



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: FFL, OPR-DR, OPRM-DR
Tenant: FFT, CNR, RP, OLC

Introduction

This was a cross application hearing that dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46;
- an Order for regular repairs, pursuant to section 32;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

This hearing also dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent, pursuant to section 67; and
- authorization to recover the filing fee for this application 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 landlords' interpreter also attended the hearing.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this decision and order.

Preliminary Issue- Amendment

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.

The parties both listed the tenant's children as tenants in both applications for dispute resolution. The children are not listed as tenants in the tenancy agreement. I find that the tenant's children are occupants and not tenants. Pursuant to section 64(3)(c) of the *Act*, I amend both the landlords' and the tenant's applications for dispute resolution to remove the children's names.

The tenant's application for dispute resolution mis-spelled landlord T.B.'s first name. Pursuant to section 64(3)(c) of the *Act*, I amend the tenant's application to correctly spell the landlord T.B.'s first name.

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 landlords' original application claimed unpaid rent and pet damage deposit in the amount of \$4,400.00. Since filing for dispute resolution, the landlords testified that the amount of rent and pet damage deposit owed by the tenant has increased to \$6,010.00.

I find that in this case the fact that the landlords are seeking compensation for all outstanding rent, not just the amount outstanding on the date the landlords filed the application, should have been reasonably anticipated by the tenant. Therefore, pursuant to section 4.2 of the Rules and section 64 of the *Act*, I amend the landlords' application to include a monetary claim for all outstanding rent and pet damage deposit in the amount of \$6,010.00.

Service

The landlords testified that the landlords' application for dispute resolution was personally served on the tenant on March 3, 2021. The tenant testified that her son who is a minor was served with the landlords' application for dispute resolution on March 3, 2021 and she received it on March 3, 2021. I find that while service to a minor residing at the property is not a method of service approved under section 89 of the *Act*, the tenant was sufficiently served, for the purposes of this *Act*, pursuant to section 71 of the *Act*, with the landlords' application for dispute resolution, on March 3, 2020 as she testified she received it on that date.

The tenant testified that served the landlords with her application for dispute resolution by putting it in the landlords' mailbox. No proof of service documents evidencing same were entered into evidence. The landlords testified that they were not served with the tenant's application for dispute resolution.

Rules 3.5 of the Rules states:

At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the *Act* and these Rules of Procedure.

I find that the tenant has not proved, on a balance of probabilities, that the landlords were served with the tenant's application for dispute resolution. The tenant's application is therefore dismissed with leave to reapply, except the tenant's application to recover the filing fee which is dismissed without leave to reapply.

Issues to be Decided

1. Are the landlords entitled to an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55 of the *Act*?
2. Are the landlords entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
3. Are the landlords entitled to recover the filing fee for this application from the tenants, 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 landlords' claims and my findings are set out below.

Both parties agreed that this tenancy began on December 1, 2020 and is currently ongoing. Both parties agree that at the time the tenancy agreement was signed by both parties, rent was \$1,400.00 per month, due on the first day of each month. Both parties agree that the tenant paid December 2020's rent in full in the amount of \$1,400.00. The tenant testified that because laundry was not included in the rent the landlord agreed to lower the rent to \$1,300.00 per month. Later in the hearing the tenant testified that the rent was lowered to \$1,350.00 per month. The landlords testified that they never agreed to reduce the rent and as per the tenancy agreement, rent was \$1,400.00 per month.

Both parties agree that the tenant paid a security deposit in the amount of \$700.00 to the landlord. A written tenancy agreement was signed by both parties and entered into evidence.

The landlords testified that the tenant paid \$500.00 towards January 2021's rent on January 15, 2021 and did not pay rent again until April 4, 2021 when the tenant paid \$1,190.00.

The landlord testified that a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") was posted on the tenant's door on February 12, 2021. The tenant testified that she received the 10 Day Notice on February 12, 2021. The tenant filed to dispute the 10 Day Notice on February 19, 2021, seven days after receiving the 10 Day Notice. The 10 Day Notice is dated December 2, 2021. The landlords testified that this was a typo and should have read February 12, 2021. The 10 Day Notice states that the tenant must move out of the subject rental property by February 22, 2021. The 10 Day Notice states that the tenant failed to pay rent in the amount of \$3,000.00.

The landlord testified that the \$3,000.00 was comprised of \$900.00 of rent owing for January 2021, \$1,400.00 of rent owing for February 2021 and \$700.00 owed by the tenant for a pet damage deposit.

