Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

RP, LRE, CNC, CNR, OPR, OPL, OPB, MNR, MNSD, FF

Introduction

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing.

Preliminary Matter

At the start of the hearing it was confirmed that the parties had served each other and the Residential Tenancy Branch will all evidence.

The tenants have made three separate Applications which have been joined and heard on March 16, 2010.

At the start of the hearing the tenants explained that their agent, who was to assist them during the March 16 hearing, had experienced a medical emergency that morning and was unable to attend. The tenants decided they would proceed in the absence of their agent.

After the conclusion of the hearing held on March 16, 2010, it was determined that the landlord had submitted an Application for dispute resolution that was to be heard as a cross-Application. On March 22, 2010, the parties were reconvened to provide submissions in relation to the landlord's Application, much of which was heard on March 16, 2010, in relation to the tenant's Application requesting cancellation of the Notices issued by the landlord. The parties were reminded that their testimony was affirmed.

Issue(s) to be Decided

Is the landlord entitled to an Order of possession based on a 10 Day Notice to End Tenancy for Unpaid Utilities issued on February 9, 2010?

Is the landlord entitled to an Order of possession based on a 1 Month Notice to End Tenancy for Cause issued on February 8, 2010?

Is the landlord entitled to a monetary Order for unpaid utilities?

May the landlord retain the deposit paid?

Must the landlord be ordered to complete emergency repairs for health and safety reasons to the rental unit?

Must limits be placed on the landlord's right to enter the rental unit?

Is the landlord entitled to filing fee costs?

Background and Evidence

During the hearing the following facts were established:

- The tenancy commenced on September 5, 2009 and a written tenancy agreement was not signed;
- Rent is $725.00 per month due on or before the first day of the month;
- A deposit in the sum of $365.05 was paid on September 5, 2009.

On February 8, 2010, the landlord issued a 1 Month Notice to End Tenancy for Cause for the reasons of repeated late payment of rent, a refusal to pay gas bills after having been given written notice, smoking in the rental unit after having been given written notice and causing a disturbance to other tenants.

The 10 Day Notice to End Tenancy for Unpaid Utilities issued on February 9, 2010, was in relation to the refusal of the tenants to pay the Terasen gas bills in the sum of $254.83.

The terms of this tenancy are under dispute and directly relate to the tenant's application to cancel the Notices.

The tenants witness (S.B.) stated that she was employed as an agent of the landlord from May 2009 until January 2010; this was confirmed by the landlord. The witness (S.B.) negotiated the verbal terms of the tenancy in September 2009 and confirmed that

during her time as agent the tenants had been allowed to make payments for rent throughout the month and that they always fully paid their rent.

At the hearing held on March 22, 2010 the property owner provided testimony that his prior agent, S.B., had negotiated the terms of the tenancy agreement. The landlord's current agent submitted that the property owner had negotiated the terms with the tenants.

The tenants witness S.B. stated that she had a good relationship with the tenants and that they trusted her. The tenants had moved in due to the loss of their home as the result of a fire and the landlord was aware of their circumstances and agreed to provide a flexible tenancy arrangement, allowing rent payments to be made as the tenants could make them. The witness stated that hydro was included in the rent as part of the verbal tenancy agreement which commenced in September 2009.

On December 9, 2009 the witness (S.B.) stated she was instructed by the landlord to meet with a number of tenants and have them sign tenancy agreements. The witness testified that she was told by the landlord not to point out date or term changes made in the written agreements and that she was not to draw attention to the change in the terms of the agreement that would now include the tenant's responsibility for gas costs.

The tenants agreed that on December 9, 2009, they did sign a written tenancy agreement, as the male tenant was going out the door to work. The tenants stated they only saw the last page of the agreement and that they did not receive a copy of the agreement until January 15, 2010. At the time of signing the tenants asked the landlord's agent if the written agreement included the same terms as their verbal agreement and they was assured it was the same, so they agreed to quickly sign the document.

A copy of the original agreement submitted as evidence indicates that the final page of the agreement had circles by each term, 2 for tenant initials and one for the landlord's agent initials. Each of the hand-written terms on the final page was initialed by both tenants and the agent. One of the terms indicates "all utilities paid by tenants."

