



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BELLA VISTA REAL ESTATE INVEST LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, FF; CNR, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for unpaid rent pursuant to section 67;
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

This hearing also dealt with the tenants' application pursuant to the Act for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

The tenants both attended the hearing. The tenant AS (the tenant) provided testimony on behalf of the tenants. The landlord was represented by its agent, who confirmed he had authority to act on behalf of the landlord. All parties were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Both the landlord and tenants provided late evidence to the opposing party. Both the landlord and tenant confirmed that they had enough time to review the other's late evidence and consented to the hearing continuing with the late evidence before me.

The agent elected to limit the amount of the landlord's claim to \$2,900.00, that is, \$1,450.00 in rent for each of April and May.

Preliminary Issue – Applications Amendments

At the beginning of the hearing the agent asked to amend the landlord's application to withdraw the following claims:

- an order of possession for unpaid rent pursuant to section 55;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38.

At the beginning of the hearing the tenant asked to amend the tenants' application to withdraw the following claims:

- an order to the landlord to make repairs to the rental unit pursuant to section 32;
- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an order to the landlord to provide services or facilities required by law pursuant to section 65; and
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70.

As there is no prejudice to the responding party by allowing each respective applicant to amend their application to withdraw certain claims, I allowed all the requested amendments.

As the tenants have provided notice to end the tenancy as of 1 June 2015 and as the landlord has withdrawn its claim for an order of possession, I do not need to consider the tenants' application to cancel the landlord's 10 Day Notice as the issue is moot.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent? Is the landlord entitled to recover the filing fee for this application from the tenants?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began on or about 1 November 2010. The rental unit was made up of a self-contained upper unit and self-contained lower unit. The parties entered into a fixed-term tenancy agreement on 30 October 2010. The fixed-term tenancy ended 31 October 2011. The agreement set out that at the end of the fixed-term tenancy the tenancy would end. Under the tenancy agreement rent was due on the first. The parties did not enter into any subsequent written tenancy agreement.

Monthly rent for the majority of the tenancy was \$1,900.00. The landlord collected a security deposit at the commencement of the tenancy. The security deposit has not yet been returned to the tenants.

On or about 20 March 2014, the agent and tenants made an oral agreement (the March Agreement). The parties disagree as to the terms of the March Agreement. The tenant testified that the March Agreement was that the landlord would provide the tenants with two months free rent on the sale of the rental unit. The agent testified that the March Agreement was that the successor landlord would provide the tenants with two months free rent in the event a notice to end tenancy was issued to the tenants for the purpose of development.

On 8 March 2015, the tenants discovered that the rental unit had been sold. At this time, the tenants asked for the terms of the March Agreement to be put in writing. On 10 March 2015, the agent wrote to the tenant setting out the terms of the March Agreement:

This is to confirm our verbal agreement dated back to approximately March 2014: One additional month of "Free Rent" beyond BC Tenancy Guidelines to be extend by Landlord at time landlord issues notice to vacate for development purposes.

On 11 March 2015, the tenants emailed the agent and set out their understanding of the March Agreement:

As stated, your contract with the buyer states we as tenants have an agreement for two months rent free upon sale.

On 16 March 2015, the tenants gave notice of their intent to vacate the lower level effective 1 April 2015. The tenants did not want to continue subletting the lower level because of the uncertainty regarding development of the rental unit. The landlord and tenants agreed that monthly rent for the upper level would be \$1,450.00 per month beginning 1 April 2015.

The agent testified that he assigned the March Agreement with the tenants to the successor landlord.

On 4 April 2015, the landlord issued the 10 Day Notice. That notice set out that the tenants had failed to pay \$1,450.00 in rent that was due on 1 April 2015. The landlord provided a proof of service statement that set out that the notice was served on 4 April 2015 by posting the 10 Day Notice to the tenants' door. The 10 Day Notice set out an effective date of 15 April 2015.

The agent testified that the landlord did not receive any payment since the issuance of the 10 Day Notice.

The agent submits that the March Agreement was intended to be an enhancement of the one month of free rent that the tenants would otherwise be entitled to on the issuance of a 2 Month Notice to End Tenancy for Landlord's Use.

Analysis

There is no written tenancy agreement for this tenancy. The original written tenancy agreement was not extended when it concluded on 31 October 2011. I find that as of 1 November 2011 the tenancy continued as a month-to-month tenancy on the same terms as the original tenancy agreement.

The parties agree that there was a March Agreement; however, there is no agreement as to the terms of the March Agreement. There is no written agreement in respect of the March Agreement. There is no record of the exact language used in the striking of this bargain, merely the parties' conclusions as to what the legal entitlements of the tenants are under the March Agreement.

What is at issue in these applications is whether or not the March Agreement required the landlord to provide two months' of free rent to the tenants on the sale of the rental unit. It is not necessary that I determine the exact terms of the March Agreement in order to resolve this issue.

Subsection 5(1) of the Act prohibits contracting out of the provisions of the Act and Regulations. Pursuant to subsection 5(2), any term that attempts to contract out is of no effect.

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

There are various provisions of the Act that permit a tenant to deduct amounts from rent:

- Subsection 19(2) permits a tenant to deduct amounts from rent to recover the excess amounts of a security deposit that did not comply with the Act.
- Subsection 33(7) permits a tenant to deduct amounts from rent for the costs of emergency repairs.
- Subsection 43(5) permits a tenant to deduct the amount of a rent increase which did not comply with the Act from rent.
- Subsection 51(1.1) permits a tenant to deduct one month rent where the landlord has issued a notice to end tenancy pursuant to section 49.
- Subsection 65(1) and subsection 72(2) permit a tenant to deduct rent to recover an amount awarded in an application before this Branch.

There are no other deductions from rent permitted under the Act or regulations.

Subsection 26(1) mandates that rent must be paid when it was due unless the tenant had a right to deduct an amount. Neither the tenants' construction nor the landlord's construction of the March Agreement fits within any of the provisions in the Act that allow a deduction from rent. As such, I find that the March Agreement represented a contract that attempted to contract out of the Act. As such, the March Agreement is of no effect.

As the March Agreement is of no effect, the tenants owed rent to the landlord for each of April and May 2015. The landlord's application for April's and May's rent is granted. The landlord is entitled to recover the amount of \$2,900.00 in rent arrears from the tenants.

As the landlord has been successful in this application, it is entitled to recover its filing fee from the tenants. As the tenants have been unsuccessful in their application, they are not entitled to recover their filing fee from the landlord.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$2,950.00 under the following terms:

Item	Amount
Unpaid April Rent	\$1,450.00
Unpaid May Rent	1,450.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	\$2,950.00

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with this order, this 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 subsection 9.1(1) of the Act.

Dated: May 20, 2015

Residential Tenancy Branch

