Decision

Dispute Codes:

MND MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord for a Monetary Order for damage to the unit, site or property, to keep the security deposit and to recover filing fee from the tenant for the cost of this application.

The landlord and the tenant appeared along with two witnesses for the tenant. Both parties and one witness gave testimony in turn. All of the testimony and documentary evidence was carefully considered.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to a monetary Order under section 67 of the *Residential Tenancy Act* for damages or loss.
    - Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a balance of probabilities:
        - a) that the damage was caused by the tenant and
        - b) a verification of the actual costs to repair the damage
        - c) that the landlord fulfilled the obligation to do what ever is reasonable to mitigate the costs

The burden of proof regarding the above is on the landlord/claimant.

Preliminary Issue

The tenant had submitted some evidence that received to file. However, the landlord testified that this evidence was not received. I note that the tenant's evidence was submitted to file on January 13, 2010. Pursuant to the Residential Tenancy Rules of Procedure, Rule 4.1 requires that the respondent file and serve the evidence on the other party at least 5 days prior to the hearing or if the date of the dispute resolution proceeding does not allow the five (5) day requirement to be met, then all of the respondent's evidence must be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

In this instance I found that the tenant did not prove that the evidence was served on the landlord and therefore it will not be considered. However, verbal testimony was heard from the tenant on this matter.

Background and Evidence

The landlord testified that the tenant moved in to the rental unit in May 2007. A security deposit of $425.00 was paid and the rent was $850.00. The landlord testified that not move-in inspection report was completed and no written tenancy agreement was signed. However, according to the landlord, the parties agreed that the unit would be non-smoking. The landlord testified that on one occasion, the tenant was seen smoking in the unit and a discussion ensued about complying with the non-smoking prohibition in the unit. The landlord testified that this was not pursued. The landlord testified that the tenant gave notice on April 30, 2009 and moved out of the unit on June 1, 2009. The landlord testified that, due to the smoke contamination, the unit was difficult to market and despite the fact that the tenant had shampooed the carpets and cleaned the unit, it was not re-rented until near the end of June 2009. The landlord testified that it suffered a loss of one-month's rent, for which compensation is being sought. The landlord did not submit into evidence any documents verifying the date of re-rental. The landlord also testified that the unit required substantial renovation including re-painting and

replacement of the carpet, which has not been done yet. The landlord's claim also included retention of the tenant's $425.00 security deposit in compensation for the damage to the unit.

The landlord testified that when the parties attempted to discuss the damage, the co-tenant ordered the landlords to leave and threw the contents of a coffee cup at one of the landlords. The landlord testified that during a subsequent telephone conversation with the tenant's daughter, who was purporting to represent the tenant, it was agreed that the landlord was entitled to keep the deposit for the smoke damage caused by the tenant. However, on September 8, 2009, a written demand containing the forwarding address was later received from the tenant seeking the return of the security deposit. The landlord stated that this correspondence was given to the landlord by the property manager on September 8, 2009 in a sealed envelope, along with the rent collected by the manager who was acting as agent to the landlord.

The tenant disputed the landlord's claims. The tenant acknowledged that the issue of smoking was discussed but no such term was ever agreed upon as a condition of the tenancy. The tenant denied that the unit was contaminated by the smell of smoke and testified that the tenants had thoroughly cleaned the rental unit prior to vacating. While still in possession, the tenant stated that they had also opened the windows prior to the showings at the landlord's request in order to air out the home. The tenant pointed out that after the tenant vacated, it was likely that the house, being sealed up in the summer heat prior to the showings, would have a stronger odour than normal when the landlord entered. The tenant testified that the carpets were not clean nor odour-free when the tenant first moved into the unit.

The tenant testified that the forwarding address was initially mailed to the landlord by registered mail to the address provided by the landlord in July 2009 but it was not deliverable and was returned. The tenant then personally gave a copy of the notification with the forwarding address to the landlord's agent prior to September 1, 2009. The tenant testified that thereafter an application for dispute resolution was

served on the tenant with a monetary claim against the security deposit by the landlord for damages. The tenant denied that any damages or losses were caused by the tenant and the tenant feels entitled to the full return of the security deposit.

