

DECISION

Dispute Codes MND MNR MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for unpaid rent or utilities, for money owed or compensation for damage or loss under the Act, for damage to the rental unit, to retain the security deposit in partial satisfaction of this claim, and to recover the cost of the filing fee from the Tenant.

Both the Landlord and Tenant appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

Issues(s) to be Decided

Has the Landlord proven the merits of his claim pursuant to Sections 38, 67, and 72 of the *Residential Tenancy Act* to obtain a Monetary Order?

Background and Evidence

The Landlord testified that the Tenant was served with the Notice of Dispute Resolution by registered mail and that he did not have copies of the mail receipts to provide verbal testimony in relation to the date the documents were sent.

The Tenant testified that the property manager served the Tenant personally on March 31, 2009 at 12:30 p.m. with the Notice of Dispute Resolution and that she never received anything from the Landlord via registered mail.

In reviewing receipt of submitted evidence, the Landlord testified that he did not provide documentary evidence to either the Residential Tenancy Office or to the Tenant and that he was presenting the merits of his claim in his verbal testimony. The Landlord confirmed receipt of the evidence submitted by the Tenant.

The Tenant testified that the tenancy began September 1, 2008 and that rent was payable on the 1st of each month in the amount of \$900.00. The Tenant paid a security deposit of \$450.00 on August 19, 2008.

The Landlord testified that the Tenant signed a tenancy agreement entering into a fixed term tenancy that was to expire on September 1, 2009.

The Tenant argued that she never received a "signed copy" of the tenancy agreement, that she dealt directly with the property manager and when she request a signed copy from the property manager the Tenant was given another copy with only the Tenant's signature. The Tenant argues that she has never received a tenancy agreement with the Landlord's signature.

The Landlord argued that the Tenant would have been given a copy of the tenancy agreement signed by both herself and the Landlord at the beginning of the tenancy and that the Tenant must have lost her copy. The Landlord stated that he must have provided the Tenant a copy of the unsigned copy that he keeps in his files in response to her recent request for a signed copy. The Landlord did not provide a copy of the signed agreement into documentary evidence as the issue is that the Tenant has not paid rent that is owed.

The Landlord is claiming \$900.00 for unpaid rent for April 2009 as the Tenant submitted her notice to end the tenancy on March 4, 2009 effective March 31, 2009.

The Tenant confirmed that she provided written notice to end tenancy on March 4, 2009, effective March 31, 2009 and that she left the rental unit because of an on going health issue resulting from condensation and mould in her apartment.

The Tenant argued that the property manager knew about the condensation and mould issue as the Tenant discussed it with the property manager during every monthly walk through. The Tenant stated that at one point she called the Landlord with her concerns and the Landlord asked the Tenant why she was calling him and not the property

manager. The Tenant stated that she was instructed by the Landlord to deal with the property manager regarding this issue.

When asked why the property manager was not at the hearing to provide testimony the Landlord testified that he was aware of this situation, that "he realized that the excessive humidity was being created by the Tenant" and that he did not need to pay his property manager to attend. The Landlord confirmed that he did not have first hand knowledge of the conversations that went on between the tenant and the property manager but that his property manager kept him well informed.

The Landlord stated that he does not diarize issues that come up with his Tenants but that he thinks the issue of condensation and mould with this Tenant began sometime in January 2009 and that the Landlord responded to the Tenant's complaints in a timely fashion and even had a builder walk through the unit to assist in determining the cause. The Landlord claims that it was simply a matter of educating the Tenant in keeping the rental unit ventilated by leaving windows open and keeping the window drains clear of debris.

The Tenant argued that she was never notified of anyone walking through her rental unit, that she was present every time the property manager requested an inspection walk through, and that she was diligent in keeping the windows wiped and the drains clean.

The Landlord advised that he couldn't remember the date when the builder walked through as he doesn't have it written down and the Landlord could not remember if the Tenant was home during this walk through.

