

DECISION

Dispute Codes MNR MNSD MNDC MND FF
 MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution by the Landlord and Tenant.

The Landlord applied to obtain a Monetary Order for damage to the unit, for unpaid rent, to keep all or part of the security deposit, for money owed or compensation for damage or loss under the Act, and to recover the cost of the filing fee from the Tenant for this application.

The Tenant applied to obtain a Monetary Order for the return of her security deposit and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, sent via registered mail on June 18, 2009. Mail receipt numbers were provided in the Landlord's documentary evidence. The evidence supported the Landlord's testimony that the registered mail package was "unclaimed" by the Tenant. The Tenant was deemed to be served the hearing documents on June 23, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Service of the hearing documents, by the Tenant to the Landlord, was not done in accordance with section 89 of the *Act*. The Tenant did not leave a copy of the hearing documents with the Landlord or his Agent but rather left the documents on a work bench in the basement of the rental unit, which is where the Landlord has received rent payments and letters from tenants in the past. The Landlord confirmed receipt of the hearing documents.

Both the Landlord and Tenant appeared, the Landlord acknowledged receipt of the Tenant's evidence however the Tenant testified that she never received anything from the Landlord. The Landlord provided documentary evidence in support of his testimony that he mailed the Tenant copies of his evidence but that the packaged was marked "return to sender" and returned to the Landlord.

Both The Landlord and Tenant 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

Is the Landlord entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Is the Tenant entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The tenancy agreement was dated for May 15, 1997 however the Tenant was allowed to move into a different suite in the rental unit in February 1997, until her suite was ready to occupy. The Tenant paid a security deposit of \$382.50 on May 15, 1997 and rent was payable on the 1st of each month in the amount of \$910.00.

The tenancy end date is in dispute as the Tenant states that the tenancy ended on March 7, 2009 when she stopped occupying the rental unit but that she did not remove the last of her possessions from the rental unit until March 15, 2009 as she had injured her back during the move and the Landlord gave her permission to store her remaining items until she could move them out as no one else was moving in right away.

The Landlord argued that the tenancy did not end until March 15, 2009 as this is when the Tenant vacated the rental unit completely and that this is when the Tenant handed over the keys and possession of the unit to the Landlord. The Landlord testified that between March 6 and March 15, 2009 he had attempted to have contractors enter the rental unit on two separate occasions but that the Tenant refused entry claiming that she was in the process of moving and her apartment was a mess.

The Landlord did not complete a move-in or a move-out inspection form.

Landlord's Claim

The Landlord testified that the Tenant had fallen behind in her rent payments back in the summer of 2008 and at one point was 3 months in arrears. The Landlord and Tenant came to an agreement to end the tenancy and the Tenant provided the Landlord with 3 months written notice to end the tenancy effective January 31, 2009. The Landlord granted the Tenant a one month extension until February 28, 2009 and then the Tenant advised the Landlord that her new place would not be ready until during the first week of March. The Landlord and Tenant negotiated a verbal agreement of a daily rental rate of \$30.00 per day for the period of March 1 to March 7, 2009.

The Landlord argued that during her move out the Tenant injured her back and the Landlord offered the Tenant to take her time as he was concerned she would injure herself further. The Landlord stated that it was his interpretation that the Tenant would continue to pay the \$30.00 daily rental rate for the period she continued to possess the rental unit. The Landlord has claimed 15 days occupancy for March 2009 for a total of \$450.00 which he states, as per the verbal agreement with the Tenant, he was to deduct from the security deposit

The Tenant argued that their verbal agreement covered only the period of March 1 to March 7, 2009 for a total of \$210.00, to be deducted from the security deposit, and that there was no discussion about her having to pay \$30.00 a day after March 7, 2009.

The Witness was called and confirmed that she was present during a conversation between the Landlord and Tenant where a discussion took place in regards to the Tenant having hurt her back and the Landlord did tell the Tenant that there was no hurry for her to move the rest of her possessions because the Landlord did not have another tenant moving in right away. The Landlord did advise the Tenant that the contractors needed to access the rental unit. The Witness advised that the Landlord was forced to reschedule some of his contractors as a result of the Tenant's delay in moving out.

The Witness did not recall if there was any discussion about the Tenant continuing to pay \$30.00 per day for the period after March 7, 2009.

The Landlord testified that the Tenant still has possessions stored in the storage area at the rental unit and that she has refused to discuss this issue with him.

The Tenant argued that these items have been in that storage area in the basement of the rental unit since 1997 and that the Landlord agreed to allow her to store the items in the basement until she was able to remove them but when she went to see about removing the articles she felt it was a health hazard for her to deal with the articles as there was mould and "rat" feces throughout the articles.

