

## **DECISION**

Dispute Codes      CNR, OPR, MNR, MNSD, FF

### Introduction

This hearing dealt with applications from both the landlord and the tenant pursuant to the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- an Order of Possession pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

The tenant applied for cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) pursuant to section 46 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions.

The tenant testified that he handed a copy of his dispute resolution hearing package to the landlord on March 14, 2011. The landlord confirmed having received this package. The landlord testified that she sent the tenant a copy of her dispute resolution hearing package by registered mail on March 11, 2011. She provided the Canada Post Tracking Number to confirm this mailing. The tenant testified that he has not received the landlord's dispute resolution hearing package, but said that he has not checked his mailbox since March 11, 2011. In accordance with section 90 of the *Act*, the landlord's hearing package was considered served to the tenant five days after she sent it to him by registered mail. I am satisfied that both parties served their hearing packages to one another in accordance with the *Act*.

At the hearing, the landlord said that the tenant is no longer in rental arrears. As such, the landlord said that she was no longer seeking a monetary award for unpaid rent.

### Issues(s) to be Decided

When did the landlord serve her Notice to End Tenancy to the tenant? Is the tenant entitled to a cancellation of the Notice to End Tenancy? Is the landlord entitled to an Order of Possession? Is the landlord entitled to recover her filing fee for her application from the tenant?

### Background and Evidence

This two-year fixed term tenancy commenced on March 1, 2010. Monthly rent is set at \$1,925.00, payable initially on the 31<sup>st</sup> of each month. The timing of the rent was amended to the first of each month by agreement of the parties. The landlord continues to hold the tenant's \$980.00 security deposit paid on February 15, 2010.

The landlord testified that she posted the Notice on the tenant's door on March 2, 2011, when he did not pay any of his March 2011 rent the previous day. Her husband participated in this hearing and confirmed that he witnessed the landlord tape the Notice to the tenant's door between 7 and 8 a.m. on March 2, 2011. The tenant provided oral and written evidence that he did not receive the landlord's March 2, 2011 Notice. He testified that he was unaware of the landlord's Notice until the landlord sent him a text message on March 9, 2011. The parties agreed that the landlord handed the tenant a copy of the March 2, 2011 Notice on March 9, 2011 after the tenant called the landlord to let her know that he had not received the earlier Notice.

The parties agreed that the tenant attached a bank money order for the entire amount of the March 2011 rent when he gave the landlord a copy of his dispute resolution hearing package on March 14, 2011. The landlord cashed this money order. Both the landlord and her husband testified that they told the tenant at that time that the landlord was accepting the money order for use and occupancy only. The tenant denied that he was provided this information by the landlord. The landlord testified that she provided the tenant with a receipt for his March 2011 rent payment, although he said that he did not need it. The landlord and her husband said that the receipt stated that the tenant's cheque was received for use and occupancy only. The landlord said that she included a copy of this receipt with the evidence package she sent to both the tenant and the Residential Tenancy Branch. The tenant said that the copy she provided to him was of poor quality and he could not read the reference to the rent being accepted for use and occupancy only. The Residential Tenancy Branch received no such receipt as part of the landlord's evidence package.

### Analysis

#### Tenant's Application to Cancel Notice to End Tenancy and Landlord's Application for Order of Possession

While I have turned my mind to all the documentary evidence, including miscellaneous letters and e-mails, and the testimony of the parties and the landlord's witness, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the claims and my findings around each are set out below.

When a landlord issues a notice and the tenant disputes the notice, the onus is on the landlord to prove cause for issuing the notice. The parties are in agreement that the landlord served the tenant with another copy of the Notice on March 9, 2011. They also agree that the tenant paid all of the outstanding rent identified in the March 2, 2011 Notice on March 14, 2011, within five days of receiving the March 9, 2011 copy of the Notice. The issue in dispute narrows to an assessment of whether the landlord has demonstrated that she complied with the *Act* in posting the Notice on the tenant's door on March 2, 2011 as she maintained. If she did, the tenant did not pay all of the outstanding rent identified in that Notice within five days nor did he apply for dispute resolution.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

In addition to the manner and tone (demeanour) of the witness' evidence, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

The parties presented very different accounts regarding whether the landlord posted the Notice on the tenant's door on March 2, 2011, as she claimed, and whether the landlord and her husband advised the tenant that his March 14, 2011 money order for March 2011 rent was accepted for use and occupancy only. Although both of the parties presented a reasoned and detailed chronicle of what transpired regarding this phase of the tenancy, it appears likely that one of the parties has misrepresented when Notice was provided and whether the tenant's March 14, 2011 payment was accepted for use and occupancy only. Both parties testified that they discussed their circumstances with representatives of the Residential Tenancy Branch (RTB) to seek guidance on how best

to proceed with their applications. Their applications, evidence and sworn testimony appear consistent with information provided to them during those discussions.

