DECISION

Dispute Codes MNSD
MND, MNR, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for a monetary order for unpaid rent, for compensation for a loss of rental income, for damages to the rental unit, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts. The Tenant applied for the return of his security deposit plus compensation equal to the amount of the security deposit due to the Landlord's failure to return the deposit within the time limits required by the Act.

Issues(s) to be Decided

1. Are there arrears of rent and if so, how much?
2. Is the Landlord entitled to compensation for a loss of rental income?
3. Is the Landlord entitled to compensation for damages to the rental unit?
4. Is the Tenant entitled to the return of his security deposit?

Background and Evidence

This month to month tenancy started on October 1, 2007. The Tenant says the tenancy ended on September 30, 2009. The Landlord said she only discovered sometime after a hearing on October 13, 2009 that the Tenant had moved out. Rent was $500.00 per month. The Tenant paid a security deposit of $250.00 on September 18, 2007. Neither a move in nor a move out condition inspection report was completed by the Landlord.

The Landlord's Claim:

The Landlord said that the Tenant did not pay rent for August or September 2009. The Landlord filed a previous application for dispute resolution on or about September 2, 2009 for an Order of Possession for unpaid rent and to recover "unpaid rent." The Landlord said she tried to dial into that conference call hearing but was unable to do so even with the assistance of an operator. The Landlord claimed that she only discovered after the hearing (on October 13, 2009) that the Tenant had moved out of the rental unit on September 30, 2009.

The Landlord admitted that she received a photocopy of a money order for August 2009 rent from the Tenant but denied that she ever received payment for that month or for September 2009. The Landlord claimed that due to the lack of Notice from the Tenant that he was moving out, she was unable to re-rent the rental unit for October 2009 and lost rental income for that month.

The Tenant claimed that the Landlord's application for unpaid rent was dismissed at the hearing on October 13, 2009 and therefore he believed that he did not have to pay her rent. The Tenant said he had money orders for August and September 2009 rent available to give to the Landlord on the hearing date, but when her claim for rent was dismissed, he cashed the September 2009 money order. The Tenant said he gave the money order for August 2009 to the Landlord (which she denied). The Tenant also claimed that he sent the Landlord a written notice that he was ending the tenancy on August 24, 2009 by registered mail. The Tenant submitted a document from the Canada Post online tracking system that showed that the Landlord received a package on September 4, 2009.

The Landlord also claimed that the Tenant broke off a key in the door lock, damaged some electrical outlets and some linoleum tiles, removed some curtains and left the rental unit in need of cleaning. The Tenant claimed that he went to the Landlord's residence (in the upper part of the rental property) on September 30, 2009 to return the key but she would not answer the door or take his calls. Consequently, the Tenant said he wrapped the key in a piece of paper and put it through the Landlord's mail slot. The Tenant denied that he damaged the door lock.

The Tenant also denied that he put a deadbolt lock on the door and claimed that the Landlord had done so as she had done on all the units in the rental property so that tenants could not gain access to other units from common areas. The Tenant argued that the electrical outlets in question were in poor condition (due to water leaking through the ceiling and walls) and did not work during the tenancy. The Tenant said he advised the Landlord about this during the tenancy but she did not do anything about it. The Tenant also claimed that the rental unit was reasonably clean at the end of the tenancy. In support of his position, the Tenant provided photographs of the rental unit he said he took on September 30, 2009.

The Tenant's Claim:

The Tenant said he sent the Landlord his forwarding address in writing on November 10, 2009 by registered mail. The Tenant submitted a copy of the letter he said he sent as well as a document from the Canada Post online tracking system that showed that the Landlord received a package on November 14, 2009. The Tenant said he did not give the Landlord written authorization to keep the security deposit.

Analysis

The Tenant's Claim:

Section 38(1) of the Act says that a Landlord has 15 days from either the end of the tenancy or the date she receives the Tenant's forwarding address in writing (whichever is later) to either return the Tenant's security deposit or to make an application for

dispute resolution to make a claim against it. If the Landlord does not do either one of these things and does not have the Tenant's written authorization to keep the security deposit then pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit.

Section 38(5) of the Act says that if a Landlord does not complete a move in or a move out condition inspection report, the Landlord's right to make a claim against the security deposit *for damages to the rental unit is extinguished*. However, section 38(4) of the Act also says that a Landlord may retain an amount from the security deposit after the tenancy ends if the director orders that the Landlord may retain the amount. In other words, if a Landlord does not complete a move in or a move out condition inspection report, the Landlord may only apply to keep part of the security deposit to pay for an amount that is owed for anything other than damages to the rental unit (such as unpaid rent). The Landlord may still bring an application for compensation for damages to a rental unit, however, she may not offset those damages from the security deposit.

