Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1153713 BC LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL OPRM-DR AS CNR FFT LAT MNDCT OLC RP RR

Introduction

This hearing dealt with applications from both the landlord and tenants pursuant to the *Residential Tenancy Act* (the "*Act*").

The landlord applied for:

- An order of possession pursuant to section 55;
- A monetary award for unpaid rent pursuant to section 67; and
- Authorization to recover the filing fee from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") pursuant to section 46;
- authorization to assign or sublet the rental unit pursuant to section 65;
- authorization to recover the filing fee from the landlord pursuant to section 72;
- authorization to change the locks to the rental unit pursuant to section 70;
- a monetary award for damages and loss pursuant to section 67;
- an order that the landlord comply with the Act, regulations or tenancy agreement pursuant to section 62;
- an order that the landlord perform repairs to the rental unit pursuant to section 33; and
- authorization to reduce the rent for repairs, service or facilities not provided pursuant to section 65.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The corporate landlord was represented by its agent (the "landlord"). The tenant was represented by

an individual whom the tenant confirmed was their counsel (the "tenant"). At several times throughout the hearing the tenant was instructed by their counsel against giving testimony.

The tenant confirmed receipt of the landlord's 10 Day Notices dated September 10, 2019 and October 4, 2019 and the landlord's application for dispute resolution and evidence. Based on the testimony I find that the tenant was served with the landlord's materials in accordance with sections 88 and 89 of the Act.

The landlord disputed receiving the tenant's application and evidence. The tenant stated that their materials were sent by regular mail, explaining that it was chosen to do so rather than by registered mail after discussion with counsel.

At the outset of the hearing, the landlord applied to change the monetary amount of their application. The landlord indicated that since the application was filed additional rent has come due and the total rental arrear is $7,080.00. As additional rent coming due is reasonably foreseeable, pursuant to section 64(3)(c) of the *Act* and Rule 4.2 of the Rules of Procedure I amend the landlord's Application to increase the landlord's monetary claim from $3,330.00 to $7,080.00.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession?
Is the landlord entitled to a Monetary Award as claimed?
Is the landlord entitled to recover the filing fee from the tenant?
Is the tenant entitled to any portion of their claim?

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 arguments are reproduced here. The principal aspects of the claims and my findings around each are set out below.

The parties agreed on the following facts. The monthly rent for this fixed-term tenancy which began in June 2019 is $3,750.00 payable on the first of each month. A security deposit of $1,875.00 was paid and is still held by the landlord.

The tenant submits that there is an agreement between the parties allowing the tenant to perform work on the rental property which authorizes them to reduce the monthly rent to $1,000.00. The landlord disputes that any such agreement exists.

The landlord issued several 10 Day Notices for rental arrears. The landlord issued a 10 Day Notice dated September 10, 2019 for an arrear of $2,320.00 and a subsequent notice dated October 4, 2019 for an arrear amount of $3,330.00. The tenant confirmed receipt of both notices. The parties gave evidence that no payment has been made by the tenant since the October 2019 10 Day Notice was issued. The landlord testified that as of the date of the hearing, November 28, 2019 the total arrears for this tenancy is $7,080.00.

The tenant submits that they have performed various work on the rental unit in accordance with an agreement between the parties allowing them to deduct the value of the labour from the monthly rent. The tenant further calculates that the landlord owes them $1,500.00 for the work performed.

The tenant said that the rental unit required emergency repairs to leaks in the pipes of the rental unit. The tenant submits that they informed the landlord of the need for repairs but the landlord did not undertake repairs in a reasonable period of time. The tenant gave evidence that they personally incurred expenses in the amount of $1,638.00 for plumbing services.

Analysis

Section 89 of the *Act* establishes the following rules for service of certain documents, which include an application for dispute resolution for a monetary award:

89(1) An application for dispute resolution,...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 document]...

Registered mail is an acceptable method of service of an application for dispute resolution. Regular mail is not an acceptable method provided under the *Act*. The tenant gave evidence that they opted to serve the landlord by regular mail based on advice provided by counsel. The landlord disputes that they have been served with any materials by the tenant. Based on the evidence of the parties, I am not satisfied that the landlord was properly served with the tenant's application for dispute resolution. Consequently, I dismiss the tenant's application in its entirety with leave to reapply.

Section 46(4) of the *Act* provides that upon receipt of a 10 Day Notice to End Tenancy for Non-Payment of Rent a tenant may, within 5 days of receipt, either pay the overdue rent or file an application for dispute resolution.

In the present case the tenant confirmed that they were served with the 10 Day Notice dated October 4, 2019. The tenant further confirmed that they have not made any payment against the arrears, have not filed an application to dispute that 10 Day Notice nor have they amended their application for dispute resolution of September 17, 2019 to add a new claim to dispute this 10 Day Notice.

