Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the tenants: CNR, CNC, MNDC, RR
For the landlords: MNSD, OPR, MNR, FF

Introduction

This hearing was convened as the result of the cross applications of the parties for dispute resolution seeking remedy under the Residential Tenancy Act (the "Act").

The tenants applied for an order cancelling a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10 Day Notice") and 1 Month Notice to End Tenancy for Cause (the "1 Month Notice"), a monetary order for money owed or compensation for damage or loss, and for an order allowing a reduction in rent.

The landlords applied for an order of possession for the rental unit due to alleged unpaid rent and alleged cause, a monetary order for unpaid rent, for authority to retain the tenants' security deposit, and for recovery of the filing fee.

At the beginning of the hearing, the documentary evidence was reviewed and all parties confirmed receiving the other's evidence. Additionally both parties filed requests to amend their original application, and both parties acknowledged receiving the other's amendments. Neither party raised any issues regarding the service of the other's application, amended applications, or evidence.

The hearing process was explained to all parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties were provided the opportunity to present their evidence orally, refer to documentary evidence submitted prior to the hearing, respond to the other's evidence, and make submissions to me.

I have reviewed the oral and written evidence of the parties before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Preliminary matter-I have determined that the portion of the tenants' application dealing with a request for a monetary award and an order allowing a reduction in rent are unrelated to the primary issue of disputing the Notices. As a result, pursuant to section 2.3 of the Residential Tenancy Branch Rules of Procedure, I have severed the tenants' Application and dealt only with the tenants' application seeking cancellation of a 10 Day Notice and the 1 Month Notice and the landlord's application seeking an order of

possession for the rental unit and a monetary order. The disposition of the portion of the tenants' application for other relief, which has been severed, is addressed further within this Decision.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling the Notice?

Are the landlords entitled to an order of possession for the rental unit due to unpaid rent, monetary compensation consisting of unpaid rent, and to recover the filing fee?

Background and Evidence

The parties, particularly the tenants, submitted a large amount of documentary evidence, all of which has been reviewed. A written tenancy agreement supplied by each party, which was on the standard form available on the Residential Tenancy Branch ("RTB") website, shows that this tenancy began on November 1, 2009, listing a monthly rent of $1350, due on the first day of the rental period which falls on the *last* day of the month.

The written tenancy agreement also provided that the tenants would pay for water, electricity, propane, and heat. The tenancy agreement was signed by all parties on November 1, 2009.

The tenants also supplied an undated, three page addendum to the tenancy agreement, containing the parties' initials following each paragraph. One of the clauses in the addendum stated that the tenants would provide for cable and electricity to the studio, and as long as a "renter" lived in the studio, the tenants were to deduct $100 from their monthly rent. The clause additionally provided that if the studio was not occupied by a tenant, the amount deducted off monthly rent by the tenants would be "negotiated according to the amount of use."

Another clause in the tenancy agreement contained a typewritten long list of repairs to be performed by the landlords; however, even that list was modified by the markings and handwritten statements of the parties, presumably the landlords. The clause ended with the provision that any other repair not noted in this list would be negotiated with the landlords, with the landlords providing materials and the tenants providing "free labour." Additionally if the supplementary repairs were beyond the tenants' willingness to provide free labour, the parties would "negotiate a rate to cover the repair."

Another clause in the addendum to the tenancy agreement mentioned that the tenants paid the first and last month's rent and the "damage" deposit, which would give the tenants "30 days to pay the rent up to date in full by the first of the next month."

Another clause in the addendum to the tenancy agreement required the tenants to provide closets in the front bedroom upstairs and the master bedroom downstairs, with

design and construction methods to be approved by the landlords, if the tenants wanted closets.

The tenants also supplied a document referred to as an additional addendum, which dealt with the tenants' use of part of the garage, which was described as an accessory building to the left of the house.

In this document, signed by the parties on May 24, 2010, the tenants agreed to pay $100 for use of the majority of the garage, with the landlords retaining partial use. The terms in this document also required the tenants to work on minor repairs to the property as the landlords would no longer have the garage available to them. I note that it was not made clear to me whether the tenants would also be required to work on the separate studio.

At the hearing, the parties could not agree on the current monthly rent obligation of the tenants. The landlords submitted that monthly rent was $1450, as the monthly rent was increased to $100 pursuant to the addendum pertaining to the garage.

