Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNR, MNDC, OLC, ERP, RP, PSF, RR, FF, O, (MNSD)
OPR, MNR, MND, FF, (MNSD)

Introduction

In a previous decision issued on November 26, 2009 in this matter, the Tenants' application to cancel a Notice to End Tenancy for Unpaid Rent was dismissed and the Landlord was granted an Order of Possession. As the tenancy has ended, I find that it is unnecessary to deal with the Tenants' application for an Order that the Landlord comply with the Act by making repairs or to provide services and facilities and they are dismissed without leave to reapply.

At the beginning of the hearing both Parties agreed to amend their respective applications to include a claim for the security deposit paid by the Tenants.

Issues(s) to be Decided

1. Are there arrears of rent and if so, how much?
2. Is the Landlord entitled to compensation for damages to the rental unit and if so, how much?
3. Are the Tenants entitled to be reimbursed for alleged emergency repairs and if so, how much?
4. Are the Tenants entitled to compensation due to the Landlord's failure to make repairs or to provide services or facilities during the tenancy?

Background and Evidence

The Tenant claimed that on December 1, 2009, she asked another tenant in the rental property, R.L., to do a move out inspection of the rental unit and that this person told her that the Landlord had also asked her to do a move out inspection and collect the key. The Tenant further claimed that R.L. sent her a letter by e-mail on the day of this hearing confirming that she left the rental unit clean and undamaged (but did not provide a copy of that letter as evidence at the hearing).

The Landlord claimed that he did not authorize R.L. to do a move out inspection with the Tenant. The Landlord said that when he spoke to R.L. on December 1, 2009, she advised him that the Tenant had moved out and left her key. The Landlord said he went to the rental unit on December 5, 2009 with his witness, S.J.F., and found that the Tenant had left behind some furnishings and garbage and had damaged a garage door opener and toilet. The Landlord admitted that he did not do a move in or a move out

condition inspection report, however, he provided copies of photographs of the rental unit that he said he took on December 5, 2009.

The Tenant denied damaging a garage door and toilet. The Tenant said these items were damaged at the beginning of the tenancy and that the Landlord said he would repair them but never did. The Tenant also claimed that while the toilet tank cover was broken at the beginning of the tenancy, the rest of the toilet was not smashed to pieces at the end of the tenancy as shown in the Landlord's photographs. The Tenant admitted that she left behind a mattress, box spring, bed frame, a dresser, printer and stereo. The Tenant denied that she left any garbage behind and argued that the amount claimed by the Landlord for the removal of these items was unreasonable.

The Tenant also claimed that when the Landlord advertised the rental unit on Craigslist, he included an office or storage area on the other side of the garage, under the patio (or deck). The Tenant said that the room was not heated so he used it as a summer bedroom. The Tenant also said that in mid-October, she noticed water leaking from the ceiling of that room which was caused by the Landlord's failure to seal the patio. The Tenant said she advised the Landlord about the leak on October 17, 2009 and that the Landlord came to the rental unit and viewed it. The Tenant claimed that the Landlord told her he could not afford to repair it and that she could move if she wasn't happy with it. At the first day of hearing the Tenant said that later in the day on October 17, 2009, parts of the ceiling fell on her bed in that room. At the 2nd day of hearing the Tenant said this occurred a few days after October 17, 2009. In any event, the Tenant said she advised the Landlord about it but he didn't do anything so on October 24, 2009 she paid a friend $500.00 cash to remove the damaged ceiling and insulation.

The Tenant admitted that she did not give the Landlord a copy of the receipt for this "emergency repair" but said she deducted the amount from her rent for November 2009. The Tenant also admitted that she did not pay any other amount for November rent. The Tenant said that as a result of this leak, her mattress and bedspring were damaged and she lost the use of this room until the end of the tenancy. The Tenant provided a witness statement and invoice from M.D. who claimed that he removed water damaged drywall and insulation but did not replace it because there were "mould issues" and the roof was still leaking.

The Landlord claimed that the storage room was not included in the Tenant's rent. The Landlord denied that the copy of the advertisement relied on by the Tenant was his advertisement. The Landlord said that the tenancy agreement indicated that the rental unit included 2 bedrooms, 1 bathroom, 1 garage and a shed. The Landlord claimed that where he indicated on the tenancy agreement that storage was also included, he meant the shed. The Landlord said he allowed the Tenant to use the room for storage and was unaware that she had used it for a bedroom until October 17, 2009 when he viewed

the ceiling. At that time, the Landlord said there was just a small drip of water coming from the ceiling and that shortly thereafter he water sealed the patio. The Landlord denied that the ceiling fell in and claimed that the Tenant pulled it down for no reason. Consequently, the Landlord sought to recover the cost of repairing the ceiling.