I accept the evidence of the parties that the tenant failed to pay the full rent due within the 5 days of service granted under section 46(4) of the *Act* nor did the tenant dispute the 10 Day Notice within that 5 day period. Accordingly, I find that the tenant is conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the corrected effective date of the 10 Day Notice, October 19, 2019.

I find that the 10 Day Notice submitted into evidence conforms to the form and content requirement of section 52 of the Act as it is signed and dated by the landlord's agent, provides the address of the rental unit, the effective date of the notice and the reason for the tenancy to end.

I accept the landlord's evidence that the monthly rent for this tenancy is $3,750.00 payable on the first of each month. The amount is recorded on the written tenancy agreement submitted into evidence and was confirmed by the tenant.

While the tenant submits that the full amount of the rent is not payable, I find that there is insufficient evidence in support of the tenant's submission that there is a collateral

agreement between the parties allowing the tenant to perform work in lieu of the monthly rent payments. No documentary evidence of such an agreement was submitted. The tenant's application makes no mention of such an agreement being the basis for non-payment of rent. It is reasonable to expect that if there was an agreement between the parties allowing for a reduction of rent it would be recorded in writing, referenced in correspondence, or be raised by the tenant at some point in their application. I find the tenant's suggestion that rent in the amount of $3,750.00 was reduced to not be supported in the evidence and have no air of reality.

The tenant further submits that they were not under the obligation to pay the full amount of rent as the landlord failed to perform necessary emergency repairs and they were entitled to deduct the cost of the emergency repairs from the monthly rent.

Section 33 of the *Act* describes "emergency repairs" as those repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purposes of:

- repairing major leaks in pipes or the roof,
- damage or blocked water or sewer pipes or plumbing fixtures
- the primary heating system
- damaged or defective locks that give access to the rental unit
- the electrical systems
- in prescribed circumstances, a rental unit or residential property

The *Act* further provides in subsection (3) that:

33 (3) A tenant may have emergency repairs made only when all of the following conditions are met:

(a) emergency repairs are needed;
(b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;
(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

I find that there is insufficient evidence that there were circumstances as prescribed under the Act, that gave rise to the tenant's right to deduct the cost of emergency repairs from the monthly rent. I accept the evidence of the tenant by way of the invoice from the third-party plumbing company that the nature of the repairs performed were

related to blocked water pipes and leaking plumbing fixtures. However, I find that there is little evidence that the repairs were urgent in nature or that they were necessary for health and safety reasons. The description of the work in the invoice shows that the issues were easily resolved and not the source of major risk to health and safety or the preservation of the property.

Furthermore, I find little evidence that the issues were reported to the landlord or that the landlord was permitted a reasonable time to arrange for repairs prior to the tenant unilaterally arranging for these repairs themselves. The parties gave some testimony on the timing of when repairs were undertaken but disagreed on the details and were vague in their recollection of the sequence of events. I find that the testimony without supporting documents is insufficient to establish that the tenant had reported the issue to the landlord and that the landlord was provided a reasonable time to make repairs.

I find that the nature of the repairs were not urgent, necessary for the preservation of the property or the health and safety of anyone so that they could be considered emergency repairs. I further find insufficient evidence that the landlord was provided reasonable time to perform these repairs prior to the tenant taking on the work. Consequently, I find that the tenant has no basis in the *Act* to deduct or withhold any portion of the monthly rent.

I find that the landlord is entitled to an Order of Possession, pursuant to section 55 of the *Act*. As the effective date of the notice has passed, I issue an Order effective 2 days after service.

I find that there was an enforceable tenancy agreement between the parties and the tenant was required to pay rent in the amount of $3,750.00 on the first of each month. I accept the evidence of the parties that the tenant breached the agreement and failed to make rent payments. I accept the evidence of the landlord that the total arrears for this tenancy as of the date of the hearing, November 28, 2019 is $7,080.00. Accordingly, I find that the landlord is entitled to a monetary award in that amount for the unpaid rent for this tenancy.

As the landlord’s application was successful, the landlord is also entitled to recovery of their filing fee of $100.00.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenant's security deposit of $1,875.00 in partial satisfaction of the monetary award issued in the landlord's favour.

Conclusion

The tenant's application is dismissed in its entirety with leave to reapply.

I grant an Order of Possession to the landlord effective **2 days after service 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 issue a monetary order in the landlord's favour in the amount of $5,305.00, which allows the landlord to recover the rental arrears and the filing fee for their application and retain the security deposit for the tenancy.

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 *Residential Tenancy Act*.

Dated: November 28, 2019

Residential Tenancy Branch