

DECISION

Dispute Codes CNR, OLC, OPR, MNR, MNSD, FF

Introduction

This hearing dealt with applications filed by both the tenant and the landlord pursuant to the *Residential Tenancy Act* (the *Act*). The tenant seeks:

1. Cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent pursuant to Section 46;
2. An order that the landlord comply with the *Act*, *Regulation* or tenancy agreement pursuant to Section 62; and
3. Recovery of the filing fee paid for this application pursuant to Section 72.

The landlord seeks:

1. An Order of Possession for unpaid rent pursuant to Section 55;
2. A monetary order for unpaid rent pursuant to Section 67;
3. An order that the landlord be allowed to retain all or a portion of the security deposit pursuant to Section 38; and
4. Recovery of the filing fee paid for this application pursuant to Section 72.

Total sum sought by the landlord was \$4,150.00 plus the filing fee.

Both the landlord and the tenant appeared at the hearing and were given full opportunity to be heard, to present evidence and to make submissions. The tenant testified that the landlord personally served him with the 10 Day Notice to End Tenancy for Unpaid Rent (the notice) on May 9, 2010. The tenant testified that he personally served the landlord with the tenant's May 13, 2010 Application for Dispute Resolution and hearing package (the hearing package) on May 13, 2010. The landlord testified that the tenant was personally served with the landlord's May 18, 2010 hearing package on May 20, 2010. I

accept that the landlord and tenants were duly served with the notice and the hearing package.

The landlord testified that she did not receive all of the tenant's evidence package, although he maintained that he provided this to her. The tenant's evidence package included copies of documents from the landlord that the landlord had not provided as part of her hearing package. As these materials provided a better understanding of the two applications, I agreed to consider the evidence packages submitted by the parties.

At the outset of the hearing, the tenant requested an adjournment to seek information from the police regarding alleged illegal entry to his premises by the landlord. He had submitted this request in writing before the hearing. As the tenant's allegation that the landlord improperly entered the tenant's rental premises without notice or permission was not before me, I declined to grant an adjournment.

On the basis of the solemnly sworn evidence presented at the hearing a decision has been reached.

Issues(s) to be Decided

Whether the landlord is entitled to an Order of Possession for unpaid rent. Whether the landlord is entitled to a monetary order for unpaid rent, retention of the security deposit and recovery of her filing fee. Whether the tenant is entitled to an order requiring the landlord to comply with the Act, regulation or tenancy agreement. Whether the tenant is entitled to recovery of her filing fee.

Background and Evidence

The landlord submitted into evidence a copy of a March 19, 2010 fixed term tenancy agreement with the tenant and a co-tenant that was to take effect on April 1, 2010. This

tenancy agreement was for the "Main House" at this address. This six-month fixed term tenancy agreement was to terminate on August 31, 2010. Rent was established at \$1,600.00 and occupancy was to be limited to three persons. The landlord testified that the lease stated that she would accept \$1,200.00 in rent for April 1, 2010 while the two tenants attempted to find a third tenant to share the rent with them. This modification of the rental amount was clearly identified on the copy of the tenancy agreement submitted into evidence by the landlord. She testified that the tenant was to pay a security deposit of \$380.00 on March 26, 2010. She gave sworn evidence that no security deposit was paid by the tenant.

The landlord and tenant agreed that the co-tenant never did move into the rental premises. They testified that the tenant encountered difficulty in obtaining roommates to share the cost of the Main House. The landlord said that she agreed to let the tenant rent a room in the downstairs portion of the Main House for \$500.00 if he moved from the upstairs portion where he was living. If he did so, she said that she told him that she would let him out of the lease he had signed for the Main House. Although he paid \$500.00 in rent for the downstairs room on March 26, 2010, she maintained that he never did move from the upstairs portion of the house to the downstairs area. She submitted into evidence a copy of a March 26, 2010 receipt she issued to him for payment of rent for the downstairs rooms at this address. She also provided a copy of a receipt for \$250.00 which was "for the deposit of rooms" at this address. She said that she decided to apply \$380.00 of the tenant's \$500.00 rent payment to a security deposit and the remainder of that payment to rent that she considered owing from his March 2010 occupancy of the Main House.

