



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1031007 B.C. Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **FFT, OPT, ERP**
 MNR-DR, OPR-DR, FFL

Introduction

This hearing dealt with applications filed by both the tenant and the landlord pursuant to the *Residential Tenancy Act* (the “Act”).

The tenant applied for:

- Authorization to recover the filing fee for this application from the opposing party pursuant to section 72;
- An order of possession to the tenant pursuant to section 54; and
- An order for emergency repairs pursuant to section 33.

The landlord applied for:

- A monetary order and an order of possession for rent not paid in the required time pursuant to sections 46, 55 and 72; and
- Authorization to recover the filing fee for this application from the opposing party pursuant to section 72.

The tenant attended the hearing and the landlord attended the hearing represented by his lawyer, AP. Each of the parties was advised that recording of the hearing was prohibited and both parties acknowledged this prohibition.

The landlord acknowledged receipt of the tenant’s notice of expedited hearing, having been served with it by the tenant’s lawyer. The landlord acknowledges receipt of 4 pieces of evidence filed by the tenant in support of her own application, specifically a letter dated May 10, 2021 from the tenant’s lawyer, a BC Hydro statement dated April 13, 2021 and a copy of the document signed by both parties agreeing to rent the unit. This document does not have the address for service of the landlord on it.

The tenant testified that on June 19th, she sent another set of evidence to the landlord by registered mail at an address where she states the landlord lives, not to the address provided on the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. The landlord testified that this address belongs to a motel he owns but he does not run his business of being a landlord from this address. The landlord did not specify that the motel was his personal residence. The landlord testified he has never sent correspondences to the tenant regarding the tenancy from the motel address and there are no other documents bearing the motel address provided as evidence from the landlord. Despite this, the tenant testified that she has always served the landlord at the motel address.

Section 88(c) allows a tenant to serve a landlord with documents such as evidence by registered mail by sending it to the address at which the person resides or carries on business as a landlord. I have no evidence before me to show the landlord lives in the motel and no evidence has been adduced to show the landlord carried on business as a landlord at the motel address. Conversely, there is ample evidence to indicate the landlord carries on business as a landlord at a different address on Highway 97C in a different city. This evidence includes the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities and the offer of purchase and sale between the parties tendered by both the landlord and the tenant.

As such, I find the tenant's second set of evidence was not served in accordance with section 88 and that evidence was excluded from consideration for this decision. The 4 pieces of evidence exchanged by the tenant to the landlord when the Application for Dispute Resolution was served will be admitted into evidence.

The tenant acknowledges receipt of the landlord's Application for Dispute Resolution, but testified she did not receive the landlord's evidence. Landlord's counsel advised that he served the tenant's counsel of record with his evidence on June 28, 2021 at 8:01 p.m. and that the tenant's counsel sent him an email saying she can accept service on behalf of the tenant. A copy of the tenant's email dated May 20, 2021 stating that counsel can accept service on behalf of her client was provided by the landlord. Pursuant to section 71, I deem the tenant sufficiently served with the landlord's evidence on June 28, 2021. The landlord's evidence is admitted.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent?

If not, should the landlord be required to perform an emergency repair of turning on the power?

Is the landlord entitled to a monetary order for unpaid rent?

Can either party recover the filing fee?

Background and Evidence

The landlord's counsel gave the following submissions. The rental unit is brand new and is owned by the landlord. There was once a purchase and sale agreement signed by the parties whereby the tenant would purchase the unit, however that deal fell through and the tenant continued to live in the unit as a tenant as of the fall of 2020.

The landlord concedes that there was a tenancy relationship established between the parties with rent set at \$2,750.00 per month payable on the 15th day of each month. A copy of the signed agreement to rent was provided by both parties. Notably, the copy supplied by the tenant indicates a date of September 15, 2020 while the one supplied by the landlord does not bear a date. During testimony, the landlord concedes that it was around this time that the parties signed the document.

The landlord acknowledges there was no condition inspection report done at the commencement of the tenancy and testified that he did not collect a security deposit from the tenant.

The landlord submits that rent was not paid for the months of January, February, March, April and May of 2021. He served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "notice") by posting a copy of it to the tenant's door. The tenant acknowledges receiving the notice on May 28th.

