

DECISION

Dispute Codes MND MNR MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by Landlords to obtain a Monetary Order for damage to the unit, for unpaid rent, to keep the security deposit, and to recover the cost of the filing fee from the Tenants for this application.

Service of the hearing documents, by the Landlords to the Tenants were sent via registered mail, in one envelope, on September 11, 2009. Mail receipt numbers were provided in the Landlords' documentary evidence. The Tenants were deemed to be served the hearing documents on September 16, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Section 88(1) of the *Act* determines the method of service for documents. The Landlords have applied for a monetary Order which requires that the landlord serve each respondent as set out under section 89(1). In this case only one envelope was sent to two Tenants. Therefore, I find that the request for a monetary Order against both Tenants must be amended to include only one of the Tenants. I note that there is no evidence before me to support which order the names were listed on the envelope and who signed for the registered mail package.

The female Landlord and both Tenants appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

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*?

Background and Evidence

The undisputed facts are the parties entered into a written tenancy agreement on August 30, 2009 for a month to month tenancy. The Tenants were given permission to move their possessions into the rental unit on August 29, 2009 and rent was payable on

the last day of the month in the amount of \$750.00. The Tenants paid a security deposit of \$375.00 on August 15, 2009. The Landlord did not complete a written move-in inspection form and did not provide the Tenants with a copy of the written tenancy agreement.

The Landlord testified that she printed a standard tenancy agreement form off of the Residential Tenancy Branch website and that this was their first time being Landlord's so she was not aware of the move-in inspection report.

The Landlord argued that the male Tenant called her on August 31, 2009 to inform the Landlord that his pay cheque from his previous employer did not arrive and that they would not be able to pay the rent. The Landlord argued that she tried to negotiate a payment plan with the Tenants however the male Tenant told the Landlord that they had to move out.

The Landlord testified that the rental unit was painted just prior to the Tenants moving in and that they damaged the living room wall and the hallway walls when they were moving their furniture out of the rental unit. The Landlord stated that the Tenants broke an exterior window to access the storage space to remove their items. The Landlord is claiming \$24.82 for drywall mud and supplies to conduct the repairs; paint and paint brushes in the amount of \$73.18; \$100.00 for 3 hours of labour for her husband to complete the repairs; \$50.00 for 1 ½ hours to clean the rental unit; and \$750.00 for loss of rent for September 2009. The Landlord argued that she did not have the receipts with her when she filed and that she was told just to list her claim in writing.

The male Tenant testified and confirmed that he called the Landlord on August 31, 2009 and told her that his last cheque from his previous employer did not arrive so they did not have the money to pay the rent. The Tenant stated that the Landlord never offered a payment plan for them and it was the Landlord who demanded that the Tenants move. The male Tenant argued that the Landlord gave them until 12:30 the next day to pay the rent or be out of the rental unit.

The male Tenant stated that later that evening at approximately twelve midnight the Landlords knocked on their door when it appeared to the male Tenant that the male Landlord had been drinking and both Landlords were upset. The Tenant argued that the female Landlord kept trying to calm the male Landlord down while he was arguing with the Tenants. The male Tenant stated that the male Landlord worked his way into the rental unit and kept demanding the keys for the rental unit and that he told them

they had to be out of the rental unit the next day. The male Tenant stated that they finally gave the male Landlord their keys so he would leave the rental unit.

The female Tenant testified and confirmed the male Tenant's testimony. The female Tenant added that during the argument she threatened to call the police and the male Landlord replied by saying "go ahead there is no record anywhere of you living here". The female Tenant stated that they finally gave in and gave the Landlords the keys and told them that they would crawl through a window to get access to their possessions. The female Tenant stated that when they tried to move their possessions out of the storage room they did not have a key so they entered through a window. The female Tenant confirmed that they moved their possessions out on September 1, 2009.