The landlord maintained that since the tenant did not move from the Main House to the downstairs rooms, her offer to let him out of the original lease was not implemented, and the original lease agreement remained in effect. She testified that the tenant let her know in April 2010 that he was still planning to move downstairs at a monthly rental rate of \$500.00. When this did not happen and he continued living in the upstairs Main

House portion of the premises, she issued him the notice for non-payment of rent. She asked for a monetary order of \$4,150.00 for the following unpaid rent.

Rental Arrears	Amount Owing
April 2010	\$950.00
May 2010	1,600.00
June 2010	1,600.00
Total Monetary Award Requested	\$4,150.00

The tenant testified that the landlord agreed to let him rent rooms in these premises at a monthly rate of \$500.00 when his co-tenant decided that he did not wish to move these premises. He said that he was renting rooms in the upstairs portion of the Main House and was not responsible for finding tenants to live in the Main House. He testified that the landlord was responsible for locating other tenants who would also pay \$500.00 per month. He referred to a written statement from another person who was also paying \$500.00 per month to the landlord, under this same type of rental arrangement. He entered into evidence a statement from the landlord's May 9, 2010 letter to him in which she stated, "You failed to pay rent \$500 for May due on May 1, 2010 for a room." He said that he paid a security deposit of \$250.00 on April 9, 2010 for his rental of rooms at a rate of \$500.00 per month and referred to the landlord's receipt, entered by both parties into evidence. He confirmed that he made payments to the landlord of \$140.00 on March 19, 2010 for March 2010 rent and \$500.00 on March 26, 2010 for April 2010 rent.

The tenant also testified that he paid \$500.00 in rent on May 1, 2010 for the upstairs portion of this property. Although he presented evidence of this May 1, 2010 payment, the landlord disputed this payment and this receipt. She testified that the receipt was not issued by her as she did not receive any such payment from him for May 2010. She also said that he had not provided a copy of this portion of his evidence to her. Both parties agreed that the tenant has not made any rental payments for June 2010.

The tenant testified that he understood that the landlord had agreed to “scrap” the previous written tenancy agreement he had entered into with the landlord. He testified that he signed a new written tenancy agreement confirming his revised rent of \$500.00 per month with the landlord. He gave evidence that the landlord told him that she would return a copy of this agreement to him. He said that she never provided a copy to him as promised.

The landlord asserted that there was never any history or intention of renting out individual rooms in the upstairs Main House portion of this property. She stated that if the tenant had moved into the downstairs portion of the house, then she would not have held the tenant to the tenancy agreement he signed for the Main House.

Analysis and Findings

The parties agree that the tenant and a co-tenant did sign a written tenancy agreement committing them to a six-month fixed-term tenancy at a rate of \$1,600.00 per month for the Main House. Although the tenant alleged that the landlord agreed to “scrap” that lease when his co-tenant failed to move in, he provided nothing in writing to verify his understanding of the landlord’s commitment to waive the terms of this initial tenancy agreement.

It would seem that the tenant’s failure to relocate to the downstairs section of this house lies at the center of this dispute. The landlord testified that had the tenant moved to the downstairs room as promised in April 2010, she would have waived his responsibility for the \$1,600.00 monthly rental for the Main House as set out in the written tenancy agreement. However, the landlord gave undisputed testimony that the tenant never followed through on his commitment to move downstairs, and stayed in the upstairs premises. A written tenancy agreement can only be cancelled with the written agreement of the parties. Since the parties provided no evidence that this occurred, I accept the landlord’s assertion that since the tenant remained in the original premises, the terms of the original lease remained in effect.

