



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **OPC MNRL-S FFL**

Introduction

This hearing held by teleconference was convened as a result of the Landlords' application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act"). The Landlords seek:

- an Order of Possession for cause pursuant to sections 47 and 55;
- a monetary order for unpaid rent pursuant to section 55;
- authorization to keep the Tenants' security and/or pet damage deposit(s) under section 38; and
- authorization to recover the filing fee for the Application pursuant to section 72.

The Tenants ("DP" and "AP") did not attend this hearing scheduled for 9:30 am. I left the teleconference hearing connection open for the entire hearing, which ended at 10:03 am, in order to enable the Tenants to call into this teleconference hearing. All the Landlords ("CS", "PK" and "KG") attended the hearing and they 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 were provided in the Notice of Dispute Resolution Proceeding ("NDRP"). I also confirmed from the teleconference system that CS, PK, KG and I were the only ones who had called into this teleconference.

CS stated she served the NDRP and the Landlords' evidence ("NDRP Package") on AP in-person on January 15, 2023. KG stated he served the NDRP Package on DP in-person on January 15, 2023. Based on the undisputed testimony of CS, I find the NDRP Package was served on AP in accordance with the provisions of sections 88 and 89 of the Act. Based on the undisputed testimony of KG, I find the NDRP Package was served on DP in accordance with the provisions of sections 88 and 89 of the Act.

KG stated the Tenants did not serve the Landlord with any evidence for this proceeding.

Issues to be Decided

Are the Landlords entitled to:

- an Order of Possession for the rental unit?
- a monetary order for unpaid rent?
- keep the Tenants' security and/or pet damage(s)?
- recovery of the filing fee for the Application from the Tenants?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Application and my findings are set out below.

KG submitted into evidence a copy of the tenancy agreement. The agreement states the tenancy commenced on January 1, 2022, for a fixed term ending June 30, 2022, with rent of \$1,600.00 payable on the 1st day of each month. The agreement states the Tenants were required to pay a security deposit of \$800.00 by January 1, 2022. KG stated the Tenants paid the security deposit and that the Landlords were holding it in trust for the Tenants.

KG submitted into evidence a copy of a One Month Notice to End Tenancy for cause dated August 29, 2022 ("1 Month Notice"). The 1 Month Notice stated the Tenants were to vacate the rental unit by September 30, 2022. KG stated the 1 Month Notice was served on the Tenants' door on August 29, 2022. KG submitted into evidence a signed and witnessed Proof of Service on Form RTB-34 certifying the 1 Month Notice was served on the Tenants' door to corroborate his testimony. Based on the undisputed testimony of KG, I find that 1 Month Notice was served on the Tenants in accordance with the provisions of section 88 of the Act.

The 1 Month Notice stated the reason for ending the tenancy was:

- Tenant is repeatedly late paying rent.

The details provided for the cause were:

Tenants are repeatedly late in paying on rent

KG stated the Tenants were late paying the rent for the months of January, March, June, July and August 2022. KG stated the Tenants had rental arrears of \$220.00 as of September 30, 2022. KG submitted into evidence a copy of the lease ledger to corroborate his testimony. KG stated the Tenants owed \$3,639.51 as of January 10, 2023 and stated the Landlords were seeking to recover those rental arrears.

KG stated the Landlords served the Tenants with three Ten Day Notices for Unpaid Rent and/or Utilities prior to making the Application. KG stated the Landlords did not apply for dispute resolution in respect of the 1 Month Notice because they were waiting for the results of an application for dispute resolution by direct request made by the Landlords in respect of a 10 Day Notice.

Analysis

1. Claim for Order of Possession

Rule 6.6 Residential Tenancy Branch Rules of Procedure ("RoP") states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Subsection 47(1)(b) and sections 47(2) through 47(5) of the Act state:

- 47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
[...]

- (b) *the tenant is repeatedly late paying rent;*
[...]
- (2) A notice under this section must end the tenancy effective on a date that is
 - (a) not earlier than one month after the date the notice is received, and
 - (b) 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.
- (3) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.
- (5) If a tenant who has received a notice under this section does not 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 by that date.

[emphasis added in italics]

KG stated the 1 Month Notice was served on the Tenants' door on August 29, 2022. Pursuant to section 90 of the Act, I find the Tenants were deemed to have received the 1 Month Notice on September 1, 2022. Pursuant to section 47(4), the Tenants had 10-days, or until September 12, 2022, being the next business day after the 10-day dispute period expired, within which to make an application for dispute resolution to dispute the 1 Month Notice. As the Tenants did not dispute the 1 Month Notice, they were conclusively presumed to have accepted that the tenancy ended on the effective date of the 1 Month Notice, being September 30, 2022. Notwithstanding the Tenants are conclusively presumed to have accepted the tenancy has ended, I will nevertheless consider whether there was cause to end the tenancy pursuant to the 1 Month Notice.

KG stated the Tenants were late paying the rent for the months of January, March, June, July and August 2022. KG provided a copy of the lease ledger to corroborate his testimony.

Residential Tenancy Policy Guideline 38 (“PG 38”) provides guidance on when a landlord may end a tenancy where the tenant is repeatedly late pay rent. PG 38 states in part:

Three late payments are the minimum number sufficient to justify a notice under these provisions.

It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late

A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.

