Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Re-Hearing Decision

Dispute Codes:

MNDC

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Introduction

This is a re hearing of an application originally submitted by the tenant on November 5, 2008 requesting monetary compensation for $650.00 for a riding mower and $50.00 for hose left at the end of the tenancy or the return of these items by the landlord. In addition, the tenant was seeking compensation of $2,000.00 representing the equivalent of two months rent under section 51(2) due to the alleged failure of the landlord to take steps to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice. The tenant alleged that the landlord failed to use the unit for the stated purpose for at least 6 months, beginning within a reasonable period after the effective date of the notice. The tenant withdrew the portion of the application relating to the request for return of the security deposit as that matter was already dealt with in a different application.

This application had been originally scheduled to be heard on December 12, 2008 but was reconvened to be heard on January 6, 2009. On December 15, 2008 Hearing Notices with the new hearing date were sent to both parties. However, due to a typographical error, the tenant/applicant's Notice was sent to an incorrect address and the tenant failed to attend the hearing on January 6. 2009. As a result, the tenant's application was dismissed because the respondent appeared while the applicant tenant did not. The tenant then made an application for review consideration and on February 19, 2009 a decision was rendered granting the tenant a review hearing to re-hear the application, which is before me now. The rehearing was ordered to proceed only by

written submissions, to be received by March 24, 2009. Written submissions were received from both of the parties and these were considered in this determination.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence is:

- Was the Two-Month Notice for Landlord Use acted upon in compliance with the Act? In particular, were steps taken by the landlord to accomplish the stated purpose that was given to justify ending the tenancy under section 49 within a reasonable period after the effective date of the notice and continuing for at least six months?

- Whether or not the tenant is entitled to monetary compensation under section 67 of the *Act* for damages or loss caused by a violation of the Act by the landlord. This determination is dependant upon whether the tenant has submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing that the damage was caused by the tenant and by verifying that the amount being claimed is justified.

- Whether the tenant is entitled to the return of the tenant's property or compensation for its loss.

The burden of proof is on the landlord to verify that the use of the property was consistent with that stated in the notice. The burden of proof is on the tenant to verify that damages and losses were incurred due to the landlord's violation of the Act.

Background and Evidence

The landlord had issued a two-month Notice for Landlord's Use effective January 31, 2008. The tenant filed an application to dispute this Notice and requested that it be cancelled. In a decision dated January 9, 2008, the Notice was upheld and the tenant's

application was dismissed. At that time, although the landlord had a right under section 55(1) had the right to request an Order of Possession during the hearing, the landlord did not do so. However, the tenant vacated the unit on February 29, 2008 pursuant to a successful application by the landlord for an order of possession based on a Ten-Day Notice to End Tenancy for Unpaid Rent.

The tenant's written testimony indicated that when the tenant vacated at the end of February 2008, they were unable to remove their riding lawnmower and a two-hundred-foot hose as the items were immobilized by ice that had formed from a leaking water faucet. The tenant has alleged that the ice formation was due to neglect by the landlord. The tenant testified that when they returned after the weather had warmed up, these possessions were gone. The tenant is claiming the value of the lawnmower which the tenant set at $650.00 and the value of the hose, set at $50.00. In the alternative, the tenant would like to have the items returned in working condition.

The landlord's testimony confirmed that a riding lawnmower was abandoned by the tenant and had to be stored. The landlord stated that the tenants never returned to get the mower and that the landlord had to store the vehicle at a cost of $50.00 per month for 13 months. In regards to the claim for the hose, the landlord disputed the allegation that any hose was ever left. The landlord also pointed out that it is the tenant's responsibility to remove their property from the unit at when a tenancy ends.

The tenant is also claiming the equivalent of two-months rent as compensation to which the tenants feel they are entitled under section 51(2) of the Act. According to the tenant, after issuing the Notice for Landlord's Use, the landlord failed to take steps to accomplish the stated purpose for ending the tenancy under section 49 after the effective date of the Notice to End Tenancy for Landlord's Use. The tenant stated that the rental unit was not utilized for the stated purpose for at least 6 months beginning within a reasonable period after the notice and was, in fact, rented to other tenants. In support of this allegation, the tenant testified that in mid April, the tenant attempted to serve a monetary order on the landlord at the disputed address and a "young lady

