DECISION

Dispute Codes MNSD MNDC O FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to obtain a Monetary Order for the return of all or part of the pet and or damage deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, for other reasons, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the Tenant to the Landlord, was done in accordance with section 89 of the *Act*, served personally by the Tenant to the Landlord's service address, which is a business where the Tenant delivered his rent payments in accordance with his tenancy agreement.

The Landlord and Tenant appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Is the Tenant entitled to a Monetary Order a) for the return of all or part of the pet and or damage deposit, and b) for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, under sections 38 and 67 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony included the fixed term tenancy began on November 1, 2008, and was set to expire on November 1, 2009. The monthly rent was payable on the first

of each month in the amount of $2,500.00 and the Tenant paid a security deposit of $1,250.00 on November 1, 2008.

The Tenant testified that the initial tenancy agreement was entered into by him and a co-tenant and the co-tenant moved out in March 2009 and assigned the lease completely over to the Tenant. The Tenant argued that from March 2009 onward the rent was paid with a cheque drawn on the Tenant's bank account and was hand delivered by the Tenant to the business address that is listed as the Landlord's address on the application.

The Tenant provided his service address during the hearing, which is noted on the cover page of this decision, and requested that the Landlord not be given the address which is listed on the Tenant's application.

The Tenant argued that the Landlord approached him near the end of September 2009 and the Landlord told him that the house was being sold so the Tenant was required to move at the end of the lease period. The Tenant testified that he attempted to get the new owner's name so he could arrange to continue living in the house but the Landlord refused to disclose the new owner's name to the Tenant. The Tenant argued that he then entered into a verbal agreement with the Landlord whereby the Tenant would vacate the rental unit early. The Tenant moved out on October 1, 2009.

The Tenant argued that he provided the Landlord with his forwarding address in writing on October 13, 2009, when he left a note requesting the return of his security deposit. The note was left for the Landlord at the business where the rent was previously paid. The Tenant is seeking the return of double his security deposit ($1,250.00 x 2) plus the equivalent to one month's rent of $2,500.00 for notice to end the Tenancy because the house was sold.

The Landlord testified that he entered into a written tenancy agreement with the co-tenant and not this Tenant and the Landlord could not recall if he completed a move-in

inspection form. When asked why the Landlord did not submit evidence in his defence the Landlord argued that there was no evidence.

When I asked the Landlord if the house in question has been sold, the Landlord became argumentative and then answered “yes it was sold”. The Landlord argued that the Tenant left the rental unit without notice and argued that the location where the Tenant served the Notice of Dispute Resolution and the forwarding address was not the Landlord’s service address. The Landlord did not provide testimony in response to the Tenant’s statement that this was the same address where the rental payments were dropped off.

The Landlord confirmed that he was not previously issued an order to retain the security deposit; that the Landlord has not applied for dispute resolution to keep the security deposit; and the Landlord does not have the Tenant’s written permission to keep the security deposit.

Analysis

All of the testimony and documentary evidence was carefully considered.

I find that in order to justify payment of loss under section 67 of the *Act*, the Applicant Tenant would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in 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; in this case the Tenant bears the burden of proof.

The Landlord confirmed that he has not applied for dispute resolution to keep the security deposit, does not have an Order allowing him to keep the security deposit, and the Landlord does not have the Tenant’s written consent to retain the security deposit.

The evidence supports that the Tenant provided the Landlord with his forwarding address on October 13, 2009.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant’s forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make

application for dispute resolution claiming against the security deposit. In this case the Landlord was required to return the Tenant's security deposit in full or file for dispute resolution no later than October 28, 2009.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit. I find that the Tenant has succeeded in proving the test for damage or loss as listed above and I approve his claim for the return of double the security deposit plus interest.

A significant factor in my considerations of the remainder of the Tenant's claim is the credibility of the Landlord's testimony. I am required to consider the Landlord's evidence not on the basis of whether his testimony "carried the conviction of the truth", but rather to assess his evidence against its consistency with the probabilities that surround the preponderance of the conditions before me.

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In the circumstances before me, I find the version of events provided by the Tenant to be highly probable given the conditions that existed at the time. Therefore I accept that the Tenant was told that he was required to move out of the rental unit because it was sold or was being sold.

That being said, In the case of verbal agreements, I find that where verbal terms are clear and both the Landlord and Tenant agree on the interpretation, there is no reason why such terms cannot be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes as they arise. Therefore I find the Tenant has failed to prove that he had a verbal agreement with the Landlord to end the tenancy effective October 1, 2009, which is one full month sooner than the expiration of the fixed term tenancy agreement.

Having found the Tenant has failed to prove the existence of a mutual agreement to end the tenancy effective October 1, 2009, I find that the Tenant is responsible to pay the October 2009 rent; however I also find the Tenant is entitled to compensation under section 51 of the Act which provides that a tenant who receives a notice to end tenancy under section 49 is entitled to receive from the landlord an amount that is the equivalent of one month's rent payable under the tenancy agreement. Based on the aforementioned the Tenant owes the Landlord $2,500.00 for October 1, 2009 rent and the Landlord owes the Tenant $2,500.00 for compensation under section 51 of the Act, and these two amounts fully offset each other.

I find that the Tenant has partially succeeded with his application therefore I award recovery of the $50.00 filing fee.

Monetary Order – I find that the Tenant is entitled to a monetary claim as follows:

Doubled Security Deposit 2 x $1,250.00	$2,500.00
Interest owed on the Security Deposit of $1,250.00 from November 1, 2008 to April 14, 2010 of $3.12	3.12
Filing Fee	50.00
TOTAL AMOUNT DUE TO THE TENANT	**$2,553.12**

Conclusion

I HEREBY FIND in favor of the Tenant's monetary claim. A copy of the Tenant's decision will be accompanied by a Monetary Order for **$2,553.12**. The order must be served on the respondent Landlord and is enforceable through the Provincial Court 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: April 14, 2010.

Dispute Resolution Officer