



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MDSD & FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the 10 day Notice to End Tenancy was personally served on the Tenants on March 4, 2014. Further I find that the Application for Dispute Resolution/Notice of Hearing filed by the landlord was personally served on the tenants on March 12, 2014.

The tenant testified he served the original Tenants Application for Dispute Resolution on the landlord by e-mail. He was uncertain about the date. He further testified he served the Amended Application for Dispute Resolution on the landlords by fax and by e-mail. The landlords testified they never received a copy of the Amended Application for Dispute Resolution. They further testified that they received 3 pages by e-mail on March 27, 2014 and the pages contained the hearing letter setting the date of the hearing, the first page of the Application for Dispute Resolution which identified the parties but not the claim and the first page of the Fact Sheet. They have not received the page which outlines the tenants' claims.

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenants are entitled to an order cancelling the 10 day Notice to End Tenancy dated March 4, 2014?
- b. Whether the tenants are entitled to more time to bring this application?
- c. Whether the tenants are entitled to the cost of emergency repairs?
- d. Whether the tenants are entitled to a monetary order and if so how much?
- e. Whether the tenants are entitled to an order for a reduction of rent for repairs, services or facilities agreed upon but not provided?
- f. Whether the tenants are entitled to serve documents or evidence in a different way than required by the Act?
- g. Whether the landlord is entitled to an Order for Possession?
- h. Whether the landlord is entitled to A Monetary Order and if so how much?
- i. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- j. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

The parties entered into a one year fixed term written tenancy agreement that provided that the tenancy would start on November 15, 2013 and end on November 30, 2014 and become month to month after that. The rent is \$1400 per month payable in advance on the first day of each month. The tenants paid a security deposit of \$700 at the start of the tenancy. The tenancy agreement contains an address for service for the landlord which is in the same community as the rental unit.

The tenant testified he and his wife are being subjected to marijuana smoke from the next door tenant which has significantly affected there enjoyment of the property and has caused them to be ill. The next door tenant has a licensed to grow and smoke

marijuana for medicinal purposes. The landlord in this application is not the landlord of the next door tenant.

The tenant testified as follows:

- The landlord never disclosed the marijuana problem emanating from the next door tenant
- He and his family have evacuated the rental unit for over 60 days
- His wife is a hairdresser and she has lost her job because she has been ill from the marijuana smoke
- He and his wife have incurred significant expense dry cleaning clothes because of the smell.
- The tenants produced a quotation from a restoration company dated February 4, 2014 that states it will cost \$1386 to eliminate the marijuana smell.
- The landlord should bring in a professional restoration company to clean the rental unit.
- The tenants do not dispute the landlord's testimony that they have failed to pay the rent for March and April.

The tenant produced a copy of the quotation from the restoration company. However, he acknowledges he has not paid the company to do any work. The tenant alleged he spent numerous nights in hotels but he failed to produced receipts to support this allegation. He also testified he spent time at his son's apartment. He testified he wife was sick from the smell but failed to produce medical evidence to support this allegation

The landlords testified as follows:

- They testified they were never served with the tenant's Amended Application for Dispute Resolution and never served with the page of the original tenant's Application for Dispute Resolution that identified the tenant's claim. They acknowledged receiving 3 pages only by e-mail from the tenant.

- The landlords acknowledged the tenants have complained to them about the smell of marijuana coming from the neighbor. However, they testified they have no control over the neighbor. The owner of that rental unit is a third party. They have complained to the strata corporation and aware of the strata corporation fining the owner of that unit and demanding that the owner take steps to rectify the problem.
- When he has inspected the rental unit he has discovered on a slight smell of marijuana. During the inspection at the end of March along with the building owner they changed a damper in the bathroom fan which was stuck in the open position and fire caulked the water supply. There are no other locations in which the smell could go from one rental unit to the other.
- The landlords testified they have done all which one can be reasonably expected to do given that they do not have a tenancy with the neighboring tenant.

The tenant(s) failed to pay the rent for the months of March and April and the sum of \$2800 remains owing. The tenant(s) have remained in the rental unit.

Tenants Claim:

After carefully considering all of the evidence I determined the tenants have failed to prove they have properly served the landlords with a copy of the Tenants' Application for Dispute Resolution and Amended Tenant's Application for Dispute Resolution.

Section 89 of the Residential Tenancy Act provides as follows:

Special rules for certain documents

89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

(d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;

(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

(2) An application by a landlord under section 55 *[order of possession for the landlord]*, 56 *[application for order ending tenancy early]* or 56.1 *[order of possession: tenancy frustrated]* must be given to the tenant in one of the following ways:

(a) by leaving a copy with the tenant;

(b) by sending a copy by registered mail to the address at which the tenant resides;

(c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;

(d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;

(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

The Act does not permit the service of an Application for Dispute Resolution by e-mail or by fax. I accept the evidence of the landlords that they never received a copy of the Application for Dispute Resolution and that they never received all of the pages of the original Application for Dispute Resolution.

I determined there was no ground for granting an order for substituted service of the Tenant's Application for Dispute Resolution. The tenancy agreement contains an address of service for the landlord which is in the same community as the rental property.

Further, there I determined this is not an appropriate case to grant the tenant more time to file a second Application for Dispute Resolution. The tenants failed to follow the provisions of the Residential Tenancy Act with regard to service. Further, the tenants have withheld the payment of rent which is contrary to section 26 of the Residential Tenancy Act which provides as follows:

Rules about payment and non-payment of rent

26 (1) 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.

As a result I ordered that the tenants' Application for Dispute Resolution for an order cancelling the 10 day Notice to End Tenancy dated March 4, 2014, the order to recover the cost of the filing fee, the order for more time to make the application, the order for substituted service be dismissed without liberty to re-apply.

I have not determined the tenants' application for a monetary order and a reduction of rent on the merits. As I result I ordered that those claims be dismissed with liberty to re-apply.

Landlord's Claim:

Analysis - Order of Possession:

I determined the landlord was entitled to an Order for Possession. There is outstanding rent. Section 26 does not permit tenants to withhold the rent. The Tenants' application to set aside the Notice to End Tenancy has been dismissed without leave to re-apply. In such situations the Residential Tenancy Act provides the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date. Accordingly, I granted the landlord an Order for Possession. **As the landlord will be receiving a monetary order for rent for all of April I determined it was appropriate to set the effective date for April 30, 2014.**

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, the landlord may register the Order with the Supreme Court of British Columbia for enforcement.

Analysis - Monetary Order and Cost of Filing fee

I determined the tenant has failed to pay the rent for the month(s) of March and April 2014 and the sum of \$2800 remains outstanding. I determined the landlord has given sufficient notice of their intention to claim for all of last month as provided in the Application for Dispute Resolution. In addition the landlord is entitled to \$450 for move-in/move out fees charged by the Strata Corporation. The tenancy agreement provided that the tenants would pay these fees. The tenants failed to pay those fees and the landlord has made the payment to the strata corporation. The landlord is entitled to reimbursement of this sum. **I granted the landlord a monetary order in the sum of \$3250 plus the sum of \$50 in respect of the filing fee for a total of \$3300.**

Security Deposit

I determined the security deposit plus interest totals the sum of \$700. I ordered the landlord may retain this sum thus reducing the amount outstanding under this monetary order to the sum of \$2600.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

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: April 07, 2014

Residential Tenancy Branch