I find that the tenancy ended on September 30, 2009 and that Landlord received the Tenant's forwarding address in writing on November 14, 2009. The Landlord did make an application for dispute resolution on November 19, 2009 to make a claim against the deposit for unpaid rent and for damages to the rental unit. Although the Landlord's right to make a claim against the deposit for compensation for alleged damages to the rental unit was extinguished under s. 24(2) and s. 36(2) of the Act because she did not complete a move in or a out condition inspection report, I find that her right to make a claim against it for unpaid rent was not extinguished.

The Tenant argued that the Landlord's previous application for unpaid rent was dismissed and therefore she was not permitted to re-apply for that relief. However, there is no evidence before me as to what months of unpaid rent the Landlord was seeking to recover at the previous hearing. Furthermore, the Tenant admitted that the Decision issued in that matter on October 13, 2009 stated that the Landlord's application was dismissed and did not specifically state whether it was dismissed with or without leave to reapply. The Landlord argued that due to technical difficulties beyond her control, she was unable to dial into the conference call for the hearing. However, I also note that the Landlord did not apply for a Review of the Decision dismissing her application.

Given the above-noted factors and given that there was no hearing on the merits of the Landlord's application (that would have barred her from reapplying under the principle of *res judicata*), I find that the Landlord is not barred from re-applying for unpaid rent. Consequently, I find that s. 38(6) of the Act does not apply in this case because the Landlord applied within 15 days of receiving the Tenant's forwarding address to keep the security deposit to apply against unpaid rent. As a result, I find that the Tenant has only made out a claim for **$254.84** representing the original amount of the security deposit paid by the Tenant and accrued interest of $4.54.

<u>The Landlord's Claim</u>:

The Landlord said that the Tenant did not pay rent for August and September 2009. The Tenant admitted that he did not pay rent for September 2009 but claimed that he gave the Landlord a money order for August 2009 rent which the Landlord denied. I did not find the Tenant's evidence on this point convincing. In particular, the Tenant initially claimed that he paid the Landlord rent for these two months by way of money orders. The Tenant then claimed that he meant he didn't owe the rent to the Landlord for these months because her application had been dismissed. The Tenant then stated that he had cashed the money order for September 2009 but had given the Landlord the money order for August.

I note that the Tenant was very careful to serve the Landlord with all of his other documents by registered mail and given further that the Tenant's evidence was sketchy on how he served the Landlord with the money order, I find on a balance of probabilities that the Tenant did not pay rent for August 2009 or September 2009. Consequently I find that the Landlord is entitled to unpaid rent of **$1,000.00**.

Section 45(1) of the Act states that a Tenant of a month-to-month tenancy must give one clear months notice that they are ending the tenancy. If a tenant ends a tenancy earlier, they may have to compensate the landlord for a loss of rental income that she incurs as a result. The Tenant said he served his Notice ending the tenancy on the Landlord by registered mail on August 24, 2009. Although the Landlord denied receiving this document, I find on a balance of probabilities that she probably did. Section 90 of the Act deems a document delivered by mail to have been received 5 days later. Consequently, the Landlord is deemed to have received the Tenant's notice ending the tenancy on August 29, 2009. As a result, I find that the Tenant gave proper notice to end the tenancy on September 30, 2009 and the Landlord is not entitled to recover a loss of rental income for October 2009.

The purpose of having both parties participate in a move in condition inspection report is to provide evidence of the condition of the rental unit at the beginning of the tenancy so that the Parties can determine what damages were caused by the Tenant during the tenancy. In the absence of a condition inspection report, other evidence may be adduced but is not likely to carry the same evidentiary weight especially if it is disputed

In this case, the Tenant denied that he was responsible for the damages alleged by the Landlord and claimed that the rental unit was in substantially the same condition at the end of the tenancy as it was at the beginning of the tenancy. On this point, the Landlord has the burden of proof and must show that it was the Tenant's act or neglect that caused the damages to the rental unit rather than reasonable wear and tear. In the absence of any evidence to corroborate the Landlord's claims and given the contradictory evidence of the Tenant, I find that the Landlord has not provided sufficient evidence to show that the Tenant was responsible for the damage to a door, to flooring, to electrical outlets, for removing curtains and for cleaning expenses. Consequently, this part of the Landlord's claim is also dismissed.

As the Landlord has been largely unsuccessful on her claim, I find that she is not entitled to recover the filing fee for this proceeding. Consequently, I find that the Landlord has made out a total claim of **$1,000.00**. I order pursuant to s. 72 of the Act that the Parties' awards be offset and that the Landlord will receive a monetary order for the balance owing of $745.16.

Conclusion

The Tenant's application is granted. The Landlord's application for unpaid rent and to keep the Tenant's security deposit is granted. The balance of the Landlord's application is dismissed without leave to reapply. A monetary order in the amount of **$745.16** 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: March 23, 2010.

Dispute Resolution Officer