

DECISION

Dispute Codes OPR, MNR, MNSD, MND, FF
 CNR, ERP, RPP, FF
 MNDC, OLC, RP, LRE, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent, for compensation for damages to the rental unit, to recover the filing fee for this proceeding and to keep the Tenant's security deposit and pet damage deposit in partial payment of those amounts.

The Tenant applied to cancel a 10 Day Notice to End Tenancy, for an Order that the Landlord make emergency repairs, for an Order that the Landlord return the Tenant's personal property and to recover the filing fee for this proceeding.

The Tenant also filed a separate application for compensation and repairs, and for an order placing restrictions on the Landlord's right to enter the rental unit. That application was originally set for hearing on April 14, 2010 but was reconvened to today's date to give the Tenant an opportunity to serve an RCMP Report on the Landlord. In the intervening period, the Parties filed their applications indicated above.

Given that there was insufficient time to deal with the Tenant's first application (for compensation and repairs), and given further that it is unrelated to the Parties' other applications to cancel a Notice to End Tenancy for Unpaid rent and for an Order of Possession, that application is further adjourned to **August 9, 2010 at 11:00 a.m.** for hearing. New Notices of the Reconvened Hearing will be mailed to the Parties.

Issues(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?
2. Are there arrears of rent and utilities and if so, how much?
3. Are emergency repairs required?
4. Does the Landlord have personal property of the Tenant's that must be returned?

Background and Evidence

This tenancy started on September 15, 2007. Rent is \$1,000.00 per month payable in advance on the 1st day of each month plus one half of the utilities for the rental property. The Tenant paid a security deposit of \$500.00 on August 22, 2007 and a pet damage deposit of \$500.00 on September 15, 2007.

The Parties agree that on April 15, 2010, the Landlord served the Tenant in person with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated April 15, 2010. The Landlord said he served the Tenant with the Notice after he discovered that she had put a stop payment on her April 2010 rent cheque. The Landlord also said that he only recently discovered that the Tenant delivered an evidence package to his counsel and that in that package she had included a cheque dated April 20, 2010 for \$1,000.00. The Landlord's counsel argued that the cheque was delivered to his office after April 20, 2010 but he admitted that he was away on April 20, 2010 and had no evidence of when the documents were delivered to his office.

The Landlord argued that in the "Details of Dispute" portion of the Tenant's application and in her written submissions, she claimed that she (the Tenant) did not intend to pay April 2010 rent but rather was seeking to use her security deposit and pet deposit in lieu of making a rent payment. The Landlord also argued that the Tenant was not authorized to make her rent payments to his lawyer and that throughout the tenancy their practice was for the Tenant to pay her rent to him.

The Tenant claimed that she believed she had been instructed by the Dispute Resolution Officer during the hearing held on April 14, 2010 to deliver anything on behalf of the Landlord to his counsel. Consequently, the Tenant said she delivered her evidence package containing her rent cheque to the Landlord's counsel's office in person on April 20, 2010.

The Landlord said that at the beginning of the tenancy, he gave the Tenant copies of the utility bills together with a spread sheet showing how much she owed. The Landlord also claimed that the Tenant paid for the cable bill so he would deduct one half of the cable amount from the Tenant's portion of the gas and hydro bills paid by him. The Landlord said that the Tenant subsequently advised him that she did not need copies of the bills. The Landlord said it was his practice to give the Tenant a demand for payment of the utilities every 2 to 3 months. The Landlord claimed that the Tenant has not paid for utilities since November 2009 and that the last demand for payment he gave her was on April 1, 2010. The Landlord argued that he should not be responsible for crediting the Tenant one-half of the cost of cable after March 1, 2010 as he claimed that he no longer had the use of internet services because the Tenant denied him access to it by shutting off the router.

The Tenant admitted that she had utility arrears but claimed that she made a payment of \$228.25 on February 1, 2010 which she believed was for the period, October to December 2009. The Tenant denied that she cut off the Landlord's internet service by disconnecting the router and argued that the only reason he didn't have access to it was because he moved out of the rental property on March 1, 2010.

