Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: CNR, ERP, LRE, MNDC, MNR, MNSD, RP, OPR, FF

Introduction

This hearing dealt with an application by the tenants for an order setting aside a notice to end this tenancy, an order that the landlord perform repairs, an order setting conditions on the landlord's right to enter the rental unit and a monetary order. The landlords filed a cross-application for an order of possession, a monetary order and an order to retain the security deposits in partial satisfaction of the claim. Both parties participated in the conference call hearing.

At the hearing it became apparent that there were two rental units in issue, both located in a house owned by the same landlord. One rental unit is on the upper floor of the house (the "Upper Unit") and is rented by C.C.. The second rental unit is on the lower floor of the house (the "Lower Unit") and is rented by B.S.. The tenants testified that they were advised by the Residential Tenancy Branch to submit a joint application since the rental units were in the same building.

It is clear that the rental units and tenancies are separate and distinct from each other and should not have been addressed in the same application. However, the landlord was given opportunity to respond to each of the claims and made counterclaims against both tenants and although the situation is unusual, in the interest of expediency the claims were heard as filed and as scheduled. The claims and the awards arising from each are set out separately below.

The Upper Unit claim and counterclaim

Issue(s) to be Decided

Is the landlord responsible for the cost of the hot water tank replacement?
Is the tenant entitled to recover a percentage of the utility payments?

Background and Evidence

The tenancy of C.S. began in July 2008 and ended on or about March 31, 2009. Although C.S. applied to dispute the notice to end tenancy, her application made it clear that she intended to vacate the rental unit at the end of March. The parties agreed that C.S. was given keys to the rental unit on July 3, 2008 but did not start paying rent until July 15, 2008. C.S. was obligated to pay $1,200.00 per month in rent and at the outset of the tenancy paid to the landlord a $625.00 security deposit. The landlord testified that C.S. was not supposed to begin renting until July 15, but they gave her the keys because she transferred the utilities to her own name at the beginning of July and was very insistent that she be permitted to move in immediately. The tenant testified that she had a discussion with the landlords and agreed to remove existing carpets and underlay in the rental unit and install laminate flooring as well as remove rubbish left behind by the previous tenants in exchange for being permitted early, rent-free access to the home from July 3 – 15. The landlord claims the tenant was obligated to pay rent for July 4 – 15 and seeks an order for $480.00.

The parties agreed that the tenancy agreement provided that the tenant was responsible for paying utilities for the entire house, including the Lower Unit. The landlord testified that at the beginning of the tenancy she specifically told the tenant that she had a choice to either be charged less rent in exchange for paying utilities for the entire house or to pay more rent and pay just her share of the utilities. Because the tenant changed the utilities into her own name at the beginning of the tenancy, the landlord knew that the tenant had opted to pay less rent and all of the utilities. Although there is a written tenancy agreement, a copy was not entered into evidence and there was no indication that the tenancy agreement had a provision that the rent had been reduced to reflect that the tenant was paying utilities for the entire house. The tenant seeks to recover 30% of the utilities, $191.15 for BC Hydro and $335.77 for Terasen Gas, on the basis that it is unconscionable to expect her to pay utilities for the entire rental unit.

The parties agreed that in September 2008 there was a problem with a toilet in the rental unit. The landlord testified that she hired a plumber to inspect the toilet and that he found a bottle stuck in the bowl. B.S. testified that she recognized the bottle as a

perfume bottle belonging to a tenant who had lived there prior to the time C.S.'s tenancy began. The landlord took the position that it didn't matter who the bottle belonged to and that the $300.00 cost of the plumbing repair should be borne by the tenant as the toilet problem emerged during her tenancy. The landlord seeks to recover the cost of repairing the toilet. The landlord did not submit any receipts showing what amount was paid to the plumber.

The parties agreed that in February, the tenant telephoned the landlord asking the landlord to inspect the hot water tank. The tenant testified that the tank was rusted at the top and had a hole through which hot water bubbled. The landlord looked at the tank and told the tenant that a plumber would be sent to inspect it. The landlord testified that the plumber told her that he had offered to inspect the tank on Thursday, February 26 but the tenant told him it was not a convenient time. The tenant testified that the plumber called on February 26 and said he would be coming to repair the tank and although she waited for him, he did not show up. The tenant arranged for Speedy Plumbing to replace the tank on February 28 when the plumber did not make further arrangements. The parties agreed that the plumber telephoned the tenant in the late afternoon of February 28 and was advised by the tenant to not bother coming as the tank had been replaced. The tenant stopped payment on her rent cheque for March and took the position that the $1,210.63 replacement of the tank constituted emergency repairs under section 33 of the Act. The landlord seeks payment of rent for March and argued that she should have had the right to get estimates and find the lowest price for a hot water tank.

The landlord seeks to recover $40.00 in NSF fees as the tenant had stopped payment on her cheques for February and March. The landlord acknowledged that the bank only charged her $10.00 per cheque, but testified that the tenancy agreement provided for a $40.00 charge to be levied against the tenant. The tenant testified that she stopped payment on her February cheque because she knew she did not have money in her account and she did not want the landlord to incur NSF charges.