The Tenant advised that during the 12 years she occupied the rental unit there have been 3 floods in the basement. That after each flood the Tenant did not remove the articles or repack them, but instead left them stored loosely or in open cardboard boxes just as they were from the time she moved in back in 1997, or as she continued to add items to the storage area. The Tenant stated that the Landlord placed a tarp over some of her items after one of the floods and that she never went back to look at the items until she was moving out.

The Landlord testified that he has tried on several occasions to discuss the removal of the storage items with the Tenant but that she refuses to deal with the situation. The Landlord advised that they did not have rats in the basement but rather mice who came

in to eat the food that the Tenant had stored in garbage bags amongst her possessions. The Landlord advised that he has spent more than 10 hours sorting through the articles and has thrown out the obvious garbage and restacked the articles that he felt were of use to the Tenant. The Landlord has claimed \$325.00 which represents only 6.5 hours of clean up and hauling of the garbage plus \$143.52 for the dumpster charges.

The Tenant advised that she has not been "in the right state of mind" to deal with the Landlord on this issue and felt she would need to wait until the outcome of today's hearing before she could discuss the issue of her storage with the Landlord. The Tenant stated that she could not handle her articles that are in storage in case she comes in contact with rodent feces as she fears she will bring a disease back to her place of employment.

Tenant's Claim

The Tenant has claimed for the return of her damage deposit and interest in the amount of \$432.58 less the \$30.00 that the Landlord has already refunded. The Tenant argued that she provided the Landlord with her forwarding address in a letter dated March 27, 2009 which was left for the Landlord on his work bench in the basement of the rental unit, and that the Landlord failed to conduct a move-in or a move-out inspection report and so she is entitled to the return of her full security deposit and interest.

The Landlord testified that he was not concerned with the condition of the rental unit at the time the Tenant vacated the unit as he was going to do a complete renovation on the unit. The Landlord argued that the Tenant had verbally agreed to apply her security deposit and interest to the March 2009 rent for the period of March 1 to 15, 2009 at \$30.00 per day as explained in his testimony and as listed above.

The Landlord confirmed receipt of the Tenant's forwarding address however the Tenant has refused to accept mail from the Landlord at this address as supported by the Landlord's evidence.

The Tenant testified that she has never refused mail from the Landlord, that she never saw a notification for registered mail, and that her mailbox is a locked mailbox.

Analysis

I find that in order to justify payment of damages under sections 67 of the *Act*, 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, in this case the Applicant for each claim, 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 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 an Applicant's right to claim damages from the Respondent, 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.

Landlord's Claim

Unpaid Rent \$450.00 – Both the Landlord and Tenant acknowledged that they had a verbal agreement for rent to be paid at \$30.00 per day for the period of March 1 to March 7, 2009 and that this rent would be deducted from the Tenant's security deposit and interest.

The two parties do not agree that the \$30.00 per day charge would continue for the period of March 8 to March 15, 2009 for a total of \$240.00 and the Witness was not able to testify to witnessing any discussion involving payment for this period.

In the case of verbal agreements, I find that where verbal terms are clear and both the Landlord and Tenant agree on the interpretation, there is no reason why such terms can not be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes as they arise.

Based on the aforementioned I find in favour of the Landlord's claim in the amount of \$210.00 for the period of March 1 to March 7, 2009 and find that this amount was to be deducted from the Tenant's security deposit and will be accounted for in the Tenant's claim below. I hereby dismiss the Landlord's claim for unpaid rent for the period of March 8 – 15, 2009, without leave to reapply.

Mail, Copies, Supplies, Attendance at Dispute Fees – The Landlord has claimed a total of \$245.63 in administrative fees and office expenses to compile his claim. Being in the business of being a Landlord involves the cost of administrative fees and I consider such fees as a cost to doing business and therefore I dismiss the Landlord's claim without leave to reapply.

Clean up of Tenant's Possessions Left in Storage – The Landlord has claimed \$325.00 in labor and \$143.52 in dumpster fees relating to the time and costs incurred to sort through and discard of garbage left by the Tenant in the storage area. The Landlord has also requested on several occasions that the Tenant remove her possessions from the storage area but the Tenant refuses to receive communication from the Landlord. The Tenant argues that she has never refused communication from the Landlord and that she “is not in the right state of mind” to deal with the Landlord relating to her articles left in storage at the rental unit.

A significant factor in my decision is the credibility of the Tenant's testimony. In determining 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 Landlord to be highly probable given the conditions that existed at the time. Considered in its totality, I favour the evidence of the Landlord over the Tenant.

