



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

CNR

Introduction

This hearing was scheduled in response to the Tenant's Application for Dispute Resolution, in which the Tenant has made application to set aside a Notice to End Tenancy for Unpaid Rent and for an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act)*. At the hearing the Tenant withdrew his application for an Order requiring the Landlord to comply with the *Act*.

Both parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present relevant oral evidence, to ask relevant questions, and to make submissions to me.

Issue(s) to be Decided

The issue to be decided is whether the Notice to End Tenancy for Unpaid Rent, served pursuant to section 46 of the *Residential Tenancy Act (Act)*, should be set aside.

Background and Evidence

The Landlord and the Tenant agree that this tenancy began on March 05, 2004; that the Tenant is currently required to pay monthly rent of \$640.00 on the first day of each month; that a Ten Day Notice to End Tenancy for Unpaid Rent was placed in the Tenant's mail box on September 08, 2009; and that the Tenant disputed this Notice on September 16, 2009.

The Landlord and the Tenant agree that the Tenant generally pays his rent in cash or by money order. The Tenant stated that he usually receives a receipt a couple of days after he pays his rent in cash and that on occasion he has to prompt the Landlord to provide a receipt. The female Agent for the Landlord stated that when the Tenant pays rent in cash he leaves the payment with her; that he leaves before she has time to issue a receipt; and that she always leaves a receipt in his mail box on the same day that payment was made.

The Tenant stated that he went to the office on the morning of September 02, 2009; that he handed \$640.00 in cash to the female Agent for the Landlord as she was walking down the hall with the male Agent for the Landlord; that the female Agent for the Landlord told him that she would provide a receipt later that day; that the female Agent for the Landlord did not provide a receipt for the payment; and that the male Agent for the Landlord witnessed the payment.

The female Agent for the Landlord stated that she did not receive \$640.00 in cash from the Tenant; that the Tenant has not yet paid rent for September of 2009; and that she did not meet with the male Agent for the Landlord on the morning of September 02, 2009. The male Agent for the Landlord, who is the supervisor of female Agent for the Landlord, stated that he was not at the residential complex on the morning of September 02, 2009 and that he did not witness the Tenant pay his rent for September.

The Landlord and the Tenant agree that the Tenant paid rent for October of 2009 and that he was issued a receipt that clearly states the rent was being accepted for "use and occupancy only". The Landlord and the Tenant agree that the Tenant paid rent for November of 2009 and that he was issued a receipt that does not indicate that rent was being accepted for "use and occupancy only". The Tenant stated that he was not advised that rent was being accepted for use and occupancy when the payment was made.

The female Agent for the Landlord stated that the employee who issued the receipt was a new employee; that the employee had been instructed to advise the Tenant that the rent was being accepted for use and occupancy only; and that she does not know if the new employee verbally advised the Tenant that rent was being accepted for use and occupancy only.

Analysis

The evidence shows that the Tenant is currently required to pay monthly rent of \$640.00 on the first day of each month.

After hearing the contradictory evidence in regards to the payment of rent for September of 2009, I find that the Tenant has not paid the rent that was due on September 01, 2009. I favoured the evidence of the female Agent for the Landlord over the Tenant in this regard partly because the version of events provided by the Tenant was inconsistent with the evidence of the individual the Tenant contends witnessed the payment. In reaching this conclusion I was strongly influenced by the evidence of the male Agent for the Landlord who specifically stated that he was not in the building at the time the Tenant alleges he paid his rent for September.

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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 improbable given the conditions that existed at the time. I find that it is unlikely that the Landlord would have kept a rent payment that is made to her in front of a supervisor and then immediately proceed to serve the Tenant with a Notice to End Tenancy, when that Notice would surely come to the attention of her supervisor.

I find, on the balance of probabilities, that the Tenant did not pay rent for September of 2009 and that he still owes \$640.00 in rent for that month. Section 26(1) of the *Act* stipulates, in part, that a tenant must pay rent when it is due unless the tenant has a right under the *Act* to deduct all or a portion of the rent. In the circumstances before me, there is no evidence to indicate that the Tenant has the right to deduct any portion of the rent. I therefore find that the Tenant failed to pay the rent that was due for September of 2009. Section 46(1) of the *Act* stipulates, in part, that a landlord may end a tenancy if the tenant fails to pay rent that is due and I find that the Landlord had the right to serve a Notice to End Tenancy pursuant to section 46 of the *Act*.

A Notice to End Tenancy can be waived with the express or implied consent of both parties. The question of waiver arises when the Landlord accepts rent after the effective date of the Notice to End Tenancy. In these circumstances the Landlord accepted rent for October and November, which are both after the effective date of the Notice to End Tenancy. In the circumstances before me there is no evidence to refute the Tenant's statement that he was not advised, either orally or in writing, that his rent payment for November was being accepted for "use and occupancy only". I therefore find that there was an implied waiver of the Notice to End Tenancy that was served on the Tenant and I find that this tenancy was reinstated when the Landlord accepted rent for November without clearly establishing that the tenancy was not being reinstated.



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Conclusion

As I have found that the Landlord reinstated this tenancy by accepting rent for November of 2009, I hereby grant the Tenant's application to set aside the Notice to End Tenancy and I Order that this tenancy continue until it is ended in accordance with the *Act*.

The Landlord retains the right to file another Notice to End Tenancy for Unpaid Rent, pursuant to section 46 of the *Act*, if the Tenant fails to pay the outstanding rent from September of 2009 that I have determined is due. As I have determined that rent for September of 2009 has not been paid, the Tenant should be clearly advised that he is obligated to pay this rent and that any attempt to argue that the rent has been paid in a future dispute resolution hearing is *res judicata*, and is not grounds to dispute a subsequent Notice to End Tenancy for Unpaid Rent from September of 2009.

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: November 02, 2009.

Dispute Resolution Officer