

## **DECISION**

### **Introduction**

This was a cross application hearing that dealt with the Tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the 10 Day Notice to End Tenancy dated May 21, 2024 (the First Notice)
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67;
- an Order to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an Order to restrict or suspend the landlord's right to enter, pursuant to section 70;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62;
- authorization to change the locks, pursuant to section 31;
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

This hearing also dealt with the Landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for Unpaid Rent pursuant to a 10 Day Notice to End Tenancy for Unpaid rent dated May 28, 2024 (the Second Notice)
- authorization to recover the filing fee for this application from the Tenant, pursuant to section 72

The Landlord and the Landlord's agent (the Agent) attended the hearing for the Landlord.

The Tenant and the Tenant's support person attended the hearing for the Tenant.

### **Service of Notice of Dispute Resolution Proceeding (Proceeding Package)**

The Tenant testified that the Landlord was served with the Proceeding Package via registered mail. The Tenant was unable to provide the date of service in the hearing. The Agent testified that the Landlord received the Proceeding Package via registered

mail on June 3, 2024. I find that the Landlord was served in accordance with section 89 of the Act.

The Agent testified that the Tenant was served with the Landlord's Proceeding Package in person the day after it was received from the Residential Tenancy Branch. The Landlord entered into evidence a witnessed proof of service document which states that the Tenant was personally served with the above documents on June 11, 2024. The Tenant testified that he received the Landlord's Proceeding Package but could not recall the date. Based on the proof of service document entered into evidence I find that the Tenant was served with the Landlord's Proceeding Package in person on June 11, 2024 in accordance with section 89 of the Act.

## **Service of Evidence**

The Tenant testified that the evidence uploaded to the Residential Tenancy Branch on June 17, 2024 was not served on the Landlord. I find that this evidence is excluded from consideration because it was not served on the Landlord in accordance with section 88 of the Act. The Tenant's only other evidence uploaded to the Residential Tenancy Branch was a copy of the 10 Day Notice to End Tenancy dated May 21, 2024 (the First Notice). I accept this for consideration because the Agent confirmed the Landlord served this on the Tenant and was able to speak to its contents. I find that the Landlord was sufficiently served with the First Notice in accordance with section 71 of the Act.

The Agent testified that he served the Tenant with the Landlord's evidence on June 3, 2024 or June 6, 2024 in person and that the Landlord witnessed this service. The Agent entered into evidence a document dated June 7, 2024 which states that the Landlord witnessed the Agent personally serve the Tenant with a U.S.B. drive. The document is signed by the Landlord. The document does not state the date the service occurred.

The Landlord testified that she witnessed the Agent serve the Tenant with documents around May 6, 2024. It was undisputed that the parties had a previous application for dispute resolution on June 14, 2024. The file number for the previous application is located on the cover page of this Decision. The Tenant's application currently before me was filed on May 27, 2024 and the Landlord's application currently before me was filed on June 7, 2024. The Landlord testified that she does not recall if she witnessed the Agent serve any additional documents after the documents served in early May 2024.

The Tenant testified that he did not receive the Landlord's evidence for this hearing and that the last evidence he received from the Landlord was on May 15, 2024, before these applications for dispute resolution were filed.

I find that the Landlord has not proved, on a balance of probabilities, that their evidence was served on the Tenant. The testimony of the Agent on what date service occurred was imprecise. The Landlord was not able to corroborate the service of any evidence in the month of June 2024 and the proof of service document dated June 7, 2024 does not state on what date service occurred. The Landlord's evidence, excluding the 10 Day

Notice to End Tenancy dated May 28, 2024 (the Second Notice) is therefore excluded from consideration. I allow the Second Notice into evidence because both parties agreed that it was served and did not dispute its contents. I find that the Tenant was sufficiently served with the Second Notice in accordance with section 71 of the Act.

I also note that when parties forget to upload notices to end tenancy it is standard practice to allow the parties to upload copies during or after the hearing. As both parties confirmed that they had copies of both notices to end tenancy I find that it is reasonable to allow their consideration.

