



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, FF, CNR

Introduction

This hearing was scheduled to consider cross-applications pursuant to the *Residential Tenancy Act* (the “Act”).

The tenants seek

- cancellation of the landlords’ 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “10 Day Notice”) pursuant to section 46; and
- recovery of the filing fee for this application from the landlords pursuant to section 72.

The landlords seek:

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

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord, VK (the “landlord”) spoke on behalf of both landlords. The tenant SH (the “tenant”) spoke on behalf of both tenants.

As both parties were in attendance I confirmed there were no issues with service. The landlord confirmed receipt of the tenants’ application for dispute resolution hearing package (the “Tenant’s Application”). The tenant confirmed receipt of the landlords’ application for dispute resolution hearing package (the “Landlord’s Application”). In accordance with sections 88 and 89 of the *Act*, I find that the parties were duly served with copies of each other’s application and evidence.

Issue(s) to be Decided

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

Background and Evidence

While I have turned my mind to all the 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 parties' claims and my findings around each are set out below.

The parties agreed on the following facts. This tenancy began in September, 2014. There is no written tenancy agreement between the parties. The monthly rent was initially \$1,000.00 payable on the first of each month. A security deposit of \$500.00 was paid by the tenants at the start of the tenancy and is still held by the landlords. There was an agreement that the tenants would pay a portion of the electric bills if the amount charged by the utility company exceeded a set amount but the parties testified that this surcharge was never enforced.

The landlord testified that the tenancy agreement was for the two tenants to reside in the rental unit. The landlord testified that in or about September, 2016 relatives of the tenants began residing in the rental unit as well. The landlord said that the parties entered into a new tenancy agreement at that time with a new monthly rent of \$1,250.00 payable on the first of each month. This arrangement was, again, not put in writing. The landlord testified that the tenants paid this new rental amount in full for the months of October, November and December. The landlord testified that the tenants failed to make any payment for rent in January. The landlord said that the tenants always pay in cash. The landlord testified that the landlords have not issued receipts for the rent payments and the tenants have not requested receipts.

The tenant testified that the monthly rent is \$1,000.00 and the increase by \$250.00 was a surcharge applicable only for the time that additional occupants were in the rental unit. The tenant testified that the relatives are his wife's parents and they stayed in the rental unit for a few months while they were in the country. The tenant testified that his in-laws have returned to their home country and therefore the monthly rent has reverted to \$1,000.00.

The tenant testified that he has made full payment of the January rent in the amount of \$1,250.00 on December 31, 2016, handing the cash in person to the landlord, VK. The tenant stated that earlier that day he withdrew \$1,000.00 from his own bank account and combined it with \$250.00 which was owed to him by an associate. The tenant testified that he attended at the landlord's address and provided the cash to VK in the presence of his associate. He said that he requested the landlord issue a receipt for the payment. The tenant said that he was told by the landlord that the receipt book could not be located and a receipt would be issued later. The tenant testified that he does not receive receipts for his rent payments and does not usually ask for a receipt. The tenant testified that he requested a receipt for January but he has not received one from the landlord.

The tenant testified that the landlords have harassed him for rent payment in the past, attending at his wife's place of work when he has been late delivering payment. He said that while he has paid the \$1,250.00 rent for January in full the landlords have continued to demand payment of the rent. The tenant testified at various points in the hearing that the landlords have demanded payment of: \$1,250.00 full rent for January; full rent at a newly set rate of \$1,500.00; and \$250.00 in addition to the full \$1,250.00 already paid. The tenant gave evidence that there have been recent violent altercations with the male landlord and the landlord's family when they have attended at his rental unit to demand rent payment.

The landlord testified that on the date that the tenant claims he made rent payment she was recuperating from a medical procedure and was bedridden. The landlord is unaware of payment being received by any of the landlord's family members who resides at the landlords' residence. She denies that the tenant made rent payment on that date or at all.

Analysis

In accordance with subsection 46(4) of the *Act*, the tenant must either pay the overdue rent or file an application for dispute resolution within five days of receiving the 10 Day Notice. Where a tenant applies to dispute a 10 Day Notice, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 10 Day Notice is based. In the present case the landlord testified that there was a rent arrear of \$1,250.00 at the time the 10 Day Notice was issued. The tenants deny that there was a rental arrear and testified that a cash payment in the amount of \$1,250.00 was made on December 31, 2016.

