



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes

OPR, CNR, CNC, MNR, MNSD, OLC, & FF

Introduction

This hearing dealt with cross applications by the parties. The landlord filed an application seeking an Order of Possession due to non-payment of rent by the tenant. The landlord also sought a monetary claim due to the non-payment of rent and requested to retain the tenants' security deposit plus interest in partial satisfaction of their claim.

The tenants filed an application to dispute a 10 day Notice to End Tenancy due to Unpaid Rent and to dispute a one month Notice to End Tenancy for Cause. The tenants also were seeking an Order that the landlord comply with the tenancy agreement.

During the first hearing it became apparent that the tenants were relying upon evidence of an alleged verbal agreement made with the landlord. As the landlords were being represented by an agent who was not a witness to the alleged discussions, I adjourned the hearing so that the parties involved in the alleged discussions had an opportunity to hear the tenants' evidence and had an opportunity to respond.

The hearing was reconvened on July 2, 2009, again by conference call. I explained to the new participants what had transpired in the first hearing, why they were asked to join the proceeding and the submissions presented by the tenants prior to the hearing being adjourned.

Only one of the tenants appeared for the hearings; however, during the second hearing this tenant was experiencing problems with his cell phone reception. The tenant indicated that he was not near a land line telephone when I asked if he could call on another phone. At approximately 3:06 p.m. the tenant hung up and was going to try to call back into the conference. The other tenant named in this proceeding did not appear for either of the scheduled hearings.

The landlord, the landlord's agent and I waited for twenty minutes for the tenant to return to the hearing. I attempted to call the tenant on two different phone numbers during that time as well, but each call went to an answering machine.

I decided at that point to proceed with the hearing. The tenant was aware of the reconvened hearing and had the responsibility of being prepared and able to proceed. I

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did not find it appropriate to adjourn the hearing a second time due to the difficulties experienced by the tenant, as I believed that the tenant could have, or should have been, prepared to proceed with the hearing as scheduled despite potential cell phone failures.

In the absence of the tenant, I proceeded with the hearing. As the tenant had a witness available for this proceeding I called the tenants' witness to present evidence based on the submissions previous given by the tenants'.

Issues(s) to be Decided

Should the Notices to End Tenancy, one due to non-payment of rent and one due to cause, be set aside?

Was there a verbal agreement between the parties to reduce the rent in exchange for repairs to a fence on the rental property?

Background and Evidence

The landlord and tenants signed a tenancy agreement on April 19, 2009. The written tenancy agreement shows that the tenancy was to begin on May 15, 2009 for a fixed term ending on June 1, 2010, at which point the tenancy could continue on a month to month basis. I note that the agreement originally indicated the start date of April; however, this was crossed out and changed to May. The crossed out portion was initialled by one of the tenants. The rent was to be \$1,650.00 per month and the tenants were to pay a security deposit of \$825.00 on April 24, 2009 and a pet deposit on May 15, 2009. Documentary evidence submitted by the landlord shows a cheque dated for May 15, 2009 for the sum of \$825.00, with a memo stating "Rent for May 1 to June 1", and a second cheque dated June 1, 2009 for the sum of \$1,650.00 with a memo stating "June Rent". Both of these cheques were returned as not having sufficient funds. According to the testimony of the parties a security deposit of \$825.00 was paid in cash on April 24, 2009. The pet deposit has not yet been paid.

In addition to the written tenancy agreement the landlord submitted a copy of the move-in and move-out condition inspection report. This document was signed by one of the tenants on May 15, 2009. Under the section titled, "W. Repairs to be Completed at start of the tenancy", the following was written in, "Fence to be replaced later".

Based on the documentary evidence provided by the landlord, the tenants' cheque dated May 15, 2009 was returned with insufficient funds on May 21, 2009 and then the June 1, 2009 cheque was returned. On June 3, 2009 the landlord served the tenants with two notices to end tenancy by posting them on the door. One was the 10 day

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Notice to End Tenancy due to Unpaid Rent and the other was a one month Notice to End Tenancy for Cause due to the tenants' failure to pay the pet deposit within 30 days of the start of the tenancy.