The tenants submitted that monthly rent was $1350, as their monthly rent listed in the tenancy agreement was reduced by $100 as they were required to pay utilities for the studio. The tenants submitted that the landlords confirmed the $100 deduction in an email sent to the tenants, a copy of which was supplied by the tenants.

Pursuant to the Rules of Procedure, the landlords proceeded first in the hearing to explain or support the Notices to End Tenancy.

Landlords' application-

The landlords submitted that the tenants were served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on March 23, 2014 by registered mail, listing unpaid rent of $4035 and $120 in unpaid utilities as of February 28, 2014. The effective move-out date listed was April 6, 2014.

I must note that on the day the Notice was issued, the landlords' accounting records show that the tenants owed a balance of $3285, not the $4035 listed on the Notice. I note the use of the word "balance," as the landlords' accounting records, which were handwritten entries in a payment form book, also mentions credits for hydro for the studio and for the "empty studio."

As to the landlords' application, their monetary claim listed in their first application was $5235 in "back rent & current rent owing." The landlords also listed a claim for $675 for the "damage" deposit, which has already been collected by the landlords, without a clear explanation why they were seeking this amount they still retain. The balance of the claim was for the filing fee of $50. No further particulars or breakdown were included to explain the amount.

On May 8, 2014, the landlords amended their application by reducing their monetary claim to $1975, indicating that the tenants were given a credit of $4600 as they had misplaced the garage addendum, with the further statement that the credit only applied if they moved out on time. No further particulars or breakdown were included to explain the amount.

On May 16, 2014, the landlords' evidence shows that they attempted to again amend their application, increasing their monetary claim to $4999, but only through their evidence. In response to my question, the landlord submitted that this amount was requested as she did not want to pay an extra filing fee of $50; however, no further particulars were included to explain the amount.

I must note that I have not accepted this latest attempt by the landlords to amend their application, as any amendment to an application must be filed within 7 days of the hearing and served upon the respondents, the tenants in this case, within 5 days of the hearing, pursuant section 2.5 of the Rules, and such was not the case here. Therefore, the hearing on the landlords' application proceeded upon their first amended application, or for a claim of $1975, for back rent and current rent owing, and recovery of the filing fee.

In support of their application, the landlord testified that issues regarding unpaid rent have occurred since almost the beginning of the tenancy and that the last time the tenants were fully paid up date was in 2011. Additionally, early in 2013, the tenants began falling further and further behind in their rent payments, according to the landlords. The landlords testified that in May 2013, the rent deficiency was $6647, and that the tenants were given a credit of $3000.

In September, the parties agreed that the rent deficiency was $2485, and that if the tenants paid rent on time from that time on, and paid some on the deficiency, the tenancy could continue, according to the landlords.

The landlords submitted that the tenants paid the rent on time in October, November and December, 2013, but paid $1200 in January, $1000 in February, $1000 in March, and $1050, with a $50 credit, for a total of $1100 in April. The evidence also shows that the tenants were given credit due to a lack of a functioning washing machine.

The landlord submitted that as of the day of the hearing, the tenants owed the amount of $6035.

The landlords also submitted that they served the tenants with a 1 Month Notice to End Tenancy for Cause on May 1, 2014, as they were repeatedly late in paying rent, the cause listed on the Notice. The months referenced as to late payments of rent were February, March, and April 2014.

The landlords' relevant documentary evidence included, but was not limited to, a written explanation of their claim, some banking records, the written tenancy agreement, with the first addendum, and the Notices.

In the landlords' written explanation, they submitted since the tenants didn't pay the full rent for January, their verbal agreement was "null and voided" and their rent deficiency was reinstated.

The written submission also explained that the monthly hydro credit of $100 given to the tenants per the addendum to the tenancy agreement was in consideration of the tenants paying hydro for the studio and the shop, and then when the renter left, the hydro credit was to be $50 per month. The landlords submitted that the tenants were given various hydro credits during the time when the other tenant left and the landlords moved into the studio in June 2013. The landlords also explained that a renter was now using the shop for storage, but not using hydro.

Tenants' response to the landlords' oral submissions -

The tenant submitted that they did not owe the amount of rent as stated by the landlords, as they paid $250 for the landlords' use of heat in the studio from September 2014 until February 2014. The tenants also submitted that they overpaid rent for October, November and December 2013, and should have a credit for those months.