The Landlord also claimed that the Tenant was responsible for a damaged fence. The Tenant claimed that the fence was damaged on the evening of October 31, 2009 when a gang of youths went on a rampage through the neighbourhood. The Tenant said she only discovered that the fence was damaged on the morning of November 1, 2009 when she went outside and saw that the Landlord was speaking to the police. The Landlord did not claim that the Tenant caused the damage but argued that the Tenant should have brought it to his attention earlier.

The Landlord further claimed that the Tenant should compensate him for utilities even though they were included in the rent under the tenancy agreement. The Landlord argued that the Tenant used her own washer and dryer in contravention of a term of the tenancy agreement which says that laundry facilities were not included in the rent.

Analysis

Although the Landlord argued that the address on the Craig's List advertisement was incomplete, I find that only 2 numbers of the whole address are missing and that given the number similarities of the rest of the information in that advertisement compared to what was listed in the tenancy agreement, I find that it was more likely than not the Landlord's advertisement. Furthermore, even though the Landlord claimed that the shed was the storage area referred to in the tenancy agreement, I find that the tenancy agreement is not sufficiently clear to draw that conclusion and as a result, I find that the storage room/office beside the garage was included in the Tenant's rent.

I also find, however, that there is insufficient evidence to conclude that the ceiling in the storage area/office fell in due to the weight of water soaked insulation and drywall. Although one of the Tenant's photographs shows that part of the ceiling is pulled down, no water staining is visible on the drywall. The other photographs of that room taken by the Tenant show the insulation after the drywall was removed and the water stained plywood board behind that. Although there is evidence that the insulation in the ceiling had black spots that may have been mould and that there was evidence of water stains on the plywood, I cannot conclude from that evidence that the ceiling fell in. I find it significant that the Tenant provided no photographs of pieces of the ceiling that she claimed fell on her bed. I also find it significant that the written statement of M.D. does not refer to the ceiling having fallen in but only that he removed "damaged" drywall.

Section 33 of the Act defines an "emergency repair" as one that is urgent, necessary for the health or safety of anyone or for the preservation of the property and includes major leaks in a roof. Given the evidence of both Parties, I find that there was a water leak in the ceiling of the storage room/office that had penetrated the plywood, insulation and drywall of the ceiling. However, I find that there is insufficient evidence that it was a major leak which required an urgent repair. In particular, I note that the Tenant waited for almost a week after she said the ceiling started falling in before she had the ceiling removed. Consequently, I find that the Tenant has not shown that the removal of the ceiling in the storage room/office was an emergency repair.

However, based on the Tenant's photographs and the uncontested evidence of her witness, M.D., I find that the insulation and drywall of the ceiling was water damaged and would have had to be removed and replaced in any event. I find that the Tenant gave the Landlord a reasonable opportunity to repair the damaged ceiling but that he refused to do so and instead opted to prevent further water from leaking into the room by sealing the patio. According to the Tenant's witness, M.D., as of October 24, 2009, those efforts had not resolved the leak. Consequently, I find that the Tenant is entitled to recover the amount of **$500.00** from the Landlord for the expense of removing the damaged ceiling. For the same reasons, I find that the Landlord is not entitled to the cost of replacing the damaged ceiling material and that part of his claim is dismissed.

Section 32 of the Act says a Landlord has a duty to "repair and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law and....that makes it suitable for occupation by a tenant." If a Landlord fails to carry out this duty and the Tenant suffers loss as a result, the Landlord will have to compensate the tenant for that loss pursuant to s. 7(1) of the Act.

The Tenant sought compensation for a loss of the use of the storage room/office for the period October 17 – November 30, 2009. I find that the Landlord did breach his duty under s. 32 to repair the leak in the storage room/office such that it could not be used for any purpose. Consequently, I find that the Tenant is entitled to compensation of **$75.00** representing $25.00 for ½ of October and $50.00 for November 2009.

The Tenant also sought the cost of replacing a mattress that she said was water damaged from the leak in this room. I find, however, that there is no evidence that the mattress was damaged or could not be salvaged. The Tenant provided no photographs of the damaged mattress. The Landlord did provide a photograph of the mattress (which was left behind by the Tenant), however, no damages are visible. Consequently, I find that there is insufficient evidence to support this part of the Tenant's claim and it is dismissed.

In her written submissions, the Tenant also alluded to a claim for a loss of laundry facilities but withdrew that claim at the hearing. I note that laundry facilities were not included in the rent under the tenancy agreement and that this claim would not have been successful in any event. Consequently, I find that the Tenant has made out a total claim for $575.00.