The landlord further seeks loss of income for the month of April. The landlord testified that the tenant changed the locks on the rental unit without her permission and has not returned the keys to the rental unit. The tenant testified that she gave keys to B.S. in

order to permit B.S. to access the heat control in the Upper Unit and that the landlord's husband agreed that B.S. should keep the keys. At the hearing B.S. agreed to give one copy of the keys to the landlord. I instructed the landlord to permit B.S. to retain a key to the Upper Unit until such time as it was re-rented in order to permit her ongoing access to the heat control. The landlord testified that because the tenant retained the keys, she could not show the rental unit to prospective tenants. The landlord provided no evidence that she has advertised the rental unit or made other attempts to re-rent the unit.

Analysis

I find that the landlord has failed to establish that the tenant was obligated to pay rent for July 4-15. The landlord provided no explanation as to how the tenant was compensated for her labour in removing carpet and rubbish and installing laminate and the tenant's position that she was to live rent-free during that time period in exchange for her labour makes sense. I deny the landlord's claim for rent for July 4 – 15.

I find that the agreement that the tenant pay the utilities for the entire house is unconscionable in that it is grossly unfair to the tenant. I do not accept the landlord's position that the tenant enjoyed a lower rental rate in exchange for her payment of all of the utilities. The landlord was obligated to put the specific terms of the tenancy agreement, including any relief from rent in exchange for utility payment, in writing. In light of her apparent failure to do so, I find that she has failed to prove this term of the tenancy agreement. I find it reasonable to allow the tenant to recover $526.92, which represents 30% of the utilities paid during the tenancy and I award the tenant that sum.

I find that the landlord has failed to prove that the problem with the toilet was the fault of the tenant. In light of B.S.'s identification of the bottle has having belonged to the previous tenant and the fact that the landlord has failed to provide an invoice showing the sum paid to the plumber, I find that the landlord has not proven either the liability or quantum of her claim and I deny the claim.

As for the tenant's claim to apply the cost of the hot water tank to rent owing for March, I find that the tenant has established her claim. Section 33 of the Act permits the tenant to make emergency repairs to damaged plumbing fixtures after having made attempts

to contact the landlord and give the landlord the opportunity to perform the repair. I find that the tenant contacted the landlord and gave the landlord opportunity to repair the tank, but that the landlord did not do so within a reasonable time period. I do not accept the landlord's testimony that the plumber attempted to attend at the Upper Unit to repair the tank and note that a statement or testimony by the plumber was not provided. The tenant was entitled to deduct the cost of the emergency repair from her rent for March. As a result, the tenant only owes $39.37 rent for the month of March. I award the landlord $39.37.

I find that the landlord may not recover the $40.00 stop payment fee for the month of March as the tenant had reason to stop payment in that month. However, the landlord may recover a fee for the month of February as I find the tenant should not have put a stop payment on her cheque. The tenant did not dispute that the tenancy agreement provided for a $40.00 fee in these circumstances. The Residential Tenancy Regulation permits such fees to be assessed when they are a term of the tenancy agreement, but limits the fee to $25.00. I award the landlord $25.00 for the stop payment fee in the month of February.

I deny the landlord's claim for loss of income for April. The landlord has presented no evidence that she has attempted to minimize her loss by advertising the rental unit and further I accept the tenant's testimony that the landlord's husband agreed that the keys could be given to the tenant of the Lower Unit, particularly since the landlord's husband did not deny having given such permission.

The landlord indicated that the tenant should not be entitled to the return of her security deposit because she did not participate in a condition inspection of the unit at the beginning of the tenancy. The landlord provided no evidence that the tenant had been served with a Notice of Final Opportunity to Schedule a Condition Inspection, which the landlord is required to give the tenant pursuant to section 23(3) of the Act and section 17 of the Regulation. I find the tenant has not extinguished her claim on the security deposit.

Conclusion

The landlord has been awarded a total of $64.37 and the tenant has been awarded a

total of $526.92. In these circumstances it is appropriate to set off the awards as against each other, the end result of which is an award in favour of the tenant for $462.55. The landlord currently holds a security deposit and interest of $629.66 and must return this sum together with the $462.55 awarded to the tenant. A monetary order is enclosed for the total of $1,092.21. This order may be filed in the Provincial Court of British Columbia and enforced as an order of that Court. The parties will each bear the cost of their filing fees.

The Lower Unit claim and counterclaim

Issue(s) to be Decided

Is the landlord entitled to recover $250.00 in rent for April and a $40.00 late payment fee?
Should the landlord be ordered to perform repairs?
Is the tenant entitled to a monetary order as requested?
Should the landlord's access to the rental unit be restricted?

