

DECISION

Dispute Codes: OPR, MNR, MNDC, CNR, OLC, ERP, RP, PSF, LRE, RR and FF

Introduction

These applications were brought by both the landlords and the tenants.

By application of May 13, 2010, the landlords seek an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid rent served in person on May 3, 2010. The landlords also seeks a Monetary Order for the unpaid rent, loss or damage under the legislation or rental agreement, recovery of the filing fee for this proceeding and authorization to retain the security deposit in set off against the balance owed.

By application of May 5, 2010, the tenants seek to have the Notice to End Tenancy set aside, a Monetary Order for loss or damage under the legislation or rental agreement, Orders for landlord compliance, emergency repairs, repairs, provision of services or facilities, restrictions on the landlords' right to enter the rental unit, a rent reduction and recovery of the filing fee for this proceeding.

At the commencement of the hearing and by fax of June 18, 2010, the tenant requested the matter be adjourned to allow him more time to submit evidence and to respond to late evidence submitted by the landlord.

Given that the tenant is currently in arrears by over three months rent, I found it would unfairly prejudice the landlords to postpone the hearing further on their application and declined to adjourn it.

I deferred my decision on whether to adjourn the tenants' application until the landlords' application had been dealt with.

Issues to be Decided

The landlords' application requires decisions on whether the Notice to End Tenancy should be set aside or upheld, whether the landlord is entitled to a Monetary Order for rent and utilities and filing fee and authorization to retain the security deposit.

In addition to the Notice to End Tenancy issue, the tenants' application requires a decision on whether they are entitled to monetary compensation for loss of a service and quiet enjoyment, and the various orders sought in their application.

Background and Evidence

This is a fixed term tenancy agreement under which the tenancy was to start on December 15, 2009 for six or seven months, then become a month to month tenancy, however, the tenants did not take occupancy until early January as their trip from Ontario had been interrupted. Rent is \$1,050 per month and the landlord holds a security deposit of \$525 paid on or about December 1, 2009.

During the hearing, the landlord gave evidence that the Notice to End Tenancy had been served when the tenants had paid no rent for March 2010, had a shortfall for April of \$550 and had not paid the rent for May. In the interim, the tenants have not paid the rent for June 2010.

The tenant agreed that the rent had not been paid as claimed by the landlord.

The landlord also requested a Monetary Order for unpaid utilities but the tenant claimed that they had either been paid or were not currently due and there was no documentary proof of either claim available..

The tenant gave explanation that the rent had not been paid as a result of the fact that the rental unit had been substantially without heat because the landlord had not filled the oil tank.

In response, the landlord noted that the rental agreement did not include heat or any utilities.

He further pointed to exchanges of emails with the tenant including the following statements:

November 26, 2009 – landlord to tenant: “The tenant is responsible for all utilities i.e. Hydro, telephone/cable, **oil** (emphasis added), water and garbage collection and you would need to make those arrangements. I would be able to assist you with the contact number information.”

December 7, 2009 – landlord to tenant. “you are about one week from arrival in Victoria. Our phone numbers are..... You may want to make arrangements with Shawor Telus. BC Hydro can be reached at..... Columbia Fuel for furnace oil.... There are **many choices in the phone book...Peninsula Co-op Hating may have an incentive program going but you need to sign up to be a member.... The incentive is 100 litres of oil free if you go to the automatic fill plan.**” (Emphasis added)

January 1, 2010 - landlord to tenant. “I left the electric heater in the unit as there is not much fuel oil available for the furnace.”

The landlord provided copies of receipts showing that had purchased 40 litres of furnace oil on December 13, 2009 which he said he had place in the tank to ensure that the tenants had sufficient oil to warm them until they could arrange their own delivery..

January 9, 2010, the parties exchanged emails in which the tenant advised the landlord that the rental unit was cold and they had spent the night in a hotel. The landlord replied that the lack of heat was a surprise.

He said the furnace had been working properly but he had turned the thermostat down to conserve heat and suggested the tenant adjust it in the living room. He invited the tenant to call him on his cell phone so they could meet.to address the problem.

The landlord stated that he had met with the tenant that day, a Saturday, and offered to arrange for an oil delivery. He stated that the tenant had declined and said that he would take care of the matter the following Monday.

The landlord said that he did not hear about the issue again until he received the tenants' application on May 17, 2010.

Analysis

As to the landlord's application, section 26 of the Act states, in part, that:

“(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.”

Section 46 of the Act states that a rent is not paid, a landlord may end the tenancy by issuing a 10-day Notice to End Tenancy on any day after the rent is due. The tenant may nullify the notice by paying the overdue rent within five days of receipt of the Notice. In this instance, I find that the rent remained unpaid to the time of the hearing.

Accordingly, I find that the Notice to End Tenancy is valid and lawful and that the landlords are entitled to an Order of Possession effective two days from service of it on the tenants.

I further find that, including recovery of their filing fee and authorization to retain the security deposit in set off, which I award under section 72 of the *Act*, the tenants owe the landlords an amount calculated as follows:

March rent	\$1,050.00
April rent shortfall	550.00
May rent	1,050.00
June rent	1,050.00
Filing fee	50.00
Subtotal	\$3,750.00
Less retained security deposit	- 525.00
TOTAL	\$3,225.00

As to the tenants' application, I find that, having upheld the Notice to End Tenancy, the tenants' application to set it aside is dismissed.

As the tenancy's end is imminent, the tenants' request for orders for repairs, landlord compliance, provision of services, rent reduction and restricting landlord access are dismissed as moot.

While I expressed an intention during the hearing to consider the tenants' request for adjournment, on a careful review of all the evidence, I must decline to reconvene on the tenants' application.

The tenants' arguments all rest on the claim that they had no furnace oil for the duration of the tenancy.

However, the rental agreement, exchange of emails and meeting between the landlords and tenants make it abundantly clear that tenants were responsible for contracting with a supplier to provide the oil.

I accept the evidence of the landlord that they declined his offer to assist on January 9, 2010 and did not raise the issue with him again until their application responding to the Notice to End Tenancy. I must find, therefore, that they voluntarily accepted the consequences of failing to arrange for oil delivery.

Therefore, the tenants' application is dismissed in its entirety without leave to reapply.

Conclusion

The tenants' application is dismissed in its entirety.

The landlords' copy of this decision is accompanied by:

1. An Order of Possession, enforceable through the Supreme Court of British Columbia, effective two days from service of it on the tenant.
2. In addition to authorization to retain the security deposit in set off, a Monetary Order for \$3,225.00, enforceable through the Provincial Court of British Columbia, for service on the tenants.

June 22, 2010