



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

LL: MNR-DR, OPR-DR, FFL
TT: CNL, CNR, DRI, OLC, FFT

Introduction

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

The landlord applied for:

- an Order of Possession pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the “10 Day Notice”) pursuant to section 46;
- cancellation of the landlord’s 2 Month Notice to End Tenancy for Landlord’s Use of Property (the “2 Month Notice”) pursuant to section 49;
- an order regarding a disputed additional rent increase pursuant to section 43;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The tenant was assisted by a family member and counsel and interpreter who attended by conference

call from different physical locations. The landlord was represented by an agent who attended with the owner of the property.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

At the outset of the hearing the tenant withdrew the portions of their application dealing with issues other than the cancellation of the notices and recovery of their filing fee. Those portions of the application are withdrawn and dismissed with leave to reapply.

Issue(s) to be Decided

Should the 10 Day Notice be cancelled? Should the 2 Month Notice be cancelled? If not is the landlord entitled to an Order of Possession?
Is the landlord entitled to a monetary award as claimed?
Is either party entitled to recover their filing fee from the other?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. The tenant did not pay rent for October, November and December 2021 and January and February 2022. There is a security deposit of \$1,000.00 paid at the start of the tenancy and currently held by the landlord. The landlord issued a 2 Month Notice dated September 27, 2021 with an effective date of November 30, 2021. The landlord subsequently issued a 10 Day Notice dated October 12, 2021 as the tenant failed to pay rent on October 1, 2021.

The parties agree that the rent at the start of the tenancy was \$1,600.00 and pursuant to an amendment to the written tenancy agreement was increased to \$1,900.00 from January 1, 2021. The parties confirm the tenant paid rent in the amount of \$1,900.00 from January to September 2021. The tenants characterize the increase as a rent

increase prohibited under the *Act*. The landlord submits that this term of the agreement was proposed by the tenant to continue the tenancy on a periodic basis and is not a rent increase as contemplated under the *Act*.

The written tenancy agreement provides that the tenancy begins on January 20, 2020. The parties agree that no rent was paid for the months of January and February 2020. The tenants submit that this was in accordance with an agreement with the landlord as they moved from another unit in the same building. The landlord submits that there was no such agreement to waive the obligation to pay rent for those months and seeks a monetary award for rent in the amount of \$1,600.00 for each of the months of January and February 2020.

The landlord seeks a monetary award in the amount of \$14,300.00 for unpaid rent of \$1,600.00 in January and February 2020 and \$1,900.00 payable for each of the months of October, November, December 2021 and January and February 2022.

The tenants submit that rental arrear should be calculated on the basis of monthly rent at \$1,600.00 pursuant to the tenancy agreement. The tenant further submits that they are entitled to compensation in an amount equivalent to one month's rent pursuant to section 51 of the *Act* as they were served with a 2 Month Notice to End Tenancy for Landlord's Use.

The tenant also says that they were required to obtain tenants insurance in the amount of \$400.00. The tenants submit that this requirement was not outlined in the tenancy agreement and was later imposed by the landlord. The tenant seeks to deduct this amount from any monetary award in the landlord's favour.

The landlord submits that there was no obligation for the tenant to purchase insurance and this was done unilaterally by the tenant.

Analysis

I find that there was an enforceable tenancy agreement between the parties created in January 2020 setting monthly rent at \$1,600.00 initially and \$1,900.00 from January 2021 onwards. I do not find the characterization of the agreement to be a rent increase to be accurate or supported in the evidence. It is evident that the parties agreed that the rent would increase after the initial months of the tenancy. I find this is not a rent increase imposed on the tenant by the landlord but an agreement between the parties.

The written agreement is signed by both parties and the tenant paid rent in the amount of \$1,900.00 without objections or question from January 2021 onwards.

Based on the evidence I find this was simply an agreement between the parties rather than an attempt to circumvent the *Act* or an instance where the landlord unilaterally imposed a rent increase in breach of the *Act* and regulations. I therefore find that the tenant was obligated to pay rent in the amount of \$1,900.00 on the first of each month from January 1, 2021 onwards.

I note that the parties gave evidence that the security deposit for this tenancy is \$1,000.00 which exceeds the value of $\frac{1}{2}$ of one month's rent allowable under section 19(a) of the *Act*. Accordingly, I find that the amount of \$1,000.00 paid at the start of the tenancy is comprised of a security deposit of \$800.00, $\frac{1}{2}$ of the monthly rent of \$1,600.00 at the start of the tenancy, and an overpayment of \$200.00.

