

DECISION

Dispute Codes OPR MNSD MNDC FF
 CNC MNDC OLC RPP LAT RR FF

Preliminary Issues

Rule 3.5 of the *Residential Tenancy Branch Rules of Procedure* stipulates that evidence that the applicant intends to rely upon at the dispute resolution hearing must be received by the Residential Tenancy Branch and served on the respondent as soon as possible and at least five (5) days before the dispute resolution proceeding.

Based on the above, I find that the Tenant failed to comply with the Rules of Procedure and I hereby refuse to accept or consider the Tenant's documentary evidence in this decision.

Introduction

This hearing dealt with cross Applications for Dispute Resolution.

The Tenant's application was filed on May 19, 2009 to cancel a notice to end tenancy for cause, to request an Order to have the Landlord comply with the *Act* to return the Tenant's personal property, authorize the Tenant to change the locks to the rental unit, for a monetary claim for reduced rent for loss of services, and to recover the cost of the filing fee from the Landlord for this application.

The Landlord's application was filed on May 22, 2009 to obtain an Order of Possession for cause, to keep all or part of the security deposit, for money owed for compensation under the *Act*, and to recover the cost of the filing fee from the Tenant for this application.

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 spouse, an agent of the Landlord's, while in her car at the rental unit on May 19, 2009.

Service of the hearing documents, by the Landlord to the Tenant was done in accordance with section 89(2) of the *Act*, posted to the Tenant's door on May 22, 2009, which meets the requirement to apply for an Order of Possession. Service of the hearing documents by the Landlord to the Tenant was not done in accordance to section 89(1) of the *Act* and does not meet the requirements for a monetary claim.

Both the Landlord and Tenant appeared, were both represented by agents, 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 submitted by the Landlord was carefully considered.

Issues(s) to be Decided

Has the Landlord proven entitlement to obtain an Order of Possession and a Monetary Order pursuant to sections 38 55 67 72 of the *Residential Tenancy Act*?

Has the Tenant proven entitlement to obtain an Order to cancel a notice to end tenancy, to have the Landlord comply with the *Act*, and a Monetary Order pursuant to sections 47, 67, and 71 of the *Residential Tenancy Act*?

Background and Evidence

The month to month tenancy was based on a verbal agreement which began on October 26, 2008. Rent is payable on the first of each month in the amount of \$930.00 and the Tenant paid a security deposit in the amount of \$465.00 on October 26, 2008. The above mentioned facts are not in dispute.

The Landlord's agent testified that the Landlord requests all rent payments to be in cash as the Landlord is concerned that cheques will not clear and that the Landlord does not provide receipts for rent.

The Landlord's agent advised that the Landlord issued a 1 Month Notice to End Tenancy to the Tenant on May 15, 2009 because the Tenant and his family and disrespected the Landlord, refused to pay their rent in cash, harassed the Landlord on different occasions to reduce the rent, and deposited June 2009 rent directly into the Landlord's bank account without the Landlord's permission.

The Landlord's agent referred to an evening when the Landlord requested to conduct an inspection of the rental unit and the Tenant refused and called 911 to have the police attend. The inspection was conducted in the presence of the police and no damage was present in the rental unit.

The Tenant's agent argued that the Tenant called the police because the Landlord and several of the Landlord's dinner guests attended the rental unit after 10:00 pm on the evening in question and that they began banging on the Tenant's door demanding entrance to conduct an inspection. The Tenant's agent stated that the Tenant felt threatened and concerned for the safety of his family and that is why he called 911 and that the police stayed until after the Landlord conducted his inspection.

A discussion followed where each party presented their concerns and recollections of incidents documented in the Landlord's evidence.

The Tenant's agent testified that the Landlord was preventing the Tenant access to his personal possession which are currently stored in the Landlord's garage and that the Landlord has disconnected the Tenant's cable T.V. and internet connections, and that the Landlord attends the rental unit several times per week, knocking on the door, banging upstairs to purposely disturb the Tenant and his family and to argue about which lights are turned on and how high the temperature is set in the rental unit.

The Tenant's agent has requested that the Tenant and his family be allowed to stay in the rental unit until the end of July, 2009. A discussion followed and both parties agreed

that the Tenant and his family will be allowed to occupy the rental unit until July 31, 2009.

Analysis

I find that in order to justify payment of damages or loss under sections 47 and 67 of the *Act*, the Applicant 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 bears the burden of proof and the evidence furnished by the Applicant 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

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.

A significant factor in my considerations is the credibility of the testimony. In assessing 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 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 testimony of the Tenant over the Landlord's testimony and evidence.

Order of Possession – Based on the agreement between the two parties I grant an Order of Possession effective July 31, 2009 at 1:00 p.m. and that a move-out inspection of the rental property is to be conducted at 1:00 p.m. on July 31, 2009.

Tenant's Property – Based on the testimony before me I find that the Landlord contravened section 30 of the *Act* by restricting the Tenant access to his possessions that are stored in the Landlord's garage. I hereby Order the Landlord to allow the Tenant and his family full and unrestricted access to their possessions that are stored on the Landlord's property and in the Landlord's garage.

Change the Locks – The Tenant has requested permission to change the locks on the rental unit yet did not provide evidence that the Landlord has entered into the rental unit without proper notice, however there was testimony which supported that the Landlord has been interrupting the quiet enjoyment of the Tenant while at the rental unit where the Landlord continues to knock on the Tenant's door and bang from above yelling at the Tenant and his family to turn out lights or to turn down the heat. Based on the aforementioned I find that the Landlord has contravened section 28 of the *Act* and I hereby Order the Landlord to restrict his communication to the Tenant and his family for the remainder of the tenancy, except in the event of an emergency. I hereby Order the Landlord to comply with Section 29 of the *Act* and ensure he does not access the rental unit otherwise.

I hereby dismiss the Tenant's request to change the locks without leave to reapply.

Allow Tenant Reduced Rent – Based on the testimony I find that the Landlord has removed the Tenant's access to cable T.V. and the Internet as of May 15, 2009, a service that was previously included in the tenancy agreement, and I find in favour of the Tenant's request for rent abatement for the remainder of the tenancy (1/2 May, June, July) 2 ½ months at \$50.00 per month = \$125.00. I hereby Order the Tenant to reduce his July 2009 rent by \$125.00.

Payment of Rent – I find that the Landlord has refused to provide the Tenant with receipts for rent payments previously paid for in cash. Based on the aforementioned I hereby Order the Tenant to pay the July 2009 rent (\$930.00 - \$125.00 = \$805.00) by directly depositing the rent amount into the Landlord's bank account.

Filing Fee – As both the Landlord and Tenant have paid a filing fee, and both have been partially successful in their application, I hereby dismiss both their requests to recover the cost of the filing fee from the other.

Landlord's Request for Money Owed and to Keep Security Deposit – I find that the Landlord has failed to serve the Tenant with notice of this hearing in accordance with the *Act* and has failed to prove a monetary claim. I hereby dismiss the Landlord's request to keep all or part of the security deposit and for money owed, without leave to reapply. I Order the Landlord to administer Tenant's security deposit in accordance with Section 38 of the *Residential Tenancy Act*.

Conclusion

I HEREBY FIND that the landlord is entitled to an Order of Possession effective **July 31, 2009 at 1:00 p.m.** 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 Tenant's monetary claim in the amount of \$125.00 and Order the Tenant to reduce his rent payable on July 1, 2009 by \$125.00.

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 29, 2009.

Dispute Resolution Officer