Based on the testimony and evidence before me, I find that the Tenant has abandoned her personal property that was left in the storage area of the rental unit, pursuant to section 24 of the *Residential Tenancy Regulation*.

Section 25 of the *Residential Tenancy Regulation* states a Landlord's obligation in relation to abandoned property as follows:

25 (1) The landlord must

- (a) store the tenant's personal property in a safe place and manner for a period of not less than 60 days following the date of removal,
- (b) keep a written inventory of the property,
- (c) keep particulars of the disposition of the property for 2 years following the date of disposition, and
- (d) advise a tenant or a tenant's representative who requests the information either that the property is stored or that it has been disposed of.

(2) Despite paragraph (1) (a), the landlord may dispose of the property in a commercially reasonable manner if the landlord reasonably believes that

- (a) the property has a total market value of less than \$500,
- (b) the cost of removing, storing and selling the property would be more than the proceeds of its sale, or
- (c) the storage of the property would be unsanitary or unsafe.

(3) A court may, on application, determine the value of the property for the purposes of subsection (2).

As per the above, I find that the Landlord has complied with section 25(2) when disposing of the Tenant's articles and I find in favour of the Landlord's claim of \$325.00 for labor and \$90.96 dumpster dump fee (\$86.63 plus GST).

With respect to the rest of the Tenant's possessions that remain in storage at the rental unit, I HEREBY Order the Tenant to have all the Tenant's articles/possessions removed from the Landlord's property no later than Sunday July 26, 2009 at 6:00 p.m. If the Tenant fails to have all of her possessions removed from the Landlord's property by this

date, the Landlord is at Liberty to apply to dispute resolution for a monetary order for storage of the Tenant's possessions in the amount of \$5.00 per day for every day the possessions remain at the Landlord's property.

As the Landlord was primarily successful in his claim I find that he is entitled to recover the cost of the filing fee from the Tenant.

Monetary Order – I find that the Landlord is entitled to a monetary claim as follows:

Labor to Clean up Tenant's Garbage Possessions in Storage	\$325.00
Dump fee for Dumpster plus GST	90.96
Filing fee	50.00
TOTAL AMOUNT DUE TO THE LANDLORD	\$465.96

Tenant's Claim

The Tenant has requested the return of her full damage deposit plus interest in the amount of \$432.58 less \$30.00 previously refunded.

I find that the Tenant and Landlord had an agreement for the Landlord to retain \$210.00 from the security deposit in payment for March 1-7, 2009 rent and that the Landlord reimbursed the Tenant \$30.00 from the security deposit at a time that the Tenant needed to borrow some cash. The Tenant argued that the Landlord could not make a claim against the security deposit because he failed to conduct a move-in and a move-out inspection report. I note that while the Tenant's argument is valid, this does not prevent the Landlord and Tenant from entering into an agreement to have the security deposit used as payment towards rent.

The security deposit of \$382.50 was paid on May 15, 1997 and interest to March 7, 2009 is \$50.08 for a total of \$432.58 Based on the aforementioned the remaining security deposit would be \$142.50 (\$382.50 - \$30.00 - \$210.00) plus interest of \$50.08.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security and pet deposit to the tenant with interest or make application for dispute resolution claiming against the security deposit or pet damage.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the landlord is subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposit and the landlord must pay the tenant double the amount of the security and pet deposit. I find that the Tenant has succeeded in proving the test for damage or loss as listed above and approve their claim for the return of double the balance of security deposit in the amount of \$285.00 (2 x \$142.50).

As the Tenant was partially successful with her claim I find that she is entitled to recover the cost of the filing fee from the Landlord.

Monetary Order – I find that the Tenant is entitled to a monetary claim as follows:

Double Security Deposit (\$382.50 - \$30.00 - \$210.00) x 2	\$285.00
Interest due on security deposit	50.08
Filing fee	50.00
TOTAL AMOUNT DUE TO THE TENANT	\$385.08

Off-Set Orders

I hereby order the Tenant's monetary claim be offset against the Landlord's monetary claim as follows:

Total amount due to the Landlord	\$465.96
LESS Total amount due to the Tenant	-385.08
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$80.88

Conclusion

I HEREBY ORDER the Tenant to have all the Tenant's articles/possessions removed from the Landlord's property no later than Sunday July 26, 2009 at 6:00 p.m.

A copy of the Landlord's decision will be accompanied by a Monetary Order for \$80.88. The order must be served on the respondent Tenant and is enforceable through the Provincial Court and enforced 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: July 16, 2009.

Dispute Resolution Officer