DECISION

Dispute Codes DRI, MNSD, MNDC, FF, O

Introduction

This hearing dealt with the tenant's application to dispute a rent increase; for return of double the security deposit; for compensation for damage or loss under the Act, regulations or tenancy agreement; recovery the filing fee paid for this application and other issues. Both parties appeared at the hearing and were provided the opportunity to be heard and to respond to the submissions of the other party. Both parties confirmed service of documents upon them.

It was determined that the landlord served the Residential Tenancy Branch and the tenant with late evidence. The landlord's evidence was accepted; however, the tenant was provided additional time to submit documentary evidence in response to the landlord's late submission. It should be noted that the majority of the landlord's position related to the condition of the rental unit at the end of the tenancy; however, as the parties were informed during the hearing, the landlord has not made an application for damages to the rental unit and the issues before me did not relate to damages to the rental unit.

Issues(s) to be Decided

1. Has the tenant established that she paid a rent increase that was not legally obtained?
2. Has the tenant established an entitlement to return of double the security deposit?
3. Has the tenant established an entitlement to compensation for loss of quiet enjoyment of the rental unit?

Background and Evidence

I heard the following undisputed testimony from the parties. There is no written tenancy agreement. The rental unit is a house on an 8 acre property and the landlord's residence is located adjacent to the rental unit, on the same property. The landlord raises livestock and grows crops on the acreage. The tenant and her former spouse moved into the rental unit October 27, 2003. Prior to moving in a $425.00 security deposit was paid to the landlord using cheque from a business the tenant and her former spouse had. The monthly rent was due on the 1st day of the month. The monthly rent was initially $850.00 and increased to $1,000.00 per month.

I also heard undisputed testimony that the tenant's former spouse moved out of the rental unit but did not give notice to the landlord to end the tenancy. The tenant remained in the rental unit and paid rent to the landlord. The tenant vacated the rental unit July 31, 2009 and provided a forwarding address to the landlord in writing on July 31, 2009. Neither the tenant nor her former spouse authorized the landlord to retain any portion of the security deposit. The landlord did not return the security deposit to either tenant or make an application to retain it.

In making this application the tenant is seeking the following amounts:

1. Double the security deposit in the amount of $850.00;
2. Recovery of $2,133.90 for the rent increase that was in excess of allowable increase for the months of February 2008 through July 2009; and,
3. Loss of quiet enjoyment in the amount of $3,000.00.

Security deposit

The landlord's initial position was that the tenant had not paid a security deposit because a deposit was paid on a business account for a business run by the tenant's former spouse.

The tenant responded by saying the business was run by both her and her former spouse and the cheque had been signed by the tenant. The tenant was also of the position that it was irrelevant as to the origin of the funds for the security deposit.

The landlord took an alternative position that the landlord did not return the security deposit due to the condition of the rental unit at the end of the tenancy and because he did not know of the requirements of the Act with respect to security deposits.

Rent increase

The tenant submitted that three months prior to February 2008 the landlord gave the tenant a handwritten note advising her that rent would be increasing to $1,000.00 effective February 2008. The tenant began paying $1,000.00 per month starting February 2008. The tenant is agreeable to paying the 3.7% rent increase the landlord could have charged under the Act and is seeking to recover the amount in excess of the 3.7% increase.

The landlord explained that he was unaware of limitations on rent increases and that the rent increase was imposed to reflect improvements to the rental unit such as a new roof and because the tenant was not maintaining the yard. The landlord could not recall what month the rent increase started but was of the belief it was not as early as February 2008.

The tenant responded by saying that the roof was repaired many months after the rent increase was imposed and that there was no agreement for the tenant to maintain the yard. Rather, the tenant submitted that the rental unit was advertised for $850.00 per month. The tenant requested and was granted one week to provide documentary evidence to show when the rent increase commenced and the tenant was instructed to serve the evidence upon the landlord. The tenant submitted a copy of the note signed by the landlord that increased the rent to $1,000.00 per month starting February 1, 2008 and a copy of a cancelled cheque for $1,000.00 for March 2008. The tenant made a

notation on the evidence that the bank could only locate a $1,000.00 cheque as far back as March 2008.

Loss of quiet enjoyment

The tenant submitted that starting in the fall of 2008 she began working night shifts for work and usually went to bed at 2:00 p.m. Starting in March 2009 the tenant and landlord had a falling out and the landlord began deliberately making excessive noise in the yard with farming and other equipment after 2:00 p.m. The tenant provided a chronological account of events she submitted were evidence of loss of quiet enjoyment and stated she could provide an audio recording of the machinery noise she hear. The tenant testified that the landlord was made aware of her sleeping times and was of the belief the landlord was making excessive noise to drive her out of the rental unit. The tenant stated that a sign was posted on the tenant's door when she was sleeping so that she would not be disturbed. The tenant also submitted that on the day she moved-out the landlord threw items at her.

