Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: Tenant: PSF, CNR, CNC
Landlord: OPRM-DR, OPR-DR, FFL, OPC, MNDL, MNRL, MNDCL

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The landlord requested:

- an Order of Possession for cause pursuant to section 55;
- an Order of Possession for unpaid rent pursuant to section 55; and
- a monetary order for unpaid rent and monetary losses pursuant to section 67; and
- authorization to recover the filing fee for their applications pursuant to section 72.

The tenant requested:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order to the landlord to provide services or facilities required by law pursuant to section 65.

CB attended for the tenant in this hearing as the tenant is no longer residing in the country. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to call witnesses, and to make submissions.

At the outset of the hearing both parties confirmed that the tenant had moved out at the end of March 2021, and that the tenancy has ended. The landlord confirmed that an Order of Possession is no longer required. As the tenancy has come to an end, only the monetary portions of the landlord's claims will be considered. The other claims are dismissed without leave to reapply.

The landlord testified that the tenant was served several packages by way of registered mail to the tenant's forwarding address. The landlord provided proof of service for the packages sent on March 12, 2021 and March 19, 2021. In accordance with sections 88, 89, and 90 of the *Act,* I find the tenant deemed served with these packages 5 days after mailing.

Preliminary Issue—Amendment to Landlord's Application

The landlord filed their original monetary claim for losses and unpaid rent on March 5, 2021. The original monetary claim included a claim of $2,900.00 for "lost rental income for one month (the tenant) vacates unit (to repair damage, replace furnishings and re-let), as well as estimates to replace and repair other items in the home. The landlord submitted a preliminary claim of $9,600.00 to $13,600.00 as indicated in the Monetary Order Worksheet submitted on March 5, 2021.

As the tenant moved out at the end of March, the landlord amended their claim to include further monetary losses that were not included in the original monetary claim. The landlord submitted an updated monetary order worksheet dated May 26, 2021 for a total monetary claim of $34,648.15, and provided proof of service for the registered mail package sent on May 26, 2021. The landlord testified that they had also emailed the tenant these materials.

Rule 4.6 states the following:

***As soon as possible**, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by the applicable Act and these Rules of Procedure.*

The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.

In any event, a copy of the amended application and supporting evidence must be received by the **by the respondent(s) not less than 14 days before the hearing.**

The agent for the tenant testified that the tenant had boarded her flight on May 24, 2021 in order to return to her home country, and was no longer residing at the address where the registered mail packages were sent to. The agent also testified that she could not confirm that the tenant had received the package by email.

Based on the evidence before me, I am not satisfied that the tenant was served with the amendment and package in accordance with section 88 of the *Act* and Rule 4.6 of the Rules of Procedure as the tenant had already left the country on May 24, 2021. These rules and service requirements ensure that a respondent is aware of the scope of the hearing and is prepared to respond, if they chose to do so. While the respondent was served with packages containing preliminary figures and estimates, the respondent was not made aware that the landlord would be seeking the specific amounts requested on the monetary worksheet dated May 26, 2021. I find that the amounts have substantially changed since the original application was filed and served on the tenant. I find that prior to the submission of the Monetary Worksheet dated May 26, 2021, the original application and worksheet did not provide the tenant with a clear breakdown of the landlord's monetary claim contained in the amended claim. This was due to the fact that at the time the original application was filed, the landlord was not able to determine the final monetary losses associated with this tenancy, and since the original application was filed the circumstances have changed, including the tenant's moving out of the rental unit.

Given the importance, as a matter of natural justice and fairness, that the respondent must know the case against them, I do not allow the landlord's amended monetary claim as summarized in the Monetary Worksheet on May 26, 2021, and I dismiss the landlord's application for monetary compensation or money owed for this tenancy with leave to reapply. The landlord remains at liberty to file a new application for damage or losses arising out of this tenancy. Liberty to reapply is not an extension of any applicable limitation period.

RTB Rules of Procedure 4.2 does allow for amendments to be made in circumstances where the amendment can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made. In this case, the landlord testified that the tenant had only paid $500.00 in rent for March 2021 before she had moved out, and the landlord was only able to re-rent the home for June 15, 2021, losing $7,250.00 in rental income. The landlord testified that this was

due to the state of the rental unit left by the tenant. The landlord is requesting that a monetary order of $9,650.00 be considered for these losses. In this case, as this claim relates to the loss of monthly rent, in accordance with RTB Rule of Procedure 4.2, I allow the landlord's amended claim of $9,650.00 for lost rental income.

