Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, MNR, FF

Introduction
This hearing dealt with applications from both the landlords and the tenant under the *Residential Tenancy Act* (the *Act*). The landlords applied for:

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

The tenant applied for cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another.

Preliminary Issues – Service of Documents and Other Matters
The tenant confirmed that Landlord JK handed her the 10 Day Notice on May 4, 2013. She also testified that she received a second copy of that Notice sent by the landlords by registered mail on May 13, 2013. The landlords confirmed that on or about May 10, 2013, they received a copy of the tenant's dispute resolution hearing package handed to their mother at the address they identified for service of documents in their 10 Day Notice. The tenant confirmed that she received a copy of the landlords' dispute resolution hearing package sent by the landlords on May 27, 2013 by registered mail. I am satisfied that the parties were served with the above documents. As the tenant also confirmed that she received the landlords' written evidence package, I am satisfied that the landlords served these documents to the tenant in accordance with the *Act*.

The tenant testified that she served the landlords with her written evidence package by leaving it on their doorstep approximately one week before this hearing. She said that she knocked on their door, but they did not answer. She said that she saw their cars in the driveway and assumed that they were home. She said that there was no mail slot at this residence so she placed the documents against their front door. She also said that

she tried to serve her evidence to the landlords at another address she had been provided for them, but was unsuccessful in serving evidence to them at that location, which she assumed to be an incorrect address.

As outlined below, section 88 of the *Act* establishes the methods by which a party can serve written evidence to another party.

> ***88*** *All documents, other than those referred to in section 89* [special rules for certain documents]*, that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:*
>
> *(a) by leaving a copy with the person;*
>
> *(b) if the person is a landlord, by leaving a copy with an agent of the landlord;*
>
> *(c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;*
>
> *(d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;*
>
> *(e) by leaving a copy at the person's residence with an adult who apparently resides with the person;*
>
> *(f) by leaving a copy in a mail box or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;*
>
> *(g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;*
>
> *(h) by transmitting a copy to a fax number provided as an address for service by the person to be served;*
>
> *(i) as ordered by the director under section 71 (1)* [director's orders: delivery and service of documents]*;...*

Both landlords testified that they had not received any written evidence from the tenant. They said that the only information they received from the tenant was her dispute resolution hearing package, including a copy of her application for dispute resolution and the notice of hearing issued by the Residential Tenancy Branch (RTB).

At the hearing, I advised the parties of my finding that the tenant had not served the landlords with a copy of her written evidence package in a way allowed under section 88 of the *Act*. As such, I informed the parties that I would not be considering the tenant's written evidence package in my decision.

At the commencement of the hearing and at various times during this hearing, Landlord JK attempted to have the following issues added to the landlords' grounds for ending this tenancy:

- the landlords' allegation that the tenant was keeping a dog on the rental premises in contravention of her Residential Tenancy Agreement (the Agreement); and
- the landlords' claim that the tenant has been late in paying her rent a number of times during this tenancy.

The landlords also raised these issues in their written evidence. Landlord JK testified that he was told by representatives at the Kelowna Service BC Office that the landlords could obtain consideration of heir concerns about the tenant's alleged breach of the restriction on pets from this tenancy and the tenant's repeated late payment of rent at this hearing.

At the hearing, the landlords testified that they had not issued a 1 Month Notice to the tenant. Landlord MK, who had a copy of Landlord JK's completed application for dispute resolution, also confirmed that the only reason identified by Landlord JK in the landlord's application for seeking an end to this tenancy was for the tenant's failure to pay rent or utilities.

I advised the parties that I could only consider the landlords' request for an Order of Possession for the tenant's alleged failure to pay the rent identified in the landlords' 10 Day Notice. I noted that this was the sole stated reason cited by the landlords in their application for dispute resolution. To add additional issues to the landlords' application for dispute resolution without properly notifying the tenant beforehand would deny the tenant her right to know the case against her and to enable her to respond to that case, both fundamental principles of natural justice. Even if the landlords had included a request to end the tenancy for cause on their application for dispute resolution, they could not end this tenancy and obtain an Order of Possession for any of the alleged contraventions of section 47 of the *Act* (including those identified by the landlord for late

payment of rent or contravention of pet clauses) without first issuing the necessary 1 Month Notice to End Tenancy for Cause. I informed the parties that I could not hear matters that were not properly before me and could not agree to the landlord's request to add reasons for ending this tenancy to the sole reason included in the landlords' application for dispute resolution.

