DECISION

Dispute Codes MNSD MNDC FF
MNDC MNSD OLC FF

Introduction

This hearing dealt with Applications filed by both the Landlord and the Tenant.

The Landlord filed for Dispute Resolution to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, to keep the security deposit in partial satisfaction of their claim, and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed for Dispute Resolution to obtain a Monetary Order for money owed or compensation for damage of loss under the Act, for the return of all the security deposit, an Order to have the Landlord comply with the Act, and to recover the cost of the filing fee form 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 May 15, 2009. Canada Post tracking numbers were submitted in the Landlord's evidence. The Tenant was deemed to be served the hearing documents on May 20, 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 done in accordance with section 89 of the *Act*, sent via registered mail on August 10, 2009. Mail receipt numbers were provided in the testimony. The Landlord was deemed to be served the hearing documents on August 15, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

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 and an Order to have the Landlord comply with the Act under sections 38, 62, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The fixed term tenancy began January 1, 2009 and was scheduled to expire on December 31, 2009. Rent was payable on the first of each month in the amount of $2,588.00. The Tenant paid a security deposit in the amount of $1,294.00 in cash on January 13, 2009.

The Landlord testified that the Tenant paid the security deposit by cheque initially and that the cheque was returned NSF and was replaced with another NSF cheque. The Tenant then paid the security deposit in cash. The Landlord did not issue a receipt for the cash payment.

The Landlord stated that both parties signed a tenancy agreement and that she did not conduct a move-in or a move-out inspection report.

The Landlord testified that the Tenant sent her an e-mail on March 5, 2009 advising the Landlord the Tenant was dealing with a family emergency and that the Tenant had to relocate to the Okanagan so the Tenant wanted to meet with the Landlord to discuss ending the tenancy agreement early.

The Tenant argued that her March 5, 2009 e-mail did not say she moved back to the Okanagan but that she would be travelling back and forth and in fact that is what the Tenant did.

The Tenant testified that the e-mail communications switched to telephone conversations whereby the Landlord advised the Tenant that she had found other tenants who would be occupying the rental unit on April 1, 2009 and that the new tenants had a car so the Landlord asked the Tenant to make sure her car was moved in order to allow the new tenants to park their car.

The Landlord argued that she did not have a conversation with the Tenant stating she had tenants for April 1, 2009 and that the Landlord never asked the Tenant to make sure her car was moved.

The Landlord stated that she received a telephone call from the Tenant's boyfriend sometime during the third or fourth week of March asking the Landlord to pick up the keys to the rental unit. The Landlord later changed her testimony to state that she picked up the keys from the Tenant's boyfriend on March 31, 2009.

The Tenant argued that they were at the rental unit late on March 31, 2009 and that her boyfriend did not meet with the Landlord until April 1, 2009 to return the rental unit keys and give the Landlord the Tenant's forwarding address.

The Landlord stated she only received the keys from the boyfriend and no forwarding address.

The Landlord argued that she did not attend the rental unit until the morning of April 1, 2009. The Landlord stated that she could not explain why she waited weeks before attending the rental unit if she was told the Tenant moved March 5, 2009. The Landlord later stated that she did not attend the rental unit until the boyfriend returned the keys and that when the Landlord attended the morning of April 1, 2009 there was a young lady moving out of the rental unit and the Landlord had no knowledge that this young lady was residing at the rental unit. The Landlord stated that she did not give the Tenant permission to sublease the rental unit.

The Tenant argued that this young lady was a friend of her boyfriends and that this girl was her guest and was not subleasing the rental unit.

The Landlord testified that she advertised the rental unit on the internet on approximately March 5, 2009 and that she was not able to re-rent the unit until May 15, 2009 for $2,350.00 per month, an amount that is $238.00 less per month than what the Tenant's lease was for.

The Landlord is seeking loss of April 2009 rent of $2,588.00 loss of ½ of May 2009 rent of $1,294.00, compensation for the Landlord's time to show the rental unit in the amount of $100.00, to keep the Tenant's security deposit and interest in partial satisfaction of her claim, and to recover the $100.00 filing fee from the Tenant.

The Tenant is seeking return of double her security deposit plus interest and to recover the $50.00 filing fee from the Landlord and to have the Landlord provide the Tenant with a copy of the tenancy agreement.

The Landlord argued that she mailed the Tenant a copy of her tenancy agreement back on December 15, 2008.

A discussion followed whereby I requested each party to supply the following evidence via fax:

- Landlord to fax a copy of the tenancy agreement with the Tenant
- Landlord to fax all tenancy agreements she has entered into between March 5, 2009 and May 15, 2009.
- Tenant to fax copies of e-mails between the Tenant and Landlord between the dates of March 5, 2009 and May 13, 2009.

All faxes are to be sent to my fax number by the close of business August 26, 2009. To uphold the principles of natural justice, copies of all evidence requested and received by me via fax after the closing of the hearing, will be attached to my written decision and mailed to both the Landlord and the Tenant.

The Tenant provided telephone numbers for her boyfriend and the young lady who was staying with the Tenant at the end of the tenancy. I attempted to add both the boyfriend and young lady into the hearing to speak as witnesses however neither party was available to provide testimony.