A copy of the notice was provided as evidence by the landlord. It provides an effective date of June 05, 2021 and states the tenant failed to pay \$13,750 in rent that was due on Jan¹, Feb¹, March¹, April¹, May¹, 2021. It also states the tenant failed to pay utilities in the amount of \$1,181.94 following written demand on 26/05/2021. No copy of the written demand for payment of utilities dated May 26, 2021 was provided as evidence by the landlord, however a copy of a BC Hydro bill in the amount of \$1,181.94 was submitted. This bill states there are previous charges of \$940.31 however the bills for the previous charges were not provided by the landlord.

The landlord's counsel submits that although the notice to end tenancy states the tenant failed to pay rent from January onwards, it's the May 2021 rent payment that he wants to focus on. The evidence supplied by the landlord shows that on May 19th, the tenant's

agent cancelled a money transfer of \$2,000.00 sent to the landlord by interac e-transfer on May 15, 2021. As a result, the landlord can no longer deposit the funds.

On May 19th, the landlord also received a further email from interac indicating that the money transfer of \$750.00 sent to the landlord on May 17th was cancelled. A last email saying \$750.00 money transfer sent to the landlord by the tenant's agent on May 17th was also cancelled by the tenant's agent. The landlord's counsel submits that tenant or her agent cancelled the payments right before there was an expedited hearing before the Residential Tenancy Branch regarding the tenant's application for emergency repairs to turn on the power. The file number for the previous hearing is recorded on the cover page of this decision.

The tenant gave the following testimony. She paid a \$10,000.00 security deposit to the landlord on September 15, 2018. The tenant testified that she had never been a renter before and was unaware that there was a limit on how much a landlord could require for a deposit. This was a brand new building and the landlord never got occupancy for anybody to live in the building until July, 2020. The tenant moved into a different unit on July 1, 2020, then was relocated to the unit she lives in now a week later since the original unit was sold.

On July 14th, the landlord told the tenant he was going to sell her unit and so the tenant decided to purchase it, giving the landlord \$20,000.00. Her broker was going to purchase it with her but was delayed due to family issues. The tenant testified that she always paid the landlord her rent in cash and never got receipts from the landlord. The tenant denies failing to pay rent to the landlord.

Later on in the hearing, the tenant testified she made a \$20,000.00 lump sum payment to the landlord which the landlord used to apply towards outstanding rent. Landlord's counsel submits that the landlord took the position that he would apply the lump sum payments and apply them towards rent. The landlord testified that he doesn't recall how much he received as a lump sum payment and was vague accounting for which months he applied the lump sum payments toward.

The landlord testified he received a cash payment for November 2020 rent but was unable to confirm whether he issued a receipt to the tenant. The landlord further testified that he doesn't know how much rent money was received. He testified that he didn't collect any rent from the tenant in October as he took the position that he was not the tenant's landlord at the time.

Lastly, the tenant testified that the May 2021 payments were cancelled because the landlord wouldn't accept them. They were then re-sent to the landlord, according to the tenant. She testified that she re-sent a payment of \$2,000.00 to the landlord on May 21st at 3:01 p.m. but it wasn't accepted by the landlord. The tenant surmised that the landlord wouldn't accept the rent so that he could say the tenant failed to pay her rent.

Analysis

The tenant acknowledges receiving the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities when it was posted to her door on May 28, 2021. Upon receiving the notice, the tenant filed an application on May 31, 2021, seeking an order of possession to the tenant under section 54 of the *Act*. On June 14th, the tenant filed a subsequent application seeking an emergency repair for the landlord to turn the power back on. Both of those applications were set for hearing today.

Section 46(4) and (5) of the *Act* state:

(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
- (b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

- (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
- (b) must vacate the rental unit to which the notice relates by that date.

The tenant did not file an application seeking to dispute the notice to end tenancy served upon her pursuant to section 46 of the *Act*. Instead, the tenant filed an application seeking an order of possession for the tenant pursuant to section 54 of the *Act*.

