Dispute Resolution Services

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

DECISION

Dispute Codes:

MNSD, MNR, FF

Introduction

This hearing was convened in response to an application filed by the tenant and an application filed by the landlord.

Pursuant to an amended application the tenant seeks a monetary order for:

- money owed or compensation for damage or loss under the Act, regulation or tenancy agreement ($2000)
- return of the security deposit of $1000, and compensation under Section 38 for double the security deposit (claim of $2000)
- recovery of the filing fee from the landlord for this application in amount of $50

The landlord sought a monetary order for:

- unpaid rent or utilities ($2000 for March 2009)
- recovery of the filing fee from the landlord for this application in amount of $50

Both parties were represented in the conference call and each was given an opportunity to participate in the hearing, and each provided submissions and affirmed testimony to this hearing.

Issue(s) to be Decided

Is the tenant entitled to the monetary amounts claimed?
Is the landlord entitled to the monetary amounts claimed?

Background and Evidence

The undisputed testimony in this matter is that the tenancy began December 01, 2009 as a one year fixed term lease to end the tenancy on November 30, 2009. During the tenancy the monthly rent payable was $2000 per month. At the outset of the tenancy the landlord collected a security deposit in the amount of $1000.

In January 2009 the tenants were notified by the landlord that their rental unit had been sold and therefore were required to vacate the unit by March 31, 2009. The tenants consequently acted on this notification from the landlord to vacate and complied with the landlord's request: vacating the rental unit one month earlier than offered by the landlord - vacating February 28, 2009.

It is further undisputed that the parties did not conduct a proper start of tenancy inspection. The parties did a "walk through" but no report was completed and confirmed by both parties by their signatures. The tenants submit that they were never given a copy of any report of the suite's inspection. It is also undisputed by the parties that another "walk through" inspection of the suite was conducted by the tenant and a designated agent of the landlord on March 03, 2009; but again, there was no inspection report completed and signed by the parties, and it is undisputed that the inspection did not result in the landlord seeking any damages or remedy to the suite. The landlord is not claiming damage to the rental unit; but is still holding the security deposit.

The landlord testified that after the rental unit was sold, the tenants were duly notified of the sale by a phone call from the selling realtor. This was followed up by an e-mail from the landlord on January 27, 2009 stating, "this e-mail serves as a 2 month's written notice . . . that the lease is being terminated effective March 27, 2009". Subsequently, a written letter was also sent to the tenants in this same regard. I note the landlord's application for dispute resolution differs from the e-mail letter - for the tenants to vacate on March 31, 2009. Regardless, the tenants testified they acted in good faith on the landlord's request to vacate the suite.

The landlord submits, and is undisputed by the tenants, that on February 12, 2009 the tenants notified the landlord they would vacate the premises earlier than offered by the landlord's notification – and would vacate on February 28, 2009. The tenant's response

was that they determined to seek alternate accommodations as soon as possible given they did not have an easy experience in securing their previous (subject) suite.

The landlord further submits the tenants refused to pay rent for the month of March, "as required under the lease", and that there was correspondence by e-mail between the parties in this regard. It is noteworthy that, neither the landlord nor the tenant has provided a copy into evidence of the purported lease. The tenant further submitted they have never received a signed physical copy of the lease from the landlord.
The landlord notified the tenant they would have to pay full rent of $2000 for March 2009 as the landlord could not rent out the suite for March 2009. The tenants, in turn, attempted to negotiate some resolve as they determined they would have to pay rent on two rental unit for the month of March 2009.

The tenant submits that for the balance of February 2009 they were unable to effectively communicate with the landlord, and after the March 03, 2009, "walk through", with a different agent of the landlord, the communication between the parties became contentious. The tenant submits that on March 12, 2009 they received a demand from the landlord for $777.52, and that the landlord would also be keeping their security deposit.

Analysis

I have reviewed all submissions and reflected on all the testimony and claims of the parties, and given full regard to all the evidence before me.

It must be emphasized that in order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. Moreover, 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 other party 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.

Simply stated, the claimant bears the burden of establishing their claim on the balance of probabilities. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally the claimant must show that reasonable steps were taken to address the situation and to mitigate the damage or losses that were incurred.

