



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MNDC, FF

Introduction

This hearing was convened in response to an application filed by the tenant seeking:

1. To cancel a Notice to End Tenancy for unpaid rent;
2. A monetary Order for compensation for damage or loss in the sum of \$7,677.00;
and
3. Recovery of the filing fee paid for this application.

The landlord did not appear. The tenant gave evidence that he served the landlord personally with the Application for Dispute Resolution and Notice of Hearing on May 31, 2012. Based on the tenant's evidence I find that the landlord has been duly served with notice of this claim and this hearing by a means allowed under the *Residential Tenancy Act*.

The tenant gave evidence under oath.

Issue(s) to be Decided

Does this matter fall within the jurisdiction of the Residential Tenancy Act"? If so, is the tenant entitled to the Orders sought?

Background and Evidence

The tenant gave evidence that this tenancy is actually a rent-to-own situation. The tenant testified that he moved into the rental unit on February 9, 2012. The tenant states that the rent would have been \$2,400.00 per month however, because this was a rent-to-own situation he actually paid \$2,900.00 per month with \$500.00 per month going toward the purchase price and/or down payment on the property. The tenant testified that he paid a \$3,900.00 security deposit.

A Condition Inspection Report dated February 9, 2012 was prepared and signed by the tenant and the landlord. No boxes are ticked in the report. The report simply states that the rental unit was "new condition – new home".

The tenant produced a Residential Tenancy Agreement. In that Agreement it states that the tenancy began on February 9, 2012 for a fixed term ending February 1, 2013. Thereafter the tenancy could continue on a month-to-month basis. Rent was fixed at \$2,900.00 per month; rent included water, appliances (stove and oven, dishwasher, refrigerator), carpets, window coverings and garbage collection. The Agreement confirms the tenant's testimony that he paid a deposit of \$3,900.00 noted as a security deposit of \$2,900.00 and a pet deposit of \$1,000.00. The Agreement is signed by both parties and it is noted that there is an addendum.

The attached addendum is entitled "Rental Agreement "Addendum" it is also dated February 9, 2012. Clause 2 of that addendum states in part as follows:

- 1) The home being rented is brand new condition and has never been occupied. There are no deficiencies.
- 2) The landlord has agreed that should the tennant desire to purchase the property within 12 months of occupancy, that both parties will enter into a contract of purchase and sale.

The purchase price will be \$549,900. Including net HST, and any HST rebate forms would be signed by the buyer and rebate going to the seller.

In consideration of this, the landlord would credit they buyer \$500 per month of the \$2,900 per month paid towards a purchase credit.

- 3) The landlord will provide basic black fridge, dishwasher and electric self clean stove. If the tenant wishes to upgrade these appliances they can do so at the Brick Comercial Sales Langley BC at the tennants expense. The contact person is Chris, 604-539-3939.

If at any time, the tenant is in default on the monthly payments BC Residential Tenancy Lawy shall be followed and the rental agreement can be terminated such that the parties shall have no further rights, claims or obligations arising out of the agreement.

(reproduced as written)

The tenant submits that he did upgrade the appliances and he has produced an invoice from The Brick issued to Natalie Jackman on May 28, 2012 showing a "New Balance" owing of \$3,037.19.

The tenant also says that he paid \$800.00 by way of a "barter" arrangement with a Papa Plumbing to reconnect the garburator, dishwasher, fireplace and stove.

The tenant testified that in February 2012 he paid pro-rated rent of \$900.00, in March and April he paid \$2,900.00 for each month. The tenant agrees that he paid no rent whatsoever for May. The tenant says he did not pay rent because he realized he had overpaid his security and pet deposits and the landlord failed to reimburse the overpayment. Further, that the landlord refused to reimburse the tenant for the \$800.00 he spent for reconnecting the appliances.

The tenant testified that when he failed to pay May's rent he was served with a 10 day Notice to End Tenancy for unpaid rent dated May 22, 2012. The tenant agrees that in addition to not paying rent for May he has not paid rent for June.

In addition to seeking to cancel the Notice to End Tenancy given for unpaid rent on the basis that this is a rent-to-own situation, not a tenancy agreement, the tenant believes that because his rent- to-own agreement has been broken by the landlord, the tenant is therefore now claiming the following sums:

February rent credit (prorated)	\$ 140.00
March rent credit	500.00
April rent credit	500.00
Refund excess security and pet deposits	2,700.00
Appliance upgrade costs	3,037.00
Connecting utilities	800.00
Total Costs	\$7,677.00

Analysis

If the relationship between the parties is that of seller and purchaser of real estate, Residential Tenancy legislation would not apply as the parties have not entered into a "Tenancy Agreement" as defined in Section 1 of the Act. It does not matter if the parties have called the agreement a tenancy agreement. If the monies that are changing hands are part of the purchase price, a tenancy agreement has not been entered into.

