Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNSD Money Owed or Compensation for Damage or Loss

FF Recover the Filing Fee for this Application from the Respondent

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the landlord for a monetary order for rent owed and loss of rent stemming from the tenant ending the tenancy prior to that allowed under the tenancy agreement or under the Act.

Both the landlord and tenant were present and each gave testimony in turn.

Issue(s) to be Decided

The landlord was seeking a monetary order for rent owed for the month of November 2009 and loss of three months rent caused by the tenant's failure to comply with the tenancy agreement by not taking tenancy in and not paying rent on the date specified.

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

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for rent owed under the agreement

Preliminary Issue

The tenant advised that evidence which had been submitted to the file, could not be served on the landlord at the address given. The landlord did not receive the tenant's evidence and the question of whether or not it could be considered arose.

I find that the *Landlord and Tenant Fact Sheet* contained in the hearing package makes it clear that "*copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible"*, and Residential Tenancy Rules of Procedure, Rule 4.1, requires that copies of all evidence that the respondent intends to rely upon at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding. Or, if the date of the dispute resolution proceeding does not allow the five (5) day requirement in 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 regards to the manner of service, section 88 states that all documents, other than those referred to in section 89 *[special rules for certain documents]*, must be given or served in one of the following ways:(a) by leaving a copy with the person; (b) if the person is a landlord, by leaving a copy with an agent of the landlord; (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord; (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant; (e) by leaving a copy at the person's residence with an adult who apparently resides with the person; (f) by leaving a copy in a mail box or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord; (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord; (h) by transmitting a copy to a fax number

provided as an address for service by the person to be served; (i) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;

Being that the tenant's evidence was not properly served on the applicant landlord, it was determined that the tenant would instead be permitted to present verbal testimony on the matters affected.

Background and Evidence

Both parties agreed that a tenancy agreement was signed in October for a tenancy that was scheduled to start on November 1, 2009, with rent set at $1,400.00 and that a move-in inspection was done on October 31, 2009 and signed by both parties. The parties also agreed that the tenant had some concerns about issues with the unit and requested that the landlord obtain a mould inspection report based on the tenant's observation of mould and a musty smell.

The landlord submitted into evidence a copy of the tenancy agreement signed on October 12, 2009, a copy of the move-in inspection report signed by both parties, a copy of the professional report with recommendations regarding mould and copies of communications between the parties.

The landlord testified that, after the move-In condition inspection was signed indicating the requested repairs and tasks, the landlord took immediate action to address the issues of concern. However, the tenant later placed a stop-payment on the cheques given for rent and the security deposit. The landlord testified that she was shocked because all of the requested repairs were either done or were in process as required under the Act.

The landlord stated that she was not able to re-rent the unit in November and testified that after the experience with the tenants, she listed the home for sale. However, according to the landlord, the search for tenants began immediately by placing an ad on Craigslist after the renovation work was done, which was initiated without delay. The

landlord submitted a copy of the advertisement. The landlord testified that she did get a substantial response to the ad but the rental applicants were found to be unsuitable. The landlord testified that, despite the continued advertising, the unit was vacant until it was recently sold. The landlord is claiming compensation for a total of $5,600.00 and the $50.00 cost of filing.

The tenant testified that although they had agreed to the tenancy and signed the inspection report, the issue of mould contamination seriously bothered the tenants even at the time. The tenant testified that there was visual evidence of mould infusion and a musty smell in the root cellar. The tenant testified that even after the report from the professional inspector was received, they did not feel that all of the mould could be totally eradicated and prevented. In any case, according to the tenant, it was clear that during the remediation process the tenants would not be able to safely reside in the unit and could therefore not even move in on the agreed-upon date. The tenant testified that they believed that it would not be healthy to put their furnishings and possessions in the building at all until all of the mould issues were resolved. The tenant testified that they felt there was no choice but to end the tenancy immediately, before they took occupancy. The tenant argued that they had every intention of moving in and had contracted in good faith, but because the home was not in livable condition and was unlikely to be restored to the standard that would make it suitable for occupancy, the tenants were left in a homeless state and should therefore not be held liable to pay for losses incurred by the landlord.

In regards to the loss of rent for the four-month period being claimed by the landlord, the tenant disputed that the home would have remained vacant for that duration and pointed out that the landlord had put the home up for sale at the time. The tenant testified that if the landlord had taken the appropriate steps it was likely that suitable tenants could have been found within one month.

The tenant gave verbal testimony regarding expenditures that the tenant incurred due to having to terminate the tenancy including costs for hooking up utilities and telephone

which amounted to the equivalent of one-month's rent. The tenant's position was that the landlord is not entitled to any compensation.

