

DECISION

Dispute Codes OPR OPB MNR MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord to obtain an Order of Possession and a Monetary Order for unpaid rent, to keep all or part of the pet and or security deposit, for money owed or compensation for damage or loss, and to recover the filing fee from the tenant for this application.

Both the landlord and tenant appeared, 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.

Issues(s) to be Decided

The issues to be decided based on the testimony and the evidence are:

- Whether the landlord is entitled to an Order of Possession under Section 55 of the *Act* for cause
- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent and loss or damages and to offset their claim against the security and or pet deposit pursuant to section 38 of the *Act*
- Whether the landlord is entitled to recover the cost of the filing fee from the tenant

Background and Evidence

The landlord testified that service of the 10 Day Notice to End tenancy was done in person, by the property manager to the tenant, at the rental unit.

The female tenant/occupant, as listed on the first page of the copy of the lease entered into evidence, appeared at the hearing on behalf of her husband, the male tenant who was named on the landlord's application for dispute resolution.

The tenant testified that service of the first 10 Day Notice to End tenancy was done by the property maintenance person by posting it on the tenants' door April 2, 2009 and was signed by the property administrator and was not dated.

The tenant advised that a second 10 Day Notice to End Tenancy, which was signed and dated by the property administrator, was hand delivered by the property maintenance person on approximately April 3, 2009 to the female tenant.

The tenant testified that they never received a 10 Day Notice to End Tenancy that was signed by the property manager.

The landlord testified that she believe the property manager signed their blank file copy of the 10 Day Notice to End Tenancy and submitted it with the application for dispute resolution.

The landlord testified that the service of the Notice of Dispute Resolution Hearing was served personally by the property manager to the tenant.

The tenant testified that service of the Notice of Dispute Resolution was done in person by the property maintenance person to herself, the female tenant, and not to the male tenant who is listed on the landlord's application for dispute resolution as the tenant.

The landlord advised that the tenancy began January 1, 2008 and ended on May 14, 2009, as per their records. The landlord requested to withdraw their application for an Order of Possession as the tenants have vacated the rental unit.

The tenant advised that they moved out of the rental unit on April 30, 2009 and provided the Dispute Resolution Officer with her forwarding address. The tenant testified that they did not pay April 2009 rent and that they are putting together their evidence for a claim for dispute resolution but have not filed a claim to date.

Analysis

The landlord has withdrawn their application for an Order of Possession.

The purpose of serving documents under the *Act* is to notify the person being served of their breach and notification of their rights under the *Act* in response. The landlord is seeking a Monetary Order in relation to this breach; however, the landlord has the burden of proving that the tenant, as named in the landlord's application for dispute resolution, was served with the Notice of Dispute Resolution Hearing.

In the presence of contradictory testimony I must consider the credibility of each person's statements. In assessing the credibility of the testimony I am guided by the following:

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 tenant to be highly probable given the conditions that existed at the time. Considered in its totality, I favour the evidence of the tenant over the landlord. I find that the landlord has failed to establish that the tenant, as named in the application for dispute resolution, was served with the Notice of Dispute Resolution Hearing, in accordance with section 89 of the *Residential Tenancy Act*.

The tenant testified that they did not pay April 2009 rent because of issues they were having with the landlord. I find that the tenant has contravened section 26 of the *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*, the regulations or the tenancy agreement.

I do not accept the tenant's argument that the tenant's violation was somehow excused due to the landlords' alleged failure to comply with the Act or agreement. Even if the landlord was found to be in violation of the Act, there is no provision in the Act that extends immunity for a reciprocal breach on the part of a tenant.

Conclusion

Based on the above, I have found that the landlord has failed to prove service of the Notice of Dispute Resolution Hearing to the tenant as named in the landlord's application for dispute resolution hearing, and I HEREBY DISMISS the landlord's application with leave to reapply.

In response to the parties' enquiries about the tenants' security deposit, I find that the landlord has complied with section 38 of the *Residential Tenancy Act* by making application to retain the security deposit on April 16, 2009. Although this application has been dismissed, the landlord has been granted liberty to reapply for an order to retain the security deposit.

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 27, 2009.

Dispute Resolution Officer