

DECISION

Dispute Codes CNR ERP RP RR FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to cancel a notice to end tenancy for unpaid rent, and to obtain an Order to reduce rent for repairs, Order the Landlord to make emergency repairs for health and safety reasons, make repairs to the rental unit, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the tenant to the Landlord, was not done in accordance with section 89 of the *Act*, as they were not sent via registered mail or delivered to the Landlord in person. The hearing documents were served to the Landlord by leaving a copy of the documents in the Landlord's mailbox on May 13, 2009.

Both the Landlord and Tenant appeared, 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

Has the Tenant proven his reasons to obtain an Order to cancel a notice to end tenancy for unpaid rent under Section 46 of the *Residential Tenancy Act*, and is the Tenant entitled to an Order to allow him to deduct the cost of repairs from his rent while ordering the Landlord to complete repairs and emergency repairs to the rental unit pursuant to Sections 32, 65, 72 of the *Residential Tenancy Act*?

Background and Evidence

The tenancy began January 24, 2004 as a one year fixed term tenancy and has continued afterwards as a month to month tenancy. Rent is payable on the first of each month in the amount of \$800.00 and the tenants paid a security deposit of \$337.00 on January 23, 2004.

The tenancy agreement was written in the names of the female Tenant and her daughter. The Landlord testified that she knew of the male tenant at the beginning of the tenancy when she checked on the utilities to ensure they were switched into the Tenants' names after occupancy.

The Landlord testified that the Tenant has not paid rent and is in arrears of \$300.00 for April, 2009, \$800.00 for May, 2009 and \$800.00 for June, 2009 for a total rent arrears of \$1,900.00. The Landlord stated that a 10 Day Notice to End Tenancy was issued on May 21, 2009 and put inside the Tenants' mailbox.

The Tenant confirmed receipt of the 10 Day Notice to End Tenancy and confirmed that he did not pay the full amount of rent for April and that he has not paid anything for May or June. The Tenant testified that he was previously in receipt of WCB payments and that in January 2009 he applied for Social Assistance. The Tenant stated that the Landlord had a verbal conversation with the Tenant's Social Assistance Worker whereby the Landlord had agreed to allow the Tenant a reduced rent for February, March, and April 2009.

The Landlord argued that she did not make any agreement about reducing the Tenant's rent and that she would never consider such an agreement as she too has bills to pay.

The Tenant is seeking an Order to have the Landlord make emergency repairs and repairs to the rental unit. The Tenant testified that the roof has been leaking for approximately two years now. The Tenant stated that he told the landlord on a few occasions about the leaky roof and that finally the ceiling collapsed. The Tenant advised that he ended up doing the repairs to the ceiling.

The Landlord testified that she allowed the tenant to repair the ceiling and that the Tenant charged her \$70.00 to do the repairs, an amount that the Landlord allowed the Tenant to deduct from his rent.

The Tenant is claiming that the roof still leaks and that there is damage and mould to the interior of the rental unit. The Tenant confirmed that he was allowed to deduct the \$70.00 from his rent back when he repaired the ceiling.

The Landlord argued that she has never been told of a mould issue nor has she been advised that there are continuing problems with the roof.

The Tenant is seeking a reduction in rent for having to replace the washer, dryer, fridge and stove. The Tenant testified that his washer broke down sometime last winter, October, November or December 2008 and that when he informed the Landlord she told the Tenant that it wasn't the Landlord's problem so the Tenant purchased a used washer and dryer at a cost of \$300.00. The Tenant did not request reimbursement from the Landlord on this item and did not previously apply for dispute resolution. The Tenant stated that during a time when the Landlord was away on vacation, during the summer of 2008, his fridge broke. The Tenant testified that he was working on a job at the time where a fridge and stove were being replaced and the Tenant was given the opportunity to purchase the existing fridge and stove for \$300.00. The Tenant claims that he was not able to contact the Landlord during her absence, to gain permission to replace the fridge and stove so he decided to do so on his own.

The Landlord argued that the tenancy agreement did not show that laundry was included and that she wrote on the agreement "washer and dryer" because the units were already existing and that she gifted these items to the Tenants so it was up to the Tenants to maintain the units. The Landlord argued that she did not give permission for the fridge and stove to be replaced and that although she was away on vacation, the Tenants were advised that her adult sons were looking after her business during her absence and that if there was a problem the Tenant could have left a message for her sons to respond too.

The Tenant is seeking a rent reduction because his rent increases were not issued on the proper form and were not issued for the proper amounts.

The Landlord did not testify in response to the Tenant's claim relating to rent increases.

