Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, ERP, MNR, FF

Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution, in which she sought an order to cancel a 10 day Notice to End Tenancy for unpaid rent, for a monetary order for the cost of emergency repairs, for an order for the Landlord to make emergency repairs and to recover the filing fee for the Application.

The Tenant and an Agent for the Landlord appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Issues

The Tenant provided her evidence less than five business days before the hearing. The Tenant provided this evidence on May 8, 2014, to the Landlord and the Branch for a hearing on May 12, 2014; and there was a weekend between those dates. Therefore, the Tenant submitted evidence to the branch only one clear business day before the hearing, May 9, 2014.

I note the hearing package documents and the Notice of Hearing provided to the Tenant when she filed her claim on March 24, 2014, provided written instructions to the Tenant on the importance of providing evidence and explained that deadlines to provide evidence applied.

The Tenant testified she was late because she had the dates for the hearing mixed up and that she was dealing with some recent family illnesses. There was no medical evidence submitted by the Tenant to support the latter claim.

The evidence the Tenant submitted late included a report from February, an invoice from February, some correspondence from February, an invoice from early March - all dated in 2014. There are a few emails between the Landlord and Tenant from May

2014. In other words, the Tenant's evidence was sent in late, despite the fact the Tenant already had the majority of this evidence before she filed her Application on March 24, 2014. I also note that Rule 3.4 of the rules of procedure required the Tenant to submit all evidence she had available at the time of filing her Application.

Therefore, for the above reasons, I did not allow the documentary evidence to be admitted in the hearing. Nevertheless, I note that the Tenant spoke to her evidence during the hearing.

The Tenant also requested an adjournment to provide more time for her evidence to be accepted. The Landlord did not agree to an adjournment. I find that the Tenant is unable to use an adjournment to rehabilitate late evidence, and therefore the requested adjournment was denied.

Lastly, I note that the Tenant was interruptive, argumentative and would not answer direct questions throughout the hearing.

Issue(s) to be Decided

Should the Notice to End Tenancy for unpaid rent be cancelled or is it valid?

Background and Evidence

The Landlord testified that the tenancy started in June of 2013, and the monthly rent is $650.00, payable on the first day of each month.

The Landlord testified she personally served the Tenant with a 10 day Notice to End Tenancy for non-payment of $650.00 in rent on March 18, 2014.

The Notice informed the Tenant that the Notice would be cancelled if the rent was paid within five days. The Notice also explains the Tenant had five business days to file an Application to dispute the Notice. The Tenant applied to cancel the Notice as described above.

The Landlord testified that the Tenant had withheld $185.00 from March 2014 rent, and withheld $160.00 from April 2014 rent. The Landlord testified that the Tenant had expressed concerns about the windows in the rental unit last year. The Landlord testified that the Strata Council in the building were dealing with the windows.

The Tenant agreed she had withheld the rent. The Tenant argued she withheld rent because of health and safety concerns for her and her children.

The Tenant testified that she had been complaining to the Landlord about mould growing in the tracks and around the windows, apparently because the seals in the windows were broken. She testified that the Landlord did a mould inspection but would not share the results with her.

The Tenant testified that she had a mould inspection report done and later paid for a cleaner to come in and clean the mould around the windows, because the Landlord refused to do these things. The Tenant testified that the windows were supposed to be repaired by the Strata in the fall of 2013 and this was not done.

The Tenant testified that the Landlord informed her that if she did not like the rental unit she could move.

The Tenant testified that the windows had now been replaced by the Strata.

The Tenant also complained that the vent fans in the kitchen and bathroom were not functioning correctly.

The Tenant argued that the mould was affecting her health and that of her children.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

I find that the Tenant has not paid all the rent due to the Landlord, and therefore, the 10 day Notice to End Tenancy is valid and should not be cancelled.

Under section 26 of the Act, the Tenant could not withhold rent unless she had an order from the Residential Tenancy Branch allowing her to do so, or, if the Tenant had paid for emergency repairs in accordance with section 33 of the Act.

Section 26 states:

> **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.

In order to have such a right under the Act, the Tenant might have applied for an order allowing her to reduce the rent and ordering the Landlord to make the repairs. The Tenant did not do this; she simply withheld rent and then filed an Application to dispute the Notice, and then asked for compensation for alleged emergency repairs.

I also find the Tenant had no evidence she had paid for emergency repairs as defined by the Act. Emergency repairs are explained in section 33 of the Act:

> **33** (1) In this section, "emergency repairs" means repairs that are
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> (a) urgent,

(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and

(c) made for the purpose of repairing

(i) major leaks in pipes or the roof,

(ii) damaged or blocked water or sewer pipes or plumbing fixtures,

(iii) the primary heating system,

(iv) damaged or defective locks that give access to a rental unit,

(v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

(a) emergency repairs are needed;

(b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;

(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

(a) claims reimbursement for those amounts from the landlord, and

(b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:

(a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;

(b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);

(c) the amounts represent more than a reasonable cost for the repairs;

(d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

I find the Tenant has failed to prove that the alleged mould around or in the windows constituted an "emergency repair" as set out above. I further find the Tenant had insufficient evidence, such as a letter from a treating physician, that she or her children had suffered any illness due to the alleged mould. I further find that the Tenant had insufficient evidence to show that a mould inspection report or cleaning of the alleged mould was necessary to address an emergency situation for health and safety purposes.

The findings above lead me to find the Tenant had no authority under the Act to withhold rent from the Landlord.

I also note that although the Landlord entered $650.00 in rent due on the Notice, this did not invalidate the 10 day Notice to End Tenancy form. The Act requires that the Landlord be paid all the rent due on the due date. The Notice form itself sets out that, "An error in this notice or an incorrect move out date does not make it invalid."

In other words, had the Tenant paid the Landlord the balance of the rent that was due within the five days allowed, this would have invalidated the Notice. The Tenant would still have been able to proceed to file an Application to claim for her alleged monetary losses, if she filed her evidence on time and if it was persuasive.

Nevertheless, I am unable to find the Tenant paid for emergency repairs which under the Act, had she followed the correct process, would have entitled the Tenant to make deductions from rent.

Therefore, I dismiss the Application of the Tenant without leave to reapply. The 10 day Notice to End Tenancy before me is valid and enforceable by the Landlord, and the Landlord may apply for an order of possession.

Lastly, I note the Tenant stated at the end of the hearing she would be taking this matter to “small claims” court for an appeal. I tried to explain to the Tenant that the Provincial Court had no jurisdiction in an Appeal, but rather the Supreme Court of British Columbia has a process known as Judicial Review, although the Tenant remained argumentative that she was going to Provincial Court and would not listen to the Arbitrator. Attached is a document regarding the review process through the Residential Tenancy Branch.

This decision is final and binding on the parties, unless otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: May 12, 2014

Residential Tenancy Branch