The Landlord provided additional testimony and after being reminded that she had taken an affirmation the Landlord confirmed that both her and her husband attended the rental unit the evening of August 31, 2009; that they requested and took the keys back from the Tenants on August 31, 2009; that they told the Tenants to be out of the rental unit by noon on September 1, 2009; and yes they were upset and that everyone was yelling, not just the Landlords.

Analysis

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant Landlords 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 Landlords, bears the burden of proof and the evidence furnished by the Applicant Landlords 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 Landlords' right to claim damages from the Tenants, 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.

I note that while the Landlord is the owner of the rental property, at the moment she entered into tenancy agreement(s) with tenant(s), whether verbal or written, she gave exclusive occupation and possession of the rental property to the tenants and is subject to the obligations as set out in the *Residential Tenancy Act (Act)*. The Landlord testified that she printed the tenancy agreement off of the Residential Tenancy Branch website which confirms that she had access to information on what her obligations as a landlord are.

The Landlord has claimed for a loss of \$24.82 for drywall mud and accessories; \$73.18 for paint and brushes; \$100.00 labour to repair the unit; and \$50.00 to clean the rental unit. I note that the Landlord has failed to provide actual receipts for the materials being claimed and that the Landlord did not comply with section 23(4) of the *Act* which provides that the Landlord must complete a condition inspection report in accordance with the Regulations. As there is no evidence before me to prove the condition of the rental unit prior to the tenancy and there are no receipts to support the Landlord's claim 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.

As the Landlords failed to complete a move-in inspection report the Landlords have extinguished their right to claim against the Tenants' security deposit as provided in section 24(2) of the *Act*.

Based on the testimony and evidence before me the relationship between the Landlords and Tenants broke down when the Tenants informed the Landlords that rent would not be paid on time. I find the action by the Landlords of taking the keys for the rental unit away from the Tenants, on August 31, 2009 was done before the rent could be considered late and was deliberate, as admitted by the female Landlord. I have determined that despite any rent arrears owed to the Landlords, the Landlords committed a serious and wilful breach of the *Act*. The Landlords have ignored the *Act* and summarily evicted the Tenants without regard for the consequences of this action.

I have determined that the Landlords were aware of the *Act* and the possibilities for remedies under the *Act*, yet they chose to ignore their responsibilities and due process in relation to issues of unpaid rent and obtaining an Order of possession.

There was no benefit to the Tenants, who were denied the right to due process under the Act. The Landlords did nothing to minimize their actions and during the hearing indicated that they felt justified in taking the keys away from the Tenants and demanding that they move out by noon the next day to settle the dispute over unpaid rent.

The Landlord is seeking \$750.00 in unpaid rent for September 1, 2009. Section 26(3) of the Act states that whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not prevent or interfere with the tenant's access to the tenant's personal property which the Landlords did when they took the Tenants' keys for the rental unit where the Tenants' possessions were located.

Given the presence of contradictory testimony 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 demeanor 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 Tenants to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the Tenants over the Landlords with respect to what transpired in the late evening of August 31, 2009.

Section 7 of the Act states that a landlord or tenant who claims a loss must do whatever is reasonable to minimize the damage and loss. Taking the keys away from the Tenants and demanding that they vacate the rental unit by noon the next day created the loss and did nothing to minimize the loss. Based on the aforementioned I find that the Landlords have failed to prove the test for damage and loss as listed above and I hereby dismiss their claim of loss of rent, without leave to reapply.

As the Landlords have not been successful in their claim I find that they are not entitled to recover the cost of the filing fee from the Tenants.

The Landlords are hereby ordered to return the Tenants' security deposit in the amount of \$375.00 plus \$0.00 of interest, in accordance with section 38 of the Act.

Conclusion

I HEREBY DISMISS the Landlord's application, without leave to reapply.

A copy of the Tenants' decision will be accompanied by a Monetary Order for \$375.00. The order must be served on the Landlords 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: November 30, 2009.

Dispute Resolution Officer