

DECISION

Dispute Codes

For the tenant - CNC, MNDC, OLC, FF, O

For the landlord – OPC, MND, MNDC, SS

Introduction

This decision deals with two applications for dispute resolution, one brought by the tenant and one brought by the landlords. Both files were heard together. The tenant seeks to cancel the One Month Notice to End Tenancy for cause. The tenant seeks a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act (Act)*, Regulation or tenancy agreement and to recover the filing fee. The tenant also seeks an Order for the landlord to comply with the *Act* and other issues. The landlord seeks an Order of Possession for cause; a Monetary Order for damage to the unit, site or property. During the hearing the landlord withdrew her application for a Monetary Order for money owed or compensation for damage or loss under the *Act* and an order for substitute service.

The tenant served the landlord by registered mail on January 27, 2010 with a copy of the application and a Notice of the Hearing. The landlord served the tenant in person on February 25, 2010 with a copy of the Application and Notice of Hearing. I find that both parties were properly served pursuant to s. 89 of the *Act* with notice of this hearing.

Both parties appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in written form, documentary form, to cross-examine the other party and witnesses, and make submissions to me. On the basis of the solemnly affirmed evidence presented at the hearing I have determined:

Issues(s) to be Decided

- Is the tenant entitled to an Order to cancel the One Month Notice to End Tenancy for cause?
- Is the tenant entitled to a Monetary Order for money owed or damage or loss under the Act?
- Is the tenant entitled to an Order for the landlord to comply with the Act?
- Is the landlord entitled to an Order of Possession based on the One Month Notice to End Tenancy for Cause?
- Is the landlord entitled to a Monetary Order for damage to a bathtub?

Background and Evidence

Both parties agree that this month to month tenancy started on December 01, 2008. A tenancy agreement was in place and signed on November 30, 2008. Rent for this unit was \$725.00 per month and due on the 1st of each month. The tenant paid a security deposit of \$350.00.

The landlord served the tenant with a One Month Notice to End Tenancy for cause dated January 15, 2010 with a vacate date of February 28, 2010. The landlord gave the following reason on the Notice: The tenant has engaged in an illegal activity that has jeopardized the lawful right or interest of another occupant or the landlord.

The landlord testifies that the tenant has not been cooperative with viewing times given by her realtor and made it difficult therefore to sale her house. The landlord states that the tenant is a shift worker and is sometimes asleep in his bedroom when viewings have been arranged making it difficult to see his entire unit. The landlord admits the realtor did not always give the tenant the correct notice but this has now been rectified and written notice of enter has been posted to the tenants door.

The tenant disputes the landlords' testimony; he testifies that he has always allowed viewings to take place when he has been given proper notice and has never engaged in an illegal activity that has jeopardized the lawful right or interest of the landlord. The tenant testifies that he works from midnight to 8.00 am and then attempts to sleep. The tenant states he has not always been given notice to enter his unit for viewings and on occasion the Realtor has just left a phone message asking for access. Since January, 2010 he notified the Realtor when it was his days off and requested that the Realtor did not ask for five and six hour slots to show the property as

the tenant felt this was unreasonable due to his shift patterns and the fact that he has to sleep during the day. On occasions he did put notes on his door asking them to enter quietly as he was sleeping.

The landlord claims the tenant damaged a new bathtub stored in her garage, when he drove his car into the garage at speed. The landlord testifies that she believed the tenant to be intoxicated at this time. The landlord seeks a monetary award of \$670.88 to replace this bathtub and has provided a receipt for this amount.

The landlords witness states that he was working in the house when he heard a loud noise in the garage. The tenants' car was backing up and he believed the tenant had driven into the bathtub. The landlords witness states that at first he could not see any damage to the tub but when he went to fit it sometime later the surface was cracked and the back top edge was cracked. The tub was covered in plastic film so the damage was not seen at the time until the film was removed.

