month Notice to End Tenancy for Landlord's Use of Property on August 5, 2020. The landlord testified that he changed jobs and that his accommodation was tied to his job so had to move and needs to move into the subject rental property. The landlord testified that his family is currently staying with family and that it is crowded and is not a permanent solution. The landlord testified that he needs to move into the subject rental property soon.

The Two Month Notice was entered into evidence and has an effective date of October 31, 2020. The landlord filed the first application seeking an Order of Possession for landlords' use of property on November 13, 2020.

The tenant testified that she did not dispute the Two Month Notice and started looking for a new place to live but has not been able to find anything. The tenant testified that the landlord called her in November of 2020 and told her that he could not afford to move in and that she could stay.

The landlord testified that he called her in November and told her that the rent she paid was for use and occupancy only while the parties waited for this hearing. The landlord testified that he told her that he could not afford to pay rent at his current place and pay the mortgage if the tenant did not pay rent. Both parties agree that the tenant owes the landlord \$6,950.00 in unpaid rent from May to August 2020. The tenant testified that the parties agreed to enter into a new tenancy agreement. The landlord denied the above testimony.

The tenant entered into evidence an undated cropped text message which states:

The agreement that I had with [the landlord] was that he told me that I could stay. I had to pay October and November right away, which I did and that I would figure out how much I could pay on top of the rent to make payments on the unpaid rent from covid. We were to make up an updated rental agreement. I paid the rent and told him that I could pay 300 on top of rent. I also said that if I could pay more at anytime, that I would. I was unable to meet as I was in quarantine due to illness

The top of the above text message is cropped off. The uncropped text messages entered into evidence state who the recipient of the text is and the date and time of the text. The above cropped message does not have these details.

The uncropped text messages entered into evidence by the tenant show the tenant was actively looking for new accomodation on October 30, 2020.

The landlord testified that he posted a 10 Day Notice to End Tenancy for Unpaid Rent (10 Day Notice) on the tenant's door on December 2, 2020. The tenant testified that she received the 10 Day Notice on December 2, 2020. The landlord testified that the tenant failed to pay December 2020's rent on time. The landlord testified that the tenant paid rent within 10 days of receiving the notice. The tenant testified that she paid rent on December 3, 2020. The tenant entered into evidence a deposit receipt for same.

The landlord testified that he served the tenant with a repayment plan for the outstanding rent from the summer. The landlord did not know when it was served. The

landlord testified that the tenant has not made any payments as set out in the repayment plan. No proof of service documents were entered into evidence. The tenant testified that she was not served with a repayment plan.

Analysis

Based on the testimony of both parties and the evidence provided, I find that service of the Two Month Notice was effected on the tenant on August 5, 2018, in accordance with section 88 of the *Act*.

Section 49(5) and section 49(6) state that if a tenant who has received a Two Month Notice does not make an application for dispute resolution within 15 days after the date the tenant receives the notice, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date.

In this case, the tenant did not dispute the Two Month Notice within 15 days of receiving it. Therefore, the tenant is conclusively presumed, pursuant to section 49(5) and 49(6) of the *Act*, to have accepted the end of this tenancy on October 31, 2020.

I find that, on a balance of probabilities, the landlord did not reinstate this tenancy after the tenant was conclusively presumed to have accepted the end of this tenancy as the landlord filed for an Order of Possession 13 days after the tenant was supposed to move out.

I find that the cropped text message is not a credible piece of evidence as it is different than all of the other text messages and lacks the text header that identifies the recipient and the date and time. The message appears to be sent to another person about the landlord, and not a text to the landlord.

I find that, pursuant to section 49 of the *Act*, the tenant's failure to file to dispute the Two Month Notice within 15 days of receiving the Two Month Notice led to the end of this tenancy on the effective date of the notice. In this case, this required the tenant to vacate the premises by October 31, 2020, as this has not occurred. I find that the landlord is entitled to an Order of Possession effective February 28, 2021. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit by 1:00 p.m. on February 28, 2021, the landlord may enforce this Order in the Supreme Court of British Columbia.

Section 46(1) of the *Act* states that 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.

Section 46(4) states that if within 5 days after receiving a notice under this section, the tenant pays the overdue rent, the notice has no effect

I find that the landlord served the 10 Day Notice on the Tenants pursuant to section 88 of the *Act*. I find that the tenant paid December 2020's rent on December 3, 2020. Since the rent was paid within five days of the tenant receiving the 10 Day Notice, I find that the 10 Day Notice is of no force or effect, pursuant to section 46(4) of the *Act*.

I find that the landlord has not proved, on a balance of probabilities, that the tenant was served with the repayment plan.

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*.

Residential Tenancy Branch Policy Guideline 52 states:

If the tenancy has ended and the landlord wants to pursue an amount of unpaid affected rent, the landlord does not have to give the tenant a repayment plan.
The landlord may apply to the RTB for a monetary order

“Affected rent” is rent that becomes due to be paid by a tenant in accordance with a tenancy agreement during the “specified period” between March 18, 2020 and August 17, 2020.

Pursuant to the testimony of both parties, I find that the tenant owes the landlord \$6,950.00 in unpaid rent from May to August 2020. As this tenancy has ended, I find that the landlord is entitled to recover the entirety of outstanding rent owed by the tenant, including “affected rent”.

Section 38(1) of the *Act* states that within 15 days after the later of:

- (a) the date the tenancy ends, and
 - (b) the date the landlord receives the tenant's forwarding address in writing,
- the landlord must do one of the following:

- (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
- (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security deposit pursuant to section 38(1)(a) and 38(1)(b) of the *Act*.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

I find that the landlord bears the onus of proving the amount of the security deposit as this is the landlord's application to retain the tenant's security deposit. I find that the landlord has not proved, on a balance of probabilities that the tenant paid a security deposit of \$500.00. The landlord's claim to retain the tenant's security deposit is therefore dismissed.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover one of the \$100.00 filing fees from the tenant, pursuant to section 72 of the *Act*. I find that the landlord is only entitled to recover one of the two filing fees paid as the landlord could have filed an amendment instead of a second application for dispute resolution, which would not have required the additional filing fee.

Conclusion

Pursuant to sections 49 and 55 of the *Act*, I grant an Order of Possession to the landlord effective at **1:00 p.m. on February 28, 2021**, which should be served on the tenant. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a Monetary Order to the landlord in the amount of \$7,050.00.

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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: February 04, 2021

Residential Tenancy Branch