



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the tenant – CNR, MNDC, OLC, RR
For the landlord – OPR, MNR

Introduction

This hearing was convened by way of conference call in response to both parties' applications for Dispute Resolution. The tenant applied for an Order to cancel a 10 Day Notice to End Tenancy for unpaid rent; for a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act (Act)*, regulations or tenancy agreement; for an Order for the landlord to comply with the *Act*, regulations or tenancy agreement and for an Order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided. The landlord applied for Order of Possession for unpaid rent or utilities and for a Monetary Order for unpaid rent or utilities.

The tenant and landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The tenant and landlord provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. The parties confirmed receipt of evidence. 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

I have determined that the portion of the tenant's application dealing with any claim other than the request seeking cancellation of the 10 Day Notice Notice to End Tenancy for unpaid rent (the Notice) is unrelated to the primary issue of disputing the Notice. As a result, pursuant to section 2.3 of the Rules of Procedure, I have severed the remainder of the tenant's application.

Jurisdictional Issues

The tenant raised the issue of the Residential Tenancy Branch (RTB) having jurisdiction in the matter before me. I refer the parties to the Residential Tenancy Policy Guidelines #27 part 6 which states, in part, that The *Residential Tenancy* does not apply to living accommodation included with premises that

- i) are primarily occupied for business purposes, and
- (ii) are rented under a single agreement

Where the premises are used primarily for residential purposes and the tenant operates a home-based business from the premises, this does not mean the premises are occupied for business purposes. The distinction is whether the premises are business premises which include an attached dwelling unit or whether the premises are residential in nature with a lesser business purpose.

The tenant testified that the *Act* does not apply as this is a commercial tenancy and the tenant rented this property with the purpose of operating her horse business from the property. The tenant testified that the landlord was fully aware that the tenant intended to operate a business and this property was used for farming purposes with the tenant entering into a five year commercial lease agreement with the landlord. The tenant testified that she was involved in drawing up the lease agreement with the landlord and as the terms were nearly the same as a previous lease agreement where the RTB declined jurisdiction because the tenant was operating her horse business from a different property; the tenant contends that the RTB should decline jurisdiction on this matter also.

The tenant testified that she cleared the land, put down wood chips and built a riding ring on the property and created stalls in the barn for her horse business. The tenant testified that she would never have gone to this expense if it was not a commercial lease. The tenant testified that if this was a residential lease then the landlord would have been responsible for all the repairs. The tenant testified that the landlord used the tenant's lease agreement to take to BC assessments to show that the tenant was operating a business from the property so the landlord could still obtain their farm status.

The landlord testified that the lease agreement is for a residential tenancy. The lease clearly shows that the tenant rented the house and acreage including outbuildings from the landlord. The landlord agreed that the tenant said she wanted to start something with her horses but the lease agreement drawn up is not a commercial lease. The tenant has also sublet the basement suite to other tenants. The landlord testified that a riding ring and barn were always at the property and the advert for the property clearly stated that it came with a barn when the tenant rented it.

I have considered the evidence before me and find the tenant has the burden of proof to show that the premises were rented as a commercial tenancy and not a residential tenancy. In making this determination I have considered both arguments in this matter and the lease agreement

provided in documentary evidence. If the tenant had a previous hearing with a different property and landlord and the RTB declined jurisdiction that does not automatically mean that at this hearing for this tenancy that jurisdiction will also be declined and each matter is dealt with separately.

The lease agreement does not contain any information about this being a commercial tenancy or that the tenant will be operating a business from the property. The tenant was involved with the landlord in drawing up this lease agreement and if it was the tenant's intention to operate a business then the tenant should have asked to have this included in the lease agreement. While I accept that the tenant did have horses on the property and may well have been operating a business from the farm with her horses it is clear that this lease agreement is for the house, seven acres of land and the buildings on the property. I am not satisfied that when this lease was signed by the parties that it was a commercial lease agreement. Consequently, I find the *Act* does apply in the matters before me and I have jurisdiction to hear these matters.

Issue(s) to be Decided

- Is the tenant entitled to an Order to cancel the 10 Day Notice?
- Is the landlord entitled to an Order of Possession?
- Is the landlord entitled to a Monetary Order for unpaid rent?

Background and Evidence

The parties agreed that they entered into this lease agreement in June, 2011 for the tenancy to start on July 01, 2011. Rent is documented on the lease agreement as \$1,700.00 per month for the first year and \$1,800.00 per month for each of the subsequent four years. This is a five year lease agreement. The tenant paid a damage deposit of \$850.00.

The landlord testified that the tenant failed to pay the rent for February, 2016 of \$1,800.00. A 10 Day Notice to End Tenancy for unpaid rent (the Notice) was served in person to the tenant on February 07, 2016. This Notice indicates that rent is owed of \$1,800.00 and has an effective date of February 17, 2016. The landlord testified that the tenant has not paid the rent within the five allowable days and has failed to pay rent for March and April, 2016. The total amount of outstanding rent is now \$5,400.00. The landlord requested to amend their application to include the unpaid rent for March and April, 2016. The landlord seeks a Monetary Order for the rent arrears and an Order of Possession effective on April 30, 2016.

The tenant testified that in accordance with the lease agreement on December 31, 2015 the tenant gave the landlord three months' notice to end the tenancy. The tenant testified that she did not pay the rent for February, March or April because the tenant has overpaid rent by \$100.00 per month since July 01, 2012.