As to the tenant's claims:

Section 44 of the Residential Tenancy Act (the Act) states as follows:

How a tenancy ends

44 (1) A tenancy ends **only** if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 *[tenant's notice]*;

(ii) section 46 *[landlord's notice: non-payment of rent]*;

(iii) section 47 *[landlord's notice: cause]*;

(iv) section 48 *[landlord's notice: end of employment]*;

(v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii) section 50 *[tenant may end tenancy early]*;

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

In this matter, the landlord submits that the parties entered a lease which provided that, *"in case of the sale of the premises (the lease contained) a two month provision for written notice to vacate".* The tenant submits, *"We were informed that if the suite sold before the end of our year lease we would be given written notice that we would have up to two months to vacate".*

On the evidence, and in the absence of the referenced lease, I find the landlord's interpretation of and actions respecting the lease amount to circumventing the Act. The landlord, essentially, contracted with the tenant to end the tenancy other than according to Sec 44 of the Act. **Section 5** of the Act states as follows:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find the landlord was obligated to provide the tenant with a notice to vacate as per **Sec 49** of the Act, for landlord's use of property, and that the notice was to be in the approved form as per Sec 52(e) of the Act (Two (2) Month Notice to End Tenancy for Landlord's Use of Property) in which the rights and remedies of the tenant and landlord are aptly spelled out and explained. A provision of Sec 49 prescribes the effective

timing of such a notice in respect to this tenancy: Sec 49(2) . . . *by giving notice to end the tenancy effective on a date that must be,* ***[Sec 49(2)(c)]*** *if the tenancy agreement is* ***a fixed term tenancy****,* ***not earlier*** *than the date specified as the end of the tenancy.* In this matter the lease was for a fixed term ending November 30, 2009; therefore, the tenant was not obligated to vacate until that date.

In spite of the provisions set out in Section 49 of the Act the tenant acted on the landlord's letter to vacate so as to accommodate the sale of the suite and for the sole benefit of the landlord.

I find the tenant, in the least, is entitled to receive compensation under **Section 51** of the Act, as if a Two (2) Month Notice to End Tenancy for Landlord's use of Property had been properly and validly issued, per **Section 49** of the Act. The tenant has met the test for damage and loss claims for this matter. **I grant** the tenant an amount that is the equivalent of one month's rent payable under the tenancy agreement as prescribed in **Section 51**, in the amount of **$2000**.

The tenant did not provide evidence via submissions or testimony as to how or when the landlord would have been in receipt of the tenant's forwarding address. Therefore, I find the tenant cannot rely on the provisions for *double* the security deposit, as per Section 38 of the Act, which states:

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

Further: (6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) **must pay** the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

However, **I find** that the undisputed evidence from the tenant and landlord in regards to the lack of damage to the rental unit at the end of the tenancy indicates the tenant is entitled to the return of the *original* security deposit plus accrued interest in the quantum of **$1001.27.**

As the tenant's application has merit, the tenant is entitled to recovery of the filing fee in the amount of **$50.** The tenant's total entitlement is **$3051.27.**

As to the landlord's claim:

The landlord relies on the terms of the lease in respect to supporting their claim. The landlord has not provided a copy of the purported lease into evidence. In the absence of a mutual agreement to end the tenancy, and in spite of the landlord's provision in the lease for the tenancy to end on the landlord providing written notice to vacate in two months (on March 27, 2009), the landlord could only end the tenancy by a provision set out in Section 44 of the Act. On the sale of the suite, the tenant was given improper notice to vacate. None the less, in good faith and for the benefit of the landlord, the tenant acted on the landlord's notice and therefore the tenant was entitled to compensation of one month's rent under Section 51 of the Act, and other rights prescribed for such an end to the tenancy. The tenant elected to end the tenancy early as afforded by Section 50 and therefore, **I find** the tenancy ended February 28, 2009. It is undisputed that all rent up to this date was paid in full. The landlord's claim for any unpaid rent for this tenancy is not a valid claim, and **therefore I dismiss** the landlord's application in its entirety without leave to reapply.

Conclusion

I am granting the tenant a Monetary Order under Section 67 of the Act for the quantum of the tenant's entitlements in the amount of **$3051.27**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated June 29 , 2009