The first page of the tenancy agreement also included a change in terms that had been established in September 2009, altering the tenancy from month-to-month to a fixed term which would require the tenants to move out on January 31, 2010; just over 7 weeks later. The written agreement was back-dated to the start of the verbal tenancy, September 2009.

The first page of the agreement, which references the fixed term, had circles for the landlord agent's initials and only one of the tenant's initials. This page has been initialed by the agent and the male tenant only. Witness S.B. could not recall if she presented the first page of the agreement to the tenants for signature on December 9, 2009; however the witness thought it was unusual that the first page did not include a

circle for the 2nd tenant to sign, as the landlord was very particular about obtaining initials on all portions of the agreements.

The tenants alleged that the male tenant's initial on the first page of the tenancy agreement is forged and that they were not presented with this page for signature on December 9, 2009. The landlord believes she made an oversight on the first page of the tenancy agreement and failed to include a second circle for both of the tenant's initials.

The tenants submitted a written statement from an individual who was to act as their agent during the hearing. The written statement indicates that in September 2009 the verbal tenancy agreement had been negotiated with the landlord's agent at the time, S.B., and that due to the tenants personal situation, they could pay rent in increments. The written statement alleges that the tenants were not given proper notice of a change in services provided by the landlord, that the presentation of the December 2009 tenancy agreement was made in bad faith and that the first page of the December tenancy agreement was not initialed by the male tenant and that his initials were falsified.

The landlord's previous agent S.B. indicated that she knew the tenants would be receiving gas bills on December 10, 2009 and that she felt very badly about this. The witness confirmed that utilities were included at the start of the tenancy and that on December 9, 2009, she presented the written tenancy agreement for signing as having the same terms as the verbal agreement made in September 2009. The witness stated she was told by her employer to present the written agreement as just a technicality and that she felt tenants were being abused as they were not told they would receive gas bills the next day.

The tenant asked his witness why they had been accused of being problem tenants and the witness S.B. responded that the landlord did not like them and wanted them to go. The landlord did not dispute this allegation. The tenants evidence acknowledges receipt of a 10 Day Notice for Unpaid Rent issued on December 4, 2009; the result of the tenants holding back rent payments due to a dispute over repairs required to the rental unit.

The landlord denied that her agent had been instructed to deceive the tenants.

The landlord explained that in July 2009 a decision had been made to install gas and that the tenants were to put the gas bill in their name and failed to do so, resulting in a disconnection notice issued by Terasen on January 22, 2010. The landlord assumed the costs of the gas hook-up completed on October 28, 2009, resulting in an October 28 to December 1, 2009 bill, submitted as evidence, in the amount of $122.23. The landlord submitted a second Terasen gas bill from December 31, to February 2, 2010 in the sum of $92.06.

The landlord stated that on December 10, 2009 a copy of the gas bill in the sum of $122.23 was left for the tenants in their mail box along with a notice that was given to all residents of the complex reminding them that they were to be responsible for the gas bill, retroactive to the connection date.

On January 20, 2010 the tenants gave the landlord a letter explaining that they would not pay the gas bills as they had a verbal tenancy agreement that included electrical heat and that they had not been informed of the requirement that they must now pay for gas costs. The tenants explained that their verbal tenancy agreement of September 2009 determined that costs for heat were the responsibility of the landlord and that this verbal agreement was binding.

In relation to the 10 Day Notice issued for unpaid utilities, that landlord provided the tenants with written notice on December 10, 2009, that was given to all residents of the complex on the same date. This notice informed tenants that they would be responsible for water and hot water costs, as it was installed, and that billing for water would commence. The notice stated the landlord would pay the gas hook-up fees and that the tenants must register with the gas company. As the tenants refused to pay the gas costs, the landlord issued the 10 Day Notice on February 9, 2010.

