Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: Landlords: OPR-DR, MNR-DR, FFL, MNDL-S, MNRL, MNDCL
Tenant: CNR, FFT

Introduction

This hearing was reconvened from an adjourned hearing originally scheduled for September 3, 2021 in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The landlords requested:

- an Order of Possession for non-payment of rent pursuant to section 55; and
- a monetary order for unpaid rent and monetary losses pursuant to section 67.

The tenant requested:

- cancellation of the landlords' 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- authorization to recover the filing fee for this application, pursuant to section 72.

At the outset of the hearing on September 3, 2021, both parties confirmed that the tenancy had ended on July 27, 2021. AM had testified that the tenant wished to withdraw their application. As the tenancy had ended, the tenant's entire application was cancelled, as well as the landlord's application for an Order of Possession.

While the landlord and their agent and witnesses attended the hearing by way of conference call, the tenant did not. I waited until 11:48 a.m. to enable the tenant to participate in this scheduled hearing for 11:00 am. The landlord and their agents were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Reconvened Hearing. During the hearing, I also confirmed from the online teleconference system that the landlord, landlord's agents, witnesses, and I were the only ones who had called into this teleconference.

Rule 7.3 of the Rules of Procedure provides as follows:

7.3 Consequences of not attending the hearing

If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply

In my interim decision, I had ordered that the landlords re-serve the tenant with their amendment and any evidentiary materials the landlords wished to rely on to the email address confirmed in the hearing. The email address was noted on the title page of this interim decision.

The landlords provided sworn testimony in the hearing that after the hearing on September 3, 2021, the tenant had informed the landlord that they had changed their email address, and requested that the materials be sent to that new address. The landlords testified that they had followed the instructions of the tenant, and on November 23, 2021 the landlords sent the tenant the packages twice by email to the address provided. The landlords testified that the tenant had blocked the landlords from communicating with them, and they could not follow up with a call or text message.

I accept the sworn testimony of the landlords that they had served the tenant with the materials as required. Furthermore, I find that both parties had attended the initial hearing on September 3, 2021, and were aware that the adjourned hearing would be taking place today as they were both sent copies of the interim decision and call-in numbers and participant codes as provided in the Notice of Reconvened Hearing. In accordance with sections 88 and 90 of the *Act,* I find the tenant deemed served with the landlords' amendment and evidentiary materials on November 26, 2021, three days after the emails were sent. As I find that the tenant had attended the initial hearing on September 3, 2021, and was sent a copy of the Interim Decision and Notice of Reconvened Hearing, and therefore should have been aware of the details of how to call into the reconvened hearing, the hearing proceeded as scheduled.

The landlords were clearly informed of the RTB Rules of Procedure Rule 6.11 which prohibits the recording of a dispute resolution hearing. The landlords confirmed that they understood.

Preliminary Issue – Jurisdiction

At the hearing held on September 3, 2021, the tenant raised the issue of jurisdiction. In my interim decision, I had noted that I would be deferring my decision on this preliminary issue until after the reconvened hearing. The landlords were unable to complete their submissions and call their witnesses at the previous hearing due to the time allotted.

The agent for the tenant, AM, testified that the tenant is a business which operated as an internet service provider, and that AM was simply the primary contact for that

business. The tenant provided submissions at that hearing as to why the RTB did not have jurisdiction to hear this matter as the home and rental property was primarily used for commercial use.

The landlords had argued at the previous hearing that both parties had entered into the tenancy agreement with the understanding that the home was to be used for residential use, and this was not a commercial lease. A copy of the Offer to Lease, dated May 3, 2020, was submitted in evidence which states that “The Landlord agrees to rent to the Tenant as a residential property for the use of the Tenant’s employees to a maximum of 5 persons and contractors relocating or resettling in the greater Vancouver area”. The document also referenced that the Tenancy would be subject to house rules. In the document under condition 11(a). it is noted that “This is a residential premise”

The landlords argued that it was clearly designated to both parties that the home was a to be used for residential purposes. The landlords also testified that they had performed regular inspections of the property during the tenancy, and dispute the descriptions provided by the tenant of how the property was used. The landlords testified that computers were set up in the living room, but was informed by the tenant that they used these computers for trading purposes.