answered the door" and told the tenants that the landlord did not live in the unit. The tenants testified that they also asked a neighbour if the landlord lived in the unit and the tenants were told that he did not live there. The tenants testified that they hired a process server to serve legal papers on the landlord and to confirm whether or not the landlord was residing at the subject address. Submitted into evidence was a signed statement from the process server indicating that on Friday April 25, 2008 a person living in the unit verbally confirmed that the landlord did not reside there. The process server's statement also indicated that the legal documents were finally served at a different address and were accepted by the landlord's wife at that location. The process server received confirmation that, on the day the process server attended, the landlord was working at the location where the subject unit was situated. Also submitted into evidence was a signed, undated, statement from a former resident of the complex testifying that at the end of February 2008, he was offered the opportunity to move into the subject unit vacated by the tenant. The statement indicated that, at the end of March 2008, new renters were seen moving into the unit. The applicant/tenants also submitted copies of an undated printout showing that the subject address was occupied by two different individuals but did not identify whether the unit occupied at the address was the basement or upper unit. The tenants concluded that the landlord did not actually move into the unit they vacated, contrary to the landlord's stated intention shown on the Two-Month Notice to End Tenancy for Landlord's Use, and therefore the landlord is required under the Act to pay the equivalent of two months rent as compensation to the tenants.

The landlord disputed the allegation that he did not reside in the upper unit of the subject address and supplied copies of documents addressed to the landlord at the house address. These included:

- TV cable bills for April, May, June, July and August 2008 which contained the street address but did not specify whether they related to the upper or basement unit;
- medical documents dated in August 28, 2008 where the address is indecipherable;

- a vehicle insurance registration form dated May 22, 2008 addressed to the landlord at the subject house address but neglecting to specify whether the unit was “upper” or “basement”;
- two bank statements, showing no activity for the duration from May to August 2008 and from August to October 2008 with the landlord’s address shown as the subject property, but not specifying whether the unit was upper or lower.

The landlord submitted a handwritten statement from an individual who identified herself as a former tenant residing at the same address, in the basement unit, between October 2007 and April 2008. This individual gave written testimony that the landlord had moved into the upper unit sometime in March 2008 and was still residing there when the basement tenant moved out. The landlord’s written testimony indicated that there were three other tenants who had lived in the basement unit over the past 12 months.

The landlord also observed that, since the Order of Possession ending the tenancy was issued based on unpaid rent, the provisions of section 49 applicable to a Notice to End Tenancy for Landlord Use may not apply to this situation and therefore the tenant would not be entitled to receive any compensation relating to the Two-Month Notice to End Tenancy under section 51 of the Act.

Analysis

Return Property or Compensate for its Loss

In regards to this Applicant’s claim of damages from the other party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that, in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the tenant, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the landlord. Once that has been established, the claimant must then provide evidence to verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to mitigate the damage or losses that were incurred.

In regards to the riding mower, I find that it is premature to consider monetary compensation for the value of the vehicle, and I also find that the tenant has not offered any evidence to prove the claimed value. I find that both parties agree that the mower was left by the tenant and it appears that both parties would like the tenant to reclaim this item. However, during the past year, I find that the only action taken by the tenants towards retrieving their property was to return to the property when the weather was warmer only to find the item gone. I note that the tenant did not submit relevant

evidence such as any written requests from the tenant to the landlord attempting to make arrangements or schedule a time to pick up the item. From the landlord's perspective, the Act imposes a responsibility to securely store personal items left by a tenant and it appears that this was done. I find that there is no reason why the tenant could not have initiated formal communications with the landlord before choosing to pursue this matter thorough formal dispute proceedings. A claim for the return of property is premised on the assumption that the property has been confiscated or wilfully withheld after the tenant has requested it be released. I find that the tenant has not presented any evidence to support the notion that the landlord had ever denied access or refused to release the mower. I find that, only if the tenant had evidence that the landlord was not cooperating or was withholding the property, would it be necessary to deal with the conflict through a dispute resolution hearing. When a claim such as this appears in an application, there is an expectation that the claimant had already taken necessary steps under the Act to resolve such matters and I find that the tenant inexplicably neglected to take these reasonable steps.

However, as the matter is now before me and a long period of time has already passed, I am issuing an order that the landlord have the rider mower on site at the former property available for the tenant to pick up between 9:00 a.m. and 4:00 p.m. on Saturday May 2, 2009, between 9:00 a.m. and 4:00 p.m. on Sunday May 10, 2009 or other date and time that the parties mutually agree to in writing as preferred. Given that the landlord has stored this vehicle for an extended period of time, well beyond that required under the Act, I find that the landlord is entitled to receive storage costs for keeping this property on behalf of the tenants. The landlord has set the costs of storage at $50.00 per month but I find that a rate of $25.00 per month would be more appropriate and I order that the tenants compensate the landlord in the amount of $200.00 for eight months storage from April 2008 when the ice blocking the mower would have been gone and November 2008 when the tenant made this application. At the time the vehicle is retrieved by the tenant, the amount of $200.00 should be paid directly to the landlord, or the tenant must give the landlord a written receipt to indicate

that the landlord will be credited this amount towards any existing debt or previous monetary order owed by the landlord to the tenant. If the tenant does not retrieve the vehicle between 9:00 a.m. and 4:00 p.m. on Saturday May 2, 2009, or between 9:00 a.m. and 4:00 p.m. on Sunday May 10, 2009, or other date and time that the parties have mutually agreed to in writing, then I order that the landlord is entitled to dispose of the property according to provisions in the Residential Tenancy Act and the Residential Tenancy Regulations and is to adhere strictly to these provisions in every respect.