In relation to the 1 Month Notice for Cause, sometime after January 22, 2010, when a Terasen disconnection notice was received, the landlord issued a note to Terasen gas which included a copy of the tenants tenancy agreement signed on December 9, 2010, as proof that the landlord was not responsible for the overdue account. The landlord testified that a second written notice was given to the tenants, directing them to pay their gas bill, but the landlord could not recall the date this notice was given and a copy was not submitted as evidence.

On December 21, 2009 the landlord issued the tenants a written notice to cease smoking in the rental unit. The tenants acknowledged receipt of this notice and stated that they did cease smoking in the unit.

The landlord's witness S.D. stated that she had hand delivered the no smoking notice to the tenants and some time afterward something was thrown at her door. The witness stated that on another occasional when walking by the tenants window she heard the male tenant refer to her in a derogatory manner.

The landlord submitted two anonymous letters; one dated February 9, 2010 and a second dated February 5, 2010; alleging disturbances caused by the tenants.

The landlord submitted that the tenants have been repeatedly late paying rent and that payments were made late in November, December 2009, and January, 2010. Rent was paid early for February. The landlord issued a 10 Day Notice for late payment in December and the tenants then paid the rent and the tenancy was reinstated.

The tenants have applied requesting the landlord complete emergency repairs to the rental unit. The tenants provided photographs that were taken of the rental unit. These photographs show some sort of mould on flooring and walls. The landlord had agreed to enter the rental unit approximately one month after the tenancy commenced, to wash the walls, but did not do so as the tenants were not home. The landlord has completed downspout repairs that may have resulted in moisture problems. The tenants believe the mould was caused as the result of heaters that had been placed in the crawl space, which caused moisture to enter the rental unit.

The tenants want limits placed on the landlord's right to enter the rental unit. The landlord has been completing repairs that have resulted in frequent access to the crawl space under the unit. The tenants have found this access disturbing.

Analysis

First I will consider the validity of the written tenancy agreement signed on December 9, 2009, and the allegation made by the tenants that the landlord's agent, S.B., misled the tenants and obtained their signatures as the result of deceit.

Witness S.B. testified that she knowingly misled the tenants by telling the tenants that the document they were signing and initialing contained the same terms as the verbal agreement that had existed since September 2009. The landlord denied this assertion made by her past employee; however the landlord offered no other rebuttal and no reason as to why her past employee would testify she had misled the tenants on behalf of the landlord.

I find the admission on the part of witness S.B. calls the validity of the written tenancy agreement signed on December 9, 2009, into question. The witness has used her authority and past positive relationship with the tenants to purposely mislead them into believing that the tenancy agreement would not result in a change of terms and I find that this abuse of the agent's authority renders the agreement void.

Whether the witness carried out the deception of the tenants at the behest of the landlord or not, I find the fact that the witness confirms she did so intentionally, troubling. The tenants had a right to expect that the agent would not abuse her authority in obtaining their consent in signing a new tenancy agreement and the agent failed the tenants. Further, there was no reasonable explanation as to why the tenants would sign a tenancy agreement that would increase their monthly costs, retroactive to October, 2009 and that would also require them to move out of the rental unit 7.5 weeks later.

Therefore, I find that the terms of the tenancy agreement negotiated in September 2009 continue. The tenants will pay rent due on the first day of each month and heat will continue to be included in the rent. I have not given any weight to the allegation that the first page of the tenancy agreement included a forged tenant initial, as I have based my

decision on the unfair advantage that was taken by the landlord's agent against the tenants.

In relation to the 1 Month Notice to End Tenancy for Cause, after considering all of the written and oral evidence submitted at this hearing, I find that the landlord has provided insufficient evidence to show that the tenants have significantly interfered with or unreasonably disturbed another occupant or the landlord. In reaching this conclusion I considered the complaints submitted supporting allegations of disturbances. There is no evidence before me that the tenant threw something at another tenant's door and I find, on the balance of probabilities, that any other person could have thrown an object at the door. The male tenant's derogatory comment made in his own home and overheard by another tenant may have caused temporary unease, but I find this does not form the basis for eviction.

In relation to the anonymous letters alleging disturbances by the tenants, there is no evidence before me that the landlord investigated these allegations to determine if they were valid. Further, there is no evidence before me that the landlord spoke with the tenants or provided them with any written warning in relation to any investigated and confirmed reports of disturbances that the tenants are alleged to have caused.