KG stated the Landlords did not apply for dispute resolution in respect of the 1 Month Notice because they were waiting for the results of an application for dispute resolution by direct request made by the Landlords in respect of a 10 Day Notice. KG stated the Landlords had served the Tenants with three Ten Day Notices for Unpaid Rent and/or Utilities prior to making the Application. Based on the undisputed testimony of KG, I find there was a legitimate reason for the Landlords to make the Application four months after the date of the 1 Month Notice. Based on the undisputed testimony of KG, I find the Tenants were late paying the rent on the 1st of the month as required by the tenancy agreement on five occasions from the time the tenancy commenced on January 1, 2022 to the date of the 1 Month Notice. As such, the Tenants have been repeatedly late paying the rent to he Landlord pursuant to the guidance provided by PG 38. Based on the foregoing, I find the Tenants have breached section 47(1)(b) of the Act.

Sections 55(2), 55(3) and 55(4) of the Act state:

55(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

- (a) a notice to end the tenancy has been given by the tenant;
- (b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;

- (c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
 - (c.1) the tenancy agreement is a sublease agreement;
 - (d) the landlord and tenant have agreed in writing that the tenancy is ended.
- (3) The director may grant an order of possession before or after the date when a tenant is required to vacate a rental unit, and the order takes effect on the date specified in the order.
- (4) In the circumstances described in subsection (2) (b), *the director may, without any further dispute resolution process under Part 5 [Resolving Disputes],*
- (a) *grant an order of possession, and*
 - (b) *if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.*

[emphasis in italics added]

I have reviewed the 1 Month Notice and find it complies with the form and content requirements of section 52 of the Act. The Tenants have not vacated the rental unit on the effective date of the 1 Month Notice, being September 30, 2022. Based on the foregoing, pursuant to section 55(4)(a) of the Act, I grant an Order of Possession to the Landlord requiring the Tenants to deliver vacant possession of the rental unit within two days of being served with a copy of this decision and attached Order by the Landlord.

2. Claim for Unpaid Rent

The Landlord stated the Tenants did not pay the rent of \$220.00 as of September 30, 2022. KG stated the Tenants owed the Landlords \$3,639.51 as of January 10, 2023.

Sections 26 and 57(3) of the Act state:

- 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.

- 57(3) A landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

Residential Tenancy Policy Guideline 38 (“PG 38”) addresses, among other things, situations where a landlord seeks to hold a tenant liable for loss of rent after the end of a tenancy such as where the tenancy has ended pursuant to conclusive presumption under section 47(5)(a) of the Act. PG 38 states in part:

B. Overholding tenant and compensation

Section 44 of the RTA (section 37 of the MHPTA) sets out when a tenancy agreement will end. *A tenant is not liable to pay rent after a tenancy agreement has ended. If a tenant continues to occupy the rental unit or manufactured home site after the tenancy has ended (overholds), then the tenant will be liable to pay compensation for the period that they overhold pursuant to section 57(3) of the RTA (section 50(3) of the MHPTA). This includes compensation for the use and occupancy of the unit or site on a per diem basis until the landlord recovers possession of the premises.* In certain circumstances, a tenant may be liable to compensate a landlord for other losses associated with their overholding of the unit or site, such as for loss of rent that the landlord would have collected from a new tenant if the overholding tenant had left by the end of the tenancy or for compensation a landlord is required to pay to new tenants who were prevented from taking occupancy as agreed due to the overholding tenant’s occupancy of the unit or site.

[emphasis in italics added]

Based on the guidance provided by PG 38, a landlord must seek compensation where the tenant overholds the rental unit after the tenancy has ended pursuant to subsection 57(3) of the Act. In the Application, the Landlords made a claim for unpaid rent but did not make a claim to seek monetary compensation for the Tenants overholding the rental unit. As such, the Landlords are not entitled to seek rental arrears after September 30, 2022. In these circumstances, the Landlords have the option of making an application for dispute resolution to seek compensation for the time the Tenants overheld the rental unit rental after the effective date of the 1 Month Notice as stated in PG 3. Based on the undisputed testimony of KG, I find the Tenants had rental arrears of \$220.00 as of

September 30, 2022. Pursuant to section 26(1), the Tenants must pay the Landlords \$220.00 for unpaid rent to September 30, 2022. Based on the foregoing, I order the Tenants pay the Landlords \$220.00 for the rental arrears pursuant to section 55(4)(b) of the Act. Pursuant to section 72(2)(b), the Landlords may deduct the \$220.00 from the Tenants' security deposit.

As the Landlords have been substantially successful in the Application, pursuant to section 72 of the Act, I order the Tenants pay the Landlords \$100.00 for the filing fee of the Application. Pursuant to section 72(2)(b), the Landlords may deduct the \$100.00 from the Tenants' security deposit.

After deducting \$220.00 for unpaid rent and \$100.00 for the filing fee of the Application, the Landlords will continue to hold \$480.00 on behalf of the Tenants. The Landlords must handle the remaining security deposit of \$480.00 in accordance with the provisions of the Act.

Conclusion

I order that the Tenants deliver vacant possession of the rental unit to the Landlords within two days of being served with a copy of this decision and attached Order of Possession by the Landlords. This Order of Possession may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

The unpaid rent of \$220.00 and the filing fee of \$100.00 are satisfied by deducting those amounts from the Tenants' security deposit of \$800.00. The Landlords must handle the balance of the security deposit of \$480.00 in accordance with the provisions of the Act.

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 8, 2023

Residential Tenancy Branch