The tenant's witness testified that the landlord's claim for a full month of lost rent was not supported as the unit was occupied as early as June 11, 2009. The witness denied that any damage was caused by the tenants and described an incident in which the landlord had approached the tenants in a heavy-handed manner to insist that the deposit be relinquished to the landlord and refused to leave the residence when the co-tenant repeatedly asked the landlord to go, prompting the co-tenant/witness to throw the contents of a coffee mug at the landlord in exasperation.

Analysis: Damage Claim

In regards to the landlord's monetary claim of damages to the unit, I note that, in order to support compensation under section 67 of the *Act*, the landlord had the burden of proving the following:

(1) Proof that the damage or loss existed

(2) Proof that this damage or loss happened solely because of the Respondent and in violation of the Act or agreement

(3) Verification of the actual amount or cost of repairing or rectifying 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.

Section 37(2) of the *Act* states that in vacating a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

I can appreciate, as put forth by the landlord, that it would be difficult to submit evidence to verify that an odour was left in the unit from the tenant's habit of smoking indoors. However, even if this was proven to be true, I find that it would only satisfy

element one of the four-part test for damages. In regards to meeting element two of the test for damages, the landlord was not able to furnish evidentiary proof to establish that the tenant's smoking in the unit constituted a violation of a term in the tenancy agreement.

Section 13, of the Act, places the responsibility for a written tenancy agreement onto the landlord and states that 21 days after a landlord and tenant enter into a tenancy agreement, the landlord must give the tenant a copy of the agreement.

I find that although the Landlord did not comply with the above section of the Act, oral terms contained in a verbal tenancy agreement may still be recognized and enforced. In fact, section 1 of the Act, defines "tenancy agreement" as follows:

"tenancy agreement" means an agreement, ***whether written or oral****, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;* (my emphasis)

However, on the subject of whether or not terms of a tenancy agreement can be enforced, Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if:

- the term is inconsistent with this Act or the regulations,
- the term is unconscionable, or
- the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Where verbal terms are clear and both the landlord and tenant agree, then there is no reason why such terms can be enforced. That being said, it is evident that, in relying on memory alone, the parties may end up interpreting verbal terms in drastically different ways. Obviously, by their nature, contested verbal terms are virtually impossible for a

third party to interpret in order to resolve disputes as they arise. I find that where the term is found to be unclear, there is no choice but to base deliberations on the provisions contained in the Residential Tenancy Act by default and the Act does not contain any prohibition on smoking in a unit. A non-smoking term is one that the parties would include in the agreement between them.

Section 23(1) on the Act requires that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day and the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

Given the above, I find that the landlord's claim for damages and loss must be dismissed and therefore the tenant's deposit must be refunded to the tenant..

In regards to the security deposit, I find that section 38 of the Act requires that, within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or pet damage deposit to the tenant with interest or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

In this instance, I find that the tenant had submitted to an agent of the landlord, the tenant's written forwarding address sometime prior to September 1, 2009. I do not accept the landlord's position that the date the address was received was September 8, 2009 when the landlord finally retrieved the correspondence from the agent.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit. I further find that the landlord did not make an application for an order to keep the deposit within 15 days as the application was processed on September 21, 2009..

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit.

Conclusion

Given the above, I find that the tenant is entitled to a refund of double the security deposit of $425.00 plus interest of $10.72 for the total amount of $860.72.

I hereby issue a Monetary Order in favor of the Tenant in the amount of $860.72 pursuant to section 38(10)(c) of the *Act*. The landlord must be served with the monetary order and should the landlord fail to comply with the order, the order may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

I hereby dismiss the landlord's application for a monetary order, in its entirety, without leave to reapply.

January 2010
Date of Decision

_____
Dispute Resolution Officer