Analysis

Section 16 of the Act provides that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

Section 6 of the Act provides that the rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement and that a landlord or tenant may make an application for dispute resolution if they cannot resolve a dispute.

In this instance I find that the parties entered into a written agreement which stated that the tenant would take possession on November 1, 2009.

I find that on a balance of probabilities the unit was not in a condition suitable for habitation by the tenant on the date that occupancy was supposed to begin under the contract, that being November 1, 2009. I find that this would have been a significant violation of section 32 of the Act, particularly if the landlord had refused to take action in a timely manner to rectify the deficiencies. I find that the landlord did take immediate action as required by law and was therefore not in violation of the Act. However, at the same time, it is a fact that the landlord was in violation of a material term of the contract. I find that the tenancy agreement they had signed had a move-in date that was pivotal to the tenant, and the landlord's failing to have the unit ready to move in to as of November 1, 2009, was a significant violation of the Act.

I find that the tenant then chose to commit a reciprocal violation of the Act and Agreement by terminating the tenancy in contravention of section 45 of the Act and also by failing to pay rent due on November 1, 2009 which violates section 26 of the Act.

Although, I find that the landlord failed to comply with the terms of the tenancy agreement and was the first to breach the agreement, it does not follow that this would automatically function to grant the tenant total immunity from liability for a subsequent breach of the Act or agreement. I find that there is no provision in the Act that extends immunity for a reciprocal breach on the part of a tenant or landlord.

Moreover, the Act provides a mechanism for an aggrieved party to seek relief when the other party is in violation of the Act in any respect. I find that, rather than suddenly contravening the agreement by terminating the tenancy altogether, the tenant had an option to make an application for dispute resolution claiming compensation, seeking an order that the tenancy be ended or requesting an order to force the landlord to comply with the Act.

In regards to an Applicant's right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, 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 find that in order to justify payment of damages under section 67, the Applicant 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 bears the burden of proof and the evidence furnished by the applicant must satisfy <u>each</u> component of the test below:

<u>Test For Damage and Loss Claims</u>

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 the claimed loss or to rectify 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

In this instance, the burden of proof is on the claimant, that being the landlord], to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant made a reasonable attempt to address the situation and to mitigate the damage or losses that were incurred.

In this situation I find that the landlord has successfully established that there was a violation of the Act by the tenant and that this resulted in losses by the landlord. I find that elements 1 and 2 of the test for damages have been met.

In regards to how much of the loss for November 2009 was attributable to the tenant, so as to satisfy element 3 of the test, I find that the relative worth of this tenancy was devalued for the month of November 2009 because the tenant could not move in on the date that the contract specified and as such was a consequential breach by the landlord. The landlord did not offer to provide alternate accommodation taking the position that the rental unit was suitable to inhabit during the mould remediation process. Although I do accept the landlord's testimony that all the interior work was fully completed within a relatively short time, I find that the failure to have the unit ready on the specified move-in date was a significant inconvenience for the tenants, particularly as they would have had no other place to go at the time. I find that expecting the tenant's to avail themselves of a remedy through dispute resolution at that

point in time was not very practical. Accordingly, I find that the landlord is not entitled to be compensated in the amount of $1,400.00 claimed for the month of November 2009 and that this portion of the claim must be dismissed.

In regards to the loss of $1,400.00 rent for the month of December 2009, I find that the landlord did incur a loss of rent for that month, that it was due to the violation by the tenant in terminating the tenancy and that the unit was in safe liveable condition by December. I accept the landlord's testimony that the landlord took reasonable steps to minimize the loss by advertizing the vacancy on Craigslist for the months of November and December 2009. I find that the landlord has justified entitlement to $1,400.00 for loss for the month of December.

In regards to the months of January and February 2010, I find that the landlord has not submitted sufficient proof that reasonable steps were pursued to minimize the loss. I find that, using the same source of advertising and maintaining the same monthly rate, despite having no success in finding a suitable new renter, was not an adequate measure to support the claim for a loss of $2,800.00 over this period of time. I also find that the landlord's decision to place the unit up for sale may possibly have had some impact on the continued vacancy, as potential tenants generally balk at the prospect of having to accommodate showings. The "for-sale" status of the property may also have limited the pool of target consumers seeking longer-term tenancies. I find that the landlord has not successfully met the test for damages in regards to the claims for compensation of $1,400.00 for January and $1,400.00 for February. I find that this portion of the landlord's application must be dismissed.

Based on the evidence and testimony, I find that the landlord has established a total monetary claim of $1,450.00 comprised of $1,400.00 rent loss for December 2009 and the $50.00 fee paid by the landlord for this application.

Conclusion

I hereby grant the Landlord an order under section 67 for $1,450.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

March 2010 _____

Date of Decision

Dispute Resolution Officer