The tenants further submitted that she understood the parties would discuss a rent reduction due to the inconvenience of not having functioning plumbing, as per an email to the landlords.

The tenant further submitted when the landlord came to the rental unit in January, she, the tenant, asked the landlord to take her to the bank. It was at this time that the landlord informed the tenant that as long as they received at least over $950 per month, the tenants would be "okay," according to the tenant.

Landlords' rebuttal-

The landlord submitted that when the tenants' hydro bill was over $250, the reason was due to the other tenant's use of appliances, and that the hydro bill had not been read. The meter should be read shortly and the bill should be corrected, according to the landlord.

Tenants' further response in response to the landlords' application and in support of their application seeking cancellation of the landlords' Notices -

The tenants submitted documentary evidence, which included in relevant form, the garage addendum, extensive email communication between the parties, utility bills, a 54 point letter to the landlords regarding issues with the tenancy and the rental unit, requesting the promised repairs to be performed, dated August 3, 2010, and which the

tenant said was signed by the landlord on August 5, 2010, as shown on her document, and photos of the rental unit.

The tenants submitted that the parties have always had an understanding as to what rent was owed and that payments as they have been made were accepted. The tenants submitted that rent adjustments have been discussed and made throughout the course of the tenancy, as mentioned on various email communication.

The tenants also submitted that the landlords only issued the Notices in retaliation to their demands for a functioning washing machine, which the landlords refused to supply unless the tenants returned the use of the garage to the landlords and to allow the landlords to use 1/3 of the rental unit, due to the mold in the studio, as shown in an email transmission from the landlord on April 1 and 2, 2014.

Analysis

Landlords' application-
10 Day Notice-

In considering the extensive amount of oral and documentary evidence submitted, it was unclear to me what amount of rent was owed when the 10 Day Notice was issued, as the landlords' own evidence contradicts itself. The 10 Day Notice does not reflect amounts listed in the landlords' accounting records. The landlords' amended application, which is the application upon which the hearing proceeded, shows unpaid rent of $1975, which I find is not supported by their own evidence and did not include the particulars of a breakdown as required by section 59 of the Act.

Additionally, it appears that the accounting records include sums owed for the use of the garage, some terms of which I find to be unenforceable under the Act, as the use of the portion of the garage between the landlords and the tenants is vague and unclear and the agreement provides that the tenants would now be responsible for repairs to the rental unit, as the landlords would not have unrestricted access to their tools. Under section 32 of the Act, a tenant is not responsible for repairing the rental unit and as the agreement contains terms in violation of the Act, I am not able to enforce the agreement.

I also find that the evidence shows that the landlords and the tenants have had numerous verbal and written agreements and revisions to the tenancy agreement throughout this tenancy, some of which were later attempted to be rescinded, and so, I am unable to determine that the tenants were certain of the exact amounts which may or may not have been owed in any particular month. In particular, I note that the tenants were given permission to reduce their monthly rent, due to a particular season, and to be increased at a later season, to accommodate the male tenant's work schedule. Section 6(3)(c) of the Act states that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it.

I must also note that it appears from the evidence that the tenants were to be given credit for certain repairs throughout the tenancy.

As to the rent for April, I took particular note that the landlords, in an email dated April 2, 2014, put forth an offer or condition, that the tenancy could continue so long as the tenants paid the "back rent from the past two years," and to give back the use of the garage, as well as allow the landlords to move back into 1/3 of the rental unit. Incredibly, the landlords' email also informed the tenants that if they did not agree to return some of the house to the landlords by May 1, 2014, for a reduced rent, they would give the tenants 60 days' notice to reclaim the basement. It was not made clear under which legal authority the landlords intended to reclaim a portion of the rental unit for their use.

I also considered that the parties have presented a written tenancy agreement which contained convoluted revisions and unenforceable addendums, and conditions of payments, I find it virtually impossible for a third party to interpret the real intent or terms of a specific, set amount of rent every month throughout this long term tenancy. The monthly rent appears contingent on certain conditions or requests made each month during the tenancy and the amount of deductions for hydro to the studio was to be negotiated, if another tenant did not reside in the studio. Additionally, it now appears that, although the landlords are using the cottage, another person is using the shop, and there was no provision for a further reduction for hydro for the shop.

I also find the landlords' expectation that a tenant to be responsible for splitting the cost of hydro consumed in a separate structure to be an unconscionable term, under section 6 of the Act, and therefore unenforceable.