The landlord responded to the tenant's allegations by saying he did not have malice toward the tenant and was not trying to drive her out of the rental unit. The landlord did not deny that machinery was often used on the property but denied running equipment when it was not necessary as that would be a waste of fuel. The landlord submitted that March is ordinarily the time of year when the farming operations get underway and that he did not recall the tenant informing him that she went to bed at 2:00 p.m. The landlord acknowledged that the relationship with the tenant soured after the tenant's spouse moved back in for a period of time and that he was annoyed with hearing about the drama in her life. The landlord also acknowledged that he threw a dog blanket at the tenant when she was vacating as he was frustrated she was leaving a lot of garbage behind at the rental unit.

The tenant refuted the landlord's position by saying that the landlord was acting like he was jealous of the tenant's spouse being at the rental unit and that she had heard plenty of issues from the landlord about the drama in his life. Upon review of the landlord's

photographs the tenant exclaimed that she was glad to see them as she was unaware of where some of her possessions were.

Included in the landlord's evidence was a letter from the landlord's neighbour who stated that a part of the residential property is used for livestock and another part is for crops and that running a tractor and other cultivating equipment is necessary when time is available for working the farm. The neighbour claims that the landlord and the neighbour help each other on their acreages, that the property is located close to a major highway and airport, and that incidental noise is part of living in the area.

Included in the landlord's evidence was a written statement of the landlord's partner who stated the tenant did not have a sign on the rental unit door to indicate the tenant was sleeping. The tenant claims this statement is untrue.

Also included in the landlord's evidence is a letter from the tenant to the landlord dated March 28, 2009 whereby the tenant requests her rent be temporarily reduced to $750.00 per month. Both parties agreed that the rent for July 2009 was paid by the tenant's father. It was also undisputed that the tenant was late paying rent for January and February 2009 and then paid four months worth of rent at one time. The landlord submitted that he believed the tenant was asking for a rent reduction because she was not working very much and did not realize the tenant was trying to sleep during the day.

Analysis

Upon review of all of the testimony and documentary evidence provided to me by both parties, I make the following findings.

Security deposit

As the parties were informed during the hearing, the landlord's claims for cleaning costs or other damages were not issues for me to decide for this proceeding as the landlord had not made an application for dispute resolution. The purpose of this hearing was to

hear the tenant's application for dispute resolution and determine whether the landlord complied with the Act with respect to returning or retaining the security deposit. The landlord retains the right to make an application against the tenant within two years of the tenancy ending.

Section 38(1) of the Act requires that a landlord either return the security deposit and interest to the tenant, or make an application to retain all or part of the deposit, within 15 days after the tenancy ends or the tenant gives a forwarding address to the landlord in writing, whichever date is later. The landlord does not have the legal right to retain the security deposit unless the tenant has given the landlord written consent to make deductions from the security deposit, the landlord has authorization from a Dispute Resolution Officer to retain the security deposit or the tenant has extinguished their right to the security deposit. If the landlord does not comply with the requirements of section 38(1) the landlord must pay the tenant double the security deposit in accordance with section 38(6) of the Act.

In this case, I heard the security deposit was paid by a business cheque. A landlord cannot accept a security deposit except where a tenancy has formed. I am satisfied that the landlord did not establish a residential tenancy with the business and that the tenancy was formed with the tenant and her spouse. Therefore, I find that the security deposit was paid on behalf of the tenants using the business chequing account.

Under the Act, a co-tenancy exists where there is more than one tenant under a single tenancy agreement. The co-tenancy continues unless one of the tenants gives written notice to end the tenancy or the tenancy otherwise ends in accordance with section 44 of the Act. One or both tenants of a co-tenancy have the same rights and obligations under the Act. Therefore, either tenant is entitled to claim return of the security deposit within the time limits provided under the Act.

In this case, the female tenant has claimed return of the security deposit and I am satisfied that the tenants' right to claim the security deposit was not extinguished. Since

it was not in dispute that the tenant provided the landlord with a forwarding address on July 31, 2009 and the tenancy ended on July 31, 2009, the landlord had 15 days after July 31, 2009 to either make a claim to retain the security deposit or return the security deposit to the tenant to avoid having to pay the tenant double the security deposit. The landlord did neither of these two options and I find the tenant is now entitled to return of double security deposit plus interest on the original deposit. The tenant is awarded double the security deposit of $850.00 plus interest of $15.06 for a total of $865.06.

Rent increase

Sections 40 through 43 of the Act provide for rent increases. A rent increase must be made on the approved form and served upon the tenant at least three months before the increase is to take effect. The amount of the rent increase is limited to the amount provided in the Residential Tenancy Regulation or as agreed upon by the tenant in writing or authorized by a Dispute Resolution Officer. For the year 2008 the amount of the allowable rent increase provided by the Residential Tenancy Regulation was 3.7%.

Upon review of the evidence before me, I find the landlord did not use the approved form to impose a rent increase. By not using the approved form, no part of the rent increase was valid or enforceable.

