

DECISION

Dispute Codes OPR, MNR, MNSD, FF, O

Introduction

This hearing was convened by way of conference call to deal with the landlord's application for an Order of Possession for unpaid rent, a monetary order for unpaid rent, an order permitting the landlord to retain the security deposit in partial satisfaction of the claim, and an order that the landlord recover the filing fee from the tenant for the cost of this application.

At the outset of the hearing, the landlord applied to amend the Application to include a monetary order for unpaid rent for the month of March, 2010. That application has been allowed, and the Application for Dispute Resolution is amended accordingly.

Both parties appeared and gave evidence, and were given the opportunity to cross examine each other on their evidence.

Issues(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to an order permitting the retention of the security deposit in partial satisfaction of the claim?

Background and Evidence

This month-to-month tenancy began on or about July 1, 2009, and the tenant still resides in the rental unit. Rent in the amount of \$1,000.00 is payable in advance on the 1st day of each month. At the outset of the tenancy, the tenant paid a security deposit in the amount of \$500.00.

The landlord's agent testified that he was commissioned to take over as agent for the landlord on February 1, 2010, and has no first-hand knowledge of any prior agreements or arrangement between the owner and the tenant.

The agent sent a letter to the tenant, a copy of which was provided as evidence, and testified that he attempted to get a signed Tenancy Agreement in place with this tenant. He stated that the tenant neglected to do so, and the agent feels that the tenant is avoiding the situation. When questioned about it at the hearing, the tenant replied that he did not want to sign a Tenancy Agreement until this matter was resolved.

The landlord's agent testified that a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities was served on the tenant by posting same to the door of the residence on February 5, 2010. The first page of that notice was entered into evidence only, along with a copy of the Proof of Service. The notice states that the tenant failed to pay rent in the amount of \$1,025.00 that was due on the 1st of February, 2010. I note that the document also states: "0 PRIOR EVICTION NOTICES." The notice is deemed to be served 3 days after such service.

The landlord's agent also testified that rent for November, December, January and February were not paid. This is disputed by the tenant, who testified that at the request of the owner, he paid a neighbour, who is a friend of the owner, \$1,000.00 in cash during the 2nd or 3rd week in November for which he received a receipt, to cover the rent due for November, 2009. Further, on December 21, 2009, the tenant and the owner had a telephone conversation in which the tenant offered to pay December's rent by giving the owner \$500.00 and the landlord could take the remaining \$500.00 from the security deposit, and the tenant would make it up at a later date. The owner originally agreed, but then called the tenant back indicating that he was not comfortable with that arrangement and asked if he had any assets of any value. The tenant responded that he had a sea-doo, a trailer for the sea-doo and a quad and the items were worth an approximate total of \$3,300.00. The owner stated he would take the items in trade for the outstanding rent, but the tenant argued they were worth alot more than one month of rent. It was then agreed that the owner could take the items in exchange for rent for

December, 2009, January and February, 2010. On December 22, 2009, the tenant signed the required transfer papers for the trailer, and the next day the owner picked up all the items.

The agent for the landlord argued that his position is that rent was not paid in February, and that he was commissioned to manage the property on February 1, 2010 so regardless of what deals were made between the owner and the tenant prior have no bearing on today's application, and that rent for February has not been paid. He also stated rent is due when it is due, and that if the owner seized property belonging to the tenant for unpaid rent, those items would be returned upon the tenant paying the rent owed. He also argues that the evidence of the tenant cannot be relied on because it is hear-say evidence. The owner did not attend the hearing to testify.

Analysis

Firstly, I disagree with the agent's contention that the tenant's evidence cannot be relied on because it is hear-say evidence. Hear-say evidence is evidence of a person who was not present and was told that certain evidence exists or events took place. That is not the case here. If the owner had attended to testify that the evidence of the tenant is incorrect, then it would be up to me to determine what is reasonable in the circumstances or what evidence to consider. The tenant did appear to testify, and I have no reason to disbelieve that evidence. The agent that appeared at the hearing was not present in December when the conversations took place, and I do find that those conversations are relevant to this application. Further, the agent was asked if he wished to cross-examine the tenant but he declined to do so.

Secondly, dealing with the 10 Day Notice to end Tenancy for Unpaid Rent or Utilities, I find that the tenant was served by posting the notice to the door of the residence, and that the notice is deemed to have been served on February 8, 2010. The tenant did not pay the rent that the agent stated was outstanding for February, 2010 and did not apply for dispute resolution within the time required under the *Act*, but the tenant did attend the hearing to argue that the rent was paid. Further, the agent testified that rent hadn't been paid for November, December, January or February, yet the notice says that

\$1,025.00 was outstanding for February only, and that the \$25.00 was a late payment fee. The landlord and his agent are not permitted to charge a \$25.00 late fee for rental payments unless it is contained in a signed, written Tenancy Agreement. Therefore, I find that no late payment fee can be charged against this tenant.

If I find that the owner took the items in question with the intention of giving them back when rent arrears were paid in full, then the landlord would be in breach of Section 26(3) of the *Residential Tenancy Act*, which states as follows:

26 (3) Whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not

- (a) seize any personal property of the tenant, or
- (b) prevent or interfere with the tenant's access to the tenant's personal property.

(4) Subsection (3)(a) does not apply if

- (a) the landlord has a court order authorizing the action, or
- (b) the tenant has abandoned the rental unit and the landlord complies with the regulations.

On the other hand, if I find that the owner "traded" the items for the outstanding rent, I would have to accept the evidence of the tenant on the value of those items and find that the tenant did not, in fact, owe any money for rent arrears.

In the circumstances, I accept the evidence of the tenant that the owner received the items, and transfer papers were signed by the tenant for the ownership of the trailer. I further find that the tenant has paid the rent up to the end of February, 2010 by "selling" the items to the owner. Therefore, the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities is hereby cancelled.

The landlord is also required to serve both pages of the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and only page one of that document was entered into evidence. I make no findings with respect to whether or not both pages were served,

other than to say that the second page of the notice contains vital information for the tenant, and for future applications, both pages should be submitted as evidence.

I also find that the tenant is in arrears for rent for the month of March, 2010 in the amount of \$1,000.00. Section 26(1) of the *Residential Tenancy Act* states as follows:

26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent.

The landlord is at liberty to serve another 10 Day Notice to End Tenancy for Unpaid Rent or Utilities for the outstanding rent for March, 2010, and the tenant may pay the outstanding rent within 5 days or apply for dispute resolution within that time period, or is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice.

Conclusion

The landlord's application for an Order of Possession is hereby dismissed.

The landlord is entitled to a monetary order for unpaid rent in the amount of \$1,000.00 for the month of March, 2010 only. This order may be filed in the Provincial Court of British Columbia and enforced as an order of that Court.

The landlord's application to retain the security deposit in partial satisfaction of the claim is hereby dismissed.

The landlord is not entitled to recover the filing fee from the tenant for the cost of this application.

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 18, 2010.

Dispute Resolution Officer