

DECISION

Dispute Codes SS CNC OLC FF

Preliminary Issue

I explained the definition of a request for substitute service after which the Tenant confirmed that she erred in applying for an Order for substitute service and therefore was withdrawing her request.

The Tenant's evidence was served to the Landlord on June 15, 2010 when it was placed in the Landlord's secure mailbox located at the Landlord's office in Building 2. The Landlord confirmed receipt of the Tenant's evidence.

The Landlord confirmed that she did not serve evidence to the Tenant and that the Letter she sent to the *Residential Tenancy Branch* on June 22, 2010, was not sent to the Tenant.

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to obtain an Order to cancel a notice to end tenancy issued for cause, to obtain an Order to have the Landlord comply with the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Landlord.

Service of the hearing documents was done in accordance with section 89 of the *Act*, served personally by the Tenant to the Landlord on May 8, 2010. The Landlord confirmed receipt of the hearing package.

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

Issues(s) to be Decided

Is the Tenant entitled to Orders under sections 47 and 62 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony was the Tenant's tenancy agreement for Building 2 became effective October 1, 2009, and is for a fixed term set to switch to a month to month tenancy after September 30, 2010. Rent is payable on the first of each month in the amount of \$1,050.00 and a security deposit of \$525.00 was paid on September 3, 2009. Building 1 and Building 2 are managed by the same company and the Landlord is the resident manager for both buildings.

The Tenant testified that she entered into a fixed term tenancy agreement with her spouse, for the period of May 1, 2009 to April 30, 2010, and they occupied the unit in Building 1, as co-tenants, until they separated. The Tenant left Building 1 and entered into the tenancy agreement for Building 2 as the sole occupant effective October 1, 2009. The Tenant's spouse continued to occupy the unit in Building 1 until the end of the fixed term on April 30, 2010. The Tenant advised that she reconciled with her spouse just before Christmas 2009 and by February 2009 they decided to live together again in the rental unit in Building 2.

The Tenant argued that she provided both written and verbal notices to the previous resident manager about their plans to cohabitate in Building 2 effective April 30, 2010, which was the end of the fixed term tenancy for the unit in Building 1. The Tenant stated that she also provided information to this regard when she completed the tenant information update form for the new resident managers (the Landlord) in April 2010. The Tenant contends the Landlord new that her spouse was moving into her unit and that they discussed this when the Landlord requested her spouse's forwarding address while completing the move out inspection on the unit in Building 1 on April 30, 2010.

The Tenant testified that when she returned home from work at approximately 9:30 p.m. on April 30, 2010 she found a 1 Month Notice to End Tenancy for Cause which had been placed through her secured mail slot.

The Landlord testified that she became the resident manager of Building 1 and Building 2 on March 25, 2010. The Landlord confirmed they received proper notice to end the tenancy in Building 1 on April 30, 2010 and she was aware a move-out inspection would be required. The Landlord argued that the 1 Month Notice to end Tenancy was issued to the Tenant at Building 2 because the Landlord does not know this male who the Tenant has allowed to move into her unit. The Landlord claimed the Tenant failed to comply with #13 of her tenancy agreement which states that if a tenant adds an additional occupant without the written permission of the landlord then the tenant has breached a material term of the tenancy agreement. The Landlord went on to advise that she knew this man was a tenant at Building 1, that on a couple of occasions in April 2010 she had seen the male in Building 2, the Landlord knew the male had his own set of keys to Building 2, and that male would spend time with the Tenant at her unit in Building 2. The Landlord went on to say the male approached her near the end of April 2010 and asked the Landlord if she could direct him to the Tenant's storage unit. The Landlord stated that when she directed the male to the Tenant's storage unit he told her that the Tenant had two storage units and he was looking for the other one. The Landlord claimed she replied to the male that she was unaware that the Tenant had two storage units. During the course of the hearing the Landlord changed her testimony about this incident to add that she told the male, "you are not our tenant", after showing him the storage locker, and that they discussed how the male was not on the tenancy agreement and that the male told the Landlord he was not required to be added to the tenancy agreement because the Tenant is his wife. The Landlord confirmed she completed the move-out inspection with the male at Building 1 and when she asked him for his forwarding address he advised her at that time he had moved into Building 2 with the Tenant.

The Landlord confirmed that she kept files for each tenancy for both buildings and that she sent out a Tenant Information Update form to update the emergency information for each tenant. I requested the Landlord open the Tenant's file for building 2, which I heard her open a file cabinet to retrieve. I then asked the Landlord to count the number of pages in the file. The Landlord counted out loud as she thumbed through the pages. I could hear her turning the pages while counting and as I counted along I noticed she was not counting each page she turned over. I asked the Landlord to conduct a second count at which point she did not count out loud and I could not hear the pages turning and after a period of quiet I asked her how many pages she counted and she told me the same number she had said previously. I questioned the Landlord about which documents were in the Tenant's file and she stated that there were no letters or forms in the file that refer to the male or which refer to the Tenant advising the male would be occupying the unit with her. I then asked the Landlord to open the Tenant's file from Building 1 which she promptly replied that she did not have the file. I asked the Landlord if the Tenant's updated information sheet was in the file after which the Landlord advised the tenant information sheets are kept in a book or binder and she advised she had a separate binder or book for each building. The Landlord was able to locate the information sheet for Building 1 and confirmed the male was listed as a tenant on the form. When I asked the Landlord to locate the Tenant's information sheet for Building 2 she stated she did not have one.