The parties agree that the tenant failed to pay rent as required under the tenancy agreement on October 1, 2021 and the landlord subsequently issued a 10 Day Notice on October 12, 2021.

The onus is on the landlord pursuant to section 46 of the *Act*, to demonstrate on a balance of probabilities the reasons to uphold the notice.

Pursuant to section 51(1.1) of the *Act*, a tenant who has received a notice to end tenancy for landlord's use of property is entitled to compensation in an amount equivalent to one month's rent and may withhold the amount from the last month's rent.

In the present circumstance the parties gave undisputed evidence that a 2 Month Notice dated September 27, 2021 with an effective date of November 30, 2021 was served on the tenant. The tenant chose to withhold the monthly rent payable on October 1, 2021 which was not the last month of the tenancy in accordance with the notice.

I find it is not open for the tenant to unilaterally choose which month to withhold payment under the *Act*. The wording of the *Act* specifically authorizes withholding the last month's rent. I find, in the absence of an agreement with the landlord, the tenant was obligated to pay rent in the amount of \$1,900.00 on October 1, 2021. I accept the undisputed evidence of the parties that the tenant failed to do so and there was a basis for the landlord to issue a 10 Day Notice.

Accordingly, I dismiss the tenant's application to cancel the 10 Day Notice. I find the notice conforms to the form and content requirements of section 52 of the Act as it is signed and dated by the landlord, correctly identifies the parties, the rental address and provides the reason for the tenancy to end. Therefore, I issue an order of possession in the landlord's favour. As the effective date of the notice has passed, I issue an order enforceable 2 days after service.

As this tenancy is ending in accordance with the 10 Day Notice I find it unnecessary to make a finding on the validity of the 2 Month Notice.

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/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.

I accept the undisputed evidence of the parties that the tenant has failed to pay rent for the months of October, November, December 2021 and January and February 2022. As noted above, the tenant was obligated to pay rent in the amount of \$1,900.00 on each month of the tenancy. The tenant was issued a 2 month Notice and was entitled to compensation in the equivalent of 1 month's rent. Therefore, I find the landlord is entitled to a monetary award in the amount of \$7,600.00 ($\{5 \text{ months} \times \$1,900\} - 1 \text{ month compensation}$).

I find insufficient evidence that the tenant was obligated to pay rent in the amount of \$1,600.00 for the months of January and February 2020. While the signed tenancy agreement provides that the tenancy commences in January 2020 the parties agree that no rent was paid until March 1, 2020. If the tenant was obligated to pay rent then it would be reasonable to expect that the landlord would have made some demand at the time or indicated that rent was owing. Instead, the evidence is that the parties continued this tenancy without any reference to the arrear until the present applications were filed.

In any event, I find that the landlord is estopped from pursuing this amount as their conduct in failing to enforce the tenancy agreement comprises a waiver of their right to payment. I find the tenant relied upon the implied waiver of the landlord and continued residing in the rental unit without paying the rent for those 2 initial months. I find that the landlord is estopped from seeking a monetary award for the rent for January and February 2020.

I do not find the tenant's submission that they were required to purchase insurance to be persuasive or supported in the documentary materials. The tenant submits a text conversation with the landlord as evidence of this requirement. The communication is translated into English and even allowing for the fallibility of online translations I find the communication does not state that insurance is required. I find an ordinary interpretation of the communication to be that the tenant has already purchased insurance and the landlord is now requesting a copy of the policy to obtain owner's insurance. I am not satisfied that the tenant was obligated or required to purchase insurance or that they are entitled to deduct the amount of their insurance from any rental arrear for this tenancy.

As the landlord was mostly successful in their application they are entitled to recover their filing fee from the tenant.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenant's security deposit in partial satisfaction of the monetary award issued in the landlord's favour

Conclusion

I grant an Order of Possession to the landlord effective **2 days after service on the tenant**. Should the tenant or any occupant on the premises 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 in the landlord's favour in the amount of \$6,700.00, allowing for recovery of the rental arrear and filing fee and to retain the security deposit for this tenancy. 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 17, 2022

Residential Tenancy Branch