The tenant testifies that he was never notified of any damage to the bathtub and states that he believes that the tub stored in the garage was old and filled with rubbish. The tenant states that he does not drive while intoxicated and did not damage the bathtub. The tenant states that the landlord has fabricated this story and has provided no evidence of the damage to the bathtub.

The tenant witness testifies that she saw a bathtub in the garage when she visited the tenant. She states that this tub was old and dirty and filled with what appeared to be rubbish. On cross examination by the landlord, the landlord asks the tenants witness if she saw the tub had the plastic film covering, The tenants witness states that she did not see a tub with film on it. The tenants witness also states that she has never known the tenant to drink and drive.

The tenant testifies that the landlord let him park in the garage from December, 2008. He used this space for over a year and then received a letter from the landlord in January asking him to park first on the drive and then on the road as she needed access to the garage. The tenant agrees that parking is not in his tenancy agreement but states this was provided to him by the landlord in a verbal agreement. The tenant claims compensation for the loss of this facility at \$50.00 per month for three months.

The tenant claims compensation for a loss of peace and quiet enjoyment. He testifies that when he viewed the unit he asked the landlord if it was a quiet place to live as he works shifts and needs to sleep during the day and sometimes in the evenings before he starts work. The tenant claims the landlord told him it was a quiet place. After one month the landlord continued to do her renovations. The tenant claims he was continually disturbed from May, 2009 to December, 2009. He claims the landlord worked during the day and started the renovation in the evenings the tenant claims \$150.00 a month for seven months of disturbance.

The landlord disputes the tenants' testimony. The landlord claims she allowed the tenant to park in the garage during the winter months to help him out when the weather was cold, knowing he had to start work late at night. The landlord states that this agreement was not part of the tenancy agreement and was a favour to the tenant. She asked him to park on the driveway in January when she needed the garage space for storage. She then found that she could not access the garage with the tenants' car parked on the drive so asked him to park on the street.

The landlord disputes the tenants' testimony regarding his loss of quiet enjoyment. The landlord states the tenant should have been aware from the start of his tenancy that renovations were going to take place as materials were laying around the house for this work. The landlord states she did consider the tenants sleep patterns before doing any work and attempted to be considerate to this by doing work in the evenings. The landlord states that the renovations did not take place every day during the seven months.

The tenant seeks an Order for the landlord to comply with the Act by ensuring he receives the required notice before any viewing to his unit take place. The tenant also requires the landlord to inform her Realtor of this and does not expect the landlords Realtor to threaten the tenant with instant eviction if he does not allow viewings to take place without proper notice.

Analysis

I have carefully considered all the evidence before me, including the affirmed evidence of both parties and witnesses. With regard to the landlords application for an Order of Possession; in this matter, the landlord has the burden of proof and must show (on a balance of probabilities) that grounds exist (as set out on the Notice to End Tenancy) to end the tenancy. This means that if the Landlord's evidence is contradicted by the tenant, the landlord will generally need to

provide additional, corroborating evidence to satisfy the burden of proof. In the absence of any corroborating evidence, I find that the landlord has not provided sufficient evidence to show that grounds exist to end the tenancy and as a result, the Notice is cancelled and the tenancy will continue.

With regards to the landlords claim for damage to the bathtub I have applied a test for damage or loss claims:

- Proof that the damage or loss exists
- Proof that this damage or loss happened solely because of the actions or neglect of the respondent in violation of the *Act* or agreement
- Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
- Proof that the claimant followed S. 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage.

In this instance the burden of proof is on the landlord to prove the existence of the damage or loss and that it stemmed directly from a violation of the agreement or contravention of the *Act* on the part of the tenant. Once that has been established, the landlord must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the landlord did everything possible to address the situation and to mitigate the damage or losses that were incurred.

I find that the landlords claim for damage to the bathtub does not meet all of the components of the above test. The landlord has not submitted sufficient evidence to support her claim regarding the damage to the tub or that this damage was caused as a direct result of the tenants actions. Consequently the landlords claim is dismissed without leave to reapply.