The tenant testified that in the lease agreement it states that the rent is \$1,700.00 per month for the first year and for that same period the hay on the farm will go to a hay farmer. After the first year the rent will increase to \$1,800.00 but the hay will then be the tenants. The tenant testified that the landlord did not provide the hay to the tenant for the years after. The tenant testified that the landlord said the tenant could use the \$100.00 as credit towards her rent and therefore as the tenant had a credit of \$4,300.00 she has applied this to her rent for February, March and April. The tenant testified that she also agreed in writing that the landlord could keep her security deposit of \$850.00 to go towards the rent.

The landlord disputed the tenant's claims. The landlord testified that the lease agreement clearly sets forth the terms regarding the rent. The agreement states that the rent is \$1,700.00 per month due and payable on the first day of every month from July 01, 2011 to June 30, 2012. Thereafter the rent is \$1,800.00 per month for the duration of the lease agreement. The landlord testified that this rent had nothing to do with the hay. The landlord referred to the clause in the lease agreement concerning the hay which states that the first cut of hay for July, this year will be the property owners. Thereafter, hay, harvesting/cutting will be the lessee's for the remainder of the lease agreement. The landlord disputed saying the tenant had any rent credits.

The landlord testified that the tenant was therefore responsible for the hay after the first year. The reason the tenant did not have the hay for the first year was because the landlord had already entered into an agreement with a hay farmer for that first year. There is nothing in the agreement that shows the landlord will continue to have the hay harvested for the tenant. The tenant had horses which eat the grass and no one else took the hay from the property. The tenant was entitled to deal with the hay in any way she choose to.

The tenant argued that the lease agreement included the house, seven acres, and buildings. During the first year when the tenant was paying \$1,700.00 she already had the house and the hay. The tenant argues that why would she agree to pay \$100.00 more a month unless she was receiving an extra amount. The tenant disputed that she received any hay.

The tenant asked the landlord if the tenant had said she would pay more in rent if she could have hay. The landlord responded no. The tenant asked if the landlord said the tenant could have hay from the hay farmer after the first year. The landlord responded that the tenant was told and it is in the lease agreement that she could have the hay after the first year. There is no mention that the landlord would have the hay cut for the tenant. The tenant asked who has been cutting the hay after the first year. The landlord responded that the tenant became responsible for harvesting/ cutting the hay after the first year in accordance with the lease agreement. The tenant asked the landlord if she is saying that the tenant had to pay an extra \$100.00 per year after the first year and then still pay someone to cut the hay. The landlord responded that this was the agreement. The first year the hay farmer cut the hay and after that the tenant was responsible for the hay and could make her own arrangements. The tenant has been able to do that since July, 2012. The rent increase after the first year was agreed to on the lease agreement and was for all aspects of the tenancy not just the hay.

Analysis

It must be noted here that the tenant was disruptive and argumentative during the hearing. The tenant was cautioned many times to stop interrupting the landlord and the Arbitrator. The tenant continued to interrupt the proceedings and would not listen to direction from the Arbitrator.

With regard to the landlord's claim for unpaid rent; I have considered all the evidence before me, including the sworn testimony of both parties. Section 26 of the *Act* states:

26. 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.

I am satisfied from the evidence before me that the rent for this unit was agreed at \$1,700.00 per month for the first 12 months and \$1,800.00 per month for every month thereafter. The tenant testified that she had overpaid rent by \$100.00 per month as she did not get the hay she was entitled to after the first year. The lease agreement does not specify that the extra \$100.00 per month from July, 01, 2012 is for hay. The tenancy agreement does specify that after the first year the hay harvesting and cutting will be the tenants for the remainder of the lease agreement. The tenant helped draft this lease agreement with the landlord and has signed the lease agreement to agree to the terms and conditions contained within it. I am not satisfied that the tenant has overpaid rent from July 01, 2012 to January, 01, 2016 and is therefore responsible for the rent for February, March and April, 2016 to the amount of \$5,400.00. Consequently, I find the landlord will receive a monetary award for the amount of **\$5,400.00** pursuant to s.67 of the *Act*. I have allowed the landlord to amend their application to include rent for March and April as the tenant has continued to reside in the rental unit.

I accept that the tenant was served the Notice, pursuant to section 88 of the *Act*. As the Notice was served in person to the tenant on February 07, 2016 I find it was served on that date. The Notice states that the tenant had five days to pay the rent or apply for Dispute Resolution or the tenancy would end. The tenant did file an application to dispute the Notice within five days; however, the tenant failed to pay the outstanding rent and therefore the Notice remains in force and effect.

I find the effective date of the Notice was February 17, 2016; however, the landlord has requested an Order of Possession effective on April 30, 2016. Based on the foregoing, I find that the landlord is entitled to an Order of Possession pursuant to s. 55 of the *Act*.

The tenant's application to cancel the Notice is therefore dismissed.

Conclusion

The tenant's application to cancel the Notice is dismissed without leave to reapply. As this tenancy will end I dismiss the tenant's application for an Order for the landlord to comply with the *Act*.

The tenant is at liberty to file an application for money owed or compensation for damage or loss.

For the reasons set out above, I grant the landlord a Monetary Order pursuant to Section 67 of the *Act* in the amount of **\$5,400.00**. This Order must be served on the tenant and may then be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court if the tenant fails to comply with the Order.

The landlord has been issued an Order of Possession effective **on April 30, 2016** pursuant to section 55(1) of the *Act*. This Order must be served on the tenant. If the tenant remains in Possession of the rental unit and does not relinquish that possession to the landlord then the Order may be filed in the Supreme Court of British Columbia 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 04, 2016

Residential Tenancy Branch