The landlords called a witness in the hearing, SS, who is a tenant in the basement suite of the rental home. SS testified that she was aware that the home was occupied by AM, and three other parties. SS testified that the condition of the home was disgusting, and recalls seeing dog feces on the floor and patio. SS testified that the tenant had moved out, and did not have cleaners come to clean the home at the end of the tenancy. SS testified that she had access to the garage, which SS had entered at least three times a week. SS testified that the garage was not used for commercial purposes, and that the garage contained garbage which was full of maggots. SS described the garage as “a mess”.

Analysis

Residential Tenancy Policy Guidelines #14 and #27 speak to Commercial Tenancies and the jurisdiction of the RTB to deal with tenancies which involve commercial use.

Residential Tenancy Policy Guideline #27 states the following:

Commercial Tenancies

The RTA does not apply to living accommodation included with premises that
i) are primarily occupied for business purposes, and
(ii) are rented under a single agreement.

Generally, if the primary use is residential, the RTA will apply. For example, if a tenant rents a house to live in, and the house has a detached garage which the tenant runs a small yoga studio out of, the RTA probably applies.

If a tenant rents a shop and small living accommodation under a single agreement and the purpose for renting the property is to run a convenience store, the RTA probably does not apply even if the tenant lives in the accommodation.

An arbitrator may consider municipal by-laws including how the property is zoned in deciding whether the tenancy is primarily residential or commercial.

Residential Tenancy Policy Guideline #14 further states:

Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement. The Residential Tenancy Act provides that the Act does not apply to "living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement.[1]

To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the "predominant purpose" of the use of the premises is.[2]

Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, and visible evidence of the business use being carried on at the premises

In consideration of the evidence and testimony before me, I find that the tenant did indeed conduct business at the rental property, but the question still exists of whether the premises were primarily occupied for businesses purposes or not.

The landlords had argued that the Offer to Lease and tenancy agreement had clearly defined the tenancy as a residential one where the primary purpose of the tenancy was a residential one. The tenant's agent argued that the actual use of the property was in fact primarily commercial, and is therefore the *Act* does not apply.

In light of the disputed testimony before me, I find that I must determine how the home was actually used, and whether the primary purpose of the home was occupation for business purposes. I note that the landlords had called a witness in the hearing, who had made observations which corroborate those of the landlords'. The witness had observed that that the garage had mainly contained garbage, which contradicted the tenant's description of a presentation center. The landlords testified that they had performed regular inspections, and observed the home to be primarily occupied for residential use, with some computers in the home as commonly found on residential properties.

In determining the weight of the evidence and testimony before me, I note that AM and the tenant had the opportunity to call witnesses, present evidence, and cross examine

the parties involved. The tenant had the opportunity to attend this reconvened hearing but failed to do so.

First of all, I find that both parties had clearly entered into a residential tenancy agreement which designated the residential property for residential use, which is further supported by the terms included in the Offer to Lease. I find that these documents demonstrate that both parties had fully contemplated the primary purpose of the tenancy before the tenancy had began, and the associated consequences of the designation of the rental property as a residential versus commercial lease.

Furthermore, I find that the landlords had provided independent witness testimony that supported the description and observation of the landlords rather than the tenant's. Although the tenant did provide a detailed description of the residential property and how each room and area was used, I do not find these descriptions to be sufficiently supported in evidence or by witness testimony.

I find that the landlords have met their evidentiary burden on a balance of probabilities. The landlords' arguments are supported by documentary evidence and as well as witness testimony. On the other hand, I do not find the tenant's submissions to be convincing or persuasive. The tenant's submissions are not sufficiently supported by documentary evidence, nor witness testimony. I find the tenant's position to not be supported in the evidence.

Based on the evidence before me, I find that the property was rented for residential use, and the home and property was primarily occupied for residential use. Although business may have been conducted on the premises, I am not convinced that the home or property was used primarily for business purposes.

As such, I conclude that this was a residential tenancy and one which is not excluded from my jurisdiction by section 4(d)of the *Act*. As I do have jurisdiction to consider this application, I set out the details of the landlord's application and my findings below.