With regards to the tenants claim for compensation for loss of the use of the parking; I find that by allowing the tenant to use the parking in the garage for over a year that the landlord has entered into a verbal agreement with the tenant for this parking space. Section 27 of the *Act* states:

Terminating or restricting services or facilities

27 (1) A landlord must not terminate or restrict a service or facility if

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and

(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Consequently although the parking is not a material term of the tenancy agreement it was an implied term by the landlord allowing the tenant to use it for over a year. The landlord gave the tenant one week's notice to terminate this facility and has not compensated the tenant for the loss of this facility with a rent reduction. The tenant has applied for a rent reduction of \$50.00 for the three months he lost the use of the parking. I find this is a reasonable amount and award the tenant \$150.00 for the loss of this facility.

With regard to the tenants claim for \$150.00 for seven months he states he suffered undue disturbance from the landlord carrying out renovation work and the effect this had on his peace and quiet enjoyment. Section 28 of the *Act* states:

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

The landlord argues that the tenant should have been aware that renovations were taking place and the tenant argues that he specifically asked the landlord if this was a quiet place to live and states that the landlord told him it was. When a tenant's evidence is contradicted by the landlord, the tenant will need to provide additional corroborating evidence to satisfy the burden of proof. In this instance I find the tenant has not provided sufficient evidence to support his claim of \$1,050.00. The tenant has not detailed the times and dates he was disturbed or the level of disturbance. The tenant has not provided any witness statements confirming when and how bad the noise was. I also find the landlord acted considerately with regard to the tenants sleep patterns and limited the renovations to the evenings. Consequently this section of the tenants claim is dismissed without leave to reapply.

With regard to the tenants application for an Order for the landlord to comply with the *Act*: I find that initially the landlord and her Realtor were not giving the tenant the correct notice to enter the rental unit pursuant to section 29 of the *Act*. I understand that the landlord is attempting to sell her property and as such requires entry to the tenants unit for viewings. However, the landlord must still comply with the *Act* with regard to providing the tenant with written notice to enter his unit.

Having heard the evidence of both parties I find it would be fair and reasonable to make an Order for the landlord to comply with the *Act* in regards to giving the tenant 24 hours written notice to enter the rental unit. I also find it would be fair and reasonable to both Parties to make an Order that states: if the landlord is unable to serve the tenant in person with a Notice to enter the unit, she may post the Notice in a conspicuous place on the tenants door and telephone the tenant stating the date and time the Notice was posted. The tenant would then be deemed to

have received notification that the Notice was posted and served as required under the *Act* and the landlord or the landlords' agent may enter the rental unit 24 hours after the notice is posted.

Having considered all the evidence I find the tenant is entitled to a monetary award as follows:

Loss of parking facility	\$150.00
Total amount due to the tenant	\$200.00

Conclusion

The tenant's application is allowed. The one Month Notice to End Tenancy for Cause dated January 15, 2010 is cancelled and the tenancy will continue. As the tenant has been successful in setting aside the Notice, he is entitled to recover his \$50.00 filing fee for this proceeding he may deduct **\$50.00** from his next rent payment when it is due and payable to the landlord. As the tenant has also been successful with his claim of **\$150.00** for a loss of a facility he may also deduct \$150.00 from his next rent payment when it is due and payable to the landlord. Consequently the tenants next rent payment will be **\$525.00**.

The tenants claim for compensation of \$1, 050.00 is dismissed without leave to reapply.

I HEREBY ORDER the landlord to provide the tenant with 24 hours written notice before entering his rental unit for viewings and **I FURTHER ORDER** the landlord to telephone the tenant and notify him of the date and time this Notice was posted. This Notice will then be deemed to have been received on the date and time the landlord telephones the tenant.

The landlords' application is dismissed without leave to reapply.

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 10, 2010.

Dispute Resolution Officer