## **Preliminary Issues**

Rules 2.3 and 6.2 of the Residential Tenancy Branch Rules of Procedure say that all claims made in the application for dispute resolution must be related to each other and that unrelated claims may be severed. It is my determination that the priority claims to be heard relate to the two 10 Day Notices to End Tenancy for Unpaid Rent and that all other claims are not sufficiently related to be heard today. In accordance with the above the following claims are severed with leave to reapply:

- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67;
- an Order to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an Order to restrict or suspend the landlord's right to enter, pursuant to section 70;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62;
- authorization to change the locks, pursuant to section 31;

The Tenant filed an amendment to their application for a Monetary Order for damage or compensation on June 19, 2024. In the hearing I informed the Tenant that this amendment was filed too late to be considered. Rule 4.6 of the Residential Tenancy Rule of Procedure states that the Respondent must receive the amendment at least 14 clear days prior to the hearing. As this amendment was filed 4 clear days prior to the hearing, the Tenant breached Rule 4.6 and did not provide the Landlord with a fair opportunity to respond. In any event, as set out above, the Tenant's monetary claim was severed and dismissed with leave to reapply. The Tenant may include the amended claim in any future application.

## **Issues to be Decided**

Is the Tenant entitled to cancellation of the First Notice?

Is the Landlord entitled to an Order of Possession pursuant to the First Notice?

Is the Landlord entitled to a Monetary Order for unpaid rent?

Is the Tenant entitled to recover the filing fee for this application from the Landlord?

Is the Landlord entitled to an Order of Possession pursuant to the Second Notice?

Is the Landlord entitled to recover the filing fee for this application from the Tenant?

## **Background and Evidence**

I have reviewed all accepted evidence, including the testimony of the parties, but will refer only to what I find relevant for my decision.

Evidence was provided showing that this tenancy began on April 15, 2022. Both parties agree that the tenancy agreement is a verbal tenancy agreement. Both parties agree that in January of 2024 the rent was \$2,040.00 due on the 15<sup>th</sup> day of each month. Both parties agree that in January of 2024 the Landlord served the Tenant with RTB #7 – Notice of Rent Increase which increased the rent to \$2,106.30. The Tenant testified that he received the Notice of Rent Increase on January 20, 2024, five days late. The Agent testified that he is not in complete agreement that it was served five days late but does not know the date it was served. The Agent testified that for this hearing he will agree with service on January 20, 2024.

Both parties agreed that after serving the Notice of Rent Increase the Landlord realized that they made an incorrect calculation and that the 3.5% increase allowed for 2024 equalled a new rent of \$2,111.40, not \$2,106.30. Both parties agree that the Tenant verbally agreed to pay rent of \$2,111.40 effective April 15, 2024 and that this rent was paid.

The Agent testified that the Tenant did not pay rent on May 15, 2024 when it was due. The Agent testified that the Tenant's rent cheque bounced. The Agent testified that the First Notice was personally served on the Tenant in person on May 21, 2024. The Tenant testified that he received the First Notice on May 21 or 22, 2024. The First Notice is signed by the Landlord, is dated May 21, 2024, gives the address of the rental unit, states that the effective date of the notice is June 1, 2024, is in the approved form, #RTB-30, and states that the Tenant failed to pay rent in the amount of \$2,111.40 due on May 15, 2024.

The Agent testified that Tenant was personally served with the Second Notice on May 28, 2024. The Agent testified that the Second Notice was served because the Landlord was not sure if the verbal agreement for rent to be \$2,111.40 per month was legally binding and that it's possible it could be found that rent for May 15, 2024 was actually \$2,106.30. The Second Notice is signed by the landlord, is dated May 28, 2024, gives the address of the rental unit, states that the effective date of the notice is June 7, 2024, is in the approved form, #RTB-30, and states that the Tenant failed to pay rent in the amount of \$2,106.30 due on May 15, 2024. The Agent testified that the two notices to end tenancy were served to cover the Landlord's bases and that the First Notice was not cancelled.

The Agent testified to the following rent payments received by the Tenant:

- April 15, 2024- May 14, 2024: Rent paid April 15, 2024
- May 15, 2024- June 14, 2024: No rent paid
- June 15, 2024 – July 14, 2024: Rent paid June 15, 2024

The Tenant testified that the Landlord informed him on May 21, 2024 that the cheque for rent for May 15, 2024 to June 14, 2024 did not clear. The Tenant testified that he checked with his bank and that they said there was suspicious activity. The Tenant testified that he guessed something happened that day. The Tenant testified that the money came out of his account, and he does not know where it went. The Tenant testified that he did not make any additional payments towards rent until June 15, 2024's rent payment.

The Agent testified that the Tenant told him that he intentionally withheld May's rent because he wanted documents from the Landlord. The Tenant testified that he did not withhold rent. The Agent played an audio recording in the hearing of a conversation between himself and the Tenant as follows:

Tenant: Give me some documentation

Agent: So your withholding rent until we get you documentation?

Tenant: Yes I am. Ya, so get me the legal

Agent: Why are you doing this to us you are making life difficult for no reason

Tenant: Ho ho ho ho, you started this...