Orders of Possession for tenants are described in Residential Tenancy Policy Guideline 51 – [Expedited Hearings]. The guideline states:

Under section 54 of the RTA and section 47 of MHPTA, a tenant may apply for an order of possession for the rental unit or home site if they have a tenancy agreement with the landlord. These types of applications may arise when a tenant and landlord have signed a tenancy agreement and the landlord refuses to give the tenant access to the rental unit, or the landlord has locked the tenant out of their rental unit.

This application differs from applications filed under section 46(4) of the *Act* as an application filed under section 46 is made specifically to dispute a notice to end tenancy. While section 64 of the *Act* allows me to amend the tenant's application to change it from seeking an order of possession to disputing the notice to end tenancy, I decline to do so. I find the onus was on the tenant to file the correct application at the outset. Second, for me to arbitrarily change the nature of the tenant's application without providing the landlord with the opportunity to oppose the change would breach the principles of natural justice.

Section 46(5) of the *Act* is clear and explicit. The tenant did not pay the overdue rent or make an application to dispute the notice to end tenancy. The tenant is conclusively presumed to have accepted the tenancy ended on the effective date stated on the notice. Since the effective date stated on the notice has passed, I issue an order of possession effective two days after service upon the tenant in accordance with section 53 of the *Act*.

As this tenancy is ending, the tenant's application seeking emergency repairs is dismissed without leave to reapply. The tenant's request to recover the filing fee is likewise dismissed as the application was unsuccessful.

The landlord seeks an order to recover unpaid rent from January 15, 2021 to May 14, 2021 in the amount of \$13,750.00 plus utilities in the amount of \$1,181.94. Section 7 of the *Act* states: If a landlord or tenant does not comply with this *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

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.

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim. The standard of proof is on a balance of probabilities. If the applicant is successful in proving it is more likely than not the facts occurred as claimed, the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; and

4. Steps taken, if any, to mitigate the damage or loss.

During the hearing, the landlord acknowledged he received a lump sum payment from the tenant however the landlord was unclear in how much he received from the tenant and whether or not he applied those payments towards rent. The landlord's testimony regarding using the lump sum payment towards rent or for another purpose such as partial payment for the purchase of the rental unit was both vague and uninformative.

The arbitrary application of the lump sum payment (amount unknown) towards rent by the landlord makes it impossible for me to ascertain how much rent was paid by tenant for the period of January 15 to May 14, 2021. The tenant alleges the lump sum was in the amount of \$20,000.00, however I have no documentary evidence before me to confirm that amount. If the landlord was holding such a sum and deducted monthly rent from it, there exists the possibility that the rent was paid. To be clear, I do not have sufficient evidence before me to establish the amount of lump sum given by the tenant to the landlord or what the lump sum was for. Without a ledger to indicate when payments were made or if the landlord was deducting rent from the lump sum, the only conclusion I can make is that the landlord failed to provide sufficient evidence to establish both the existence of the damage or loss and the value of the damage or loss. The landlord's application to recover unpaid rent is dismissed without leave to reapply.

Lastly, the landlord seeks to recover \$1,181.94 as unpaid hydro utilities from the tenant. The landlord has not provided a tenancy agreement to sufficiently establish that the tenant was responsible for paying the hydro utility. Second, I have reviewed the bill and I note that the majority of this bill is for previous charges of \$940.31 and none of the previous bills were provided as evidence. I note that the bill includes transfer credits for accounts related to other units in the building. Lastly, the letter from the tenant's lawyer indicates the tenant contacted BC Hydro and confirmed the account is registered in the tenant's name alone. For these reasons, I find that the landlord has failed to provide sufficient evidence to satisfy me that the tenant is responsible for paying the Hydro utility. This portion of the landlord's claim is dismissed without leave to reapply.

The decision to order payment of the filing fee is discretionary upon the arbitrator and in accordance with section 72 of the *Act*, the landlord's filing fee will not be recovered.

Conclusion

I grant an Order of Possession to the landlord effective **2 days after service on the tenant**. Should the tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced in the Supreme Court of British Columbia.

The remainder of the tenant's application is dismissed without leave to reapply.

The remainder of the landlord's application is dismissed without 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: July 28, 2021

Residential Tenancy Branch