During the first hearing, the tenant present, submitted that a verbal agreement was reached between himself and the landlord where the tenants would replace/repair the fence on the rental property in exchange for one and half month's rent. The tenant submitted that a friend of his was in the area helping them move in and this individual overheard this conversation and verbal agreement.

The tenant stated that the landlord failed to provide the material for the project and therefore he could not proceed with the work. Subsequently the landlord served the tenants with notice to end the tenancy. The tenant stated that when they signed the tenancy agreement they provided the landlord with the two post-dated cheques but after the oral agreement was reached the landlord was not supposed to process the cheques.

In the tenants' absence, I called the tenants' witness who was waiting to present evidence. The tenants' witness provided the following affirmed evidence:

- The witness stated that on May 15, 2009 around mid afternoon while he was helping the tenants move into the rental unit a man came to talk with the tenant;
- They were discussing things in the carport and the witness indicated that he overheard pieces of the conversation as he continued to work;
- The witness stated that he believed the tenant and the man were discussing the repair of the fence, but acknowledged that he was not specifically listening to the conversation and the tenant filled him in with the specifics afterwards; and
- The witness submitted that he believes that the parties entered into an agreement to repair the fence.

The landlord denied any verbal agreement about the tenants repairing the fence in exchange of rent owed. The landlord acknowledged that they discussed the fence with the tenants and mentioned that it may be replaced in the future and the landlord also acknowledged that they may consider the hiring the tenants to do the work; however, no commitments were made. The landlord submits that the tenants' claims are not corroborated in any way and the tenants' claims fly in the face of the written agreements signed by both parties.

The landlord relies on the move-in condition report which confirms that the fence would be fixed later. The landlord questioned why the tenants would provide the landlord with

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cheques for rent during the exact period for which the tenants would have allegedly been replacing the fence in exchange for that money. The landlord also stated that the fence is not in disrepair and there is no immediate need to replace it so there would be no motivation for the landlord to enter into a verbal agreement with the tenants.

Analysis

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*.

The landlord is seeking an Order of Possession and a monetary claim due to non-payment of rent by the tenants. The tenants have disputed this claim by arguing that there was an agreement that their rent for one and a half month's would be waived in exchange for replacement of the fence on the rental property. There is no written documentation to support the tenant's claim.

I accept that the tenants' witness overheard parts of a conversation between one of the tenants and the landlord; however, the witness acknowledged that he did not overhear specifics and only heard that the parties were discussing the fence in passing. The witness also acknowledged that the tenant filled him in on the details afterwards.

The tenants have the burden to proving their claim that there was some oral agreement made which waived the tenants' obligation to pay the rent for one and a half month's. I do not accept the tenants' argument and I am not satisfied that the witness evidence has sufficient corroborated the tenants' version of events. I accept the landlord's argument that they would not have entered into an oral agreement, as the tenants' claim, as it is not consistent with the fact that they entered into this tenancy by having everything in writing.

I place the greater weight on the written tenancy agreement and I reject the tenants' argument that there was a secondary oral agreement made after they signed the written tenancy agreement. I deny the tenants' application and find that the 10 day Notice to End Tenancy due to Unpaid Rent is valid.

I grant the landlord's application and issue an Order of Possession effective **two (2) days** after it is served upon the tenants. This Order may be filed with the Supreme Court of British Columbia and enforced as an Order of that Court.

I also find that the landlord has established a monetary due to unpaid rent totally \$2,525.00 comprised of the outstanding pro-rated rent for May 15 to 31st, 2009 and June 2009 plus the recovery of the \$50.00 filing fee paid for this application.



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The landlord is at liberty to file a further application for dispute resolution if the tenants have also failed to pay the rent owed for “use and occupancy” of the rental unit for the month of July 2009.

I grant the landlord's request to retain the tenants' security deposit plus interest of \$825.00 in partial satisfaction of this claim. I grant the landlord a monetary Order for the remaining sum owed of **\$1,700.00**. This Order may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

Conclusion

The tenants' application is dismissed without leave to re-apply. The landlord's application has been granted and an Order of Possession and a monetary Order issued due to the tenants failure to pay rent.

Dated: July 21, 2009.

Dispute Resolution Officer