Similarly, a tenancy agreement is a transfer of an interest in land and buildings, or a license. The interest that is transferred, under section 1 of the Act, is the right to possession of the residential premises. If the tenant takes an interest in the land and buildings which is higher than the right to possession, such as part ownership of the premises, then a tenancy agreement may not have been entered into. In such a case the arbitrator may again decline jurisdiction because the Acts would not apply.

In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement. If the agreement meets either of the tests outlined above, then the Acts may not apply. However, if the parties intended a tenancy to exist prior to the exercise of the right to purchase, and the right was not exercised, and the monies which were paid were not paid towards the purchase price, then the Act may apply and the arbitrator may assume jurisdiction. Generally speaking, the Act applies until the relationship of the parties has changed from landlord and tenant to seller and purchaser.

In this case I find that the construction of the agreement is clear:

- 1) The landlord has agreed that should the tenant desire to purchase the property within 12 months of occupancy, that both parties will enter into a contract of purchase and sale.

(reproduced as written)

This means that if the tenant wished to purchase the property after having lived in it for 12 months then the landlord would enter into a contract of purchase and sale.

The tenancy agreement states that the monthly rent is \$2,900.00 not the \$2,400.00 the tenant submits it was meant to be on a straight rental agreement basis. As to whether the rent of \$2,900.00 was made up of \$2,400.00 in actual rent and \$500.00 towards a purchase down payment I find that the agreement addendum is also clear stating:

In consideration of this, the landlord would credit the buyer \$500 per month of the \$2,900 per month paid towards a purchase credit.

That is, the rent was \$2,900.00 and, in consideration of entering into a contract of purchase and sale, the landlord would credit the buyer \$500.00 per month of the \$2,900.00 per month towards a purchase credit. There is no indication whatsoever that the rent was \$2,400.00.

I find that tenant has failed to produce evidence to show that a “rent-to-own” contract existed or that the parties had entered into a contract of purchase and sale. I find that this was a residential tenancy as defined in Section 1 of the *Residential Tenancy Act* which included an option to purchase at the tenant’s discretion at the end of the 12 month fixed term or the tenancy may continue on a month-to-month basis.

With respect to the tenant’s application to cancel the 10 day Notice to End Tenancy given for unpaid rent, the tenant has admitted that he has not paid the rent requested in that Notice. Even if the tenant believed the landlord owed him monies, there are no provisions under the Act that allow a tenant to offset monies a tenant believes they are owed from rent the rent due for any reason without Order of the Residential Tenancy Branch or in exceptional circumstances involving a serious emergency. I therefore decline to set aside the Notice to End Tenancy.

In addition, I decline the tenant’s claim for a refund of February, March and April rent. I find that the rent as set out in the tenancy agreement is \$2,900.00 per month which, with the exception of the prorated rent for February, is the amount of rent the tenant testified that he paid for each of March and April. He is therefore not entitled to any refund.

With respect to the charges for the appliances the agreement addendum states that the landlord will supply basic appliances. It also states that if the tenant chose to upgrade the appliances he could do so at his own cost. The tenant submits that he did upgrade appliances because he believed he would be purchasing the rental unit however this is irrelevant. What is relevant is that the landlord agreed to supply basic appliances and the tenant was at liberty to upgrade them at his own cost. The agreement is silent as to whether the tenant may now remove these upgraded appliances and replace them with basic appliances but most certainly I find that the landlord cannot be expected to reimburse the tenant because the tenant exercised his option to upgrade the appliances at his own cost. I therefore dismiss the claim for \$3,037.00 for the upgrade of the appliances.

With respect to the claim for the connection charges of \$800.00 I find that the tenant has failed to prove that he paid this sum and I therefore decline to award this sum to him.

Finally, with respect to the security and pet deposit, based on a rent of \$2,900.00 the Act allows a security deposit of half a month’s rent, in this case \$1,450.00 for a security deposit and another half a month’s rent for a pet deposit, in this case \$1,450.00. Together these sums equal \$2,900.00. As the tenancy agreement shows that the tenant

paid a security deposit of \$2,900.00 and a pet deposit of \$1,000.00 for a total of \$3,900.00 I find that the tenant is entitled to a monetary Order in the sum of \$1,000.00 to reimburse the tenant for the deposit overpayment. Normally, as the tenant has been unsuccessful in this application seeking to cancel a Notice to End Tenancy the tenancy would be deemed to have ended on the effective date set out on the 10 day Notice to End Tenancy, however, in this instance no such date is indicated on the 10 day Notice to End Tenancy and the landlord has not attended the hearing to seek an Order of Possession, therefore none has been issued. Therefore, as the tenant remains in the rental unit, to realize this sum, the tenant may offset \$1,000.00 from his next rental payment.

As the tenant has been marginally successful in this application I will allow him to recover \$20.00 of the \$50.00 filing fee he has paid. The tenant is therefore at liberty to deduct \$1,020.00 from his next rental payment.

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 25, 2012.

Residential Tenancy Branch