

DECISION

Dispute Codes CNL, CNR, RR, FF

Introduction

This hearing was convened by way of conference call to deal with the tenant's application to cancel a notice to end tenancy for unpaid rent, to cancel a notice to end tenancy for landlord's use, for an order that the tenant be permitted to reduce rent for repairs, services or facilities agreed upon but not provided, and to recover the filing fee from the landlord for the cost of this application.

Both parties appeared, gave affirmed testimony and were given the opportunity to cross examine each other on their evidence. The applicant also called witnesses, who also gave affirmed testimony and were subject to cross examination by the respondent landlord.

Issues(s) to be Decided

Is the tenant entitled to an order cancelling the landlord's notice to end tenancy for unpaid rent?

Is the tenant entitled to an order cancelling the landlord's notice to end tenancy for landlord's use of the rental property?

Is the tenant entitled to an order to allow a tenant to reduce rent for repairs, services or facilities agreed upon but not provided?

Background and Evidence

This tenancy began as a month-to-month tenancy in July, 2009, and then the parties entered into a fixed term agreement to expire on June 1, 2010. Rent in the amount of \$1,650.00 is due on the 1st of each month, and in May, 2009, the tenant paid a security deposit in the amount of \$800.00 as well as a pet damage deposit in the amount of \$800.00.

The tenant testified that he signed a lease on February 28, 2010, which showed that the fixed term was January 1, 2010 to June 1, 2010, and that if the house sold, he would be permitted to stay until June 30, 2010. He also stated that a verbal agreement was entered into that states that rent would be waived for April, May and June, 2010.

The tenant further testified that the original lease in June, 2009 included a hot-tub, appliances and window coverings. The hood over the kitchen range was missing, and the hot-tub didn't work. He notified the landlord, and tried to fix it but was unable to. He and a friend moved it out of the way because the landlord said he'd bring another one over to the house, but never did. He stated that he never would have rented a house for that much monthly rent if the hot-tub had not been included, and therefore, it was a material term of the tenancy. Before realtors showed the house, the tenant put the old hot-tub back because the yard looked awful.

He further stated that about 8 electrical plug-ins did not work, or sparked when used, and were therefore not safe. Further, the dishwasher did not work.

In November, 2009, the tenant gave the landlord a written request for repairs and a reduction in rent from July, 2009 to November, 2009 because of the repairs required. The landlord tried to fix the plugs, but was only able to fix 2 of them, but he did fix the dishwasher. The landlord refused the reduction in rent.

He further stated that the landlord hired carpet cleaners to clean the carpets in the unit but didn't pay for it, and the cleaners were contacting the tenant about payment, and wanted him to contact the landlord to assist with enforcing the payment.

The house had fallen into foreclosure, and the tenant testified that the landlord told him that if he left the place a mess it wouldn't sell and he'd be able to stay longer. He further testified that the lease that he signed on February 28, 2010 was not copied and provided to him by the landlord. He did however, call a witness to corroborate his evidence that the lease stated that rent was pre-paid for April, May, and June, 2010 even though he did not actually pre-pay the rent for those months. The witness stated that he was present when it was signed, he saw the lease, and he heard the landlord

state that the tenant was getting rent free. He said he didn't know why, but he also heard the landlord talk about it twice.

Another witness called by the tenant testified that he remembers being at the residence on the porch, and the landlord arrived appearing angry about his ex-wife and lawyers and how to get even. He stated that he remembers them talking about it, and the landlord came up with the idea that the house was rented, and made a deal with the tenant to have rent pre-paid; that he would tell the realtors that he had pre-paid till the end of June, and hands were shaken. He did not, however, see the lease.

Another witness called by the tenant was a realtor who showed the house. He testified that he was there in March, 2010, and recalled the conversation about pre-paid rent but does not recall the duration.

The landlord testified that the parties signed a lease on June 1, 2009. The tenant paid \$800.00 in cash for the security deposit, but required more time to pay the rent, which he did pay before moving in.