Preliminary Issue – Priority Claims

Residential Tenancy Branch (RTB) Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

The hearing commenced at 11:00 a.m. and ended at 12:09 a.m. As the time allotted was not sufficient to allow the landlord's other claims to be heard along with the landlord's monetary claim for unpaid rent and lost rental income, I exercised my discretion to dismiss the landlord's other monetary claims with leave to reapply. Liberty to reapply is not an extension of any applicable timelines.

Preliminary Issue – Tenant's Forwarding Address

The landlord expressed concern in the hearing that the tenant did not provide the landlord with an updated forwarding address. The landlord testified that they only had the tenant's email, which was confirmed in the hearing. CB confirmed that the email address used in the tenant's application was recent, and that was the tenant's main email address which the tenant checks. The landlord testified that since the tenant has not provided a current forwarding address, the landlord is unable to serve the tenant.

CB confirmed that the email address used in the tenant's application was recent, and that was the tenant's main email address which the tenant checks. I have included the email on the cover page of this decision. The landlord testified that since the tenant has not provided a current forwarding address, the landlord is unable to serve the tenant.

I refer the landlord to section 5 of Residential Tenancy Policy Guideline #19 about using email service:

The Regulation to the Residential Tenancy Act and the Manufactured Home Park Tenancy Act prescribes service to an email address provided for service as an acceptable method of serving documents. Documents may be served by sending a copy of the document to the email address provided as an address for service by the person to be served. If no email address for service has been provided, then this

method of service should not be used. Parties may face delays or risk their application being dismissed if service is not effected in accordance with the legislation.

If service by email is used, the person serving the document will need to provide proof that the document sent by email was sent to the email address provided by the other party. Satisfactory proof may include a print out or screen shot of:

- *• RTB 51 – Address for Service or other document that sets out the party's email address for service;*
- *• the sent item, including the email address the item was sent to;*
- *• a confirmation of delivery receipt;*
- *• a response to the email by the party served;*
- *• a read receipt confirming the email was opened, or*
- *• other documentation to confirm the party has been served.*

The landlord expressed concern about the requirement to provide proof of service, and the landlord was informed that an Arbitrator does not have the ability to change the required legislation as set out above. Although the tenant's email was confirmed in the hearing, the landlord is still required to provide proof of service as required by the *Act* and legislation. As set out in RTB Rules of Procedure 3.4, the landlord has the discretion to apply for a Substituted Service Order at the time of filing an application, or after, if they are unable to serve the respondent.

3.4 If a respondent avoids service
If a respondent appears to be avoiding service or cannot be found, the applicant may apply to the Residential Tenancy Branch directly or through a Service BC Office for an order for substituted service.

An application for substituted service must show that the applicant made reasonable attempts to serve the respondent or provide evidence that shows the other party is unlikely to receive material if served according to the Act.

Issues

Is the landlord entitled to monetary compensation for unpaid rent and monetary losses?

Is the landlord entitled to recover the filing fee for their applications?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or

arguments are reproduced here. The principal aspects of the applications and my findings around it are set out below.

Both parties provided conflicting testimony of the various details of this tenancy.

The undisputed fact is that the landlord had rented out the 3 bedroom townhome to a tenant named TG for a fixed-term tenancy commencing March 1, 2019 to February 29, 2020. Monthly rent was set at $2,500.00 for the furnished townhome excluding utilities at the time, payable on the first of the month. The landlord provided a statement which stated that the home was purchased for the landlord and his wife to occupy, but was rented out as the landlord and his wife had relocated for work, and had hoped to return one day.

The landlord submits that TG returned to his home country for a visit in 2020, but was unable to return due to the pandemic. While away, TG had sublet the home to subtenants. The landlord submits that they believe that the tenant in this dispute, AH, had been residing in the home for some time before they had discovered this in November 2020 when AH had contacted the landlord by telephone.

The landlord was contacted by one of TG's other subtenants, LM, by email in December of 2020 about AH and issues with the rising tension between the tenants in the home. Due the tensions, some of the subtenants had chosen to move out, and AH had found new tenants without the landlord's consent.

