



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MND, MNDC, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order to retain the security deposit in partial satisfaction of the claim. The landlord participated in the hearing by attending in person at the Residential Tenancy Branch in Burnaby and the tenant participated via telephone conference call. At the outset of the hearing the tenant was asked if he objected to the landlord being in the same room with the Dispute Resolution Officer and he indicated that he had no objection.

Issues(s) to be Decided

Is the landlord entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on October 1, 2008 and ended on September 30, 2009. The tenancy agreement provides that the tenant is not permitted to smoke "on the premises or on the property." The landlord testified that the tenant represented himself as a non-smoker at the time he entered into the tenancy agreement. The landlord testified that in March he attended at the rental unit and discovered that under the sink there was an ashtray full of cigarette butts and that the area under the sink smelled strongly of smoke. The landlord testified that the tenant's son, a smoker, was visiting and freely admitted that he was a smoker. The tenant was advised in writing that he was not permitted to smoke on the property and that the landlord would not tolerate further breaches of the tenancy agreement. The landlord

conducted monthly inspections throughout the tenancy and claimed that he did not smell smoke many times because the tenant had treated the unit with Febreze. The landlord testified that at the end of the tenancy he discovered that the rental unit smelled strongly of smoke and further discovered that the rental unit had not been cleaned. On September 1 the landlord had advised the tenant's wife via email that a condition inspection of the unit would take place on September 30 at 1:00 p.m. The tenant was not at the unit at 1:00 p.m. on September 30 and the landlord did not complete the condition inspection report. The tenant arrived at the unit at 6:00 p.m. and the landlord advised that he had changed the locks and would not permit the tenant into the rental unit. The landlord testified that he telephoned the police because the tenant was confrontational and that some point after the tenant had left the premises a police constable attended. The landlord submitted a letter from the constable in which he stated as follows:

Immediately upon entering the suite I was able to detect the odor [sic] of cigarette smoke throughout the unit. I also observed that the unit had not been cleaned, with dirty floors and garbage still under the sink.

The landlord testified that he hired a cleaning service to completely clean the rental unit and wash the walls in an effort to rid the unit of the odour of cigarette smoke and provided an invoice showing that he paid \$435.75 for this service. The landlord testified that he contacted a number of companies to obtain quotations as to the cost of completely removing the odour of smoke from the unit and obtained quotations for several thousand dollars. The landlord testified that he treated the walls and completely repainted the unit and seeks to recover \$800.00 which he claims is the value of removing the odour based on a quotation from a company given for ozoning the suite as well as \$3,000.00 as the cost of repainting the suite based on a quotation from a second company. The landlord testified that prior to the beginning of the tenancy he had performed painting touch-ups as required but could not identify the last time the suite was completely repainted. The landlord further seeks the cost of replacing the mattress in the suite which he claimed could not be used due to the odour it had absorbed. The landlord testified that the mattress was approximately 2 years old and that rather than

purchase a new one, he moved in a mattress which had been in a different rental unit. The landlord further seeks lost income for the month of October as he claims that he was unable to re-rent the unit in October due to the time he had to take to rid the unit of the odour of smoke.

The tenant testified that he did not at any time smoke in the rental unit and that he should not be responsible for any costs of the landlord in removing smoke from the unit. The tenant testified that when his son visited him, he asked him not to throw cigarette butts outside where he was smoking, but to dispose of them in a manner that would not leave litter outside. The tenant claimed that he thoroughly cleaned the rental unit with the exception of sweeping the floor, which was overlooked. The tenant's wife testified that she advised the landlord via email in mid-September that he should speak directly with the tenant in order to schedule a time for the condition inspection report.

Analysis

In order to prove his claim the landlord must prove not just that the tenant breached the terms of the tenancy agreement, but that this breach caused damage resulting in loss to the landlord. I find that the landlord has not met this burden. I have arrived at this conclusion for the following reasons. The landlord regularly inspected the unit and only on one occasion did he smell smoke, and this was confined to an area under the kitchen sink. The tenant freely admitted that he disposed of cigarettes by placing them in the garbage there. The fact that the odour discovered by the landlord was confined to the area under the sink, where the garbage was kept, leads me to believe that the tenant was not smoking in the unit but that on that occasion merely disposed of cigarette butts in the garbage kept under the sink. The fact that further monthly inspections did not give rise to further cautions from the landlord leads me to believe that there was no odour to be smelled on those occasions as I find that the landlord would have been particularly vigilant on those inspections as he already suspected that the tenant was smoking in the unit. There may have been other occasions on which the tenant disposed of cigarette butts in the garbage leading to an odour in the unit, but I am not convinced on the balance of probabilities that the tenant was smoking in the

rental unit. The landlord claimed that the odour of cigarettes emanating from the tenant's body permeated the mattress requiring him to discard the mattress. In the absence of corroborating evidence, I find that the landlord has not proven this to be the case.

I am very troubled by the absence of a condition inspection report at the end of the tenancy. The Residential Tenancy Act and Regulations require the landlord to provide two opportunities to the tenant to schedule an inspection of the rental unit. Even if the landlord did not receive an email from the tenant's wife advising that he should directly contact the tenant to arrange an inspection, the landlord did not receive any confirmation that the tenant agreed to the proposed time for the inspection. I find that the landlord did not comply with his obligation to provide two opportunities to schedule the condition inspection and thereby deprived the tenant of the opportunity to inspect the rental unit with the landlord at the end of the tenancy and either confirm or disagree with whatever findings the landlord made at that time.

Even if I had found that the tenant had smoked in the rental unit thereby causing an odour which would have to be removed, I would have found that the landlord had not proven that the quantum of his claim. The landlord did not perform an ozone treatment on the walls of the unit, so I find that the quotation for a professional ozonation to be of little probative value. The Residential Tenancy Policy Guidelines provide that interior paint has a useful life of 4 years and I find that the landlord has not proven that the paint in the rental unit still had useful life, so the unit may have required repainting in any event. Further, I find that the landlord has not proven the quantum of his claim as he did not provide persuasive evidence as to the value of the mattress which was discarded by providing an invoice for the actual mattress. The claim for unpaid rent for October must fall with the claim for the cost of removing smoke as I have found that the landlord has not proven that smoke had to be removed.

I am also not persuaded that cleaning was required to the extent that the landlord claimed. The photographs show a generally clean unit with the exception of minimal dust on the floors and a can of garbage underneath the kitchen sink. While the unit

would have required sweeping and the garbage would have needed to be removed, I find this so insignificant that it does not warrant an award. I note that the only required cleaning noted in the email from the RCMP Constable was dirty floors and garbage under the sink.

For the reasons given above I dismiss the landlord's claim.

Conclusion

The landlord's claim is dismissed. As the landlord has been unsuccessful in proving his claim against the security deposit, I find it appropriate to order that he return the security deposit to the tenant forthwith. I grant the tenant a monetary order under section 67 for \$850.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Dated: February 05, 2010
