

## **DECISION**

Dispute Codes      OPR MND MNR 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, for damage to the unit, and to recover the cost of the filing fee from the tenant for this application.

The landlords 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 unpaid rent
- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent and for damage to the unit
- Whether the landlord is entitled to a monetary claim to recover the cost of the filing fee from the tenant pursuant to section 72 of the *Act*

### Background and Evidence

The tenancy began August 1, 2007 with the current rent payable on the 1<sup>st</sup> of each month in the amount of \$575.00. The tenant paid a security deposit of \$281.50.

The landlord/partner testified that he hand delivered the Notice of Dispute Resolution to an Adult female at the tenant's rental unit, on approximately April 22, 2009.

The tenant disputed the landlord's statement and stated that he found the Notice of Dispute Resolution on the floor, outside his door to the rental unit.

The resident manager testified that he hand delivered, to the tenant at the rental unit, a copy of the 10 Day Notice to End Tenancy, issued on March 30, 2009 for unpaid rent from October 2008.

The landlord/partner testified that the tenant threatened to kill the resident manager and that the tenant is conducting illegal activity in the rental unit and has had a lot of visitors to the rental unit over the recent past.

The landlord/partner testified that the tenant failed to pay October 2008 rent but that rent has been paid on time and directly to the real estate office for every month after October 2008. The landlord/partner did not testify to any collection attempts or past requests for payment of the alleged outstanding rent.

The tenant testified that everyone in the entire building had been paying their rent to a different real estate company that everyone was considered to not have paid their rent because they were all sending it to the wrong location. The tenant stated that once they knew who the new company and location was, they had no problems paying their rent.

The landlord/partner testified that there as not been a change in real estate companies and that the tenant is wrong with his explanation.

The landlord is requesting to have the tenant Order to vacate the rental unit and to claim for the one month of outstanding rent.

### Analysis

Section 89 of the *Residential Tenancy Act* stipulates that service of certain documents, such as a Notice of Dispute Resolution Hearing, must be served to the respondent, in this case the tenant, in one of the following ways: (1) by leaving a copy with the tenant

personally, (2) by sending a copy by registered mail to the address at which the person resides (3) by sending a copy by registered mail to a forwarding address provided by the tenant, or (4) as ordered by the director under section 71 of the *Act*. Based on the above and the landlord/partner's testimony, I find that service of the Notice of Dispute Resolution Hearing was not done in accordance with the *Residential Tenancy Act*, however the tenant did appear at the hearing, and testified that he did in fact receive a copy of the notice however not in a manner that the *Act* stipulates.

When determining the validity of the 10 Day Notice to End Tenancy, I must consider the landlord's conduct and actions, or lack thereof, in relation to the allegation that rent was not paid for October 2008. The landlord testified that the tenant failed to pay October 2008 rent and that no action was taken to try and collect the \$575.00 of unpaid rent until 5 months later, when a 10 day notice to end tenancy was issued. The tenant testified that rent was paid for October 2008 and that it was issued to the previous real estate company. In assessing the credibility of the testimony before me 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 favor the testimony of the Tenant over the Landlord.

In this situation I find that the tenancy was reinstated as the landlord continued to accept the tenant's rent payments for the months of November 2008, December 2008, January 2009, February 2009, and March 2009 without notifying the tenant that there was an issue with October 2008 rent not being paid. Based on the aforementioned I hereby cancel the 10 Day Notice to End Tenancy issued on March 30, 2009 and dismiss the landlord's application without leave to reapply.

In response to the landlord/partner's testimony in relation to the tenant's actions and threats, the landlord is at liberty to make application for an Order to End Tenancy early or to issue a 1 Month Notice to End Tenancy for Cause then apply for an Order of Possession based on this notice, and to submit evidence in support of their application to the *Residential Tenancy Branch*.

#### Conclusion

**I hereby Order** that the 10 Day Notice to End Tenancy, issued on March 30, 2009, is cancelled, and is of no force or effect.

**I hereby dismiss** the landlord's application without leave to reapply.

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 01, 2009.

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Dispute Resolution Officer