The landlord submits that on December 12, 2020, AH met with the landlord and his wife. The tenancy and the subletting situation was discussed, and the landlord submits that AH wanted to "take over 'management' of the home" from TG in exchange for discounted rent. The landlord states that they confirmed with AH that the tenancy was between TG and the landlord, and that AH was the subtenant, and any discounts in rent would have to be discussed with TG.

The landlord submits that on December 17, 2020, he had received an email from AH informing him that two of the sub-tenants were moving out, and suggested reducing the rent to $2,200.00, and AH would "oversee the general wellbeing of the house". The landlord notes that she wanted to move to the master suite while paying only $500.00 in monthly rent. The landlord notes that AH did not have consent of the landlord to advertise or rent out rooms.

The landlord submits that they believe that it was AH's intention to take over the tenancy between TG and the landlord, which resulted in the termination of the tenancy

by TG without notice on December 30, 2020. The landlord states that TG did not pay rent for January 1, 2021, and believes that TG was fed up with having to deal with AH. The landlord submits that he had allowed the subtenants to remain in the home for January 2021, and accepted rent payments from them directly in the amounts of $1,500.00 from AH, and $1,400.00 from another subtenant KS. The landlord believes that AH had collected rent from a subtenant C, whom the landlord did not have any contact details for.

Another discussion took place in January of 2021 between AH and the landlord about AH and the other subtenants continued tenancy in the home. The landlord submits that he had informed AH that he would only allow AH to enter into a tenancy agreement with AH if it was for the entire home. The landlord submits that he had emailed AH a copy of a tenancy agreement on January 15, 2021, which was submitted in evidence. The tenancy agreement names AH as the sole tenant, with monthly rent was set at $2,900.00 including utilities, and a security deposit would be required. The landlord testified that the tenant refused to sign this agreement, and pay the security deposit.

The landlord exchanged emails with AH, and informed AH that as AH refused to sign a tenancy agreement or complete the tenancy applications, everyone had to vacate the home by February 28, 2021. The landlord states that as of January 23, 2021 he had informed AH that he was only accepting rent for use and occupancy only, and that she must vacate the home by February 28, 2021.

The landlord states that in an email dated February 23, 2021 he had informed the tenant that if she was to vacate by a) March 1, 2021, no payment would be due b) March 18, 2021, $1600.00 would be due March 1, 2021 or c) March 31, 2021, in which case $2,700.00 would be due March 1, 2021.

The landlord states that he was notified by his property manager on March 3, 2021 that AH had changed the locks to the home. The tenant sent the landlord $500.00 by e-transfer on March 15, 2021, which the landlord had accepted “without prejudice to my right to collect the full rent from her, and that I was not consenting to her continued residence in the Home”.

The landlord testified that the $500.00 is only partial payments towards to full rent, which the landlord believes should be $2,900.00 including the utilities which were paid for by the landlord. The landlord is also seeking a monetary order for the lost rental income in the amount of $2,900.00 per month for the months of April, May, and June 1-15, 2021 due to AH’s refusal to vacate the home, and due to the damage left by the

tenant. At the time the initial application was filed by the landlord, the tenant had yet to move out, and the landlord was not aware of when the tenant would do so.

In the tenant's written response to the landlord, AH states that she had never met TG in person, and that they had corresponded over social media. AH states that she "took over his room at the end of August 2020 for $500.00 per month including utilities after he left the country due to the global pandemic". AH states that she was never presented a contract or agreement from TG.

AH states that she had a meeting with the landlord and his wife in December 2020 about the possible scenarios if TG were to cancel his lease.

AH argued that she was in no way financially responsible for the entire property, nor did she sublet the property. AH states that after TG had ended his lease, AH remained in the home, and she had resided in the home along with C, whom she had considered a roommate, and a couple, SB and TG, who moved out, and replaced by KS.

The landlord submitted statements from SB, TG, KS, and LM in their evidentiary materials. SB and TG stated that they had communicated with AH about a posting for a master bedroom and ensuite for rent in December 2020. After discussions, SB and TG rented the home from December 10 to December 31, 2020 for $1,050.00 including utilities, and paid AH a security deposit in the amount of $500.00. SB and TG stated that they were under the impression that AH was simply a coordinator for TG, whom all parties were renting from.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove, on a balance of probabilities, that the tenant owed the amounts claimed by the landlord.

