

## **DECISION**

Dispute Codes      OPR MNR MNSD MNDC FF  
                         CNR OLC ERP FF O

### **Introduction**

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed to obtain an Order of Possession for unpaid rent, for a Monetary Order for unpaid rent, for money owed or compensation for damage or loss under the Act, to retain all of the security deposit, and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed to obtain an Order to cancel a notice to end tenancy for unpaid rent, to Order the Landlord to comply with the Act, to Order the Landlord to make emergency repairs for health and safety reasons, to recover the cost of the filing fee from the Landlord for this application and to Order the Landlord to make the issue of collecting money for utilities to be his problem.

Service of the hearing documents, by the Landlord to the Tenant, could not be confirmed as the Landlord did not attend the hearing. The Tenant testified that after refusing to sign for papers from a women sent by the Landlord, the Tenant received copies of the Landlord's application and some evidence via registered mail.

Service of the hearing documents, by the Tenant to the Landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on June 18, 2009. Mail receipt numbers were provided in the Tenant's documentary evidence. I note that the registered envelope was sent to the Landlord at the address the Landlord provided on the 10 Day Notice to End Tenancy and that the registered mail was returned marked unclaimed and no such address. The landlord was deemed to be served the hearing documents on June 23, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The Tenant and her Witness appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

The Landlords did not appear to present their case for their own application and did not appear in response to the Tenant's application, despite being served with notice of the hearing in accordance with the *Residential Tenancy Act*.

All of the testimony and documentary evidence was carefully considered.

#### Issues(s) to be Decided

Is the Landlord entitled to an Order of Possession and a Monetary Order under Sections 38 55 67 and 72 of the *Residential Tenancy Act*?

Is the Tenant entitled to Orders under sections 27, 46, 62, 33, and 72 of the *Residential Tenancy Act*?

#### Background and Evidence

The tenancy began on September 1, 2007 prior to the current Landlords purchasing the rental property in approximately January 2008. The Tenant advised that the current rent is payable on the first of each month in the amount of \$1,250.00 for the upper floor of the rental house and that she paid \$625.00 as a security deposit on approximately September 1, 2007.

The Tenant testified that the Landlord advised her that the utilities were in the tenant's name who occupies the lower level of the rental house and that the Tenant must paid ½ of the natural gas and hydro bills directly to the tenant of the lower level.

The Tenant argued that even though she and her boyfriend always paid half of each bill to the lower tenant, their bills kept getting higher and they kept getting issued disconnection notices until finally on approximately May 11, 2009 the natural gas was disconnected.

The Tenant testified that when the natural gas was disconnected they were without hot water and heat and that she called the Landlord about this issue and the Landlord told the Tenant that it was not his concern and the Landlord instructed the Tenant that she had to work it out with the tenant in the lower suite.

The Tenant stated that she did not pay anything towards June or July 2009 rent to try and force the Landlord to reconnect the natural gas. The Tenant testified that when she did not pay the June 2009 rent that the Landlord issued her a 10 Day Notice to End Tenancy on June 12, 2009 and that the Landlord initially only served her with page 1 of the notice. The Tenant stated that after she read the notice she realized that it was page 1 of 2 pages she called that Landlord and told him that he failed to give her the second page. The Tenant stated that the Landlord brought her the second page later that evening.

The Tenant argued that she paid an additional amount of \$86.00, towards the natural gas bill, on June 6, 2009, to the lower tenant, in an attempt to have the natural gas reconnected.

The Tenant is seeking damages for having to go approximately 9 weeks without hot water and without heat. The Tenant argued that she, her boyfriend and her teenage daughter were forced to go to either the public swimming pool at a cost of \$5.20 per person, or to the Tenant's Mother's home to shower.

The Tenant's Witness testified that the natural gas was turned off approximately May 11, 2009 and was not reconnected until approximately July 13, 2009. The Witness confirmed that they had to go to either the public swimming pool or the Tenant's Mother's home to have their daily shower and that they had to live without hot water or heat. The Witness stated that they were lucky that it wasn't too cold during the day but that it still cooled off quite a bit in the evening.

Both the Witness and the Tenant advised that they have had no communication from the Landlord regarding the reconnection of the service and that they do not know who paid to have the natural gas reconnected.

The Tenant was concerned that she would be in this situation again with the hydro because they received disconnection notices from BC Hydro as well.

