

DECISION

Dispute Codes OPR MNR MNSD FF
 CNR OPT FF

Introduction

This hearing dealt with cross applications for Dispute Resolution by the landlord and tenant.

The landlord's application for dispute resolution was to apply for an Order of Possession and to request a Monetary Order for unpaid rent, to keep all or part of the security deposit, and to recover the cost of the filing fee from the tenant.

The tenant's application for dispute resolution was to cancel a notice to end tenancy for the unpaid rent and to obtain an Order of Possession.

Service of the hearing documents, by the landlord to the tenant, was done in accordance with section 89 of the *Act*, given to the tenant in person, at the rental unit, on March 20, 2009 at approximately 9:00 p.m. in the presence of a witness.

Service of the hearing documents, by the tenant to the landlord, was done in accordance with section 89 of the *Act*, given to the landlord in person, at the landlord's office, on March 26, 2009 at approximately 5:30 p.m.

Both the landlord and tenant appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

Preliminary Issues:

The landlord did not enter into the telephone hearing until 1:46 p.m. after the tenant provided verbal testimony. The landlord testified that she had dialled into the conference 3 minutes prior to the hearing time but that she was just put on hold and

listened to music. The hearing was allowed to proceed with the provision that the Dispute Resolution Officer's decision would be reserved until after the hearing telephone conference records could be verified. The tenant's testimony was repeated so that the landlord would be given an opportunity to respond and the tenant was given the opportunity to respond to the landlord's testimony.

It was later determined that if the landlord attempted to call into the conference prior to 1:25 p.m. as listed on the Telus Conferencing system, then her call would not be added to the hearing and would be held in abeyance. As the delay was of no fault of the landlord I find that she did attend the hearing as required.

Issues(s) to be Decided

The issues to be decided are:

1) Landlord's Application

- Whether the landlord is entitled to an Order of Possession under section 55 of the *Residential Tenancy Act*
- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent
- Whether the landlord is entitled to keep all or part of the security deposit in partial satisfaction of their claim pursuant to section 72 of the *Act*

2) Tenant's Application

- Whether the tenant is entitled to cancel an Order of Possession for unpaid rent under section 46(4) of the *Residential Tenancy Act*
- Whether the tenant is entitled to an Order of Possession under section 54 of the *Act*

Background and Evidence

The tenancy began as a fixed term tenancy on April 15, 2006 and after 1 year switched over to a month to month tenancy. Rent is payable on the first of each month at \$584.00 per month and the tenant paid a security deposit of \$280.00 on April 15, 2006. These facts are not in question.

1) Landlord's Application

The landlord testified that the tenant has not paid rent for March, April and May 2009 and that the landlord posted a 10 Day Notice to End Tenancy on the tenant's door on March 2, 2009, in the afternoon, with a listed vacancy date of March 12, 2009. The landlord stated that there were no witnesses to her posting the 10 Day Notice on the tenant's door. The landlord submitted into evidence copies of four letters issued to the tenant dated March 2, March 9, March 15, and March 23, 2009.

The landlord originally requested \$49.00 per month in late payment fees but has requested to change that amount to \$25.00 to be compliant with the *Act*.

The tenant testified that he new nothing of the 10 Day Notice to End Tenancy until he received the landlord's Notice of Dispute Resolution Hearing package.

The landlord has requested a monetary claim consisting of March, April and May rent at \$584.00 per month for a total rental arrears of \$1752.00 plus \$25.00 per month in late payment fees for a total of \$150.00, to recover the filing fee of \$50.00, and an Order of Possession effective as soon as possible.

2) Tenant's Application

The tenant testified that he normally pays his rent with a money order and he thought he had paid March rent that way but when he couldn't find the receipt for the money order he remembered that he paid the March rent by depositing an envelope of cash, as payment of his March rent, into the mail slot of the landlord's office. The tenant testified that he had a witness that would verify that he put the envelope of cash into the mail slot but that the landlord spoke to the witness on the street and offered her cash not to testify against him.

The tenant testified that he has not paid April 2009 or May 2009 rent and that he is still occupying the rental unit.

The tenant testified that he did not receive the 10 Day Notice to End tenancy until he received a copy of the landlord's application for dispute resolution.

The tenant testified that he did try to change the locks on the rental unit, but decided not to as the missing keys were returned to him by a previous guest.

The tenant is requesting an order to cancel the notice to end tenancy and an Order of Possession to allow him to continue to occupy the rental unit.

The landlord testified that today was the first she had ever heard that the tenant was claiming that he paid his rent by cash. The landlord stated that up until now the tenant has told her that he paid his rent with a money order and that all this time she was under the impression that he was looking for a receipt to prove the existence of the money order.

The landlord confirmed that she did speak to the tenant's female friend on the street a few days ago but that the female asked the landlord to pay her in exchange for her testimony in support of the landlord. The landlord stated that she refused the female's offer to testify and that she told the female it was illegal for her to pay for her testimony.

Analysis

The landlord has testified that rent was not paid by the tenant for March 2009 which initiated the landlord to issue a 10 Day Notice to End Tenancy and four written letters to the tenant, continually advising the tenant that he must vacate the rental unit. The landlord testified that the 10 Day Notice to End Tenancy was posted on the tenant's door on March 2, 2009 and is deemed to have been served on March 5, 2009, three days later pursuant to section 90(C) of the *Act*.

The tenant contends that he paid his March rent in cash, that his witness was bribed by the landlord, and that he did not pay April and May rent pending the outcome of this hearing.

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

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 carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current 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.

In the circumstances before me, I find the version of events provided by the landlord to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the landlord over the tenant.

I find that the tenant has breached section 26(1) of the *Residential Tenancy Act* which stipulates that a tenant must pay rent when it is due under the tenant agreement, whether or not the landlord complies with this Act. I hereby grant an Order of Possession effective 2 days upon service of the order to the tenant.

The landlord's application stipulates a request for March and April 2009 rent and during her testimony the landlord requested compensation for the loss of May 2009 rent as well. Section 7 (2) stipulates that a landlord who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss. As there may still be opportunity to re-rent the rental unit for a period in May 2009, I hereby allow the landlord's claim for March and April 2009 rent and dismiss the landlord's claim for May 2009 rent with leave to reapply.

Monetary Order – I find that the landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the tenant's security deposit, and that the landlord is entitled to recover the filing fee from the tenant as follows:

Unpaid Rent for March and April 2009 (\$584.00 x 2)	\$1,168.00
Late payment fees for March and April 2009 (\$25.00 x 2)	50.00
Filing fee	50.00
Sub total (Monetary Order in favor of the landlord)	\$1,268.00
Less Security Deposit of \$280.00 plus interest of \$9.50	- 289.50
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$978.50

Conclusion

I HEREBY FIND that the landlord is entitled to an Order of Possession effective **two days after service on the tenant**. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I HEREBY FIND in favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for \$978.50. The order must be served on the respondent and is enforceable through the Provincial Court and enforced as an order of that Court.

I HEREBY DISMISS the landlord's claim for May 2009 rent with leave to reapply.

I HEREBY DISMISS the tenant's application for an Order to cancel a notice to end tenancy and for an Order of Possession, without leave to reapply.

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: May 12, 2009.

Dispute Resolution Officer