Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER MANAGEMENT LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR; CNR, MNDC, LRE, AS

Introduction

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

- an order of possession for unpaid rent pursuant to section 55; and
- a monetary order for unpaid rent pursuant to section 67.

This hearing also dealt with the tenant's application pursuant to the Act for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70; and
- an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld pursuant to section 65.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord was represented by its agent.

Preliminary Issue – Tenant's Evidence

The landlord received the tenant's evidence on 23 October 2015. The tenant filed a copy of this evidence at the Residential Tenancy Branch on 27 October 2015.

Rule 3.13 of the Rules sets out that where possible, copies of all of the applicant's available evidence must be submitted to the Residential Tenancy Branch and served on the other party in a single complete package. Rule 3.14 of the *Residential Tenancy*

Branch Rules of Procedure (the Rules) establishes that evidence from the applicant must be submitted not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

> In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, qualified by the words "not less than", the last day for the tenant to file and serve her evidence was 23 October 2015.

The tenant filed her application 8 September 2015, but did not file her evidence until 27 October 2015. I accept that the volume of the tenant's evidence may have necessitated service after the fact; however, the large volume of evidence did place the landlord in a difficult position of having to respond very quickly. The landlord consented to my consideration of the tenant's evidence despite the issues with service. On this basis, all of the tenant's evidence has been considered.

Preliminary Issue – Landlord's Evidence

The tenant acknowledged receipt of the landlord's evidence on 29 October 2015. The Residential Tenancy Branch did not receive a copy of this evidence until 3 November 2015. This package of evidence responds to the tenant's claims. The landlord's evidence included a one page document that was not served to the tenant.

Rule 3.15 sets out that an applicant must receive evidence from the respondent not less than seven days before the hearing. In accordance with rule 3.15 and the definition of days, the last day for the landlord to file and serve evidence in reply to the tenant's application was 30 October 2015. The evidence was delivered on time to the tenant, but late to the Residential Tenancy Branch. As there is no undue prejudice to the tenant, I have admitted the landlord's late-filed evidence.

In respect of the one page document that was not served to the tenant, I have not considered it as it was not served to the tenant. Further, the contents of the letter do not disclose anything relevant in respect of the issues before me.

Preliminary Issue – Severance of Unrelated Issue

Residential Rules of Procedure, rule 2.3 states that, if, in the course of the dispute resolution proceeding , the dispute resolution officer determines that it is appropriate to

do so, the officer may sever or dismiss the unrelated disputes contained in a single application with our without leave to apply.

In this case, the tenant's application for a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67 relates to a claim for loss of quiet enjoyment, discrimination, harassment, intimidation, threats, breach of privacy and other allegations.

At the beginning of the hearing, I indicated to the parties that, unless time allowed, the tenant's claim for compensation would be severed from this application and dismissed with leave to reapply on the basis that it was insufficiently related to the remainder of the disputes. There was not sufficient time to address the issues raised by the tenant's claim for monetary compensation. On this basis, the tenant's claim for monetary compensation is dismissed with leave to reapply. I make no finding on the merits of any potential claim. Leave to reapply is not an extension of any applicable time limit.

The tenant was cautioned at the hearing that the Residential Tenancy Branch does not have jurisdiction to apply the *Human Rights Code* pursuant to sections 78.1 of the Act and 46.3 of the *Administrative Tribunals Act*.

Preliminary Issue – Notice at Issue

In the course of the hearing, I heard testimony involving three different 10 Day Notices. One notice was issued 2 September 2015. The landlord and tenant agree that the tenant took issue with the sufficiency of that notice and a subsequent notice to rectify the perceived deficiency was issued 3 September 2015 (the First Notice).

The First Notice was served personally on 3 September 2015. The agent testified that he could not secure the tenant's signature on the proof of service for the First Notice. The tenant testified that she did sign the proof of service and stated that she had a copy, but did not submit it into evidence. In any event, the landlord issued another 10 Day Notice on 9 September 2015 (the Second Notice). The Second Notice was served to the tenant by registered mail.