The Landlord argued that while documents were left in the office for her when she began her new job the previous resident manager did not meet with her and did not provide information to her about the current tenants.

The Landlord argued that the Tenant had several conversations with their Property Manager about the male moving into the rental unit and that there has been no written letters issued to the Tenant by the Property Manager or from the Landlord. The Landlord confirmed she has had conversations with the Property Manager about this situation and that it was the Landlord's decision to issue the 1 Month Notice to End Tenancy.

The Tenant argued she feels the Notice to End Tenancy was not issued in good faith and that the Landlord told her that it was only after the Landlord faxed the head office the move-out inspection report from Building 1 that they decided to issue the Notice to End Tenancy. The Tenant confirmed the Landlords withheld money from the security deposit for cleaning and the Tenant was now requesting proof of the charges claimed.

Analysis

The Landlord confirmed she did not provide the Tenant 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 Tenant has not received copies of the Landlord's evidence I find that the Landlord's evidence cannot be considered in my decision. I did however consider the Landlord's testimony.

A significant factor in my considerations is the credibility of the Landlord's testimony. I am required to consider the Landlord's testimony not on the basis of whether it "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. I find that the Landlord contradicted her own testimony on several occasions during the hearing and primarily when claiming she did not know the male and did not know he was moving in with the Tenant, even after she provided testimony that she had seen the male in Building 2 on several occasions with his own set of keys and that the Landlord knew he was there to see the Tenant.

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 Tenant to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the Tenant over the Landlord, and therefore I find the Tenant did provide the previous resident manager with notification both verbally and in writing that her spouse would be occupying the rental unit in Building 2, with the Tenant, once the lease expired in Building 1. That being said the onus then lied with the Landlord to provide the Tenant with the required documents and an amended tenancy agreement which added the Tenant's spouse as an adult occupant.

Section 47(h) of the Act provides that a landlord may end a tenancy by giving notice to end the tenancy if the tenant has failed to comply with a material term and has not corrected the situation within a reasonable time after the landlord gives written notice to do so. In this case the Landlord did not provide the tenant with written notice of the breach and did not request in writing that the tenant correct the breach in a reasonable time. Based on the aforementioned I find the Notice to End Tenancy was not completed in accordance with the requirements of the Act and therefore the 1 Month Notice to End Tenancy issued April 30, 2010 is hereby cancelled.

I do not accept the Landlord's argument that they do not know this male and cannot accept him as an occupant at the Tenant's unit. There is evidence that the Tenant's spouse was listed as a co-tenant and lived in Building 1 as of May 1, 2009 with the

Tenant and then after the Tenant moved into Building 2 the Male continued to occupy the unit at Building 1 as the sole tenant for seven months.

Upon careful review of the current tenancy agreement I find there is a provision under #6 and #13 to add an occupant to the tenancy agreement. Therefore, in accordance with section 62 of the Act I hereby Order the Landlord to amend the Tenant's tenancy agreement to add the Tenant's spouse (the male) as an adult occupant under #2 of the tenancy agreement effective April 30, 2010.

The evidence supports the terms of the tenancy agreement were negotiated based on one tenant with no additional occupants. Section # 6 of the tenancy agreement provides for an additional \$30.00 per month to be charged for each additional occupant. In accordance with section 62 of the Act, I hereby Order the monthly rent to be \$1,080.00 (\$1,050.00 + \$30.00) effective May 1, 2010. The remaining terms of the tenancy agreement do not change and this Order does not constitute the creation of a new tenancy agreement.

In accordance with section 62(3) of the Act, I hereby Order the Landlord and the Tenant to comply with the *Residential Tenancy Act*.

The Tenant has been successful with her application, therefore I award recovery of the \$50.00 filing fee. The increased rent was effective May 1, 2010 and the Tenant confirmed she has not paid the additional \$30.00 per month pending the outcome of today's hearing. Therefore the Tenant's monetary award of \$50.00 is to be offset against the balance owing on her rent of \$60.00 (\$30.00 for May 2010 + \$30.00 for June 2010), in accordance with section 72 of the Act, leaving a balance payable to the Landlord in the amount of \$10.00. A monetary order will be issued in favor of the Landlord for \$10.00.

The Tenant advised that her rent is paid by a preapproved automatic withdrawal, therefore I HEREBY ORDER the Tenant to sign the required documents to increase the automatic withdrawal amount from \$1,050.00 to \$1,080.00 effective July 1, 2010.

Conclusion

The 1 Month Notice to End Tenancy issued April 30, 2010, is HEREBY CANCELLED and is of no force or effect.

The Landlord is HEREBY ORDERED to add the Tenant's spouse as an adult occupant on the tenancy agreement.

The monthly rent is HEREBY payable on the first of each month in the amount of \$1,080.00 effective May 1, 2010. (May 2010 and June 2010 rent shortfall of \$60.00 will be offset against the monetary awards)

A copy of the Landlord's decision will be accompanied by a Monetary Order in the amount of \$10.00.

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 24, 2010.

Dispute Resolution Officer