I also determined that the landlords have not shown that they complied with section 7(2) of the Act, as they allowed any losses they may have incurred to accumulate for at least 2 years, if not longer, which I find fails to prove that they took reasonable steps to minimize their loss as and when they may have occurred throughout this long term tenancy.

I was further influenced by the landlord's statements at the hearing that she considered the tenants' monthly rent to be $1450, which fails to take into account the deduction the tenants' were allowed to take for paying hydro to the studio and shop.

For these reasons, I find the landlords have not submitted clear and consistent evidence to support their monetary claim for the unpaid rent as listed in their application and on their Notice.

I do, however, find that when the landlords issued the 10 Day Notice on March 23, 2014, that some rent was owed by the tenants. In reaching this conclusion, I was persuaded that the evidence shows that the tenants owed at least $1350 per month as listed in the written tenancy agreement, taking into account that they were providing hydro for separate structures, for a credit of $100, and were to pay $100 for use of part of the garage.

The undisputed evidence shows that the tenants made payments of $1200 in January, $1000 in February and $1000 in March 2014, for a total rent deficiency of $850 through March. I took particular note that the tenants did not deny owing at least some rent.

Therefore, I find the tenancy has ended due to the tenants' failure to pay full rent for January, February and March 2014, and the landlords are entitled to regain possession of the rental unit.

I find that the landlords are entitled to and I therefore grant an order of possession for the rental unit effective seven (7) days after service upon the tenants.

I find the landlords submitted sufficient evidence that the tenants owed the amount of $850 for unpaid rent through March 2014 and I further find the landlords are entitled to a monetary award for the rent deficiency in the amount of $850 and for recovery of their filing fee of $50, as they had at least partial success with their application, for a total monetary award of $900.

I must note that I have dealt with only the matter of unpaid rent through March 2014, as this was the issue as per the landlords' 10 Day Notice and the landlords' application was not clear if the month of April was included, due to the lack of particulars. The landlords are at liberty to file for dispute resolution to seek any further alleged unpaid rent from April 2014 onward.

1 Month Notice-
I have not considered whether or not the landlords have sufficiently proven their 1 Month Notice, as I have granted the landlords an order of possession for the rental unit.

Due to the above, I therefore find that the landlords are entitled to a monetary award in the amount of $900, comprised of the proven rent deficiency of $850 through March 2014, and the $50 filing fee paid by the landlords for this application.

Tenants' application-
The tenants' application seeking cancellation of the 10 Day Notice is dismissed without leave to reapply as I find have found merit with the 10 Day Notice to End Tenancy issued by the landlords, and the landlords have been granted an order of possession for the rental unit.

As I have granted the landlords an order of possession for the rental unit, I did not consider the portion of the tenants' application seeking cancellation of the 1 Month Notice.

The portion of the tenants' application seeking monetary compensation, which was severed in order to deal with the primary issue of the validity of the Notices, is dismissed, with leave to reapply.

The portion of the tenants' application seeking an order allowing a reduction in rent is dismissed without leave to reapply, as the tenancy is concluding pursuant to the order of possession for the rental unit granted to the landlords.

Conclusion

The landlords' application has been granted in part.

I grant the landlords a final, legally binding order of possession for the rental unit, which is enclosed with the landlords' Decision. Should the tenants fail to vacate the rental unit pursuant to the terms of the order after it has been served upon them, this order may be filed in the Supreme Court of British Columbia for enforcement as an order of that Court. The tenants are advised that costs of such enforcement are recoverable from the tenants.

At the landlords' request, I allow them to retain the tenants' security deposit of $675 in partial satisfaction of their monetary award of $900 and I grant the landlords a final, legally binding monetary order for the balance due pursuant to section 67 of the Act for the amount of $225, which I have enclosed with the landlords' Decision.

Should the tenants fail to pay the landlords this amount without delay after the order has been served upon him, the order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an order of that Court. The tenants are advised that costs of such enforcement are recoverable from the tenants.

The portion of the tenants' application seeking cancellation of the 10 Day Notice and the 1 Month Notice is dismissed as I have granted the landlords' application for an order of possession for the rental unit.

The portion of the tenants' application seeking monetary compensation is dismissed, with leave to reapply.

The portion of the tenants' application seeking an order allowing a reduction in rent is dismissed without leave to reapply.

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: May 31, 2014

Residential Tenancy Branch