However, there is also evidence to support the tenant's assertion that the landlord entered into another agreement to rent him what appears to be a different portion of this property at a rental rate of \$500.00 per month. Although her May 9, 2010 letter is somewhat contradictory, it does appear that this letter confirms that there was a second rental arrangement in place whereby the tenant would rent a room from her for \$500.00 for May 2010. I also note that the landlord's March 26, 2010 \$500.00 receipt for April's rent and the landlord's April 9, 2010 receipt for the deposit also refer to a "room" or "down rooms." These receipts lend credibility to the tenant's claim that both the landlord and the tenant understood that the parties planned to establish another tenancy agreement for a \$500.00 monthly rental of a portion of these premises. The tenant provided undisputed testimony that the landlord did prepare a second tenancy agreement for him to sign and promised to copy that signed tenancy agreement and return it to him.

There was considerable contradictory evidence submitted by the parties. Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

"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 currently 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 addition to the manner and tone (demeanour) of the witness' evidence, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

Other than the March 26, 2010 rental receipt reference to the rent being applied to downstairs rooms, the landlord has not supplied sufficient evidence to substantiate her assertion that the \$500.00 rental of rooms to the tenant was contingent on his moving downstairs in these premises. I am asked by the landlord to accept that it is reasonable that both the \$500.00 monthly rental agreement and the \$1,600.00 tenancy agreement were in force with this tenant. I do not believe that the tenant intended to have two tenancy agreements in place. There is sufficient evidence to corroborate partially the tenant's assertion that he was justified in thinking that the landlord had agreed to let him lease rooms in this property at a reduced rate of \$500.00 per month. However, the tenant has nothing in writing from the landlord to confirm this second rental arrangement, nor does he have written confirmation that the landlord released him and the co-tenant from their six-month tenancy obligations.

There is conflicting testimony with respect to the tenant's claim that he has paid \$500.00 in rent for May 2010. The authenticity of the receipt for May 2010 rent submitted by the tenant was questioned by the landlord. In inspecting this receipt, I note that it is completed on a different type of receipt form, is in a different style, and appears quite different than any of the other landlord receipts presented into evidence by both parties. This is the only written reference to a \$500.00 payment being applied by the landlord to an "upstairs" room in this property. Had the tenant paid \$500.00 in rent on May 1, 2010, as the tenant maintains, I question why the landlord would have failed to include this payment in either her notice or her application hearing package. I have questions as to the authenticity of this May 1, 2010 receipt and note that the landlord maintained that she never received a copy of this receipt before this hearing. On a balance of probabilities, I do not accept that the receipt presented by the tenant confirms that he has made any May 2010 rental payment to the landlord.

As outlined below, the landlord providing conflicting testimony with respect to the tenant's security deposit.

Under these circumstances, it appears to me that both parties attempted to create an *ad hoc* resolution to the problem the tenant encountered when the co-tenant refused to

move into the Main House. Both proceeded towards a new tenancy arrangement without ensuring that anything was in writing, either to cancel the previous written tenancy agreement or to establish the specifics of how any substitute tenancy agreement was to function.

Under such circumstances, I rely on the written terms of the tenancy agreement that the landlord and tenant entered into on March 19, 2010. In the absence of any written cancellation of that tenancy agreement, I find that the tenant is bound by the terms of that agreement and make the following determinations regarding the applications from the tenant and the landlord.

Tenant's Application for Cancellation of the Notice to End Tenancy and Landlord's Application for an Order of Possession

I find that there are sufficient grounds to establish that the tenant did not comply with the terms of the fixed term tenancy agreement he signed with the landlord. As he has not paid the rent set out in that tenancy agreement, I dismiss his application to cancel the landlord's notice to end this tenancy. I issue the landlord an Order of Possession to take effect two days after this notice is served to the tenant.

Tenant's Application that the Landlord Comply with the Act

Since I find that the landlord is entitled to an Order of Possession, I dismiss the tenant's application for an order that the landlord comply with the *Act*, *Regulation* or tenancy agreement.

Landlord's Request for a Monetary Order

The landlord submitted an application for \$4,150.00 in rent owing. I find that she is entitled to a monetary order with respect to the written tenancy agreement. However, the amount of that order is reduced by the \$500.00 that the tenant paid on March 26, 2010. Although she applied a portion of this to his security deposit, I see no basis for

her doing so, given that her receipt stated that this payment was received for his April rent. I find that the tenant did pay \$500.00 in rent for April 2010. As outlined above, I do not accept that the tenant paid \$500.00 in rent for May 2010 or anything for June 2010.

