

DECISION

Dispute Codes CNC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a notice to end tenancy for cause and to recover the cost of the filing fee from the landlord.

Service of the hearing documents, by the tenant to the landlord, was done in accordance with section 89 of the *Act*, hand delivered to the landlord's agent and then sent via registered mail on May 12, 2009.

The landlord, the landlord's agent and the 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

Is the tenant entitled to an Order to cancel a landlord's notice issued for cause pursuant to Section 47 of the *Residential Tenancy Act*?

Background and Evidence

The tenancy is a month to month tenancy which began on May 1, 2007 with the current rent payable on the first of each month at \$1,000.00 per month. The tenant paid a security deposit however the landlord could not testify to the amount.

The tenant testified that he paid a security deposit of \$400.00 on July 1, 2007 and that he was instructed by the landlord to pay this amount to the previous tenant as a refund of their security deposit. The tenant stated that he requested that the landlord put something in his name to prove that he paid the security deposit but that the landlord

did not want this amount recorded in her books. The tenant stated that the security deposit was not paid at the beginning of the tenancy because the rental unit was a mess and the tenant had agreed to clean up the unit before doing a walk through inspection. The tenant stated that the landlord never did a move-in inspection.

The landlord advised that the tenant rents the lower level of a home that is located on a 5 acre piece of property that has a barn and a smaller outer building and a small cabin that the landlord is currently renovating.

The landlord testified that she had a written tenancy agreement with the tenant but that she could not locate it and so she contends that she has a written agreement but that it is not signed. The landlord advised that after the tenant began renting the lower level of the house he requested to rent the barn area and the two came to an agreement whereby the tenant would either pay \$75.00 per month for use of the barn or would work off the amount in a contra arrangement with the landlord. The landlord testified that the barn arrangement was a casual verbal agreement.

The tenant refuted the landlord's testimony and advised that he has never signed nor has he ever been asked to sign a written tenancy agreement.

The landlord testified that the tenant in the upper floor acted as a previous agent for the landlord and that the tenant served this upper floor tenant with the notice of today's hearing. The landlord advised that the upper floor tenant no longer acts as her agent and that this upper floor tenant is moving out of the rental unit July 1, 2009. The landlord stated that she has not yet received the registered mail package sent to her by the tenant but that she was advised of today's hearing by her current agent.

The agent who attended the hearing is the trustee of the landlord's spouse's estate and he advised that the previous agent (upstairs tenant) informed him of today's hearing.

The landlord testified that a 1 Month Notice to End Tenancy for Cause was issued to the tenant by her previous agent (upstairs tenant) and that it was hand delivered to the tenant by the previous agent on May 1, 2009.

The landlord advised that she was at the rental unit in April 2009 and that the previous agent advised the landlord that she had heard that the tenant's wife was moving out. The landlord stated that she had a discussion with the tenant and asked him if things were going to change and if he thought he was going to continue being happy in the rental unit. The landlord contends that she was trying to determine if the tenant was going to get a new roommate but that she never asked him this question directly because she did not want to bring up the issue of his wife leaving.

The tenant testified that the landlord never asked or implied anything with respect to the tenant getting a roommate. The tenant stated that the landlord simply asked the tenant if he was happy living on the property and if the tenant thought his desire to stay on the property would change.

When asked why the 1 Month Notice to End Tenancy was issued the landlord testified that there was an ongoing problem with the tenant not removing his garbage and that they were having rodent issues. The landlord stated that she had a casual conversation with the tenant about removing the garbage weekly and that this conversation took place at some point throughout the two year tenancy. The landlord testified that she never issued the tenant notices in writing or direction in writing about how often the garbage was to be removed.

The landlord stated that the tenant was also found to be smoking in the rental unit. The landlord testified that the upper floor tenant reported to the landlord that she could smell smoke from the lower suite. The landlord testified that one time when she was visiting the upper floor tenant that she too could smell cigarette smoke but that she never approached the tenant about not smoking in the rental unit. The landlord testified that

she never issued a written notice or policy to the tenant about not smoking in the rental unit, nor has she ever discussed smoking with the tenant.

The landlord testified that the tenant has taken on a roommate without her permission. The landlord stated that while rent has never been late that she does not approve of the tenant taking on a roommate. The landlord stated that she does not have a written agreement with the tenant that he cannot take on roommates nor has the landlord ever issued a written request for the tenant not to take on roommates.

The landlord stated that she does not approve of this new roommate because he has four children who come to visit him during the summer which causes an unreasonable number of occupants in the rental unit.

The tenant testified that the rental unit is 1500 square feet with three bedrooms with plenty of room when his two children come to visit. The tenant testified that his children can spend up to 4 days per week with him and the remainder of the week with their mother.

The landlord testified that the tenant has caused health and safety risks to the other tenant by leaving debris in front of the house. When asked what the debris consisted of the landlord stated that it is "stuff, like cardboard boxes". The landlord testified that she has never given the tenant a written request to have the debris remove or stored elsewhere.

While the landlord has selected additional reasons on her 1 Month Notice to End Tenancy she did not testify to those reasons.

The tenant submitted evidence in support of his statement that the landlord has wanted him evicted so she and her daughter can occupy the property.

The landlord refuted the tenant's statement and stated that she wanted to occupy the barn and not the residence while she is renovating the cottage for her own occupancy.

Analysis

The testimony supports that the tenant first served the landlord's previous agent (the upstairs tenant) with the Notice of Dispute Resolution, who then informed the current agent who informed the landlord, and the tenant then sent the hearing package registered mail to the landlord. I find that the notice was served by the tenant to the landlord and to the landlord's agents in accordance with section 89 of the *Residential Tenancy Act*.

A significant factor in my decision is the credibility of the testimony. In judging the credibility 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 demeanor 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 favor the evidence of the tenant over the landlord.

I find that there is no written tenancy agreement and that no written communication has been issued by the landlord to the tenant to inform the tenant of any rules, procedures, or concerns that the landlord may have had.

The landlord has issued a notice to end tenancy for reasons that were never previously brought to the tenant's attention yet the landlord contends that she mentioned things to the tenant in a non-direct, casual fashion. Based on the above I find that the landlord has failed to prove cause in support of the 1 Month Notice to End Tenancy.

Filing fee - \$50.00. I find that the tenant has succeeded in large and that he should recover the filing fee from the landlord.

Decision

I Hereby Order that the 1 Month Notice to End Tenancy, issued on May 1, 2009, is cancelled, and is of no force or effect.

I Hereby Order the tenant to deduct \$50.00 from the monthly rent payable for July 1 2009, to recover the filing fee, pursuant to Section 72(a) of the *Residential Tenancy Act*

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: June 17, 2009.

Dispute Resolution Officer