Analysis

Landlord's Late Evidence - A thirty-three page fax was received from the Landlord on August 25, 2009 at 2:58 p.m. which included additional evidence that was not requested by me during the hearing. The *Residential Tenancy Branch Rules of Procedure* 11.5 states that a Dispute Resolution Officer may refuse to accept evidence that was not submitted in accordance with the Rules of Procedure or if the acceptance of the evidence would prejudice the other party, or result in a breach of the principles of natural justice. Based on the aforementioned the Landlord's additional evidence, that which was faxed after the hearing and not requested by me during the hearing in the presence of the Respondent Tenant, will not be reviewed or considered in my decision.

The two tenancy agreements that were requested from the Landlord, to be faxed to me after the hearing, were received in the above mentioned thirty-three page fax. These tenancy agreements will be considered as evidence for my decision and attached to all copies of my decision.

Tenant's Late Evidence - The Tenant submitted an eight page fax, consisting of e-mails between the Tenant and Landlord as requested, on August 26, 2009 at 3:17 p.m. These e-mails will be considered as evidence for my decision and attached to all copies of my decision.

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, 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 doing whatever is reasonable to minimize the damage or loss

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

Loss of Rent – The Landlord has claimed $2,588.00 for loss of rent for April 2009 and $1,294.00 for loss of rent for May 2009 as the Landlord was not able to re-rent the unit until May 15, 2009 and the Tenant broke a fixed term lease that was not set to expire until December 31, 2009

Section 45(2) of the *Residential Tenancy Act* states that a tenant may end a fixed term 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; **is not earlier than the date specified in the tenancy agreement as the end of the tenancy**; 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. Based on the aforementioned I find that the Landlord has proven the test for damage or loss as listed above and I approve the Landlord's claim for $3,882.00 of loss of rent.

Landlord's Time - The Landlord has claimed $100.00 for loss of the Landlord's time for showing the rental unit however the Landlord could not explain how she determined her time was worth $100.00. Section 7 of the *Residential Tenancy Act* states that a Landlord must mitigate their loss by doing whatever is reasonable to minimize the

damage or loss. I find that the Landlord has failed to provide evidence that she advertised the rental unit from March 5, 2009 onward and the Landlord failed to prove that she acted reasonably because she failed to attend to the rental unit for more than three weeks after she claims she was told the Tenant moved out. Based on the above I find that the Landlord has failed to prove her claim for $100.00 and I dismiss her claim without leave to reapply.

Retain Security Deposit – The Landlord has requested to retain all of the security deposit in partial satisfaction of her claim. I note that section 36 of the Act states that if the Landlord fails to complete a move-in or move-out inspection report then the right of the landlord to claim against a security deposit for damage to residential property is extinguished. I note that in this application the Landlord is not claiming damage to the property however the Landlord is requesting to retain the security deposit as satisfaction of her claim. As the Tenant has filed a cross application for the return of her security deposit, my decision whether the Landlord's claim will be offset against the Tenant's security deposit will follow my analysis of the Tenant's application below.

TENANT'S CLAIM

A significant factor in my considerations is the credibility of the Landlord and Tenant. I am required to consider the evidence not on the basis of whether the testimony "carried the conviction of the truth", but rather to assess the evidence against its consistency with the probabilities that surround the preponderance of the conditions before me. When considering credibility I am guided by:

> 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:
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> *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 in relation to the frequency and type of communication that occurred between March 5, 2009 and May 25, 2009. I find that there is evidence that the Landlord had telephone communications with either the Tenant or her Boyfriend after March 5, 2009 and prior to the Boyfriend calling the Landlord to arrange the return of the keys on April 1, 2009.

The Tenant has testified that her Boyfriend provided the Landlord with a piece of paper with the Tenant's forwarding address when the keys were returned to the Landlord on April 1, 2009. The onus lies with the Tenant to prove when her forwarding address was provided to the Landlord in writing. Based on the evidence and testimony before me I find that the Tenant's forwarding address was not sent to the Landlord, in writing, until May 13, 2009 and the Landlord applied for dispute resolution on May 15, 2009.

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. In this case the Landlord was required to return the Tenants' security deposit or file for dispute resolution no later than May 28, 2009.

I find that the Landlord has complied with section 38 of the Act by filing her application for dispute resolution within the time frame set out in the Act and I hereby dismiss the Tenant's application for the return of double her security deposit.

As the Tenant was not successful with her claim she is not entitled to recover the cost of the filing fee from the Landlord. I note that the Tenant also requested to recover $25.00 for joining her application and that there is no evidence to support that the Tenant paid a $25.00 joining fee; I hereby dismiss the Tenant's claim for $25.00.

Monetary Order – I find that the Landlord is entitled to a monetary claim, that the Landlord's 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:

Loss of Rent for April 2009 $2588.00 and ½ of May 2009 $1294.00	$3,882.00
Filing fee	100.00
Sub total (Monetary Order in favor of the landlord)	**$3982.00**
Less Security Deposit of $1,294.00 plus interest of $0.05	-1,294.05
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	**$2,687.95**

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 $2,687.95. The order must be served on the respondent and is enforceable through the Provincial Court and enforced as an order of that Court.

Both the Landlord's and the Tenant's copy of this decision will be accompanied by twenty pages of evidence that was submitted by the parties, at my request, after the hearing.

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: August 27, 2009.

Dispute Resolution Officer