The Tenant is seeking compensation for a 4 week period back in 2005 when he had no heat as a result of the furnace breaking. The Tenant claims that it took 4 full weeks before the Landlord had the heat repaired because the Landlord was relying on members of her church to repair the furnace instead of calling a proper repair person.

The Landlord argued that it did not take 4 weeks to repair the furnace and that she acted in a timely fashion in getting the furnace repaired.

Analysis

I find that the Tenant did not serve the Landlord with notice of Dispute Resolution in accordance with Section 89 of the *Act*, however given the Landlord's testimony that she did receive the notice in her mailbox I will proceed with the Tenant's application.

Order of Possession - I find that the Tenant has failed to support his request to cancel a Notice to End Tenancy and that the Tenant is in contravention of Section 26 of the *Act* which stipulates that a Tenant must pay rent when it is due under the tenancy agreement. I note that the 10 Day Notice to End Tenancy was issued in the Female Tenant's name as shown on the tenancy agreement and I find that the notice is valid and meets the requirements under sections 52 and 89(2) of the *Residential Tenancy Act*.

The Landlord has requested an Order of Possession for as soon as possible and I find that the landlord has met the requirements pursuant to Section 55(1)(a) of the *Act*.

Monetary Claim for Damage, Loss and Rent Abatement - I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant Tenant would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the Tenant, bears the burden of proof and the evidence furnished by the Applicant Tenant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement
3. Verification of the Actual amount required to compensate for loss or to rectify the damage
4. Proof that the claimant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage

In regards to the Tenant's right to claim damages from the Landlord, Section 7 of the *Act* states that if the Landlord or Tenant does not comply with this *Act*, the non-complying Landlord or Tenant must compensate the other for damage or loss that results. Section 67 of the *Act* grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

The Tenant submitted a claim for a leaky roof and then later testified that he made an arrangement with the Landlord for the Tenant to reduce his rent by \$70.00 and he would repair the ceiling that was damaged by the leaky roof. The Tenant did not supply documentary evidence in support of his claim that the roof continually leaks, nor has he provided a monetary amount for his claim. Based on the aforementioned I find that the Tenant has failed to prove the test for damages as listed above and I hereby dismiss his claim for a leaky roof without leave to reapply.

The Tenant is requesting reimbursement of \$300.00 to remove and replace the washer and dryer and \$300.00 to replace the fridge and stove. The Tenant failed to provide proof that replacement appliances were purchased and at what cost. In the presence of the Landlord's opposing testimony, a significant factor in my decision is the credibility of the Tenant's testimony. In assessing the credibility of the testimony I am driven by:

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.

Based on the above I find that the Tenant has not met the test for damages as listed above, and I hereby dismiss his claim of \$600.00 (\$300.00 for a washer and dryer and \$300.00 for a fridge and stove), without leave to reapply.

The tenant has requested rent abatement for living without heat for four weeks in 2005 and did not provide evidence to support his claim. I find that the tenant has failed to prove the test for damages or loss as listed above and I hereby dismiss the Tenant's claim, without leave to reapply.

Section 60(1) of the *Act* states that an application for dispute resolution must be made within 2 years of the date that the tenancy to which the matter relates ends or is assigned and based on this I find that the tenant's claim for "invalid" rent increases can only consider the rent increase that was issued in September 2007 to be effective December 2007. I note that while the notice of rent increase was not on the *Residential Tenancy Branch* standard form, and not for the correct amount, the notice does meet the requirements as being "in the approved form" requirements as prescribed in sections 42(1) of the *Act*.

The allowable rent increase for 2007 is 4% and I find that the rent should have been increased from \$750.00 to \$780.00 and not to \$800.00. I find that the tenant has overpaid rent in the amount of \$20.00 per month for the period of December 2007 to March 2009 for a total amount of \$320.00 (\$20.00 x 16 months). Section 43(5) of the *Act* stipulates that if a landlord collects a rent increase that does not comply with this

Part, the tenant may deduct the increase from rent. Based on the above I find that the Tenant is entitled to deduct \$320.00 from the outstanding rent owed to the Landlord for April, May, and June 2009.

As the Tenant has not been primarily successful in his application, I hereby dismiss his request to recover the cost of the filing fee from the Landlord, without leave to reapply.

In regards to the landlord's claims and evidence relating to the unpaid rent, I am not able to neither hear nor consider the landlord's claim during these proceedings as this hearing was convened solely to deal with the tenant's application. That being said, I must point out that the landlord is at liberty to make their claims in a separate application and to resubmit their evidence if the landlord wishes to pursue a monetary claim for damage or loss under section 67 of the *Residential Tenancy Act*.

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 Tenant and may be filed in the Supreme 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: June 22, 2009.

Dispute Resolution Officer