

DECISION

Dispute Codes OPR MNR MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord seeking an Order of Possession for unpaid rent and a Monetary Order for unpaid rent, money owed for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents was done in accordance with section 89 of the *Act*, served by registered mail on February 17, 2010. Canada post receipts were submitted in the Landlord's evidence. The Tenant confirmed receipt of the hearing package and copies of the Landlord's evidence.

The Tenant testified that she sent her evidence to the Residential Tenancy Branch via fax on March 28, 2010 and April 5, 2010. The Tenant confirmed she did not send the Landlord copies of her evidence and argued that the Landlord would have previously received the information such as the registered mail when the Landlord signed for the mail.

The Landlord and Tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession for unpaid rent under section 55 of the *Residential Tenancy Act*?

Is the Landlord entitled to a Monetary Order under sections 67 and 72 of the *Residential Tenancy Act*?

Background and Evidence

The fixed term tenancy commenced on December 18, 2009 and is set to expire on July 1, 2010, at which time the Tenant must vacate the rental unit in accordance with the tenancy agreement and the *Residential Tenancy Act*. Rent is payable on the first of each month in the amount of \$1,950.00.

The Landlord referred to his documentary evidence and testified the Tenant provided him with cheques for the security deposit, pet deposit, and post dated cheques for rent. The Landlord argued that the Tenant called him shortly afterwards to advise the Landlord the Tenant had written the cheques on a closed bank account and requested the Landlord return the cheques to the Tenant and the Tenant would get the rent and deposit to the Landlord at a later date.

The Landlord argued the December 2009 rent was paid, the January 2010 rent was paid 23 days late, and there has been nothing paid towards February 2010 rent, March 2010 rent, or April 2010 rent.

The Landlord testified a 10 Day Notice to End Tenancy for unpaid rent was posted to the Tenant's door on February 3, 2010 for \$1,950.00 in unpaid rent which was due on February 1, 2010.

The Tenant testified and confirmed she requested her cheques returned and confirmed that she has had them returned by the Landlord. The Tenant argued that she has paid her February 2010 rent and that this rent was paid to the Landlord via registered mail which was sent on February 11, 2010. The Tenant provided the Canada Post tracking number in her testimony and argued the Landlord signed for the package on February 13, 2010. The Tenant also argued the Landlord provided a copy of her letter in the Landlord's evidence which is proof that the Landlord received her February 2010 rent.

The Tenant did not provide testimony on why her March 2010 and April 2010 rents remain unpaid and the remainder of her testimony was focused on the Tenant's intent to file for a review hearing stating her registered mail receipt was proof that the Landlord was receiving this Order of Possession based on fraud.

The Landlord confirmed he received the Tenant's registered mail package and argued that the envelope contained only a letter and there was no rent cheque included in the registered mail package. The Landlord is seeking an Order of Possession for as quickly as possible and a monetary order for the three months of unpaid rent.

Analysis

The Tenant's evidence for the April 6, 2010 hearing was not received via fax on the dates provided in the Tenant's testimony however they were sent and received via fax on April 1, 2010 and April 5, 2010.

The Tenant confirmed she did not provide the Landlords with copies of her evidence which is in contravention of section 4.1 of the *Residential Tenancy Branch Rules of Procedure*. Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the applicant Landlords have not received copies of the Tenant's evidence I find that the Tenant's evidence cannot be considered in my decision. I did however consider the Tenant's testimony.

I find that in order to justify payment of damages or losses under section 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the Tenant.

Order of Possession I do not accept the Tenant's argument that she paid her rent within the 5 days as required in response to the issuance of the 10 Day Notice to End Tenancy. In this case the notice was posted to the Tenant's door on February 3, 2010 and the Tenant is deemed to have received the notice on February 6, 2010, in accordance with section 90 of the *Act*. The undisputed testimony proves the Tenant sent the Landlord a registered mail envelope on February 11, 2010 and the Landlord signed for the envelope on February 13, 2010, seven days after the Tenant is deemed to have received the 10 Day Notice to End Tenancy for unpaid rent.

There is disputed testimony as to the contents of the registered mail envelope sent to the Landlord with the Landlord arguing the contents consisted of only a letter, a copy of which he included in his evidence, and the Tenant arguing there was also a cheque for her February 2010 rent in the envelope. The Landlord filed his application for dispute resolution on February 15, 2010, two days after he received the Tenant's registered letter, which supports the Landlord's testimony that February 2010 rent was not paid which is why he proceeded with his application for dispute resolution.

A significant factor in my considerations is the credibility of the Tenant's testimony. I am required to consider the Tenant's evidence not on the basis of whether her testimony "carried the conviction of the truth", but rather to assess her evidence against its consistency with the probabilities that surround the preponderance of the conditions before me.

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 Landlord to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the Landlord.

Based on the above, I find that the Landlord has met the requirements for the 10 day notice to end tenancy pursuant to section 46(1) of the *Act*, the Tenant failed to pay the February 2010 rent in full within 5 days after receiving this notice, and that the Tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit to which the notice relates, pursuant to section 46(5) of the *Act*, therefore I approve the Landlord's request for an Order of Possession.

Claim for unpaid rent The Landlord claims for unpaid rent of \$1,950.00 February 2010, \$1,950.00 March 2010, \$1,950.00 April 2010, pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I find that the Tenant has failed to comply with a standard term of the tenancy agreement which stipulates that rent is due monthly on the first of each month and that the Landlord has proven the test for damage or loss under the *Act*.

Upon issuing the Order of Possession effective 2 days upon service on the Tenant I find the Landlord's request for a monetary claim for April 2010 rent to be premature as the Tenant may not be occupying the rental unit for the entire month of April. Therefore I

dismiss the Landlord's request for April 2010 rent, with leave to reapply. I hereby approve the Landlord's claim in the amount of \$3,900.00 in unpaid rent for February 2010 and March 2010.

Filing Fee \$50.00 The Landlord has been successful with his application therefore I award the Landlord recovery of the \$50.00 filing fee from the Tenant.

Monetary Order – I find that the Landlord is entitled to a monetary claim as follows:

Unpaid Rent for February 2010, March 2010 (2 x \$1,950.00)	\$3,900.00
Recovery of the filing fee	<u>50.00</u>
TOTAL AMOUNT DUE TO THE LANDLORDS	\$3,950.00

Conclusion

I HEREBY FIND that the Landlord is entitled to an Order of Possession effective **two days after service on the Tenant**. This order must be served on the Tenant and may be filed in the Supreme Court and enforced as an order of that Court.

I HEREBY FIND in favor of the Landlords' monetary claim. A copy of the Landlords' decision will be accompanied by a Monetary Order for **\$3,950.00**. The order must be served on the Tenant and is enforceable through the Provincial Court as an order of that Court.

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: April 06, 2010.

Dispute Resolution Officer