The Agent testified that the above conversation was recorded on or around May 24, 2024. The Tenant testified that he's after an agreement that outlines what hydro needs to be paid. The Tenant testified that the above recording was an argument about hydro payments and that he did not withhold rent.

## **Analysis**

### **Is the Tenant entitled to cancellation of the First Notice?**

### **Is the Landlord entitled to an Order of Possession pursuant to the First Notice?**

Based on the testimony of both parties I find that the First Notice was personally served on the Tenant on May 21, 2024. The Tenant failed to dispute the First Notice on Monday May 27, 2024. When the time for doing something falls on a day the Residential Tenancy Branch (RTB) is closed, the day is extended to the next day the RTB is open. I find that the Tenant had until May 27, 2024 to dispute the First Notice, which he did. Upon review of the First Notice I find that it meets the form and content requirements of section 52 of the Act.

Section 46(1) of the *Act* states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

Section 46(4) of the *Act* states that 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.

Based on the audio recording played into evidence by the Landlord, I find that the Tenant withheld rent for the period of May 15, 2024 to June 14, 2024 contrary to sections 26 and 46 of the *Act*. I so find as when asked if he is withholding rent the Tenant clearly states “Yes I am”. I accept the Agent’s undisputed testimony that this audio recording was made on or around May 24, 2024. Based on the Agent’s testimony and the audio recording I find that the Tenant did not pay rent on May 15, 2024 when it was due and did not pay the outstanding rent at all. I therefore dismiss the Tenant’s application to cancel the First Notice. I find that the landlords are entitled to a two-day Order of Possession for nonpayment of rent, in accordance with section 55 of the *Act*.

Based on the Tenant’s testimony I find that the Tenant was served with the Notice of Rent Increase documents on January 20, 2024. Section 42 of the *Act* says that the Landlord is required to give the Tenant three clear month’s notice of the rent increase. I find that the rent increase in the amount of \$2,106.30 therefore took effect May 15, 2024, three clear months from January 20, 2024. I find that the verbal agreement to increase rent to \$2,111.40 is not enforceable because it was not in writing and was not in the correct form, RTB Form #7. I find that the rent due and payable for May 15, 2024 was \$2,106.30.

I note that as set out in *Li v. Virk*, 2023 BCSC 83, the fact that the Landlord did not correctly state the amount of rent owing on the First Notice does not invalidate it. As long as rent was not paid, the amount of unpaid rent on the notice does not need to be correct. I accept the Agent’s testimony that the Landlord did not cancel the First Notice when the Second Notice was served and that the Second Notice was served out of an abundance of caution.

### **Is the Landlord entitled to an Order of Possession pursuant to the Second Notice?**

While I do not need to consider the Second Notice given that I have awarded the Landlord an Order of Possession based on the First Notice, I find that the Tenant is conclusively presumed under section 46(5) of the *Act* to have accepted the end of the tenancy based on the Second Notice as the Tenant did not dispute it and did not pay the outstanding rent.

### **Is the Landlord entitled to a Monetary Order for unpaid rent?**

Section 26 of the Act states that a tenant must pay rent to the landlord, regardless of whether the landlord complies with the Act, regulations or tenancy agreement. I am satisfied that the Landlord has proved that the Tenant owes \$2,106.30 in unpaid rent for May 15, 2024 to June 14, 2024.

The Tenant did not point to any authority under the Act to withhold May 2024's rent and in fact denied withholding May 2024's rent which I have found to be untruthful. I find the Tenant was required to pay \$2,106.30 on May 15, 2024, pursuant to section 26(1) of the Act and that the Tenant has not proved that section 46(3) of the Act applies. In accordance with section 67 of the Act I award the Landlord \$2,106.30.

### **Is the Landlord entitled to recover the filing fee for this application from the Tenant?**

As the Landlord was successful in their application for dispute resolution I find that they are entitled to recover the \$100.00 filing fee from the Tenant in accordance with section 72 of the Act.

### **Is the Landlord entitled to recover the filing fee for this application from the Tenant**

As the Tenant was not successful in their application for dispute resolution I find that they are not entitled to recover the \$100.00 filing fee from the Landlord in accordance with section 72 of the Act.

### **Conclusion**

I grant an Order of Possession to the Landlord effective two days from service of the Order of Possession on the Tenant. Should the Tenant or anyone 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 grant the Landlords a Monetary Order in the amount of \$2,206.30. The Landlord is provided with this Order in the above terms and 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 Act.

Dated: June 25, 2024

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Residential Tenancy Branch