

## **DECISION**

**Dispute Codes:**                      **Landlord:** OPR, MNR, MND, MNDC and FF  
   **Tenants:** CNR, MNDC, OLC, ERP, RP, PSF and LRE

### **Introduction**

These applications were brought by both the landlord and the tenant.

By application received November 8, 2010, the landlord seeks an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid rent served by posting on the tenant's door on November 2, 2010. The landlord also sought a Monetary Order for the unpaid rent, damage to the rental unit, recovery of the filing fee for this proceeding and authorization to retain the security deposit in set off.

By earlier application received on November 3, 2010, the tenant seeks to have the Notice to End Tenancy set aside, compensation for loss under the rental agreement or legislation, Orders for landlord compliance, emergency repairs, repairs, provision of services or facilities and restrictions on the landlord's right to enter the rental property.

### **Issues to be Decided**

This matter now requires a decision on whether the Notice to End Tenancy should be set aside or upheld, whether the landlord is entitled to an Order of Possession a Monetary Order for the unpaid rent, damages, filing fee and authorization to retain the security deposit in setoff.

The tenant's application requires a decision on whether he is entitled to monetary compensation and the various orders sought in his application.

### **Background, Evidence and Analysis**

This tenancy began on August 9, 2010 according to the rental agreement although the tenant did not move in until August 15, 2010. Rent was \$1,300 per month and the landlord holds a security deposit of \$650.

One factor in this dispute arises from the fact that throughout the tenancy, the property was subject to substantial excavation and landscaping work necessary to correct drainage and pooling problems.

As a matter of note, this hearing was somewhat hampered by the unpleasant relationship between the parties.

#### Landlord's Application -

During the hearing, the landlord gave uncontested evidence that the Notice to End Tenancy had been served after the tenant's rent cheque for October 2010 given on October 7, 2010 was returned NSF on October 20, 2010.

When the landlord requested payment of the October and November rents, the tenant advised he would pay no further rent until excavation and landscaping work on the property was completed. The rent remained unpaid at the time of the hearing.

Section 26(1) of the *Act* provides that:

“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* provides that a landlord may issue a Notice to End Tenancy for unpaid rent on a day after the rent is due. The tenant may cancel the notice by paying the overdue rent or make application to dispute the notice within five days of receiving it.

In this instance, I find that the tenant did make application to dispute the notice but has not paid the rent while the tenant had no right under the Act to withhold it.

Therefore, I find that the Notice to End Tenancy was lawful and valid and that the landlord is entitled to an Order of Possession. While the landlord agreed that the tenant could remain until December 10, 2010, at the conclusion of the hearing, the tenant advised that he would be vacating by the end of November 2010.

Therefore, I find that the Order of Possession should be effective two days from service of it on the tenant to allow the landlord discretion to adjust service to circumstances and gain possession immediately after the tenant has vacated.

I further find that the landlord is entitled to a Monetary Order for the October and November rents, totaling \$2,600 and recovery of the \$50 filing fee for her application and authorization to retain the security deposit in set off against the balance owed.

The landlord submitted a further claim of \$400 for restoration of the rental unit resulting from the tenant's installation and removal of a hot tub, a claim contested by the tenant. While the landlord based the amount on years of personal experience paying for such jobs, in the absence of a third party written estimate, I must dismiss this claim.

### Tenant's Application

Given that the end of the tenancy is imminent, I find that all of the tenant's claims except that for compensation for damage or loss under the *Act* are moot.

The tenant claims compensation for loss of use of the yard because of the ongoing work for the duration of the tenancy. However, the landlord noted that the rental agreement included the following provision:

"It is also understood and agreed upon by both the Landlord and Tenant that the landlord will be doing extensive landscaping and will give the tenant three days notice setting the time required to do the work to the best of the Landlord's ability. The said work will not begin before 8 a.m. nor continue past 5 p.m. – not on weekends."

I note that the landlord's evidence included a submission from the third contractor to work on the job that his crew began work at 7 a.m. To that extent, I find that the agreement was breached. In addition, I find that the work project went on longer than could be anticipated as the first two of three contractors were unable to make sufficient progress. While I appreciate that this may have been beyond the control of the landlord, the delay nevertheless impinged on the quiet enjoyment of the tenant. Therefore, I find that the tenant is entitled to \$150 in compensation.

The tenant further claims that he was deprived of the use of a garden shed from which the landlord had removed his property in preparation for its demolition. The landlord stated that it had been made clear to the tenant that the shed, dilapidated and situated on a pool of water was going to be dismantled.

She said that, while the tenant was away on his trucking job and the work was to begin, she put the more vulnerable pieces of his property in the garage and the rest under the eaves and covered with a tarp. I find the landlord's evidence to be credible and dismiss this part of the application.

The tenant claims that he lost a freezer full of fish when tools plugged in by the workers tripped a breaker. The landlord stated that she had cautioned the tenant against using an extension cord on the freezer despite her caution not to do so.

I find it impossible to determine the cause of the failure with any certainty and therefore decline to make an award on this claim.

The tenant claims he was overcharged for the first month's rent as he paid \$1,000 of \$1,300 while the tenancy began on August 9, 2010 and he had use for only 22 days of the month.

I find that the parties agreed to that amount for the partial month and that it would not be appropriate to interfere with their agreement.

Thus, I find that accounts balance as follows:

<b>Award to landlord</b>		
Rent for October 2010	\$1,300.00	
Rent for October 2010	1,300.00	
Filing fee	<u>50.00</u>	
Sub total	\$2,650.00	\$2,650.00
<b>Tenant's credit and award</b>		
Security deposit to landlord (No interest due)	\$650.00	
For loss of quiet enjoyment	<u>150.00</u>	
Sub total	\$800.00	<u>- 800.00</u>
<b>BALANCE OWED TO LANDLORD</b>		<b>\$1,850.00</b>

## **Conclusion**

The landlord's copy of this decision is accompanied by an Order of Possession, , enforceable through the Supreme Court of British Columbia to take effect two days from service of it upon the tenant

Also, in addition to authorization to retain the security deposit in set off, the landlord's copy of this decision is also accompanied by a Monetary Order for \$1,850.00, enforceable through the Provincial Court of British Columbia, for service on the tenant.

November 25, 2010