Section 26 of the Act, in part, states as follows:

Rules about payment and non-payment of rent

> **26** (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

It is disputed by both parties how much rent was owed by AH for this tenancy. It is undisputed that TG was the sole and original tenant beginning on March 1, 2019, with monthly rent set at $2,500.00, which did not include utilities. It is further undisputed that TG had left the country in 2020 on a temporary basis, but was unable to return due to the pandemic. In August 2020 he was in correspondence with AH over the internet, who moved for $500.00 per month without the landlord's knowledge or permission, which was paid to TG. The landlord found out about AH in November 2020. The last rent payment from TG to the landlord was for December 2020, and the tenancy between TG and the landlord had ended as of December 31, 2020 as TG never returned, and no further rent was paid by TG. The landlord was left with several parties still occupying the home, including AH. It is undisputed that $1,500.00 in monthly rent was sent to the landlord from AH for January 2021 rent, and $1,400.00 was received from KS.

From January 2021 onwards, it is disputed by both parties as to how much rent AH owed the landlord, and whether she was responsible for the entire home, or whether she was simply a tenant renting a portion of the home for $500.00 per month. The landlord believes that AH had taken over the tenancy from TG, and was responsible for $2,900.00 in monthly rent, which included utilities which were now paid by the landlord. The landlord submits that the tenant was collecting rent from other occupants the landlord considered to be subtenants, and that she had changed the locks without the landlord's permission. The landlord submitted statements, including a statement from a couple who rented the home from December 10-31, 2020, and paid rent and a security deposit to AH after communicating with AH about a posting for a bedroom and ensuite for rent. AH moved out on March 31, 2021, having paid the landlord only $500.00 in rent.

The definition of a "tenancy agreement" is outlined in the following terms in section 1 of the *Act*:

> **"tenancy agreement"** means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

A tenancy can exist in the absence of a written tenancy agreement. I find that in this case, it was undisputed by both parties that the tenant AH paid TG $500.00 in monthly rent as of August 2020. Even in the absence of a written agreement, I find that there was a tenancy between AH and TG. As TG was the tenant of the landlord in this dispute, AH would be considered a subtenant as contemplated by the *Act.* The difference between a subtenant and assignee is clarified in Residential Tenancy Policy Guideline #19. Under section C of Policy Guideline #19, “unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. Under Section B, an assignment is defined as the ”act of permanently transferring a tenant’s rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.” The Policy Guideline further states that “under s. 34 of the *Residential Tenancy Act*, a tenant must not assign a tenancy agreement unless the landlord consents in writing.” and that “it is possible that the original tenant may be liable to the landlord under the original agreement. For example:

1) the assignment to the new tenant was made without the landlord’s consent; or
2) the assignment agreement doesn’t expressly address the assignment of the original tenant’s obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.”

In light of the evidence and testimony before me, I find that AH had originally moved in as a subtenant, but when TG no longer planned to return and continue as a tenant, AH could no longer be considered a subtenant as of January 1, 2021. I am not satisfied that TG had obtained the landlord’s written consent of the landlord to assign the tenancy agreement to AG, and in light of this fact, I find that the original tenant TG remained liable under the original agreement. I am not satisfied that the tenancy agreement and the obligations under that agreement was assigned to AH as there is insufficient evidence to support the written consent of the landlord was ever requested or obtained.

In light of the evidence before me, I am not satisfied that AH had ever entered into a tenancy agreement with the landlord for monthly rent in the amount of $2,700.00 or $2,900.00 as indicated in the unsigned tenancy agreement submitted by the landlord. Although there was discussion between the parties as to the terms of a new agreement, I am not satisfied that the landlord had provided sufficient evidence to support that the tenant had a ever agreed to pay monthly rent in the amount of $2,700.00 or $2,900.00. As noted above, the burden of proof is on the landlord to support their claim. I find that within the landlord’s evidence contained inconsistencies when referencing the amount of monthly rent that was due. The landlord noted the outstanding rent as $2,700.00 on the 10 Day Notice to End Tenancy and in correspondence with the tenant such as the email dated February 23, 2021, while the landlord argued that $2,900.00 was the monthly rent as set out in the unsigned tenancy agreement.