Both parties agreed that the tenant had a pet and did not pay a pet damage deposit. The tenancy agreement states that pets are not permitted.

The tenant provided lengthy testimony about what rent was paid and when, much of it was confused and contradicted itself. The tenant was not sure on the dates rent was paid or how much was paid on each date but testified that \$1,200.00 was paid to the landlord in cash in January 2021 for January 2021's rent. The tenant testified that she deducted \$150.00 from rent because the subject rental property required painting and she bought the paint which cost approximately \$150.00.

The tenant testified that she gave the landlords \$1,350.00 in cash on January 25, 2021 for February 2021's rent. The tenant testified that she gave the landlords \$1,350.00 in cash in late February 2021 for March 2021's rent. The tenant agreed with the landlords that the tenant paid the landlords \$1,190.00 in cash on April 4, 2021 for April's rent. The tenant testified that the landlord cut off her internet which was included in the rent so she deducted \$160.00 from April's rent. The tenant agreed that she has not paid May 2021's rent. The tenant did not provide any documentary evidence to support her testimony regarding rent payments.

The landlords entered into evidence rent receipts for cash payments made in December 2020.

The landlords entered into evidence text messages between the parties. The following are legible excerpts pertaining to rent:

[Date unclear]

- Tenant:
 - I will have your payment for January only when you agree to the cleaning of the mold
- Landlord:
 - Are you aware that this will result in an eviction notice?
- Tenant:
 - You should have had that cleaned
- Landlord:
 - You have refused to show the mold to both myself and [landlord A.B.]
- Tenant:
 - You bombed me with the whole agenda you have set up for three of us to meet. You did not give me sufficient 24 hours notice to come into my place. So you want to do things the formal way you have to submit a 24 hour notice my sister

[January 15]

- Tenant:
 - [Landlord T.B.] I have more money for you today I need my package that was delivered 3 days ago.
- Landlord:
 - Give my wife she's @ home. How much? One pick sitting by my back door! I don't know how long it was!
- Tenant:
 - \$500

[January 24, 2021]

- Tenant:
 - I have your money but now you can wait

[January 28, 2021]

- Tenant:
 - Can you change the fire alarm batteries please
- Landlord:
 - Let me know when you have time Saturday or Sunday. And I need to know what time you be @ home.

[Date unclear]

- Tenant:
 - Hi [landlord T.B.] i know what your looking for I have your money in the morning. I am cut short for work so my pay is less so I'm juggling money I will not let this happen again I am embarrassed this happened again.
 - Ive decided that 700 isn't manageable for me so I'm asking for a deduction on that of 400 and extra time. I'm sure I'm moving out since you want to investigate me which would be a invasion of privacy and unethical of you to do this idiot is brown go ask him why he lied but you want to believe him that's biting the hand that feeds you in a sense

[Date unclear]

- Landlord:
 - How about rent? When will you be @ home?
- Tenant:

- I don't want to keep arguing and asking for these repairs

[February 18, 2021]

- Tenant:
 - I have 1200 for you today after work
 - For March 2021 rent and the 170 I'll have for you soon
- Landlord:
 - Okay I'll be at home and if you want to talk then we can also clear the Previous rent then we will move onto the March rent and talk about that
- Tenant:
 - Hi landlord sorry I didn't realize the time last night it looked like all your lights were out so I didn't bother

The landlords are seeking unpaid rent in the amount of \$5,310.00 and the \$700.00 pet damage deposit, for the total of \$6,010.00.

Analysis

Section 88 of the *Act* states that a 10 Day Notice may be served on the tenant by posting a copy on the door of the subject rental property. I find that the tenant was served with the 10 Day Notice on February 12, 2021, in accordance with sections 88 of the *Act*.

Section 52 of the *Act* states:

- 52** In order to be effective, a notice to end a tenancy must be in writing and must
- (a) be signed and dated by the landlord or tenant giving the notice,
 - (b) give the address of the rental unit,
 - (c) state the effective date of the notice,
 - (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy,
 - (d.1) for a notice under section 45.1 [*tenant's notice: family violence or long-term care*], be accompanied by a statement made in accordance with section 45.2 [*confirmation of eligibility*], and
 - (e) when given by a landlord, be in the approved form.

The 10 Day Notice was dated incorrectly, contrary to section 52(a) of the *Act*.