The Tenant admitted that she did not pay rent for November 2009 and as a result, I find that the Landlord is entitled to recover **$700.00** in unpaid rent. The Landlord also sought to recover a loss of rental income for December 2009 because he said it could not be re-rented due to all of the damages caused by the Tenant.

In particular, the Landlord claimed that the Tenant damaged a toilet and a garage door opener. The Tenant claimed that these items were in the same condition at the end of the tenancy as they were in at the beginning of the tenancy. On this issue, the Landlord has the burden of proof and must show that the damages occurred during the tenancy. If the Landlord's evidence is contradicted by the Tenant, the Landlord will generally need to provide additional, corroborating evidence to satisfy the burden of proof. In the absence of any corroborating evidence such as a move in or a move out condition inspection report, I find that the Landlord has not provided sufficient evidence to show that the Tenant was responsible for the broken toilet and garage door opener. I also find that the photographs taken on December 5, 2009 are unreliable because they were taken 4 days after the tenancy ended. Consequently, these claims are dismissed.

RTB Policy Guideline #3 – Claims for Rent and Damages for Loss of Rent states that a Landlord may elect to end a tenancy and sue the tenant for loss of rent. The damages to which a Landlord is entitled is an amount sufficient to compensate the Landlord for any loss of rent up to the earliest time the Tenant could have legally ended the tenancy. Under section 45 of the Act, a Tenant of a month-to-month tenancy must give one clear months notice. Given that the Order of Possession was served on the Tenant on November 26, 2009, the earliest the Tenant could have ended the tenancy would have been December 31, 2009.

However, as I have already found that the Tenant was not responsible for the damaged toilet and garage door opener and that the ceiling in the storage room/office would have required repairs in any event, I find that it was not due to a fault of the Tenant that the rental unit could not be re-rented but rather due to the need for repairs for which the Landlord was responsible under s. 32 of the Act. Furthermore, the Landlord did not provide any evidence to corroborate his claim that he tried to re-rent the rental unit for December, 2009. For all of these reasons, the Landlord's application for a loss of rental income for December 2009 is dismissed.

I also find that there are no grounds under the Act or tenancy agreement for holding the Tenant responsible for the damaged fence. I find on a balance of probabilities that the fence was damaged by a gang of youths on the evening of October 31, 2009 and that the Landlord discovered the damaged the following morning before the Tenant did. Consequently, this part of the Landlord's application is dismissed.

I find that there are no grounds for the Landlord's claim for utility expenses. The tenancy agreement states that utilities are included in the rent and there is no other term that prohibited the Tenant from providing her own washer and drier. Consequently, this part of the Landlord's claim is dismissed.

The Tenant admitted that she left a number of items behind in the rental unit which the Landlord claimed he had to dispose of. The Tenant argued that the amount claimed by the Landlord for disposal fees was unreasonable and may have included other garbage on the rental property that was not hers. However in the absence of any evidence from the Tenant as to what would have been a reasonable amount for disposing of her articles, I accept the Landlord's evidence and award him **$367.50** for this part of his claim. Consequently, I find that the Landlord has made out a total claim for $1,067.50.

As the filing fees paid by both of the Parties would be offsetting, I make no award for that part of their respective claims and they are dismissed. Pursuant to s. 72 of the Act, I order that the Parties' respective awards be offset as follows:

	Landlord's award:	$1,067.50
Less:	Tenant's award:	$575.00
	Balance owing to Landlord:	$492.50

Sections 23 and 35 of the Act require a landlord to complete a condition inspection report at the beginning and at the end of a tenancy and to provide a copy of it to the tenant even if the tenant refuses to participate in the inspection or to sign the condition inspection report. In failing to complete a condition inspection report, I find the Landlord contravened s. 23 and s. 35 of the Act. Consequently, s. 24(2) and s. 36(2) of the Act say that the Landlord's right to make a claim against the security deposit for damages is extinguished.

I find however, that sections 38(4), 62 and 72 of the Act when taken together give the director the ability to make an order offsetting damages from a security deposit where it is necessary to give effect to the rights and obligations of the parties. Consequently, I order the Landlord to keep the Tenants' security deposit in partial payment of the balance owing to him. The Landlord will receive a monetary order for the balance owing of $142.50.

Conclusion

A monetary order in the amount of **$142.50** has been issued to the Landlord and a copy of it must be served on the Tenant. If the amount is not paid by the Tenant, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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: January 12, 2010.

Dispute Resolution Officer