

DECISION

Dispute Codes OPR MNR MNSD MNDC FF
 CNR OLC LRE LAT FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, to keep all or part of the security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenants for this application.

The Male Tenant filed seeking an Order to cancel the notice to end tenancy for unpaid rent, an Order to have the Landlord comply with the Act, regulation or tenancy agreement, to suspend or set conditions on the Landlord's right to enter the rental unit, to authorize the Tenant to change the locks to the rental unit, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents by the Landlord to the Tenants was done in accordance with section 89 of the *Act*, served personally to the Male Tenant on April 29, 2010. The Landlord testified the Male Tenant would not allow the Landlord to see the Female Tenant to serve the documents so the Male Tenant took the documents and proof of service form to the Female Tenant, served her and had her sign acknowledging receipt of the hearing package. The Male Tenant testified and confirmed that he served the hearing package to the Female Tenant, that she signed the acknowledgement form, and that he returned the acknowledgement form to the Landlord.

Service of the hearing documents by the Male Tenant to the Landlord was done in accordance with section 89 of the *Act*, sent via registered mail on April 28, 2010 to the Owner at the address listed on the 10 Day Notice to End Tenancy.

After the Landlord and Male Tenant accepted the affirmation I asked both participants if anyone was in the room with them and if they would be calling witnesses to testify at today's hearing. The Landlord and Male Tenant both affirmed that there was no one else in the room with them. A few minutes into the hearing I heard someone else in the back ground and confirmed that the Male Tenant was on a speaker phone and his Wife was in the room with him. The Tenant's Wife identified herself and confirmed that she was in the room listening to the hearing however she would not be providing testimony.

The Landlord, the Male Tenant, and the Tenant's Wife appeared. The Landlord and Male Tenant gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form. The Male Tenant confirmed that he did not submit evidence in support of his application or in response to the Landlord's application.

Issues(s) to be Decided

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

Is the Landlord entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Is the Tenant entitled to an Order to cancel the notice to end tenancy under section 46 of the *Residential Tenancy Act*?

Is the Tenant entitled to Orders to have the Landlord comply with the Act and to set conditions on the Landlord's right to enter the rental unit under sections 62 and 70 of the *Residential Tenancy Act*?

Is the Tenant entitled to an Order to change the locks to the rental unit under section 70 of the *Residential Tenancy Act*?

Background and Evidence

The Landlord began his testimony by stating that he was not the owner of the property, that he was the property manager and that he was here representing the owner of the property. The Landlord continued by stating that he considers renting the condo a business which he rents out by the day, week, and month.

The Landlord testified that he entered into a verbal agreement with the Male Tenant for a three month fixed term tenancy for \$5,400.00 plus \$900.00 security deposit effective March 7, 2010, however the Tenant was allowed to move in early on March 5, 2010. The Landlord argued their agreement was that the rent would be paid in full at the onset of the tenancy; however the Male Tenant showed up with only \$2,700.00 in cash and two post dated cheques in the amount of \$1,800.00 each. When I questioned the Landlord about the monthly amount of rent he continuously replied that there was no monthly rent as it was supposed to be paid in full in the amount of \$5,400.00.

The Male Tenant testified and confirmed that they had a verbal agreement for the monthly rent of \$1,800.00 plus \$900.00 and their original agreement was that he was supposed to pay the three months rent (\$5,400.00 which is 3 x \$1,800.00) in advance at the beginning of the tenancy. The Male Tenant confirmed that he provided the Landlord with \$2,700.00 cash (security deposit of \$900.00 plus \$1,800.00 first month's rent) plus two cheques dated April 7, 2010 and May 7, 2010, in the amount of \$1,800.00 each.

The Landlord advised the Tenant approached him with a written tenancy agreement and requested the Landlord sign the document. The Landlord argued that he signed the document however he didn't have the authority to sign as he was not the owner of the property. The Tenant confirmed he had a signed tenancy agreement and that he did not provide a copy of this document to the Landlord, the owner, or the Residential Tenancy Branch.

The Landlord testified that when it came time to cash the rent cheque for April 7, 2010 the Male Tenant contacted him and asked him to delay cashing the cheque. The Landlord argued that when the Tenant failed to pay the April 2010 rent he changed the terms of the tenancy agreement whereby they both agreed rent would be charged on a daily rate of \$150.00 per day plus taxes from April 8, 2010 forward.

The Landlord argued that payment of rent was not forthcoming so on April 19, 2010 he served the Male Tenant with the 10 Day Notice to End Tenancy for unpaid rent issued by the Owner. The Male Tenant confirmed receipt of the 10 Day Notice.

The Landlord stated that the Tenant is well versed with the tenancy laws and that he is using this knowledge to take advantage of the Landlord. The Landlord argued that he had submitted all of the evidence to prove the Tenant has not paid his rent and yet he continues to live in the rental unit and cause the Landlord problems.

The Male Tenant testified and confirmed that he has not paid all of the rent and stated that the Landlord had cashed one of his post dated cheques for \$1,800.00 sometime in May 2010.

The Landlord confirmed the owner attempted to cash both post dated cheques, sometime in May 2010, and one cleared however the other cheque was returned NSF. The Landlord could not provide the exact date of when the cheques were cashed however he could confirm they were cashed after the effective date of the 10 Day Notice to End Tenancy and after the notices of dispute resolution were served to the Tenant and his Wife.

The Male Tenant confirmed that he and his wife are residents of the Province and general area where the rental unit is located and that they rented this unit for continued residential purposes. The Male Tenant confirmed he owes the Landlord money for rent and that he will honour his agreement to pay the Landlord.

Analysis

A significant factor in my considerations is the credibility of the evidence. I am required to consider the evidence not on the basis of whether the testimony “carried the conviction of the truth”, but rather to assess the 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.

