

DECISION

Dispute Codes:

CNR, MNDC, OLC, OPR, MNSD, FF

Introduction

This was a cross-Application hearing.

This hearing was scheduled in response to the tenant's Application for Dispute Resolution, in which the tenants have made Application to cancel a Notice issued for unpaid rent, for compensation for damage or loss under the Act, an Order the landlord comply with the Act and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

The landlord has made application requesting an Order of possession, for compensation for unpaid rent, to retain all or part of the security deposit and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present affirmed oral testimony and to make submissions during the hearing.

Preliminary Matters

At the start of the hearing neither party could confirm receipt of the other's Applications. The landlord denied she had received the tenant's Application; the tenant's denied receipt of the landlord's Application. The landlord's witness was called into the hearing to testify in relation to service of the Notice of hearing, but did not testify as the parties reached agreement that they would proceed, based upon the details of the Application which I reviewed with them.

The landlord confirmed receipt of the tenant's evidence package. The tenants disputed receipt of the landlord's evidence, which included documents the tenants confirmed they did have, such as a written agreement between the parties dated February 8, 2010 and a copy of the Notice ending the tenancy. Given the dispute in relation to service of this evidence the landlord was at liberty to provide oral testimony in relation to the balance of her evidence submitted.

The landlord has named only the male tenant as a respondent. The 2 tenants have Applied, naming the landlord as a respondent.

Issue(s) to be Decided

Is the landlord entitled to an Order of possession for unpaid rent or should the Notice issued on July 8, 2010; be cancelled?

Are the tenants entitled to compensation for loss of quiet enjoyment?

Must the landlord be Ordered to comply with the Act?

Is the landlord entitled to a monetary order for unpaid rent?

May the landlord retain the deposit paid?

Is either party entitled to filing fee costs?

Settled Agreement – End of Tenancy

During the hearing the parties reached mutual agreement that this tenancy would end effective September 30, 2010; by 1 p.m.

The tenants understood that the landlord would receive an Order of possession for the agreed end date; as part of the settled agreement.

The parties agreed that the tenants will pay the \$475.00 July rent owed by July 28, 2010, and that future rent will be paid on or before the first day of August and September, 2010.

Landlord's Monetary Claim – July, 2010 Rent

As, at the time of this hearing, the July, 2010, rent was outstanding, I have issued the landlord a monetary Order in the sum of \$475.00 for July rent owed. I Order, that the landlord must, as provided by section 26 of the Act; issue the tenants a written receipt for any payments made in cash and the receipt must be provided at the time of payment. If the landlord refuses to issue the tenants a receipt at the time of payment, I order, pursuant to section 62(3) of the Act, that the tenants may make payment in the form of a cheque issued to the landlord. The parties shall retain proof of payment made, which would negate any attempt at enforcement of a monetary Order, where payment is proven.

The landlord has requested to retain the deposit paid, in partial satisfaction of July rent owed. As the parties reached a mutual agreement that rent would be paid on July 28, 2010; I find that the deposit will continue to be retained by the landlord and disbursed, at the end of the tenancy, as provided by section 38 of the Act.

Background and Evidence – Tenant's Claim

The tenants have claimed compensation in the sum of \$1,800.00 as the result of the loss of quiet enjoyment. The tenants stated that it is difficult to place a monetary value on the loss of peace and quiet.

The tenancy commenced in March 2009; there is no written agreement. The landlord confirmed that she has accepted rent payments throughout the tenancy, from both the male and female tenant occupants of the rental unit.

Rent was \$500.00 per month and on February 8, 2010; the 2 tenants and the landlord signed an agreement reducing rent to \$475.00 per month effective March 1, 2010. A copy of the this agreement was submitted as evidence. This agreement stated, in part, that the rent reduction of \$25.00 per month is in recognition of "constant noise from landlord's children and the neighbouring suites, tenants not yet evicted."

Within 1 week of the start of the tenancy the tenants experienced problems with disturbances caused by the neighbouring occupants in the house. The neighbours had parties with large numbers of people in their unit and made threats against the female tenant. The police were called in relation to incidents caused by the neighbouring occupants, on October 22, 2009, January 31, 2010, and February 27, 2010. The tenant has been given a subpoena to attend court as a witness to an assault that allegedly occurred on October 31, 2009.

The tenants testified that the landlord often communicated with the neighbouring occupants by coming through their unit and using their door, as she was fearful. The landlord made repeated promises to evict the tenants and there were occasions that eviction was commenced based upon unpaid rent. The neighbouring occupants were not evicted for cause. The tenants submitted that the landlord was well aware of the problems and disturbances caused by the neighbouring occupants, yet she took no action until they were evicted in April 2010.

The tenants played 3 tape recordings of noise that could be heard in their unit from the landlord's unit directly above them. One tape was made during a child's birthday party; which was extremely loud. The 2nd tape played was of a loud, repetitive, constant sound being made across the floor. The tenants believe this was some sort of battery operated toy, which was constantly operated. The 3rd recording was made on May 3, 2010, of the landlord yelling, asking the tenants to leave.

The tenants testified that the noise from the children running on the floors, people yelling, even talking, were a constant, day-to-day intrusion on their right to quiet enjoyment. Initially, the tenants did not pursue a remedy, as they did not understand their rights under the Act; although they submitted that they repeatedly asked the landlord for a solution. They then investigated the process of dispute resolution and followed the suggestion that a mutual agreement be reached.

The 2 tenants met with the landlord on February 2, 2010, to discuss the need for a solution, which resulted in the February 8, 2010, agreement reducing the rent by \$25.00 per month. The tenants wanted something in writing and submit that the reference to disturbances caused by the other tenants supports their claim that the landlord was aware of the loss of quiet enjoyment that was being caused by the neighbouring occupants that needed to be evicted. The tenants stated that the landlord had asked them to let her know of any problems with the other occupants and the landlord was fully aware that they were causing disturbances.