The Tenant confirmed that she issued written notice to end the tenancy on March 4, 2009 shortly after she found mould in both her bedroom and her son's bedroom, and that it was the same day that the property manager brought her a dehumidifier and requested that she leave it running at all times.

The Landlord is claiming \$1,000.00 in liquidated damages and stated that he was not able to re-rent the unit until June 15, 2009, that he paid his property manager an extra \$300.00 to show the rental unit and screen prospective tenants, and that he paid approximately \$300.00 in advertising costs. The Landlord testified that he advertised the rental unit in two of the local newspapers and on two internet sites. The Landlord guessed that his advertising would have cost approximately \$300.00.

The Landlord is requesting to recover the \$50.00 filing fee from the Tenant and to keep the security deposit in partial satisfaction of his claim.

The Landlord testified that the Tenant left the rental unit clean and in good condition and that there were no issues noted at the move out inspection so he will not be claiming an amount for damages to the rental unit.

The witness did not provide testimony at this hearing.

Analysis

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant Landlord 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 Landlord 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, in this case the Landlord, bears the burden of proof and the evidence furnished by the Applicant Landlord 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 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 regards to the Landlord's right to claim damages from the tenant, Section 7 of the *Act* states that if the Landlord or Tenant does not comply with this *Act*, 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.

The Tenant has argued that she never received a copy of the tenancy agreement that was signed by the Landlord. The Landlord chose not to submit evidence to the contrary, even after receiving copies of the Tenant's evidence and requests from the Tenant for a signed copy.

A significant factor in my considerations is the credibility of the testimony. In assessing credibility I am guided by the following:

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

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 current 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 the circumstances before me, I find the version of events provided by the Tenant to be highly probable given the conditions that existed at the time. Considered in its totality, I favour the evidence of the Tenant over the Landlord.

I find that the Landlord has contravened Section 12 of the *Residential Tenancy Regulation* which stipulates that a landlord must ensure that a tenancy agreement is signed and dated by both the landlord and the tenant. Based on the aforementioned I

find that the fixed term tenancy agreement referred to in the Landlord's testimony as being between the Landlord and Tenant, is void and of no effect.

A “**tenancy agreement**” means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit. Based on the above I find that the Landlord and Tenant had a month to month tenancy which commenced September 1, 2008.

Section 45 of the *Act* stipulates that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice and is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement. In this case the Tenant did not provide written notice until March 4, 2009 which means the tenancy would not end until April 30, 2009. Had the Tenant wanted to end the tenancy by March 31, 2009 she would have had to given written notice no later than February 28, 2009. Based on the aforementioned I find in favour of the Landlord's claim for \$900.00 of unpaid rent for April 2009.

With respect to the Landlord's claim of \$1,000.00 in liquidated damages, as I have previously found the tenancy agreement to be void and of no effect, there is no valid clause allowing for liquidated damages. I also note that, in the absence of documentary evidence, the Landlord has failed to prove damages or loss for advertising costs and additional wages incurred for the property manager and I hereby dismiss the Landlord's claim of \$1,000.00 without leave to reapply.

The Landlord withdrew his request for damages to the rental unit.

The Landlord has been partially successful with his claim and so I find he is entitled to recover the cost of the \$50.00 filing fee from the Tenant for this application.

Monetary Order – I find that the Landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenant's security deposit, and that the Landlord is entitled to recover the filing fee from the Tenant as follows:

Unpaid Rent for April 2009	\$900.00
Filing fee	<u>50.00</u>
Sub total (Monetary Order in favor of the landlord)	\$950.00
Less Security Deposit of \$450.00 plus interest of \$2.49	- 452.49
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$497.51

Conclusion

I HEREBY FIND in favor of the Landlord's monetary claim. A copy of the Landlord's decision will be accompanied by a Monetary Order for \$497.51. The order must be served on the respondent Tenant and is enforceable through the Provincial Court 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: June 23, 2009.

Dispute Resolution Officer