Issue(s) to be Decided

Are the landlords entitled to monetary compensation for money owed or losses?

Are the landlords entitled to recover the filing fee for this application from the tenant?

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 this application and my findings around it are set out below.

This fixed-term tenancy began on May 15, 2020, and continued on a month-to-month basis after May 15, 2021. Monthly rent was set at $5,300.00, payable on the first of the month. The landlord had collected a security and pet damage deposit in the amount of $2,750.00 each deposit, which the landlord still holds.

The landlords testified that the tenant had moved out on July 27, 2021, as confirmed in the first hearing held on September 3, 2021. The landlords testified that the tenant had moved out after being served with a 10 Day Notice to End Tenancy for Unpaid Rent on April 27, 2021, and failed to pay the outstanding rent for June and July 2021. The landlords are also seeking the loss of rental income for August 2021 as the tenant failed to give proper notice before moving out on July 27, 2021. In addition to the unpaid rent the landlords are seeking additional monetary orders for losses associated with this tenancy as set out in the table below:

Item	**Amount**
Unpaid Rent for June 2021	$5,300.00
Unpaid rent for July 2021	5,300.00
Loss of rental income for August 2021	5,300.00
Missing and damaged rugs	600.00
Cleaning Fee	1,000.00
Filing Fee	100.00
Cost of registered mailing	23.38
Total Monetary Order Requested	$17,623.38

The landlords submitted photos as well as a video to show the state of the home when after the tenant had moved out. The landlord is seeking a monetary order for cleaning, and the damaged and lost rugs, as well as the associated costs of filing this application.

Analysis

Section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. I find that the landlord provided sufficient evidence in the form of photos, a video, as well as witness testimony to show that the tenant not only failed to clean the rental unit, the tenant left the home in a condition that would have caused the landlords a significant amount of time and monetary loss to clean. I find the losses claimed by the landlord to be reasonable, and reflects the condition of the home left by the tenant as depicted in the evidence. Accordingly, I find the landlord is entitled to compensation for the cleaning and lost and damaged rugs.

Section 45 of the *Residential Tenancy Act* reads in part as follows:

Tenant's notice

> **45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice, and

(b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

I find that the tenant did not end this tenancy in a manner that complies with the *Act*, as stated above. The landlords did not mutually agree to end this tenancy in writing, nor did the tenant obtain an order from the Residential Tenancy Branch for an early termination of this tenancy. The evidence is clear that the tenant did not comply with the *Act* in ending this periodic tenancy as they never gave notice in a manner required by section 45(1) of the *Act.* I, therefore, find that the tenant vacated the rental unit contrary to section 45 of the *Act*.

I find that due the lack of proper notice by the tenant, and the condition the home was left in, the landlord was not able to re-rent the home for August 2021. I therefore allow the landlords' monetary claim for loss of rental income for August 2021.

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.

I find that the tenant moved out without paying the landlord the outstanding rent for June and July 2021. Accordingly, I find that the landlords are entitled to recover the rent for these two months.

As the landlords were successful in their application, I am allowing the landlords to recover the filing fee from the tenant. I note that section 72 of the *Act* only allows the applicant to recover the filing fee, and not the other associated costs of filing an application such as the cot of registered mailing. According, I dismiss this portion of the landlords' claim without leave to reapply.

In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlords to retain the tenant's security and pet damage deposit in partial satisfaction of the monetary awards.

Conclusion

I issue a Monetary Order in the amount of $12,100.00 in the landlords' favour under the following terms which allows a monetary award for money owed, as well as the losses associated with the tenant's failure to comply with the *Act*.

Item	**Amount**
Unpaid Rent for June 2021	$5,300.00
Unpaid rent for July 2021	5,300.00
Loss of rental income for August 2021	5,300.00
Missing and damaged rugs	600.00
Cleaning Fee	1,000.00
Filing Fee	100.00
Less Deposits held	-5,500.00
Total Monetary Order	$12,100.00

The landlords are provided with this Order in the above terms and the tenant must be served with a copy of 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: December 22, 2021

Residential Tenancy Branch