I do not find the landlord's position that the rent increase was imposed to offset improvements is a basis for the landlord to avoid the requirements of the Act. Rather, the Act provides that a landlord may seek authorization for an additional rent increase where significant improvements are made. The landlord did not seek such authorization and ignorance of the law is not a defence to violating the Act.

I did not find sufficient evidence that there was an agreement between the parties that the rent was reduced to $850.00 at the commencement of the tenancy to reflect an arrangement for the tenant to perform yard work.

Section 43 of the Act provides that where a landlord collects a rent increase that does not comply with the requirements of the Act, the tenant may deduct the increase from rent or otherwise recover the increase. In light of the above, I find the rent increase did not comply with the requirements of the Act and that the tenant is entitled to recover the rent increase from the landlord.

I find the tenant provided sufficient evidence to show she paid $1,000.00 from March 2008 until July 2009. I find the tenant entitled to recover up to $2,550.00 (17 months x $150.00 per month) from the landlord for an illegal rent increase; therefore, the tenant's request to recover $2,133.90 is granted.

Loss of quiet enjoyment

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Under the Act, the tenant is entitled to quiet enjoyment. Quiet enjoyment includes freedom from unreasonable disturbance. Unreasonable disturbance may be indicated where there is unreasonable and ongoing noise caused by the landlord.

I am satisfied that the farming operations have been ongoing throughout the duration of the tenancy; however, the noise associated with such activity only became an issue for the tenant in the spring of 2009. I am satisfied that noises associated with normal farming operation was to be expected during the daylight hours. I have to determine

whether there is sufficient evidence to conclude that the landlord knew or ought to have known the tenant went to bed at 2:00 p.m. and that the landlord was deliberate in making unreasonable noise after the tenant went to bed.

In this case, the parties provided disputed evidence as to whether the tenant had notified the landlord of her sleeping times or had put a sign on her door indicating she was sleeping. Although I found the tenant very detailed and specific with respect to recalling dates and events I also found her response to seeing her possessions in the photographs provided by the landlord to be unlikely. Rather, after hearing undisputed testimony that the landlord threw a dog blanket at the tenant when she was vacating the property I have no doubt the tenant was aware that she was abandoning possessions and garbage at the rental unit. I also found the landlord's testimony to be rather vague during much of the hearing. Therefore, I do not find one party to be more believable than the other and I have applied equal weight to their respective positions concerning the tenant's claim for loss of quiet enjoyment.

It is important to note that where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

I do not find the tenant's disputed position that she had verbal discussions with the landlord about the issue of unreasonable noise levels or the placement of a sign on her door to be sufficient to establish her position is more likely than the landlord's position.

In deliberating this issue, I have also considered that the rental unit is located on a small farm and that the landlord has been engaged in farming activities for some time without unreasonable disruption to the tenant. The tenant has alleged that the excessive noise was deliberately inflicted upon her, which would be grounds to find a loss of quiet enjoyment; however, I find it equally likely that such farming noises have been ongoing for several years and the tenant's change in work schedule made it more noticeable to

the tenant. Although the tenant began working night shifts in the preceding fall, I also accept that it is likely that farming activities increased in the spring due to farming requirements.

Finally, if the landlord's activity was so disturbing, I do not understand why the tenant did not notify the landlord of this in writing. The tenant had made an effort to seek a rent reduction on March 28, 2009 in writing but no mention of excessive noise was made in that letter or any subsequent letter. Therefore, I am not satisfied that the tenant has proven that landlord knew or ought to have known his farming activities were disturbing the tenant.

Upon considering the tenant's request for a rent reduction, the late payment of rent in January and February 2009 and the tenant's father paying the rent in July 2009 I find the landlord provided a reasonable explanation and corroborating evidence that the tenant vacated the rental unit due to financial difficulties. I do not find sufficient evidence to hold the landlord responsible for causing the tenant financial difficulties.

In light of the above, I find the tenant failed to show that the tenant did whatever was reasonable to minimize her loss of quiet enjoyment, that it was the landlord's actions that caused her loss of quiet enjoyment or that the landlord's actions were deliberate in an attempt to have her vacate. Accordingly, I dismiss the tenant's claim for loss of quiet enjoyment without leave to reapply.

Filing fee

As the tenant was partially successful in this application, I award the tenant one half of the $50.00 filing fee paid for this application.

Conclusion

The tenant has been awarded $865.06 for return of double the security deposit and accrued interest. The tenant has been granted her request to recover $2,133.90 of an

illegal rent increase imposed upon her. The tenant's claims for loss of quiet enjoyment have been dismissed. The tenant has been awarded $25.00 towards the filing fee paid for this application. The tenant is provided a Monetary Order for a total amount of $3,023.96 to serve upon the landlord. The Monetary Order may be enforce in Provincial Court (Small Claims) 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: March 31, 2010.

Dispute Resolution Officer