



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, FF, CNR, FF, LRE, MNDC, MNSD, OLC, PSF, RP, RR

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the 10 day Notice to End Tenancy was sufficiently served on the Tenant by posting on July 6, 2015.

The tenant filed an Application for Dispute Resolution on July 13, 2015. He testified he served the landlord a copy of the Application for Dispute Resolution/Notice of Hearing by ordinary mail to where the landlord resides. The landlord testified he never received a copy of the Application for Dispute Resolution. Section 88(1) of the Residential Tenancy Act provides as follows:

Special rules for certain documents

89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given 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 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 registered mail to a forwarding address provided by the tenant;
- (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

Service by ordinary mail is not a sufficient form of service of an Application for Dispute Resolution where the landlord has not received a copy of the Application. I determined the tenant failed to serve the Application for Dispute Resolution/Notice of Hearing in a manner sufficient to satisfy the Residential Tenancy Act. Accordingly, the tenant's Application to cancel the 10 day Notice to End Tenancy is dismissed without liberty to re-apply. The tenant's application for the remaining claims is dismissed with leave to re-apply.

The Residential Tenancy Act permits a party to serve another by mailing, by registered mail to where the other party resides. The landlord testified he served the tenant with a copy of the Landlord's Application for Dispute Resolution by mailing, by registered mail to where the tenant resides. He produced a copy of the Canada Post tracking service indicating Notifications were sent to the tenant's address but he failed to pick up the registered mail. The Supreme Court of British Columbia has held that a party cannot avoid service by refusing to pick up their registered mail. I determined the landlord has sufficiently served the tenant in accordance with the Act despite the fact the tenant failed to pick up his registered mail.

Issue(s) to be Decided:

The issues to be decided as set out in the Applications for Dispute Resolution filed by the parties are as follows:

- a. Whether the tenant is entitled to an Order cancelling the 10 day Notice to End Tenancy dated July 6, 2015?
- b. Whether the tenant is entitled to a monetary order and if so how much?
- c. Whether the tenant is entitled to an order suspending or setting conditions on the landlord's right of entry?
- d. Whether the landlord is entitled to an Order for Possession?
- e. Whether the landlord is entitled to A Monetary Order and if so how much?
- f. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- g. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

The tenancy began in November 2011. Neither party produced a copy of the tenancy agreement. The rent is \$1600 per month payable on the first day of each month. The tenant paid a security deposit of \$800 at the start of the tenancy. The owners of the rental unit live out of the country. I determined the named landlord has authority to act on their behalf. On March 3, 2015 the parties mutually agreed in writing to end the tenancy on May 1, 2015. This agreement was varied and the parties agreed to end the tenancy on September 1, 2015.

Analysis:

There is a dispute between the parties as to whether the tenant has paid the rent. The landlord produced bank statements indicating the rent cheques for May, June and July 2015 were presented but they were returned with the caption "RET CHQ, OPTI PROP LAND, FUNDS FROZEN, FUNDS NOT CLEARED. The tenant testified he paid the rent for those months. He also testified that on August 5, 2015 he received notice from another real estate agency saying they were acting on behalf of the Bank and demanding the rent be paid to them. The tenant testified he paid the rent to the agent for the bank. The tenant acknowledges the rent for September has not been paid. However, he stated that the landlord refuses to pick up the cheque.

In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, the B.C. Court of Appeal set out the following test for assessing credibility:

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (page 357)”

I prefer the evidence of the landlord to the tenant for the following combined reasons:

- The landlord’s testimony the rent has not been paid is corroborated by bank statements for May, June, and July indicating the funds were frozen and were not cleared.
- The tenant failed to produce documentary evidence of the alleged notice for the other real estate company acting on behalf of the bank and demanding that the rent be paid to them and evidence that he in fact paid the rent to them. One would expect this evidence would be produced where there is an issue on whether monies have been paid.
- I found the tenant to be evasive in answering many questions.
- The landlord’s evidence was concise and to the point.

I am satisfied based on the evidence presented at the hearing that the tenant has failed to pay the rent for the months May, June, July and September 2015 and the sum of \$6400 remains owing. I have doubts that the tenant paid the rent to the real estate agency acting on behalf of the bank as the tenant failed to present corroborating documentary evidence to support this testimony. However, out of an abundance of caution I determined it was not appropriate to include the rent for August in this

monetary order. If the tenant's evidence that he paid the bank's agent is incorrect, the landlord has the right to file an new claim for non-payment of rent for August.

Tenant's Application:

I dismissed the tenant's application for an order cancelling the 10 day Notice without leave to re-apply as the tenant failed to properly serve the landlord. This claim is dismissed on its merits as the tenant has failed to pay the rent for 4 months and there is no basis to cancel the Notice to End Tenancy.

I dismissed the balance of the tenant's claim with leave to re-apply as I have not considered the claims on the merits.

Landlord's Application - Order of Possession:

I determined the landlord was entitled to an Order for Possession. There is outstanding rent. The Tenant's application to set aside the Notice to End Tenancy has been dismissed without leave to re-apply. The landlord is also entitled to an Order for Possession based on the Mutual Agreement to End the Tenancy. Accordingly, I granted the landlord an Order for Possession. Normally an Order for Possession would be given on 2 days notice. However, the tenant has a young daughter. The monetary award gives the landlord rent for September 2015. **I set the effective date of the Order for Possession for September 30, 2015.**

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, the landlord may register the Order with the Supreme Court of British Columbia for enforcement.

Analysis - Monetary Order and Cost of Filing fee:

I determined the tenant has failed to pay the rent for the month(s) of May, June, July and September 2015 and the sum of \$6400 remains outstanding. **I granted the landlord a monetary order in the sum of \$6400 plus the sum of \$50 in respect of the filing fee for a total of \$6450.**

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the 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: September 15, 2015

Residential Tenancy Branch