As the tenancy agreement signed on December 9, 2009 is of no force, the tenants are not required to pay the gas bills. Therefore, I find that the failure to pay the gas bills is not a breach of a material term of the verbal tenancy agreement entered into between the parties in September 2009.

In relation to the claim that the tenants have been repeatedly late paying rent, I have accepted the testimony of the tenants, supported by the landlord's past agent S.B., that initially at least, the tenants were given some leeway in making rent payments, as the result of the loss of their previous home due to a fire. I find that by December 2009 the tenants had been made aware of the need to make payments on the first day of the month and that since the 10 Day Notice issued in December that tenants have been late paying rent in January, 2010. Two late payment do not constitute reasons for ending a tenancy early; however; any further late payments could result in the landlord taking action under the Act.

The tenants agreed that they had been smoking in the rental unit and upon receiving a written warning in December, immediately ceased smoking in the unit. A material term of a tenancy term is one that the parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. The landlord did not immediately give the tenants Notice for cause, but a written warning that if the behaviour continued the tenancy could end. The tenants ceased smoking and there is no evidence before me of that they resumed smoking inside.

In relation to the tenants request that the landlord be Ordered to make emergency repairs for health or safety reasons; there is no evidence before me that the landlord has breached section 32 of the Act. Section 32 requires a landlord to provide and maintain

residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law. The photographs submitted as evidence indicate what appears to be the presence of mould, but there is no evidence before me of the type of mould that is present and any proof that a health and safety problem exists.

The tenants have the burden of proving that the landlord has breached the Act by failing to meet health standards required by law and in the absence of evidence that the landlord has failed to meet regulatory health and safety standards I find, on the balance of probabilities, that the tenants have not supported their claim that emergency repairs are required.

The landlord has previously offered to have the walls washed with bleach. The tenants and landlord may enter into a mutual agreement to have this work completed or the landlord may issue a written notice as required by section 29 of the Act, so that access may be gained in order to further investigate the mould and to address the problem as required.

In relation to the portion of the tenants Application requesting limits on the landlord's access to the rental unit, I find that the landlord must adhere to the provisions of section 29 of the Act, which provides the landlord restricted access. I have appended a copy of this section of the Act after the conclusion of the decision, for reference by each party. I find that the tenants have not provided adequate evidence that would lead me to find that the landlord's right to enter the rental unit requires additional restrictions.

As the landlord's claim does not have merit I find that the landlord is not entitled to filing fee costs.

I have enclosed a copy of the *Guide for Landlords and Tenants in British Columbia* for reference by each party.

I refer each party to section 14 of the Act, which allows a tenancy agreement to be amended to add, remove or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment.

Conclusion

I find that the tenancy agreement signed on December 9, 2009 is of no force and that the tenancy will continue as verbally negotiated in September 2009. Rent is due on the first day of the month and heat is included in the rent paid.

The Notice to End Tenancy for Cause issued on February 8, 2010, is of no force or effect.

The 10 Day Notice to End Tenancy for Unpaid Utilities issued on February 9, 2010 is of no force or effect.

I Order that this tenancy continue until it is ended in accordance with the Act.

The landlord's claim for compensation for unpaid utilities is dismissed without leave to reapply.

The security deposit paid will continue to be held in trust by the landlord and must be disbursed as required by section 38 of the Act, or as Ordered by a dispute resolution officer.

The tenant's claim that restrictions be placed on the landlord's right to enter the rental unit is dismissed.

The tenant's claim that the landlord be ordered to complete emergency repairs is dismissed.

The landlord is not entitled to filing fee costs.

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: March 29, 2010.

Dispute Resolution Officer

Landlord's right to enter rental unit restricted

29 (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

(a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

(i) the purpose for entering, which must be reasonable;

(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;

(d) the landlord has an order of the director authorizing the entry;

(e) the tenant has abandoned the rental unit;

(f) an emergency exists and the entry is necessary to protect life or property.

(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).