The tenant acknowledged service of both the First Notice and Second Notice. The tenant applied to dispute the First Notice on 8 September 2015. The landlord applied by way of direct request for an order of possession on the basis of the Second Notice on 28 September 2015. The landlord's direct request application was joined with this application to be heard as a participatory hearing.

For the purposes of this hearing, I accept that the landlord had sufficient notice that the tenant was disputing the issuance of a 10 Day Notice for September 2015. I find that the tenant's application as pleaded is sufficient to dispute both the First Notice and Second Notice. As such, the tenant is not subject to the conclusive presumption in subsection 46(5) of the Act.

Preliminary Issue – Landlord's Amendment

The landlord's application for dispute resolution was filed 28 September 2015. At that time, one month of rent was outstanding. The landlord asked to amend its application to include rent arrears for October and November.

Paragraph 64(3)(c) allows me to amend an application for dispute resolution.

As the tenant reasonably ought to have known that these amounts would accrue if she continued to use and occupy the rental unit, I have allowed the amendment as there is no undue prejudice to the tenant.

The landlord's application is amended to include a request for a monetary order in the amount of $2,805.00 for rent for September, October, and November.

Preliminary Issue – Tenant Disconnected Before Conclusion of Hearing

After I had heard all the parties evidence and submissions, I asked the landlord's agent if, in the event I granted an order of possession, the landlord was prepared to make any concessions with respect to notice. The agent indicated the landlord was not prepared to grant a longer notice period. The tenant disconnected from the hearing shortly thereafter. The line was kept open for two minutes to allow the tenant to reconnect; however, the tenant did not reconnect. No new evidence was received from the agent in the tenant's absence. I concluded the hearing without the tenant present.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession? Is the landlord entitled to a monetary award for unpaid rent?

Is the tenant entitled to an order to suspend or set conditions on the landlord's right to enter the rental unit? Is the tenant entitled to an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld?

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 / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began 1 April 2012. Current monthly rent is $935.00 and is due on the first. The landlord collected a security deposit in the amount of $447.50 at the beginning of the tenancy.

The parties entered into a written tenancy agreement dated 22 March 2012. I was provided with a copy of that tenancy agreement. The tenant is listed as the sole tenant in clause 1 of the agreement. There are no occupants set out in clause 2 of the agreement. Clause 13 of the agreement sets out:

> No person, other than those listed in paragraphs 1 and 2 above, may occupy the rental unit. … A tenant anticipating an additional person to occupy the rental unit must promptly apply in writing for permission from the landlord for such person to become an approved occupant. …

On 3 September 2015, the landlord personally served the First Notice to the tenant. The First Notice was dated 3 September 2015 and set out an effective date of 13 September 2015. The First Notice set out that the tenant had failed to pay $935.00 in rent that was due 1 September 2015.

On 9 September 2015, the landlord served the Second Notice to the tenant by registered mail. The Second Notice was dated 9 September 2015 and set out an effective date of 25 September 2015. The Second Notice set out that the tenant had failed to pay $935.00 in rent that was due 1 September 2015.

The agent and tenant both testified that the tenant was not entitled to deduct rent in relation to any of the following:

- The tenant had not paid an excessive security deposit amount.
- The tenant has not conducted emergency repairs.
- The landlord has not issued a rent increase that is not in compliance with the Act.
- The landlord has not issued a 2 Month Notice to End Tenancy for Landlord's Use.
- There are no prior orders of the Residential Tenancy Branch in respect of this tenancy.

The agent and tenant both testified that the tenant has not paid rent for September, October or November.

The agent denies that any of the landlord's agents have entered the rental unit without providing notice or securing the tenant's permission. The agent testified that the only key to the rental unit held by the landlord is held in the agent's office in the safe. The tenant testified that the issue regarding entry has not been a problem since her locks were changed. The tenant testified that her locks were changed in January or February 2013.

The tenant testified that she asked for permission to have a roommate. The landlord and tenant agree that permission was denied. The tenant submits that other persons are permitted double occupancy for their one bedroom rental units. The agent agrees that this is true for a couple that lives in the residential property, but states that the circumstances in that case is different.