The Tenant claimed that the property was in need of emergency repairs which included leaking taps, holes in the yard, unsecured baseboards and windows that did not lock. The Tenant also claimed that the Landlord had taken a 50 foot garden hose belonging to her and that he had damaged some other items. The Landlord said it was possible

that he mistakenly took the Tenant's garden hose and he agreed that he would return it to her or replace it.

Analysis

Landlord's Application:

Section 46(4) of the Act states that **within 5 days of receiving** a Notice to End Tenancy for Unpaid Rent or Utilities, a Tenant must either pay the overdue rent or apply for dispute resolution. If a Tenant fails to do either of these things, then under section 46(5) of the Act, they are conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice and they must vacate the rental unit at that time.

The Parties agree that the Tenant was served with the 10 Day Notice to End Tenancy dated April 15, 2010 in person on April 15, 2010. The Tenant says that she paid the outstanding rent on April 20, 2010 and therefore the Notice should be cancelled. However, in her written submissions, the Tenant claims that her cheque dated April 20, 2010 was in payment of May 2010 rent and that she was seeking an Order to have her security deposit and pet damage deposit applied to rent owing for April 2010. The Landlord argued that the Tenant did not pay him the outstanding rent within 5 days of receiving the Notice or on April 20, 2010 and that she was not authorized to pay the rent to his lawyer's office.

I find that the evidence of both parties on this issue is unreliable. However, the Tenant has the burden of proof and must show (on a balance of probabilities) that she paid the outstanding rent for April 2010 on April 20, 2010 as she alleged. This means that if the Tenant's evidence is contradicted by the Landlord, the Tenant will need to provide additional, corroborating evidence to satisfy the burden of proof. Given the contradictory evidence of the Parties (and especially the contradictory evidence of the Tenant) on this issue and in the absence of any corroborating evidence from the Tenant, I find that the Tenant has not provided sufficient evidence to show that she paid the outstanding rent for April 2010 within 5 days of receiving the 10 Day Notice.

For this reason, the Tenant's application to cancel the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated April 15, 2010 is dismissed without leave to reapply. Consequently, I find pursuant to s. 55(1) of the Act that the Landlord is entitled to an Order of Possession to take effect 2 days after service of it on the Tenant.

Furthermore, on the previous hearing date, the Tenant was instructed by the Dispute Resolution Officer to deliver only one piece of evidence, an RCMP Report, (which was the basis for the adjournment) to counsel for the Landlord. The Tenant **was specifically** instructed that no other documents were permitted to be delivered. Additionally, no issue of rent payments was raised in the matter before the Dispute Resolution Officer on April 12, 2010 because the issues being dealt with at that time concerned only compensation for the Landlord's failure to make repairs, and for orders that the landlord make repairs and that his right to access the rental unit be restricted.

Consequently, I find that there is little merit to the Tenant's argument that she thought she was supposed to make her rent payment to the Landlord's lawyer's office.

The Parties agree that for the period, April to June 2010, the Tenant has given the Landlord a cheque dated April 20, 2010 for \$1,000.00 and a cheque for \$1,000.00 dated June 1, 2010 neither of which have been cashed by the Landlord. Given the Tenant's arguments on her application and in her subsequent written submissions, I find that the payment she made on April 20, 2010 was intended to be in payment of rent for May 2010. Although the Tenant argued that the cheque dated June 1, 2010 was for May 2010 rent, the memorandum on that cheque states that it is in payment of rent for June 2010. Consequently, I find that there are still rent arrears for April 2010 in the amount of **\$1,000.00**.

