

DECISION

Dispute Codes OPR MNR MNSD MNDC O FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order of Possession for unpaid rent and a Monetary Order for unpaid rent, to keep all 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.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, served personally to the Tenant by the Landlord on July 21, 2009 at the rental unit. The Tenant confirmed receipt of the hearing package. I note that the Landlord was not able to provide consistent testimony in relation to the service of the hearing documents and that service was confirmed by the Tenant's testimony.

Both the Landlord and Tenant appeared, 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.

Preliminary Issues

The Tenant advised that he did not receive the evidence that the Landlord states she sent to the Tenant's Mother's address and I note that the second evidence package was not received by the *Residential Tenancy Branch (RTB)* prior to this hearing. As the evidence was not submitted and received by the RTB or the Tenant at least five days prior to the hearing the evidence will not be considered in this decision pursuant to section 11.5 of the *Residential Tenancy Branch Rules of Procedure*.

Issues(s) to be Decided

Is the Landlord entitled to an Order of Possession and a Monetary Order under sections 38, 55, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The tenancy began on April 1, 2008 as a fixed term tenancy which expired on March 31, 2009 and switched to a month to month tenancy. Rent was payable on the first of each month in the amount of \$655.00 and the Tenant paid \$330.00 as a security deposit on March 23, 2008.

The Landlord testified that she had a written tenancy agreement with the tenant that stated rent was \$595.00 plus \$60.00 per month for utilities. The Landlord argued that she had a verbal agreement with the Tenant that at the end of the tenancy they would review the actual utilities costs and the Tenant would pay the Landlord any short fall in utilities.

The Landlord testified that she did not conduct a move-in or a move-out inspection report but that she has owned this rental unit for the past six years and has renovated the unit three times.

The Tenant stated that he remembered being told that utilities were to be paid in the amount of \$60.00 but that he did not have a verbal agreement whereby the Landlord could charge him additional utility fees at the end of his tenancy.

The Landlord testified that she issued the Tenant a ten day notice to end tenancy on July 9, 2009 when she was advised that the Tenant had put a stop payment on his rent cheque.

The Tenant advised that he vacated the rental unit on August 1, 2009 because he was issued a notice to end tenancy on July 2, 2009 not July 9, 2009.

The Landlord confirmed that she has regained possession of the rental unit and is withdrawing her request for an Order of Possession. The Landlord later changed her testimony about the ten day notice to end tenancy claiming that it was issued July 2, 2009.

The Tenant explained that he had been asking the Landlord to repair utility items in his rental unit for several months and the Landlord kept telling the Tenant that they would be fixed the next month. The Tenant argued that when the utility items were not fixed by July 1, 2009 the Tenant reduced his rent by \$60.00, the utility portion, and that is why the Landlord issued him a ten day notice to end tenancy on July 2, 2009. The Tenant stated that once he received the notice to end tenancy he put a stop payment on his cheque because he could not afford to move otherwise.

The Landlord testified that she is claiming for July 2009 unpaid rent of \$655.00, August loss of rent of \$655.00, an adjustment of utilities of \$252.24, and \$1,500.00 for painting, cleaning and dumping fees. The Landlord argued that she had painted the rental unit just four years ago and that after the Tenant vacated the rental unit she had to paint, clean, and dump garbage the Tenant left behind. The Landlord stated that she had submitted pictures in the evidence package that was received at the RTB but not by the Tenant.

The Landlord argued that she was able to re-rent the unit as of August 15, 2009 and that she lost one half of a month's rent because she could not re-rent the unit sooner because the Tenant did not provide her with notice that he was vacating the rental unit.

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 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 doing whatever is reasonable to minimize the damage or loss

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.

A significant factor in my decision is the credibility of the Landlord's testimony, in judging 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 favor the evidence of the Tenant over the Landlord.

The Tenant testified that he reduced his monthly rent for July by \$60.00 to force the Landlord to complete the required repairs but that the Landlord issued him a notice to end tenancy for unpaid rent and subsequently the Tenant put a stop payment on his cheque. The Landlord claims for unpaid July 2009 rent of \$655.00 pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I find that the Tenant has failed to comply with a material term of the tenancy agreement which stipulates that rent is due monthly on the first of each month and that the Landlord has proven the test for damage or loss as listed above. I hereby approve the Landlord's claim for July unpaid rent of \$655.00.

I do not accept the Tenant's argument that the Tenant's violation, of not paying his full rent, was somehow excused due to the Landlords' alleged failure to comply with the *Act* or agreement, by failing to repair the utility items. Even if the Landlord was found to be in violation of the *Act*, there is no provision in the *Act* that extends immunity for a reciprocal breach on the part of a Tenant.

The Landlord claimed \$655.00 for loss of August rent however the Landlord testified that she issued the tenant a notice to end tenancy, that the Tenant vacated the rental unit by August 1, 2009 as a result of that notice, and that the Landlord has re-rented the unit as of August 15, 2009 after the Landlord repainted and cleaned the unit. Based on the aforementioned I find that the Landlord suffered a loss of only one half of a month's rent and I hereby approve her claim for \$327.50.

In relation to the Landlord's claim of \$1,500.00 for painting, cleaning, and dump fees I find that the Landlord has failed to prove the test for damage and loss as listed above and I hereby dismiss the Landlord's claim without leave to reapply.

The Landlord has been partially successful in her claim and I find that she is entitled to recover the cost of the \$50.00 filing fee from the Tenant.

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 July 2009	\$655.00
Loss of Rent for August 2009	327.50
Filing fee	50.00
Sub total (Monetary Order in favor of the landlord)	\$1,032.50
Less Security Deposit of \$330.00 plus interest of \$3.72	- 333.72
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$698.78

I note that the Landlord breached section 19 of the *Act* by accepting a security deposit that was greater than $\frac{1}{2}$ of the monthly rent. I have included in the Landlord's decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the Landlord to familiarize herself with her rights and responsibilities as set forth under the *Residential Tenancy Act*.

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 \$698.78. The order must be served on the respondent 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: September 09, 2009.

Dispute Resolution Officer