Analysis

Subsection 26(1) of the Act sets out:

> A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

There are various provisions of the Act that permit a tenant to deduct amounts from rent:

- Subsection 19(2) permits a tenant to deduct amounts from rent to recover the excess amounts of a security deposit that did not comply with the Act.
- Subsection 33(7) permits a tenant to deduct amounts from rent for the costs of emergency repairs.
- Subsection 43(5) permits a tenant to deduct the amount of a rent increase which did not comply with the Act from rent.
- Subsection 51(1.1) permits a tenant to deduct one month rent where the landlord has issued a notice to end tenancy pursuant to section 49.
- Subsection 65(1) and subsection 72(2) permit a tenant to deduct rent to recover an amount awarded in an application before this Branch.

There are no other deductions from rent permitted under the Act or regulations. On the basis of the evidence before me, I find that the tenant was not entitled to deduct any amount from her rent. Accordingly, she was responsible for paying her rent when it was due on 1 September 2015.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice. In this case the landlord issued the First Notice and Second Notice.

The landlord issued two notices in respect of the same issue. When two notices are given the issue of waiver may arise. The concept of waiver is discussed in *Residential Tenancy Policy Guideline,* "11. Amendment and Withdrawal of Notices":

> Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. …To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.
>
> …
>
> Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

I interpret the statement in Guideline 11 in relation to waiver on second notices to be in respect of notices issued on different issues. In this case, the landlord issued two notices on the same issue and same material facts, but with different effective dates. The effect issuing the Second Notice is a clear intention to waive the application of the First Notice as they are in respect to the same issue and are mutually inconsistent.

As the landlord has waived the application of the First Notice, I will consider the validity of the Second Notice. The agent testified that the tenant failed to pay rent for September. The tenant admits that she did not pay September's rent. As the tenant has failed to pay her rent in full when due, I find that the 10 Day Notice issued 9 September 2015 is valid and dismiss the tenant's application to cancel the 10 Day Notice without leave to reapply. As the tenant's application to cancel the 10 Day Notice is dismissed, the landlord was entitled to possession of the rental unit on 25 September 2015, the effective date of the 10 Day Notice. As this date has now passed, the landlord is entitled to an order of possession effective two days after it is served upon the tenant(s).

The tenant admits that she has not paid September's, October's or November's rents. The agent testified that the tenant has total rent arrears of $2,805.00. I find that the landlord is entitled to this amount. I issue a monetary order in the landlord's favour in the amount of $2,805.00, to enable the landlord to recover unpaid rent from the tenant.

The tenant has applied to restrict the landlord's right to entry. The agent denies that there were ever any issues with entry. The tenant states that there has not been a problem with entry since January of February 2013. As there has not been any recent improper entry alleged, I decline to issue an order restricting the landlord's right to enter the rental unit as the tenant has failed to show that the landlord is currently not complying with the rules restricting the landlord's right of entry.

The tenant has applied for an order allowing her to assign or sublet the rental unit. As the tenancy is ending, this order is moot and I decline to consider it.

The agent testified that the landlord continued to hold the tenant's $447.50 security deposit, plus interest, paid at the beginning of the tenancy. Over that period, no interest is payable. Although the landlord's application does not seek to retain the security deposit, using the offsetting provisions of section 72 of the Act, I allow the landlord to retain the security deposit in partial satisfaction of the monetary award.

Conclusion

The following claims made by the tenant are dismissed without leave to reapply:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70; and
- an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld pursuant to section 65.

The tenant's claim for a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67 is dismissed with leave to reapply.

The landlord is provided with a formal copy of an order of possession. Should the tenant(s) 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 $2,357.50 under the following terms:

Item	**Amount**
Unpaid September Rent	$935.00

Unpaid October Rent	935.00
Unpaid November Rent	935.00
Offset Security Deposit Amount	-447.50
Total Monetary Order	**$2,357.50**

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) 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 subsection 9.1(1) of the Act.

Dated: November 09, 2015

Residential Tenancy Branch