Background and Evidence

The parties agreed that the tenancy began in July 2007 and that the tenant has given notice to end the tenancy on April 30, 2009. The tenant pays $500.00 per month in rent, which amount includes utilities, and at the outset of the tenancy paid a $250.00 security deposit. The parties further agreed that the tenant paid just $250.00 of her rent in the month of April and asked the landlord to apply the $250.00 security deposit to the balance owing. At the hearing I advised the tenant that she was not permitted under the Act to apply the security deposit to rent owing the landlord without the landlord's express consent.

The tenant testified that her rent was to include Shaw Cable, but that in February an auditor from that company advised her that her unit could not share the account with the Upper Unit but required its own account. The tenant signed up for an account and received the month of February for free and paid $35.82 for the month of March and will be billed the same amount for the month of April. The tenant seeks to recover the cost of the cablevision. C.C. confirmed that Shaw Cable disconnected the Lower Unit

and reconnected it under a new account. The landlord testified that she used to live in the Upper Unit and that during the time she lived there, she had tenants in the Lower Unit who were using cablevision under her account.

The tenant seeks to control the landlord's access to the rental unit by setting specific times in which the landlord can show the rental unit to prospective tenants and restricting showings to times when the tenant is present.

The tenant seeks access to the Upper Unit for the purpose of accessing the heat control. C.C. gave the tenant keys to the Upper Unit and the tenant wishes to retain those keys to the end of the tenancy. The landlord objected to the tenant having keys, as she was only entitled to possession of the Lower Unit.

The tenant seeks $250.00 for loss of quiet enjoyment. The tenant testified that there is a 4" gap under her entry door which permits wind and water into the unit. The tenant testified that she has contacted the landlord a number of times and that he inspected the door and went so far as to purchase a replacement, but has not installed the replacement door. The tenant claimed that the replacement door is the same size as the original door and will not solve the problem with the gap. The landlord testified that the tenant did not complain about the door until shortly before her application for dispute resolution was filed and that the tenant has not permitted the landlord and her handyman access to replace the door. The tenant further testified that she has had a problem with mould in her ceiling and in the windows and she currently has a missing ceiling tile and a non-functioning light outside the kitchen. The tenant further testified that since the toilet in the Upper Unit overflowed in September 2008, the electrical outlet and fan in her bathroom have not worked. The tenant testified that the landlord's handyman attended the unit once but could not confirm that he was a certified electrician and did not repair the outlet.

Analysis

I find that the tenant still owes the landlord $250.00 for rent for April. I award the landlord $250.00.

I find that the tenant is entitled to recover the two months she has paid for cablevision.

Because the landlord promised to provide cablevision, she is responsible for the cost of doing so. The fact that the landlord has been able to provide this without a separate account in the past does not relieve the landlord of the obligation to continue to provide the service when it was discovered that two units were using the same account. I award the tenant $71.64.

I do not find it appropriate to set conditions on the landlord's right to enter the rental unit. There is no evidence before me that the landlord has entered illegally or for unreasonable purposes. The landlord is not restricted to entering only at times when the tenant is present. The landlord must comply with the Act and provide 24 hours written notice before showing the unit, but there is no reason why the tenant must be present when the landlord enters for a reasonable purpose and with legal notice. The tenant's claim to restrict the landlord's access is denied.

I find that the tenant must be granted access to the Upper Unit as long as it is unoccupied, solely for the purpose of accessing the heat control. If the landlord is successful in re-renting the Upper Unit before the tenancy ends, the tenant must return the keys to the Upper Unit to the landlord.

As for the tenant's claim for loss of quiet enjoyment, I find that the landlord knew that the bathroom outlet and fan were not working since September 2008 and has not made the required repairs. I find the tenant is entitled to recover $15.00 per month for the months of September – April inclusive and I award the tenant $120.00. As for the remainder of the tenant's complaints, I am not satisfied that the tenant gave the landlord reasonable opportunity to repair the door. The tenant seems to have decided that the landlord can only enter at her convenience and has unlawfully restricted access. I am not satisfied that the lack of a ceiling tile has any bearing on the value of the tenancy and I am not satisfied that the mold described is the fault of the landlord. Further, I am not persuaded that the landlord has been made aware of and given opportunity to repair the non-functioning light outside the kitchen. Accordingly I dismiss the remainder of the tenant's claims for compensation for loss of quiet enjoyment.

The tenant did not dispute the landlord's claim for a $40.00 late payment charge for

January. I find that the landlord is entitled to recover a late payment fee, but is restricted to $15.00 pursuant to the Regulation. I award the landlord $25.00.

Conclusion

The landlord has been awarded a total of $275.00 and the tenant has been awarded a total of $191.64. Setting off the awards as against each other produces an award in favour of the landlord for $83.36. As the tenancy is ongoing, I find it inappropriate to order the landlord to retain the amount of the award from the security deposit. The landlord is granted an order under section 67 for $83.36. The order may be filed in the Provincial Court of British Columbia and enforced as an order of that Court. The landlord may deduct this amount from the security deposit if she so chooses. The parties will each bear the cost of their filing fees.

Dated April 03, 2009.