The tenants testified that they understand that some sounds of normal day-to-day living would not be unusual, however, they submitted that the noise they were exposed such as the constant sounds of the landlord's family upstairs, combined with the neighbouring occupants, made living in the unit highly unpleasant. The rental unit had no sound-proofing and if the tenants had known the extent of noise they would be exposed to they would not have rented the unit.

The tenants testified that they do not receive their mail on the day of delivery and that at times the landlord has held their mail for a period of weeks and opened their mail. The tenants submitted that the landlord has entered their rental unit with providing proper written notice of entry.

The landlord denied that there had been any problems with the neighbouring occupants. The landlord also submitted that what the neighbouring tenants were doing had nothing to do with the tenants. The landlord denied using the tenant's suite as an access to the neighbours and denied having ever talked with the tenants about their concerns.

The landlord testified that the tenants signed the February 8, 2010, agreement for rent reduction of \$25.00; in recognition of disturbances and that the tenants cannot now claim additional compensation.

The landlord denied any delay in mail delivery or of any entry to the rental unit without prior permission.

Analysis – Tenant's Claim

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation is the reason the party making the application incurred damages or loss;
3. Verification of the amount of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Section 28 of the Act provides:

28 *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*

- (a) reasonable privacy;*
- (b) freedom from unreasonable disturbance;*
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.*

Residential Tenancy Branch policy suggests that a landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists and unless there is evidence that the landlord was aware of a problem and failed to take reasonable steps to correct the issue. The landlord had rented a basement unit to the tenants and it is not unreasonable to accept, on the balance of probabilities, that she would have known that the sounds travelled through the floor, to such an extent that the tenants would be severely impacted.

Based upon the testimony and the evidence before me, I find that the tenants did suffer a loss of quiet enjoyment. I found the one recording, of the sounds from upstairs, convincing and did not need to hear additional examples. The recording of the children's party also provided evidence of what I accept to have been an unusually high level of disturbance caused to the tenants as the result of what appears to be little, if any, soundproofing. One could expect occasional disruptions, due to events such as a birthday party, but the sounds appear to have been excessive and continuous.

I find, based on the testimony and balance of probabilities, that the landlord was aware of the disturbances caused by the neighbouring occupants and that the landlord failed to mitigate by appropriately dealing with those occupants earlier in the tenancy. I also base this decision upon the written agreement signed on February 8, 2010, which acknowledged a need for eviction of the neighbouring occupants. The landlord is responsible for the behaviour of occupants, who disturb other tenants and is required to take decisive action to remedy any loss of quiet enjoyment.

I have also considered the period of time that elapsed between the tenants moving in and when they took steps to formally address the problem with the landlord. Section 7 of the Act requires a party to minimize any loss they are claiming, and I find that a delay in requesting compensation allowed the potential claim to build. The tenants did attempt to reach a mutual solution, but found that agreement less than satisfying. Further, the disturbances caused by the lack of soundproofing have continued.

Therefore, I find that the tenants are entitled to compensation in the sum of \$400.00 for the loss of quiet enjoyment of their rental unit. This is in addition to the current rent abatement given by the landlord in the sum of \$25.00 per month. The tenants may deduct \$400.00 from the next month's rent due to the landlord, plus the \$25.00 deduction contained in the February 8, 2010, agreement.

As this tenancy is ending, by agreement, on September 30, 2010, and the parties will not receive this decision until after August 1, 2010; Notice ending the tenancy excepting that for cause or unpaid rent, by either party, cannot be given for a date any earlier than September 30, 2010.

During the hearing I reminded the landlord that entry to the rental unit is determined by section 29 of the Act, which provides:

29 (1) *A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:*

- (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;*
- (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:*
 - (i) the purpose for entering, which must be reasonable;*
 - (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;*

(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
(d) the landlord has an order of the director authorizing the entry;
(e) the tenant has abandoned the rental unit;
(f) an emergency exists and the entry is necessary to protect life or property.

In relation to problems with the mail, as provided by section 62(3) of the Act, I Order that the landlord immediately provide the tenants with a separate mail box, for delivery of their mail by Canada Post.

I find, on the balance of probabilities, that the male and female Applicants were each tenants, as they have each paid rent directly to the landlord and each signed the February 8, 2010, agreement with the landlord.

I decline filing fee costs to either party as each Application had some merit.

Conclusion

This tenancy will end, by mutual agreement by September 30, 2010, at 1 p.m. Based on the mutual agreement an Order of possession has been issued to the landlord. If the tenants to not move out by this time the Order may be served to the tenants and enforced through the Supreme Court of British Columbia.

The tenants are entitled to compensation for the loss of quiet enjoyment, pursuant to section 28 and 67 of the Act, in the sum of \$400.00, which may be deducted from the next month's rent owed.

The deposit will be held in trust by the landlord and disbursed as required by the Act.

The landlord is entitled to a monetary Order in the sum of \$475.00 for July, 2010, rent owed. The tenants were to pay the rent owed on July 28, 2010. If they have failed to pay the rent owed, this monetary Order maybe served on the tenants and enforced in Small Claims Court.

The landlord must issue a receipt for rent payments made in cash and if a receipt is not issued at the time of payment the tenants may pay their rent by cheque.

The landlord must adhere to section 29 of the Act and not enter the rental unit unless proper Notice has been given.

The landlord is to immediately provide a separate mail box for the tenant's mail delivery by Canada Post.

Neither party is entitled to filing fee costs.

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: July 30, 2010.

Dispute Resolution Officer