

DECISION

DISPUTE CODES: CNR RP OP

This hearing dealt with an application by the tenant for an order setting aside the landlord's Notice to End tenancy dated October 23, 2009 and an order that the landlord make repairs to the rental unit and provide services. At the hearing the landlord made an oral request for an order of possession in the event the tenant's application was not successful. Both parties attended the hearing and had an opportunity to be heard.

At the outset of the hearing there was a discussion about whether I had jurisdiction to deal with this matter. The issue was raised by the landlord despite the fact that the landlord availed itself of the provisions of the Residential Tenancy Act when it served the tenant with a 10-day Notice to End Tenancy. The landlord made the argument that this is really a commercial lease and that the unit in which the tenant resides was never intended to be used for residential purposes. For his part, the tenant argued that although he uses the rental unit for his art work he also resides there, cooks his food there and so on and that the landlord was fully aware that both he and the previous tenant who resided there were using the rental unit as a place of residence.

In considering these arguments and the testimony of the parties on this issue, I refer to Section 4 of the Act, the relevant portion of which states as follows:

4. What this Act does not apply to

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.....

(e) living accommodation included with premises that

4(d)(i) are primarily occupied for business purposes, and

4(d)(ii) are rented under a single agreement

Based on the testimony of Ms. O on the question of occupation for business purposes, I find that Ms. O has not established that this rental unit is being used primarily for business purposes. Ms. O testified that she did see painting canvasses in the unit but she mostly described the unit as being full of the tenant's personal items. On this basis I find that the Act does apply to this tenancy and that I do have jurisdiction.

I turn then to the issue of the Notice to End Tenancy. The facts before me are as follows. This tenancy began on June 1, 2009. On September 18, 2009 the tenant entered into a Termination Agreement which provided that the tenant would vacate the rental unit by no later than 4:00 p.m. on December 1, 2009. The tenant agreed to pay \$1,260.00 to the landlord on the first day of each month during this period. The agreement was signed by the tenant in the presence of his legal counsel P. R. The tenant failed to pay the rent for October and was served with the 10-day Notice to End Tenancy on Friday, October 23rd. The Notice was posted to the tenant's door and Mr. C testified that he received the Notice on Monday, October 26th. The tenant disputed the landlord's Notice on October 30, 2009.

At the hearing Mr. C testified that the October rent had been paid by way of a security deposit of \$1,800.00 that had been paid to the landlord by the previous tenant. Mr. C testified that he believed the \$1,800.00 was intended to cover the "last month's rent". The tenant did not submit any evidence to corroborate his testimony. Ms. O disputed the tenant's testimony and further testified that she has not received any rent from the tenant for September, October, November and December.

In a case such as this where the tenant disputes a 10-day Notice to End Tenancy the burden is on the tenant to prove on a balance of probabilities that the rent was in fact paid within the statutorily established time frame of 5 days after receipt of the Notice. In the present case, given the contradiction between the parties' testimony, I find that the tenant has failed to submit sufficient evidence to meet that burden. I note that the tenant claims that the security deposit in this case was actually "in trust" for him to use

for the “last month’s rent” but this is not only *not* the way security deposits are supposed to be utilized under the Act but also October’s rent was patently not the “last month’s rent” since the tenant is *still* residing in the rental unit. I therefore dismiss the tenant’s application for an order setting aside the landlord’s Notice and I grant the landlord an order of possession effective two days from the date of service. This order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

Given that this tenancy will be coming to an end, I dismiss the tenant’s request for orders relating to repairs and services.

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*.