Section 68(1) of the *Act* states:

68 (1) If a notice to end a tenancy does not comply with section 52 [*form and content of notice to end tenancy*], the director may amend the notice if satisfied that

- (a) the person receiving the notice knew, or should have known, the information that was omitted from the notice, and
- (b) in the circumstances, it is reasonable to amend the notice.

I find that the tenant new or ought to have known the 10 Day Notice was not signed on December 2, 2021, which is a future date. I find that the tenant new or ought to have known the 10 Day Notice should have been dated the day it was served, that being February 12, 2021. In these circumstances, I find that it is reasonable to amend the 10 Day Notice to state that it was dated on February 12, 2021. I find that the amended 10 Day Notice meets the form and content requirements of section 52 of the *Act*.

Given the conflicting testimony regarding what rent was paid and when, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most 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 landlords' testimony regarding unpaid rent is supported by the text messages entered into evidence. In the texts, the tenant notes that rent has not been properly paid. Of particular note are the text exchanges dated January 15, 2021 and February 18, 2021 which state:

[January 15]

- Tenant:
 - [Landlord T.B.] I have more money for you today I need my package that was delivered 3 days ago.

- Landlord:
 - Give my wife she's @ home. How much? One pick siting by my back door!
I don't know how long it was!
- Tenant:
 - \$500

I find that this text message corroborates the landlord's testimony that the tenant paid \$500.00 towards rent on January 15, 2021.

[February 18, 2021]

- Tenant:
 - I have 1200 for you today after work
 - For March 2021 rent and the 170 I'll have for you soon
- Landlord:
 - Okay I'll be at home and if you want to talk then we can also clear the Previous rent then we will move onto the March rent and talk about that
- Tenant:
 - Hi landlord sorry I didn't realize the time last night it looked like all your lights were out so I didn't bother

I find that the February 18, 2021 text exchange confirms the landlords' testimony that February 2021's rent was not paid. The tenant's responding text does not deny that rent prior to the date of the text was still owing. The text messages show that the tenant did not give the landlord the rent money described in the February 18, 2021 text. I find that the testimony of the landlords is in harmony with the text messages entered into evidence. I find that the tenant's testimony regarding when rent was paid was disorganized, conflicting and unreliable. In accordance with my above findings, I prefer the testimony of the landlords over that of the tenant regarding the amount and timing of the payment of rent.

Based on the preferred testimony of the landlords, I find that the tenant failed to pay the outstanding rent within five days of receiving the 10 Day Notice. The tenant did not make application pursuant to section 46(4) of the *Act* within five days of receiving the 10 Day Notice, the tenant filed this application for dispute resolution on February 19, 2021, seven days after receiving the 10 Day Notice. In accordance with section 46(5) of the *Act*, the tenant's failure to take either of these actions within five days led to the end of his tenancy on the effective date of the notice.

In this case, this required the tenant to vacate the premises by February 22, 2021, as that has not occurred, I find that the landlords are entitled to a 2-day Order of Possession. The landlords will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

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*. The tenant is not permitted to withhold rent for repairs. Pursuant to section 26(1) of the *Act*, I find that the tenant was obligated to pay the monthly rent in the amount of \$1,400.00 on the first day of each month. In determining the rental rate of the subject rental property, I rely on the tenancy agreement signed by both parties. I find that the tenant did not provide any documentary evidence to establish that any of the terms of the tenancy agreement were altered after it was signed. I therefore rely on the signed tenancy agreement.

Based on the testimony of the landlords I find that the tenant did not pay rent in accordance with section 26(1) of the *Act* and owes the landlords \$5,310.00 in unpaid rent from January 2021 to May 2021.

I find that the landlords are not entitled to recover the pet damage deposit from the tenant as this tenancy is ending.

As the landlords were successful in their application, I find that they are entitled to recover the \$100.00 filing fee from the tenant, pursuant to section 72 of the *Act*.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlords are entitled to retain the tenant's security deposit in the amount of \$700.00.

Conclusion

I issue a Monetary Order to the landlords under the following terms:

Item	Amount
January rent	\$900.00
February rent	\$1,400.00
March rent	\$1,400.00

April rent	\$210.00
May rent	\$1,400.00
Filing Fee	\$100.00
Less security deposit	-\$700.00
TOTAL	\$4,710.00

The landlords are 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.

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlords effective **two days after service 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.

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: May 31, 2021

Residential Tenancy Branch