After I notified the parties of the above finding and a number of times during this hearing, Landlord JK attempted to revisit my finding that the landlords could not add issues to their existing application for dispute resolution, nor could they end a tenancy for grounds that had not been included in any notice to end tenancy issued to the tenant. Although I appreciated that Landlord JK did not share my view on what can and cannot be raised during a hearing, I found his unwillingness to accept this decision acted at cross-purposes at times with the objective of considering those issues that were properly before me. I had to remind Landlord JK a number of times that there was no purpose to be served in his continuing objections to the scope of the matters that could be considered at this hearing.

I also had to warn the tenant a number of times during the hearing that her frequent interruptions were not assisting in my gaining a proper understanding of the issues before me. I cautioned her that should she continue with interruptions, I would have to disconnect her from this hearing and proceed with the hearing without her participation. I did not need to resort to this extreme measure to complete this hearing.

Issues(s) to be Decided

Should the landlords' 10 Day Notice be cancelled? If not, are the landlords entitled to an Order of Possession? Are the landlords entitled to a monetary award for unpaid rent? Are the landlords entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This one-year fixed term tenancy commenced on August 13, 2012. Monthly rent according to the signed Residential Tenancy Agreement (the Agreement) was set at $1,050.10, payable in advance on the first of each month. The landlords continue to hold the tenant's $525.00 security deposit paid on August 8, 2012.

Landlord MK testified that he made an oral agreement with the tenant in September 2012 to allow the tenant to deduct $50.00 from her monthly rent commencing in November 2012 until such time as repairs to her rental unit had been completed. The tenant confirmed that she had an oral agreement with Landlord MK to let her reduce her

monthly rent, but claimed that the amount of this agreed reduction was $200.00 and not the $50.00 asserted by Landlord MK.

Landlord MK testified that he allowed the tenant to pay $125.00 for her October 2012 rent. This agreement reflected the delay in having the rental unit available for her when she was supposed to move in and for the inconvenience resulting from the failure to complete repairs during the early stage of her tenancy. He testified that $1,000.10 was due in rent for the period from November 1, 2012 until May 1, 2013, when the repairs to the rental unit were completed and the full $1,050.10 monthly rent stated in the Agreement resumed. He provided written evidence from bank statements as to the following payments by the tenant towards her tenancy:

Date	**Total Payment**
November 1, 2012	$1,050.10
December 3, 2012	1,050.10
January 22, 2013 ($650.00 + $247.10)	897.10
February 21, 2013	1,000.00
March 20, 2013 ($200.00 + $700.00)	900.00
April 25, 2013 ($500.00 + $450.00)	950.00

Both parties agreed that the tenant has not made any specific rent payments for either May 2013 or June 2013.

The landlords' 10 Day Notice identified $1,050.00 as owing on May 1, 2013. The landlords applied for a monetary award of $2,100.00 in their application for dispute resolution, an amount designed to recover unpaid rent for May and June 2013.

The tenant's application to cancel the landlords' 10 Day Notice included the following Details of the Dispute:

> *I had over paid previous months so the amount owing for May is $325. I spoke with landlord he agreed that I had overpaid but we did not agree on amount. He said he would arrange meeting to compare receipts, but has not contacted me.*

At the hearing, the tenant said that she realized after comparing receipts with Landlord MK that she did not actually owe anything in May 2013, as she had not retained two receipts that Landlord MK had received.

At the hearing, I heard conflicting evidence as to the contents of the September 6, 2012 joint move-in condition inspection report entered into written evidence by the landlords.

On the third page of this report, the landlords' written evidence stated that the following repairs were to be completed at the start of this tenancy:

> *Paint specific calls listed, Blind replacement, toilet seats, shampoo & repair carpets.*

The tenant testified that on the copy of this report provided to her at the start of this tenancy, there were also commitments by the landlords to repair the glass sliding doors, to paint and to repair a shower rod. She said that most of the required repairs were completed by the end of April 2013, but some of the landlords' commitments had still not been provided in full. She was somewhat vague on these unfinished items and may have been including items listed as damaged in the remainder of the condition inspection report as opposed to specific commitments made by the landlords to repair these items as a condition of commencing this tenancy.

Analysis

When there is disputed evidence as to whether or not parties entered into an oral agreement separate from their written Agreement, the best evidence is often the written Agreement itself. However, in this case, both parties agreed that they did have an oral agreement. The principal issue in dispute is the amount of rent reduction Landlord MK agreed to allow the tenant until such time as the repairs to the rental unit were completed. The parties also disputed the extent of the repairs that had to be completed in order for the rent to resume to the amount listed in the Agreement.