On the issue of unpaid utilities, the Landlord has the onus of proof and must show that the Tenant has arrears as alleged. In particular, the Landlord claims that the Tenant has not paid for her share of the utilities since November 2009. The Tenant claims that she has paid for utilities up to and including December 2009. Although the Tenant suggested that the amount claimed by the Landlord for utilities for the period January to May 2010 were suspiciously high, she admitted that they did correspond with the billing statements provided by the Landlord. Given the contradictory evidence of the Parties on this issue and in the absence of any corroborating evidence from the Landlord (as to the Tenant's payments), I find that the Landlord has not provided sufficient evidence to show that the Tenant did not pay utilities for the period, October to December 2009. Consequently, I find that the Landlord is entitled to recover payment from the Tenant for the following invoices:

BC Gas (Jan. 16 – Feb. 16/10):	\$84.89
BC Gas (Feb. 16 – Mar. 15/10):	\$113.50
BC Gas (Mar. 16 – Apr. 15/10):	\$55.31
BC Hydro (Jan. 16 – Mar. 15/10):	\$236.34
BC Hydro (Mar. 16 – May 14/10):	<u>\$197.84</u>
Subtotal:	\$687.88
 Tenant's 50% share:	 \$343.94
Less Cable credit (Jan. – Mar/10)	<u>(\$60.00)</u>
Utilities owed by Tenant:	\$283.94

Consequently, I find that the Tenant has unpaid utilities of **\$283.94**. Given that the Landlord moved out of the rental property on March 1, 2010 and advised the Tenant at that time that he would no longer be sharing this expense, I find that no further credits for cable should be set off of the other utilities paid by the Landlord after March 2010.

The Landlord also applied for compensation for damages caused by the Tenant's dog to the back yard. However, I find that this part of the Landlord's claim is premature in that the tenancy has not yet ended and he has not given the Tenant an opportunity to repair

that damage. Consequently this part of the Landlord's claim is dismissed with leave to reapply. As the Landlord has been successful on his application, I find pursuant to s. 72 of the Act that he is entitled to recover the **\$50.00** filing fee for this application from the Tenant.

I order the Landlord pursuant to s. 38(4) of the Act to keep the Tenant's security deposit and pet damage deposit in partial payment of the unpaid rent and utilities. The Landlord will receive a monetary order for the balance owing as follows:

Unpaid Rent:	\$1,000.00
Unpaid Utilities:	\$283.94
Filing fee:	<u>\$50.00</u>
Subtotal:	\$1,333.94
Less: Security deposit:	(\$500.00)
Accrued interest:	(\$10.26)
Pet deposit:	(\$500.00)
Accrued interest:	<u>(\$9.76)</u>
Balance Owing:	\$313.92

Tenant's Application:

Section 33 of the Act defines an emergency repair as one that is "urgent, necessary for the health or safety of anyone or for the preservation or use of the residential property **and** that is made for the purpose of repairing major leaks in pipes or the roof, the primary heating system, damaged or defective locks **that give access to** a rental unit and electrical systems." I find that none of the issues raised by the Tenant constitute emergency repairs and as a result, that part of her application is dismissed without leave to reapply. As the tenancy is ending, I also find that it would not be appropriate to make an order for general repairs for those items.

The Tenant also claimed that the Landlord "stole" her personal property which included a 50 foot garden hose. The Landlord admitted that he may have inadvertently taken the hose when he moved out of the rental property on March 1, 2010. Consequently, I order the Landlord to return or replace the Tenant's garden hose. The Tenant claimed that the Landlord had damaged other items belonging to her and she sought compensation for them. However, the Tenant did not apply for that relief on her application in this matter and as a result, I make no finding as to whether she is entitled to compensation or not.

As the Tenant has been largely unsuccessful in her application, I find that she is not entitled to recover the \$50.00 filing fee from the Landlord and that part of her claim is also dismissed without leave to reapply.

Conclusion

The Tenant's application is dismissed without leave to reapply. An Order of Possession to take effect 2 days after service of it on the Tenant and a Monetary Order in the amount of \$313.92 have been issued to the Landlord and a copy of them must be served on the Tenant. The Order of Possession may be enforced in the Supreme Court of British Columbia and the Monetary Order may be enforced in the Provincial (Small Claims) Court of British Columbia.

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 02, 2010.

Dispute Resolution Officer