



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the Tenant's application to cancel a Notice to End Tenancy for cause.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Have the Landlords terminated this tenancy in accordance with the *Residential Tenancy Act*?
2. Have the Landlords seized the Tenant's possessions in accordance with the *Residential Tenancy Act*?
3. Have the Landlords completed a move-out inspection form prior to regaining possession, in compliance with section 35 of the *Residential Tenancy Act*?

Background and Evidence

The parties agreed that they entered into a month to month tenancy that began on February 1, 2008. Rent was payable on the first of each month in the amount of \$683.00 and on February 1, 2008 the Tenant paid \$325.00 as the security deposit.

After reviewing the 1 Month Notice to End Tenancy (the Notice) dated July 30, 2011, which was issued and signed by the Landlord's wife, the Landlord stated the Notice was actually issued on September 30, 2011 not July 30, 2011 and that this was a typing error. He confirmed that his wife also conducts business as a Landlord.

The Agent affirmed that he was in attendance when the Landlord's wife personally served the Tenant with the Notice on September 30, 2011, at the rental unit.

A discussion followed whereby the Advocate provided a chronological account of when the Tenant contacted her office and when she met with the Tenant. During this discussion the Advocate advised that the Tenant appeared at her office on November 1, 2011, distraught because the Landlords changed the locks on her apartment and would not let her return. The Advocate advised she attempted to contact the Landlord at the number listed on the application however the Landlord failed to return her call.

The Agent confirmed that at 12:00 noon on November 1, 2011 he attended the rental unit with the Landlord's wife and they knocked on the door. When the Tenant answered they told her she was supposed to be moved out of the unit so they are going into the unit and they changed the locks and locked her out. The Agent stated they told the Tenant to leave and she left on her own accord.

The Landlord and Agent confirmed they did not possess an Order of Possession from the *Residential Tenancy Branch* and did not possess a writ of possession from Supreme Court. They stated they are of the opinion that they had the right to take possession of the unit on November 1, 2011 at 12:00 noon because they had issued the Notice and because they had a crew lined up for November 1, 2011 to clean up and repair the rental unit. The Agent stated that it was a matter of health and safety that they gain entry into the unit and begin the work as soon as possible.

When asked why the Landlord or Agent did not return the Advocates call(s) they stated they did not receive any messages from the Advocate. Upon further clarification it was noted that the Landlord's wife manages the office telephone and that if there were any messages left she would have been the person who received them. The Landlord stated that his wife could not be present at today's hearing because she needed to be at the rental unit to conduct the Landlord's business.

The Tenant stated that she did not want to return to living in this unit however she did want her possessions returned.

I asked the Landlord and Agent what they did with the Tenant's possessions after which they changed their testimony to say they have not done any work in the rental unit and have not touched the Tenant's possessions once they were served with her application for dispute resolution.

Analysis

Section 47 of the Act provides that a landlord may issue a 1 Month Notice to End the Tenancy if the landlord has proven cause for ending the tenancy.

The issuance of a notice under section 47 of the Act does not grant a landlord possession of the rental unit.

Section 55 (2)(b) of the Act provides that a landlord may request an order of possession of a rental unit if a notice to end the tenancy has been given by the landlord and either the tenant has not disputed the notice in accordance with the Act and has failed to vacate the property in accordance with the notice, or the landlord has met the burden of proof to obtain possession of the unit. In this case the Landlords did not make an application to obtain an Order of Possession.

I favor the evidence of the Tenant and her advocate who provided a chronological description of the course of events pertaining to the Tenant's eviction that confirmed the Tenant cancelled her initial appointment to meet with the advocate. I favored the evidence of the Tenant and advocate over the Landlord and Agent, in part, because the Tenant and advocate's evidence was forthright and credible. The advocate readily acknowledged that they did not meet in time to make the application to dispute the Notice within the required timeframe. In my view the advocate's willingness to admit fault when they could easily have stated there were extreme circumstances that prevented them from applying sooner lends credibility to all of their evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I find the Landlord's and Agent's testimony contradictory pertaining to if any work was performed on the unit between changing the locks and receiving the Tenant's application for dispute resolution and I find the reasons provided as to why the Landlord's wife was not present to provide evidence to be improbable. Given that the Landlord's wife was the person who dealt first hand with the Tenant and was the only

person who managed the business phone it is reasonable to conclude that her testimony would hold the most weight in the Landlord's attempts to defend their actions.

Rather, I find the Tenant and advocate's explanation that the Landlord avoided their calls, denying the Tenant access to her possessions, to be plausible given the circumstances presented to me during the hearing.

After careful consideration of the level of capacity displayed by the Tenant during the hearing, I find the actions displayed by the Agent and Landlord's wife on November 1, 2011 at 12:00 noon when they appeared at the rental unit to evict the Tenant and change the locks, to be intimidating and threatening to the Tenant, leaving her no choice but to flee and seek assistance at the advocate's office.

The evidence before me describes what I find to be an egregious breach of the Act by the Landlords. The Landlords attended the rental unit, told the Tenant she had to leave, seized possession of the rental unit and the Tenant's personal property for a period of 17 days in breach of section 28(c) of the Act; entered a rental unit in breach of section 29(d) of the Act; and changed the locks to the rental unit without providing the Tenant with a copy of the key in breach of section 31(1) of the Act, these matters are not disputed by the Landlords.

As per the aforementioned, I find the Landlord(s) ended this tenancy illegally, in breach of the Act, seizing exclusive possession and use of the rental unit as of November 1, 2011 at 12:00 p.m., without providing the Tenant an opportunity to attend a move out inspection and without the proper execution of a condition inspection report, which is a breach of section 35 of the Act. I therefore suggest that the Landlords will be restricted in their ability to prove that no damages occurred during the period of the Landlords' exclusive possession, November 1 to November 17, 2011 at 4:00 p.m.

Having found the Landlords seized possession of the rental unit on November 1, 2011, in breach of the Act, and held that possession for 17 days of the month, I find the Landlords are not entitled to rent for November 2011.

Based on the aforementioned, I hereby Order pursuant to section 62 of the *Residential Tenancy Act*, the Landlord to deliver keys of the rental unit to the Advocate no later than 4:00 p.m., November 17, 2011.

The Tenant and her advocate are hereby granted full, unrestricted access to the rental unit, free from intimidation, harassment, or coercion, from November 17, 2011 at 4:00 p.m. to November 30, 2011 at 1:00 p.m. The advocate has affirmed that she will ensure

the Tenant is represented for future matters pertaining to this tenancy and will attend the rental unit on November 30, 2011 at 1:00 p.m. to return the keys and possession of the unit to the Landlord.

I caution the Landlord that under section 95(2) of the Act, any person who coerces, threatens, intimidates or harasses a tenant from making an application under the Act, or for seeking or obtaining a remedy under the Act, may be found to have committed an offence and is subject to a fine or administrative penalty.

Conclusion

I HEREBY ORDER the Landlords to grant the Tenant and her advocate full, unrestricted access to the rental unit from November 17, 2011 at 4:00 p.m. to November 30, 2011 at 1:00 pm.

I HEREBY ORDER that if either party makes a future claim pertaining to this tenancy that they must provide a copy of this decision in evidence.

This decision will be accompanied by a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the parties to familiarize themselves with their rights and responsibilities as set forth under the *Residential Tenancy Act*.

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: November 18, 2011.

Residential Tenancy Branch