Based on the extensive copies of invoices, receipts, work orders, the landlords' sworn testimony, and to an extent the tenant's own sworn testimony, I find that the rental unit was sufficiently repaired by May 1, 2013, to enable the landlords to resume charging the tenant the monthly rent of $1,050.10 cited in the Agreement. I find little merit to the tenant's claim that her copy of the joint move-in condition inspection report called for additional repairs beyond those included in the copy of the report entered into written evidence by the landlords. I also find it unlikely that Landlord MK committed to provide additional upgrades to the rental unit beyond those that were completed by May 1, 2013 or that any such commitment entitled the tenant to continue withholding a portion of her monthly rent as of May 1, 2013.

I find that the landlords provided detailed records outlining the payments they had received since this tenancy began. The tenant did not dispute the landlords' record of payments entered into written evidence. The landlord's payment records reveal that the tenant seldom paid her rent on time or in the amounts that would lend support to her claim that she had an oral agreement to allow her to withhold $200.00 each month from the $1,050.10 amount identified in the signed Agreement. For November and

December 2012, she actually paid $50.00 more each month than Landlord MK claimed was owed for those months. However, from January 2013 to April 2013, the landlords received payments ranging from $897.10 to $1,000.00.

Based on the tenant's payment history, I find little evidence that the amounts of the tenant's monthly rent payments adhered to any firm oral agreement between the parties to allow her to reduce her rent by $200.00, as the tenant has claimed. Rather, it appears that the tenant adopted the practice of paying whatever she could afford whenever she could afford it since January 1, 2013. Only the tenant's payment of $1,000.00 on February 21, 2013, matches closely with any of the amounts claimed by either the tenant or the landlords. I see little evidence in the tenant's monthly payments that there was an oral agreement to allow the tenant to pay $200.00 less than the $1,050.10 stated in the Agreement. In fact, the tenant did not pay $850.10 in monthly rent, the amount she claimed was due according to the oral agreement with Landlord MK, for any month of her tenancy. Under these circumstances and on a balance of probabilities, I find that the more likely amount of reduction allowed by Landlord MK from November 2012 until May 1, 2013 was $50.00 per month, rather than the $200.00 reduction claimed by the tenant.

Based on my finding that monthly rent from November 1, 2012 until April 30, 2013 was set at $1,000.10, I find that if anything the tenant may still have owed the landlords rent as of April 30, 2013. However, the landlords have not requested a monetary award for any period preceding May 1, 2013, nor did they identify any amount owing in their 10 Day Notice that precedes May 1, 2013. I find that the tenant provided written evidence in the Details of the Dispute section of her application for dispute resolution that she had not paid at least $325.00 of the rent identified as owing in the landlords' 10 Day Notice. I find the tenant's sworn testimony distancing herself from her written statement in her application for dispute resolution lacks credibility or any supporting documentation entered into evidence for this hearing.

While the tenant stated repeatedly at this hearing that she was willing pay whatever was owing in order to reinstate her tenancy, the landlords were within their rights to refuse to accept any such payment at this time in order to continue this tenancy.

Based on a balance of probabilities, I find that the tenant had no authorization to withhold even a portion of her rent for May 2013 and has continued to withhold all of her rent for June 2013, as well. I dismiss the tenant's claim that she had overpaid rent before May 1, 2013, and was thus entitled to forego making payments that became due on May 1, 2013. For these reasons, I dismiss the tenant's application to cancel the 10 Day Notice with the effect that the landlords are entitled to a 2 day Order of Possession.

I find that the landlords are entitled to a monetary award in the amount of $2,100.00 for unpaid rent for May and June 2013. Although the landlords' application does not seek to retain the tenant's security deposit, using the offsetting provisions of section 72 of the *Act*, I allow the landlords to retain the tenant's security deposit plus applicable interest in partial satisfaction of the monetary award. No interest is payable over this period. As the landlords have been successful in their application, I allow them to recover their $50.00 filing fee from the tenant.

Conclusion

I grant an Order of Possession to the landlords effective **two days after service of this Order** on the tenant(Should the tenant 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 landlords' favour under the following terms, which allows the landlords to recover unpaid rent and the filing fee for their application and to retain the tenant's security deposit:

Item	**Amount**
Unpaid May 2013 Rent	$1,050.10
Unpaid June 2013 Rent	1,050.10
Less Security Deposit	-525.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$1,625.20**

The landlords are provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: June 06, 2013

Residential Tenancy Branch