Given the absence of written evidence regarding this tenancy agreement and conflicting testimony regarding payment of the monthly rent I must first make a determination as to the credibility of the evidence provided by the parties. I have considered the parties' testimonies, their content and demeanor as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

While I find this tenancy to be marked by deficiencies and ambiguity, considered in its totality, I find the evidence presented by the landlords to be somewhat more credible than that of the tenants. I find the tenant's testimony to be inconsistent, argumentative and focused on irrelevant or peripheral matters. I find it ill-advised that the tenants would pay \$1,000.00 in cash monthly to the landlords without requesting a receipt or some evidence that payment had been accepted, but I accept that this was the arrangement made by the parties. I do not find it credible that after several years of this arrangement of making rent payments without requesting a receipt, the tenants would suddenly have made a request for a receipt specifically for the disputed month. The tenants failed to provide documentary evidence of the January rent payment saying they had requested a receipt but one was not issued by the landlords. However, the tenants had the opportunity to present other evidence of the rent payment such as bank statements showing the withdrawal of cash on that date, or having the associate who attended at the landlords' provide a written statement or attend as a witness, but failed to do so. The tenant testified that he issued payment to the landlord, VK personally. VK testified that she was recovering from a recent caesarian birth and would have been confined to bed rest on the date of the payment. While the landlord did not provide documentary evidence of the medical procedure, the tenant did not dispute the landlord's testimony. The tenants' evidence focused on recent violent altercations with the landlords which I find has only peripheral bearing on the issues before me. The tenant testified that the landlords attended at the rental unit recently to demand rent and the interaction became violent. I find it would be logically consistent for a landlord to demand rent if they have not yet received rent payment. Based on the evidence submitted I find that the landlords' version of events, that the tenants have failed to pay rent for January, 2017, to be more credible than the tenant's evidence.

I accept the landlords' evidence that the tenants failed to pay the full rent due within the 5 days of service granted under section 46(4) of the *Act*. Therefore, I dismiss the tenants' application to cancel the 10 Day Notice and I find that the landlords are entitled to an Order of Possession, pursuant to section 55 of the *Act*.

I find the absence of a written tenancy agreement to be poor practice by the landlords. The *Act* requires that the landlords are obligated to prepare a written tenancy agreement at the commencement of a tenancy. However, in this case I find that the

parties understood their respective obligations and rights and entered into a tenancy agreement in 2014. I accept the evidence of the parties that the tenancy was functioning for several years until recent events. I accept the evidence of the parties that they knew their respective responsibilities as landlord and tenant. I find that there was an enforceable tenancy agreement between the parties. I find that the parties entered into a new tenancy agreement with a monthly rent of \$1,250.00 from October, 2016 onwards. Again, while the landlord did not prepare a written tenancy agreement pursuant to their obligations under the *Act*, I find that the parties understood their responsibilities under the new agreement. The tenants paid the new rent amount of \$1,250.00 for the months of October, November and December. The tenants testified that they paid the amount of \$1,250.00 for the month of January as well. I find that the tenants were aware of their obligation to pay monthly rent at the newly agreed upon rate. I find that the tenants were aware that the amount of \$1,250.00 was the rental amount. The tenants testified that they believe a surcharge for guests would be in contravention of the *Act*. If the tenants believed that they were being charged an illegal surcharge, or a rent increase they did not accept they had several months during which they could have raised the issue. I find the fact that the tenants paid the full \$1,250.00 to be an acceptance of a new tenancy agreement and a new rental rate. I do not accept the tenants' argument that the rent remained \$1,000.00 and a \$250.00 surcharge was payable only while additional occupants were in the rental unit. I find that the tenants provided little evidence in support of their interpretation.

Even if I were to accept the tenants' interpretation of the agreement entered into by the parties, the tenants have provided no evidence that the relatives have left the country and the surcharge no longer applies. The tenants have not submitted flight ticket information, travel itineraries or any information about the date when the relatives left the rental unit. I accept the landlords' evidence that the total amount of arrears for this tenancy is \$1,250.00. I issue a monetary award for unpaid rent owing of \$1,250.00 as at January 26, 2016, the date of the hearing, pursuant to section 67 of the *Act*.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlords to retain the tenants' \$500.00 security deposit in partial satisfaction of the monetary award issued in the landlords' favour.

As the landlords' application was successful, the landlords are also entitled to recovery of the \$100.00 filing fee for the cost of this application. This results in a monetary Order in the landlords' favour in the amount of \$850.00.

Conclusion

The tenants' application is dismissed.

I grant an Order of Possession to the landlords effective **2 days after service on the tenants**. Should the tenants or any occupant 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 issue a monetary Order in the landlords' favour for \$850.00.

The tenant(s) must be served with this Order as soon as possible. Should the tenants 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.

I order the landlords to retain the tenants' security deposit in partial satisfaction of the monetary award issued in this decision.

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: January 30, 2017

Residential Tenancy Branch