I find the evidence supports that AH had paid the landlord $1,500.00 in monthly rent for January 2021. As noted above, a tenancy can exist in the absence of a written tenancy agreement. In this case, I find that by accepting rent from AH, a tenancy was implied, even in the absence of a written agreement. Although the landlord had later informed the tenant that any rent accepted was for use and occupancy only, I find that this was only done after this initial payment was made, and the tenancy was already established. In light of the disputed facts about how much rent was due, as noted above, I am not satisfied that there was an agreement that monthly rent would be set at $2,700.00 or $2,900.00 a month, nor am I satisfied that the tenant's monthly rent was set at $500.00 as originally agreed upon in the sublease agreement between AH and TG.

The landlord argued that the monthly rent owed by the tenant was supported by the fact that the tenant had possession and control of the home. I find that the landlord had provided evidence to support that the tenant had allowed parties to occupy the home including the couple SB and TG in exchange for rent.

I note that although the term "sublet" is used by the landlord in this dispute, I must note that RTB Policy Guideline #19 clearly provides the definition of a "sublet" versus a "roommate" situation, which states:

> *"Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate…"*

By the above definition the couple SB and TG cannot be considered a "sublet", but roommates, as the tenant AH still resided in the home. Although the tenant may have allowed roommates to occupy the home, this does not automatically support an assignment of the original tenancy agreement between TG and the landlord, nor does it automatically allow the landlord to unilaterally set the rent at an amount determined by the landlord. I accept the landlord's testimony that AH had changed the locks in contravention of the *Act.* Although this decision of the tenant may support that AH did have possession of the entire home, this does not sufficiently support that the tenant owed $2,700.00 or $2,900.00 in monthly rent. I am satisfied that the tenant resided in the home with roommates, and I find that by accepting $1,500.00 in monthly rent from

AH, with the remaining $1,400.00 from KS, the evidence supports an implied agreement between AH and the landlord that AH may continue to reside in the home as a tenant for that amount in monthly rent. Accordingly, I find that AH owed the landlord $1,500.00 in monthly rent, and not $500.00 or $2,700.00 or $2,900.00 as suggested by the landlord.

I find it undisputed that AH had only paid the landlord $500.00 in rent for the month of March 2021 before vacating the home. Accordingly, I allow the landlord a monetary order in the amount of $1,000.00 for the remaining outstanding rent for the month of March 2021.

The landlord also made a monetary claim relating to the lost rental income for April 2021, May 2021, and half of June 2021. I find that due to the tenant's actions and contravention of the *Act,* including the changing of the locks without the landlord's permission, and failing to give the landlord proper notice that the tenant would be vacating the rental unit in accordance with the *Act,* the landlord suffered a monetary loss of lost rental income as the landlord was unable to re-rent the home until June 15, 2021. Accordingly, I allow the landlord a monetary order in the amount of $1,500.00 in lost rental income for each of the months of April and May 2021, and $750.00 for the month of June 2021 for a total monetary order of $3,750.00.

The landlord requested the filing fee for their two applications. As the landlord's application for unpaid rent and lost rental income was successful, I allow the landlord to recover the filing fee for that application. The landlord also filed a separate application for an Order of Possession, which was no longer required as the tenant had moved out. Although the tenant did end up moving out instead of disputing the landlord's application, I find that the tenant had only done so after the landlord had already filed their application on March 12, 2021, and thus incurred a $100.00 filing fee in doing so. I find that landlord had no option but to file an application for dispute resolution as the tenant did not move out by the effective date of the 10 Day Notice, or pay the remaining portion of the outstanding rent. I therefore find, pursuant to section 72 of the *Act,* that the landlord is entitled to recover the $100.00 filing fee from the tenant for that dispute.

Conclusion

As the tenant had moved out, the non-monetary portions of the applications were dismissed without leave to reapply.

I allow the landlord's monetary claims as set out in the table below. The landlord is issued a monetary order in the amount of $4,950.00.

Unpaid Rent for March 2021	$1,000.00
Lost Rental Income for April, May, and half of June 2021	3,750.00
Filing Fee for Both Applications	200.00
Total Monetary Order	$4,950.00

The tenant(s) must be served with this Order as soon as possible. Should the tenant(s) 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.

The remainder of the monetary claims are dismissed with leave to reapply.

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: June 14, 2021

Residential Tenancy Branch