At one point the Male Tenant contradicted himself by first telling me, under affirmation, that there was no one else in the room with him, and then later acknowledging that his Wife was in the room.

Also, the Landlord argued that he did not have authority to sign a tenancy agreement as he was not the owner; however his actions of negotiating the terms of the tenancy and signing an agreement with the Tenant, clearly resemble those of an Agent with full authority to negotiate terms of the tenancy agreements. An Agent is defined as someone who is authorized to act for or in place of another whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. Based on the aforementioned I find the Landlord is an Agent for the Owner of the rental unit.

I do not accept the Landlord’s argument that rent could not be considered monthly and that it was only to be considered a lump sum amount of \$5,400.00, because if that was

the case why would the owner issue the 10 Day Notice to End tenancy on April 19, 2010 listing that \$1,800.00 was the unpaid rent amount due April 6, 2010.

In the circumstances before me, I find this tenancy to be governed by the *Residential Tenancy Act* and I am hereby ordering that the written tenancy agreement currently held by the Male Tenant to be void and of no force or effect, and I hereby make the following findings pertaining to the terms of the tenancy agreement:

The Landlord and the Male Tenant entered into a verbal tenancy agreement which contained the following standard terms: The tenancy is a three month fixed term tenancy effective March 7, 2010, which was set to expire on June 7, 2010. There are no move-out provisions in writing, therefore the Landlord and Tenant are deemed to have renewed the tenancy agreement as a month to month tenancy, in accordance with section 44(3) of the Act. The Tenant paid a security deposit of \$900.00 on March 5, 2010, and the rent is \$1,800.00 per month. As the agreement was verbal and was entered into between the Landlord and the Male Tenant, I hereby find the Male Tenant's wife to be an occupant and not a co-tenant.

The Tenant paid the Landlord \$1,800.00 in cash for the March 2010 rent and a post dated cheque in the amount of \$1,800.00 was cashed by the Owner in May 2010 which was payment for April 2010 rent.

Section 14 of the Act provides that a tenancy agreement may not be amended to change or remove a standard term; therefore the Landlord cannot change the rent to a daily charge of \$150.00 per day plus tax. Based on the aforementioned, I find the Tenant's rent remains at \$1,800.00 payable on the 7th of each month.

Landlord's Application

The Landlord is seeking an Order of Possession for unpaid rent based on the 10 Day Notice to End Tenancy issued on April 19, 2010. The evidence supports the Landlord took payment of \$1,800.00 for rent, sometime in May 2010, after the effective date of the 10 Day Notice and after service of the application for dispute resolution, and that the Landlord did not provide the Tenant with a receipt for this payment and did not inform the Tenant that the payment taken was for use and occupancy only. The *Residential Tenancy Policy Guideline #11* provides that when a Landlord accepts rent for the period after the effective date of the Notice to End Tenancy the intention of the parties will be at issue. The action of taking the rent, after the effective date of the Notice, results in an implied waiver of the Notice to End Tenancy. Based on the aforementioned I find the 10

Day Notice to End Tenancy for unpaid rent issued April 19, 2010, to be void and of no force or effect.

In regards to the Landlord's application for a monetary order for unpaid rent that the evidence supports the Male Tenant failed to pay May 2010 and June 2010 rent and he continues to occupy the rental unit . The Tenant's failure to pay rent is a contravention of section 26 of the Act which provides that a tenant must pay rent when it is due under the terms of the tenancy agreement. Based on the aforementioned I hereby approve the Landlord's request for a monetary order in the amount of \$3,600.00 (2 x \$1,800.00).

As the tenancy is ongoing I hereby dismiss the Landlord's request to keep the security deposit and hereby order the Landlord to continue to hold the \$900.00 security deposit, in trust, and to administer the deposit in accordance with section 38 of the Act.

The Landlord provided evidence of a Notice Terminating or Restricting a Service or Facility which was issued April 19, 2010 to be effective May 20, 2010 for the cancellation of Hydro, Cable, Internet, and telephone for a reduction in rent of \$75.00 per week. Having found the Landlord could not change the standard term of rent payable at \$1,800.00 per month, I find this Notice to terminate the above mentioned services not to be issued in accordance with section 27 of the Act; therefore the Notice Terminating or Restricting a Service or Facility is hereby cancelled and is of no force or effect. The Landlord is at liberty to issue another Notice Terminating or Restricting a Service, which complies with the Act and considers the rent as \$1,800.00 per month.

The Landlord has been partially successful with his application, therefore I award the Landlord recovery of the \$50.00 filing fee.

Tenant's Application

Having found the 10 Day Notice to End Tenancy to be void, the Tenant's request to cancel the Notice is moot.

The Tenant has sought Orders to suspend or set conditions on the Landlord's right to enter the rental unit, and to authorize the Tenant to change the locks to the rental unit. In making these requests the onus of proof lies with the applicant Tenant. The Tenant did not submit evidence in support his application. Upon careful review of the testimony I find the Tenant has failed to prove the merits of his application, therefore I dismiss his requests, without leave to reapply.

I decline to award the Tenant recovery of the filing fee.

I have included with my decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the Landlord and Tenant to familiarize themselves with their obligations as set forth under the *Residential Tenancy Act*.

Conclusion

I HEREBY ORDER both the Landlord and the Tenant to comply with the *Residential Tenancy Act and Regulation*.

The 10 Day Notice to End Tenancy issued April 19, 2010, is **HEREBY CANCELLED** and is of no force or effect.

A copy of the Landlord's decision will be accompanied by a Monetary Order in the amount of **\$3,650.00**. (\$1,800.00 x 2 plus \$50.00 filing fee). The Order must be served on the Respondent Tenant and may be filed in Provincial Court and enforced 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: June 14, 2010.

Dispute Resolution Officer