In considering the landlord's application for a monetary order, I find that the landlord is partially responsible for failing to clarify the terms by which she was willing to waive the tenant's responsibility for the \$1,600.00 rental for the Main House. Although she testified that she was only willing to let the tenant stay in the premises for \$500.00 per month if the tenant moved downstairs, she provided no evidence in writing to confirm that she made the tenant aware of this condition. The sworn evidence indicates that there had clearly been some discussion between the parties as to the landlord's expectations and the tenant's rental obligations. However, there is no evidence that the landlord provided the tenant with anything in writing to confirm her expectations until she sent him a May 9, 2010 letter accompanying her May 9, 2010 notice. In her notice, she formally advised him that she considered his tenancy in arrears by \$3,420.00 as of May 1, 2010. The tenant subsequently filed his application for dispute resolution, instead of paying the sum requested in the notice.

As of May 10, 2010, I find that that the tenant was clearly aware of the landlord's expectations and her refusal to waive the terms of the original written tenancy agreement. Until that time, I accept that both the landlord and the tenant share responsibility for the lack of clarity surrounding their revised rental arrangements. Until May 10, 2010, I find the landlord 50% responsible for the difference between the monthly rent established in the written tenancy agreement and the \$500.00 the tenant maintains he agreed to pay. The tenant's rental responsibility for April 2010 rent includes the \$500.00 he paid on March 26, 2010 plus half of the difference between that amount and the \$1,200.00 specified in the written tenancy agreement. Similarly, the tenant's responsibility for the first nine days of May 2010 includes the pro-rated portion of the \$500.00 he agreed to pay plus half of the pro-rated difference between that amount and the \$1,600.00 in the tenancy agreement. I grant the landlord a monetary

order from May 10 until May 31, 2010, and all of June 2010, at the monthly rental rate of \$1,600.00. The amount of this monetary order is set out as follows:

Rental Arrears	Amount Owed
April 2010 – \$500.00 + [50% x (\$1,200.00 - \$500.00) = \$850.00]	\$850.00
April 2010 Rent Paid (March 26, 2010)	-500.00
May 1 – 10, 2010 \$500.00 x 9/31 = \$145.16 + (50% x \$1,600.00 - \$500.00) x 9/31 = \$159.68 [\$145.16 + \$159.68 = \$304.84]	304.84
May 10 - 31, 2010 (\$1,600.00 x 22/31 = \$1,135.48)	1,135.48
June 2010	1,600.00
Total Monetary Award for Rental Arrears	\$3,390.32

Landlord's Request for Retention of Security Deposit

The landlord's testimony was inconsistent on her request for retention of the tenant's \$380.00 security deposit. At one point, she and her agent testified that the tenant did not pay the security deposit. Later, she said that the tenant did pay a security deposit. The only written tenancy agreement she submitted into evidence indicated two dates by which a security deposit was to be paid. No amount was identified in that agreement. The only reference to a deposit in the receipts she submitted was her April 9, 2010 receipt for \$250.00 "for the deposit of room." She provided written testimony that she applied \$380.00 from the tenant's March 26, 2010 \$500.00 rent payment towards the tenant's security deposit. This appears to have been an arbitrary decision by the landlord to apply most of the tenant's April rent payment to the security deposit she considered owing.

I find that the landlord is entitled to recover a portion of the monetary order through retention of the \$250.00 security deposit (plus interest) paid by the tenant on April 9, 2010. No interest is payable over this period.

Filing Fee

As the parties are each partially successful in their applications, I decline to order either of them to pay the other's filing fees.

Conclusion

I issue an Order of Possession to the landlord. I make a monetary order in favour of the landlord as follows:

Item	Amount Owing
Monetary Order for Rental Arrears	\$3,390.32
Less Security Deposit paid plus interest	-250.00
Total Monetary Award	\$3,140.32

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*.