

DECISION

Dispute Codes: Landlord: OPR, MNR and FF
 Tenants: CNR and FF

Introduction

These applications were brought by both the landlord's agent and the tenants.

By application of August 8, 2011, the landlord sought a Monetary Order for unpaid rent and recovery of the filing fee for this proceeding after issuing a Notice to End Tenancy for unpaid rent dated July 5, 2011.

By prior application of July 18, 2011, the tenants sought to have the Notice to End Tenancy of July 5, 2011 set aside and to recover their filing fee.

Issues to be Decided

This dispute requires a decision on whether the Notice to End Tenancy should be set aside or upheld and whether the landlord is entitled to a Monetary Order for the unpaid rent. This dispute arises over disagreement as to the validity of terms of the rental agreement and hinges on whether the terms in question are enforceable.

Background and Evidence

This tenancy began on February 15, 2011 according to the landlord and the rental agreement and it began on March 1, 2011 according to the tenants.. Matters in dispute include whether the rent is \$700 per month or \$750 per month and whether the fixed term is for one year or three years. Whether the landlord holds a security deposit of \$375 paid on or about February 16, 2011 is also in dispute.

At the commencement of the hearing, I advised the parties that, in matters involving cross applications contesting a Notice to End Tenancy, standard procedure was hear the landlord's application first as the onus was on the landlord to prove the validity of the

notice. Tenants may then present evidence challenging the notice as they would on their own application. The tenants expressed concern that they were disadvantaged by the landlord being heard first, but as the notice was the initiating factor for the hearing, logic and standard procedure indicate that its proponent should be called upon first.

During the hearing, the landlord's agent gave evidence that the Notice to End Tenancy of July 5, 2011 had been served after the tenants had a rent shortfall of \$250 for the rent due on July 1, 2011. In the interim, the landlord claims that the tenants had a \$50 rent shortfall for August. The landlord also claims the \$50 shortfall for September, rent for which has been paid, but I cannot consider an award on that claim as the September rent is not due until September 1, 2011. The landlord also claims unpaid rent and/or the security deposit from February or March 2011.

The tenants concurred that they did not pay the full amount for July but that they had done so on the advice of the agent's supervisor on the grounds that their rental agreement had been amended to reduce the rent from \$750 per month and to increase the fixed term to three years from one.

The landlord stated that while the tenants declined to sign the rental agreement provided to them until they had unilaterally amended the agreement to extend the term to three years and reduce the rent to \$700. The tenants did so on or about April 1, 2011.

The tenants stated that the agent had given her tacit approval to the changes but the agent stated that she had made it very clear to the tenants that she could not authorize the changes without the consent of the owner of the rental unit and she expressed doubt that such approval would be granted.

On examining the rental agreement, I note that the changes had been overwritten on the original agreement.

I note that the agent's signature on the agreement is dated February 15, 2011 and the tenant's signature is dated March 1, 2011, although as noted, the tenant signed on or about April 1, 2011.

I further note that while the tenant has initialled the change to the length of the tenancy, the landlord has not. In addition, neither party has initialled the change in the amount of the rent or the notation, "\$700 reduced for a 3 year lease."

The tenants noted that an addendum to the agreement includes the written in statement that, "Rent must be on time to keep the rent at \$700 per month," and propose that it substantiates agreement by the agent to the change. The agent contends that the statement was an interim caution pending ratification or refusal of the changes by the owner of the rental unit.

By letters of April 5, 2011 and April 19, 2011, the agent advised the tenants that she had heard back from the owner and that she had not approved the change to a three year lease. The letter also suggests that the landlord wishes to revert to a month to month tenancy at the advertised rent of \$775 as she had been out of the country and unable to reply when the agent requested her approval of the one-year agreement at \$750 per month.

The parties are also in dispute over when the tenancy actually began. The rental agreement indicates a start date of February 15, 2011 and \$750 was paid on that date, a security deposit of \$375 and the half the February rent, according to the landlord.

The landlord gave evidence that she had turned over the key to the female tenant's sister on February 16, 2011 and that she had turned away other prospective tenants on the subject tenants' agreement to begin the tenancy on February 15, 2011.

The tenants stated that as they had not moved in until the end of February, the payment was for March rent.

At some point prior to July, the tenants said they contacted the agent's supervisor and that he advised them that the rent to be paid was the amount stated on the rental agreement. Consequently, in July, the tenants paid only \$500, deducting the extra \$50 they believed they had paid for each of March, April, May and June and due in July.2011.

Analysis

Section 14(2) of the *Act* provides that: “A tenancy agreement may be amended to add, remove or change a term, other than a standard term, **only if both the landlord and tenant agree to the amendment.**” This provision simply codifies a principle of the common law of contract that requires a meeting of the minds of both parties to create a binding agreement.

In the present matter, I find that there is no agreement. After over two months in the rental unit and paying \$750 per month as agreed, the tenants declined to sign the rental agreement as presented to them by the landlord’s agent.

As the tenants’ changes were not initialed and/or ratified by the landlord or the landlord’s agent and as the tenants declined to accept the landlord’s terms, I find that the agreement has not been made. Therefore, I find that the tenancy defaults to the standard provisions of the *Residential Tenancy Act*.

I find that the rent is \$750 per month and the tenants owe the rent shortfall to the landlord for the six months from March 1, 2011 to August 1, 2011.

As to the question of the \$750 paid on February 15, 2011, I find it is inconsequential as to whether it was for a security deposit and half of February or March rent. If it is the former, then March rent is owed. If it is the latter, then half of the February rent is owed and the balance is security deposit which would be set off against the March rent.

On the question of the Notice to End Tenancy, I have exercised the discretion granted under section 64(3)(c) of the *Act* to permit the landlord’s agent to amend her application to request an Order of Possession.

Section 26 of the *Act* provides that tenants must pay rent when it is due irrespective of any alleged non-compliance of the landlord with the legislation or rental agreement, for which other remedies are available.

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 tenants did make the application but the contested rent remains unpaid.

Having found that there was rent owed at the time the Notice to End Tenancy was served and having found that rent was not paid within five days of receipt of the notice and remains unpaid, I find that the landlord is entitled to an Order of Possession to take effect two days from service of it on the tenants.

Accordingly, the tenants' application to set the notice aside is dismissed without leave to reapply.

As I find that the landlord's agent contributed to this dispute by waiting until July 2011 to act on the rent discrepancy for the February/March period, permitting this matter to escalate, I decline to award the filing fee.

I find that the landlord is entitled to a Monetary Order calculated as follows:

One-half month rent for February 2011 (or March rent less deposit)	\$375.00
Rent withheld for March 1 to August 1, 2011 (6 mos. @ \$50)	300.00
TOTAL	\$675.00

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 on the tenants..

The landlord's copy of this decision is also accompanied by a Monetary Order for \$675, enforceable through the Provincial Court of British Columbia, for service on the tenants.

The landlord remains at liberty to make application for any damages as may be ascertained at the end of the tenancy.

August 23, 2011