The landlord disputes the facts of the tenant's evidence; he did not give him a letter to request repairs. He further testified that the tenant knew what he meant about window coverings; some were there, but not on all windows. He further testified that the hot-tub was for the owner's use. He did have another hot-tub that he was going to give to the tenant to use, but he had so many problems with him, he changed his mind.

The landlord testified that he had hired an electrician, who was at the residence for 4 hours trying to fix lights. The switch in the hallway was sparking, as well as one in the kitchen, and both were fixed. He further testified that the tenant had 2 fish tanks, one being 4000 pounds which draws alot of electricity, as well as another in the dining room.

The landlord disputes that he signed any lease showing that rent had been pre-paid for any months, and the tenant did not pay rent for the month of April, 2010. He further stated that he now has an opportunity re-instate the mortgage with a lower interest rate but only on residential property that was not revenue property.

Analysis

I find that a tenancy agreement did exist between the parties. I also find it difficult to believe that the fixed term agreement signed on February 28, 2010 as described by the tenant did not exist. However, a party cannot expect dispute resolution to uphold an agreement that was basically obtained or made by fraud. There is no question that the tenant did not actually pay rent for April, 2010, but in the circumstances I find that the notice to end tenancy for unpaid rent ought to be cancelled.

Further, the 2 Month Notice to End Tenancy for Landlord's Use of Property dated March 31, 2010 does not show any reasons for the notice. Section 52 of the *Residential Tenancy Act* states that:

52 In order to be effective, a notice to end a tenancy must be in writing and must

- (a) be signed and dated by the landlord or tenant giving the notice,
- (b) give the address of the rental unit,
- (c) state the effective date of the notice,
- (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy, and
- (e) when given by the landlord, be in the approved form.

The landlord testified that he may wish to occupy the house himself in order to reinstate the mortgage, and he is well within his right to issue a new notice to end tenancy, as long as it's done within the provisions of Sections 49 and 52 of the *Residential Tenancy Act*.

Having found that the tenant is not entitled to claim pre-paid rent for the months of April, May and June, 2010, I point out Section 26 of the *Residential Tenancy Act*:

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.

(2) A landlord must provide a tenant with a receipt for rent paid in cash.

(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.

I do find, however, that the tenancy included a hot-tub, and in the landlord's own evidence, he did have another hot-tub that he intended to take to the residence, but changed his mind. Further, I do not accept the evidence of the landlord that the hot-tub was for the landlord's use. The landlord must provide the tenant the right to quiet enjoyment, and using the hot-tub himself would not provide that to the tenant. The tenant stated that he never would have paid that much rent if the hot-tub had not been included. Therefore, I also find that the hot-tub was a material term of the tenancy, and the tenant ought to be compensated for that.

The tenant also testified that the hood over the range was never provided, which was not disputed by the landlord. I accept that evidence, however I decline to make any monetary order or provide any rent abatement in favour of the tenant with respect to the hood and fan.

As for window coverings, I accept the evidence of the landlord that the window coverings in the house now are the ones that were included in the tenancy agreement, and I make no award in favour of the tenant for window coverings.

I also find that the landlord did attend to fixing the light switches and wall plugs, and I decline to make an award in favour of the tenant for those items.

Conclusion

The tenant's application for an order cancelling the 2 notices to end tenancy is hereby allowed, and I order that those notices are cancelled.

The tenant's application which refers to pre-paid for the months of April, May and June, 2010 rent is hereby dismissed.

Since the tenant has been partially successful with his claim, I also find that he is entitled to recover the filing fee from the landlord for the cost of this application, and I hereby order that recovery in the amount of \$50.00.

I order that the tenant be awarded a retroactive rent abatement in the amount of \$100.00 per month from the beginning of the tenancy to date for the loss of the hot-tub, for a total rent abatement of \$1,000.00. I further order that the tenant be permitted to reduce the rent for the month of April, 2010 by \$1,050.00, and I further order that the tenant be permitted to reduce the monthly rental by \$100.00 per month, commencing May 1, 2010 and that rent in the amount of \$1,650.00 per month will resume on the 1st day of the month following completion of the repair of the hot-tub or installation of another operable hot-tub.

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 29, 2010.

Dispute Resolution Officer