In regards to the missing hose, I find that the landlord has disputed its existence and there is no way to confirm that the landlord had removed or discarded this item in violation of the Act. Moreover the value of the hose has not been proven by the tenant. I find that the tenant has not sufficiently satisfied each element in the test for damages and loss. Therefore, I find that the portion of the application relating to the $50.00 compensation for the hose must be dismissed.

Equivalent of Two Month Compensation for Failure to Use Unit for Purpose Stated

Section 49(3) of the Act provides that a landlord is entitled to end a tenancy in respect of a rental unit if the landlord, or a close family member of the landlord, intends in good faith to occupy the rental unit. This was the stated purpose for the use of the unit and the reason given for ending the tenancy. The landlord's Notice was upheld at an earlier hearing held on February 21, 2008, because the landlord had successfully presented his case to prove that there was a good faith intention to reside in the unit.

Section 51(2) of the Act states that in addition to the amount payable under section 51(1), the landlord must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice.

In this instance the landlord's stated intent was to move into the unit and the Notice was upheld for that reason. Once such a notice is issued, the tenant is entitled to the equivalent to one-month compensation. As I understand it, the tenant resided in the unit for the last month rent-free. I reject the landlord's suggestion that, because the tenant had finally vacated pursuant to a Ten-Day Notice for Unpaid Rent, the landlord was therefore relieved of any obligation to compensate the tenant pursuant to the Two-Month Notice to End Tenancy for Landlord's Use issued under section 49.

In regards to whether or not the landlord resided in the unit, I find that the evidence is contradictory. The tenant had made the allegation that the landlord did not move into and reside in the unit for a reasonable period and submitted credible documentary evidence from a process server supporting this allegation as well as written testimony from another source. The burden of proof was on the landlord to verify that he lived in the unit and in support of this the landlord supplied some cable bills, a car insurance invoice, medical reports and bank statements on an account that was not active for several months that were addressed to the landlord at the subject address. I do not question the veracity of these documents. However, I find that the landlord failed to submit the kind of documentation that would normally be expected. I note that the landlord did not provide a copy of the landlord's current driver's license, copies of any credit card statements, copies of statements from the landlord's primary, active, bank account, hydro or gas bills or a copy of the post office change-of-address confirmation for his move from his former residence into the subject unit. I find that on a balance of probabilities, the landlord was likely receiving some mail at the subject address, but I find that this falls short of successfully rebutting the tenant's evidence and is not sufficient to conclusively prove that the landlord began to reside in the unit commencing within a reasonable time after the Notice and continued to live there for at least six months, as specified under the legislation.

Therefore I find that the landlord has not sufficiently met the burden of proof to establish that the landlord utilized the unit for the purpose stated on the Two-Month Notice to End

Tenancy. Accordingly, I find that the tenants are entitled under section 51 of the Act to be compensated an amount that is the equivalent of double the monthly rent payable under the tenancy agreement which amounts to $2,000.00.

Conclusion

Based on the testimony and evidence, I find that the tenant is entitled to compensation in the amount of $2,050, comprised of $2,000.00 equivalent of two-months rent as compensation under section 51(1) and $50.00 for the cost filing this application. This Order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

I order that the landlord arrange to provide access to the tenant to retrieve the rider mower on site at the former property between 9:00 a.m. and 4:00 p.m. on Saturday May 2, 2009, or between 9:00 a.m. and 4:00 p.m. on Sunday May 10, 2009 or other time that the parties mutually agree to in writing. Should the tenant fail to retrieve the rider mower in the manner specified above, I order that the landlord is entitled to dispose of the property in accordance with Part 5 of the Residential Tenancy Regulations.

I further order that, upon retrieving this item, the tenants are required to compensate the landlord for storage costs of $200.00 which will either be paid directly to the landlord, or documented as a written credit to indicate that any existing debt or previous monetary order owed by the landlord to the tenant will be reduced by this amount.

April 2009 _____

Date of Decision Dispute Resolution Officer