The landlord testified that there has been a long series of late payments of rent during this tenancy, estimating that this has occurred 75 to 80 per cent of the months since this tenancy commenced. The tenant admitted that he has been unable to pay his rent on time on a number of occasions. However, he denied having received the landlord's March 2, 2011 Notice until the landlord sent him text messages enquiring about his plans to vacate the rental unit in accordance with that Notice. Once he did receive a copy of that Notice, he complied with the landlord's Notice within five days and paid all of the outstanding rent requested in that Notice.

The landlord said that she took a photograph of the notice posted on the tenant's door on March 2, 2011 on her cellphone camera. She testified that she was unable to retrieve this photograph because she was unaware at the time that she had exceeded the limit for photographs on her cellphone. Although she did not provide a written statement to attest to her husband's witnessing of her posting of this notice on the tenant's door on March 2, 2011, her husband did provide straightforward and convincing sworn oral testimony confirming that this occurred. Section 88 of the *Act* permits a landlord to post a notice to end tenancy on a tenant's door in the way the landlord maintains she provided this notice to the tenant on March 2, 2011.

I have considered the testimony of the parties in an effort to establish credibility in relation to the disputed testimony. The real test of the truth of the information provided of a witness must align with the balance of probabilities. Although I recognize that both parties provided evidence that seems to comply with the instructions they received by the RTB staff, I find that on a balance of probabilities it is more likely than not that the landlord posted the Notice on the tenant's door as she maintains on March 2, 2011. I find the evidence of the landlord and her husband was straightforward and consistent with a logical path that a landlord would be expected to take if a tenant failed to pay rent that was due on the first of the month.

I am satisfied that the landlord has met the burden of proof and that the version of events provided by the landlord and her witness is more credible than that presented by the tenant with respect to the posting of the Notice on his door on March 2, 2011. Considered in its totality, I find the evidence presented by the landlord and her witness more credible than that of the tenant.

I find the evidence of the landlord and her husband credible regarding the landlord's acceptance of the tenant's March 14, 2011 money order for use and occupancy only. Although the landlord provided no copy of this receipt to the Residential Tenancy

Branch, the landlord's description of the details surrounding the tenant's provision of this payment attached to his application for dispute resolution hearing package was consistent and did not waiver as to what happened. The evidence from the landlord and her husband was straightforward and did not waiver on their account of the landlord's acceptance of the tenant's payment. On this basis, I find that the landlord's acceptance of the tenant's payment did not extend this tenancy.

Since I accept on a balance of probabilities that it is more likely than not that the landlord posted the Notice on the tenant's door on March 2, 2011, I find that the tenant failed to pay the March 2011 rent within five days of receiving the 10 Day Notice to End Tenancy. The tenant did not make an application pursuant to section 46(4) of the *Act* within five days of being deemed to have received the 10 Day Notice. In accordance with section 46(5) of the *Act*, the tenant's failure to take either of these actions within five days led to the end of his tenancy on the effective date of the notice. In this case, this required the tenant to vacate the premises by March 16, 2011.

At the hearing, the tenant said that he has four children staying with him and would need 1 ½ to 2 months to vacate the rental unit if an Order of Possession were granted. The landlord requested an Order of Possession to take effect April 15, 2011.

As the tenant has not vacated the rental unit by March 16, 2011, I find that the landlord is entitled to an Order of Possession that will take effect at one o'clock in the afternoon on April 22, 2011. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit by that time, the landlord may enforce this Order in the Supreme Court of British Columbia.

#### Filing Fee and Security Deposit

As the landlord has been successful in her application, I allow her to recover her filing fee for this application by retaining \$50.00 from the tenant's security deposit. The value of the remaining security deposit held by the landlord is reduced to \$930.00.

#### Conclusion

The landlord is provided with a formal copy of an Order of Possession effective at one o'clock in the afternoon on April 22, 2011. Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I dismiss the landlord's application for a monetary award for unpaid rent from March 2011. I allow the landlord to recover her \$50.00 filing fee for this application by retaining

this amount from the tenant's security deposit. The present value of the tenant's security deposit is reduced to \$930.00.

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*.