### Analysis

#### **Landlords' Application**

Section 61 of the *Residential Tenancy Act* states that upon accepting an application for dispute resolution, the director must set the matter down for a hearing and that the Director must determine if the hearing is to be oral or in writing. In this case, the hearing was scheduled for an oral teleconference hearing. In the absence of the applicant Landlords, the telephone line remained open while the phone system was monitored for ten minutes and no one on behalf of the applicant Landlords called into the hearing during this time. Based on the aforementioned I find that the Landlords have failed to present the merits of their application and the Landlords' claims were dismissed without leave to reapply.

I find that the 10 Day Notice to End Tenancy was not served in accordance with the Act as only 1 page of the Notice was served initially to the Tenant. Based on the aforementioned I hereby order that the 10 Day Notice to End Tenancy issued on June 12, 2009 is cancelled and of no force or effect.

#### **Tenant's Application**

Given the evidence before me, in the absence of any evidence from the Landlords, who did not appear to present the merits of their own application, and despite being properly served with notice of this proceeding, I accept the version of events as discussed by the Tenant and corroborated by her witness.

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 Tenant 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 doing whatever is reasonable to minimize the damage or loss

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.

Item 1 of the *Residential Tenancy Policy Guideline* stipulates that a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy is likely to be found unconscionable. In this situation I find that the Landlords' expectation that the lower tenant is to be responsible for collecting money and paying the bills for utilities that are deemed essential services for the upper Tenant is unconscionable.

Section 27 of the *Residential Tenancy Act* stipulates that a Landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of

the rental unit as living accommodation. I also note that #1 of the *Residential Tenancy Policy Guideline* states that a landlord must continue to provide a service or facility that is essential to the tenant's use of the rental unit as living accommodation. I find that hydro and natural gas are essential services and fall under the Landlord's responsibility as listed above.

Based on the testimony and documentary evidence before me I find that the Tenant has paid her share of the natural gas bills up to the point when it was disconnected. I have determined that the Tenant is responsible to pay only her share of the natural gas bill from the time the utility was reconnected in July 2009 and that the Tenant is not responsible for any arrears or outstanding amounts owing for past usage of natural gas.

Based on the above I find that the Tenant has proved the test for damage and loss as listed above and I approve their claim in the amount of \$2,400.30 which is comprised of \$5.20 per shower for each of the 3 occupants per day and \$7.50 for loss of heat, suffering and inconveniences per each of the 3 occupants per day for 9 weeks. ( $\$7.50 + \$5.20 = \$12.70 \times 3 \text{ occupants per day} \times 7 \text{ days} \times 9 \text{ weeks} = \$2,400.30$ ).

As the Tenant has been successful in her claim I find that she is entitled to recover the cost of the filing fee from the Landlord for this application.

I do not accept the Tenant's argument that the Tenant's violation of withholding rent, was somehow excused due to the Landlords' alleged failure to comply with the Act or agreement. Even if the Landlord was found to be in violation of the Act, there is no provision in the Act that extends immunity for a reciprocal breach on the part of a Tenant.

I hereby order the Tenant's monetary claim to be off-set against the amount owing to the Landlord for rent as follows:

Tenant's damage and loss as listed above	\$2,400.30
Filing fee	50.00
Sub total (Monetary Order in favor of the Tenant)	<b>\$2,450.30</b>
Less rent owed to the Landlord for June and July 2009 (\$1,250.00 x 2)	- 2,500.00
<b>TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD</b>	<b>\$49.70</b>

I hereby Order the Tenant to pay the Landlord \$49.70, as payment in full for June and July 2009 rent as documented above, immediately upon receipt of this decision. A monetary order for \$49.70 will be issued to the Landlord.

#### Conclusion

**I HEREBY ORDER** that the 10 Day Notice to End Tenancy issued on June 12, 2009 is cancelled and of no force or effect.

**I HEREBY DISMISS** the Landlords' application without leave to reapply.

**I HEREBY ORDER** the Landlord to provide the Tenant with an invoice for the Tenant's share of hydro and natural gas usage, (either monthly or bi-monthly whatever the regularity of the utility bill may be), supported by a copy of the original natural gas and hydro bill, and that the Landlord is hereby ordered to issue the Tenant a written receipt every time the Tenant makes a payment towards a utility bill.

A copy of the Landlord's decision will be accompanied by a **Monetary Order** for \$49.70. The order must be served on the respondent Tenant and is enforceable through the Provincial Court 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: July 27, 2009.

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Dispute Resolution Officer