

DECISION

Dispute Codes MNDC, OLC, CNR, MNSD, FF, O

Introduction

This hearing was convened by way of conference call to deal with cross applications by the landlord and the tenant. The landlord has applied for an Order of Possession for unpaid rent, for a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, to keep all or part of the security deposit, and to recover the filing fee from the tenant for the cost of this application.

The tenant filed 3 separate applications. In the application filed March 2, 2010, the tenant was claiming a monetary order in the amount of \$2,300.00 for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and for an order that the landlord comply with the *Act*, regulation or tenancy agreement. The application filed March 23, 2010 claimed the same relief and an order cancelling the Notice to End Tenancy for unpaid rent or utilities, and to recover the filing fee from the landlord for the cost of this application, and requesting administrative penalties be imposed in the sum of \$5,000.00 for wrongful delivery of the notice to end tenancy. The third application filed by the tenant on April 29, 2010 claims a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement, return of the security deposit, for an order that the landlord comply with the *Act*, regulation or tenancy agreement and to recover the filing fee from the landlord for the cost of this application.

The hearing was conducted almost entirely in submissions. The tenant is a lawyer, and the landlord was represented by counsel. The landlord did not give evidence however the tenant did give affirmed testimony.

At the outset of the hearing, the parties stated that the tenancy ended on March 30, 2010 and therefore, the tenant's application for an order cancelling the notice to end

tenancy is hereby dismissed as withdrawn, and the landlord's application for an Order of Possession for unpaid rent is hereby dismissed as withdrawn.

The tenant's application includes a request that administrative penalties be imposed against the landlord, and I decline jurisdiction to deal with that issue.

Issues(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Is the landlord entitled to retain the security deposit in satisfaction or partial satisfaction of the claim?

Is the tenant entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Is the tenant entitled to return of the security deposit?

Is the tenant entitled to an order that the landlord comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

This fixed-term tenancy began on April 1, 2009 and was to expire on March 31, 2010, according to the tenancy agreement which was provided as evidence in advance of the hearing. Rent in the amount of \$2,300.00 was payable on the 1st day of each month. The tenant paid a security deposit in the amount of \$1,150.00 on March 3, 2009.

The tenant testified that on January 28, 2010 he received an email from the landlord's agent stating that the mother of an officer of the landlord company was moving to Vancouver from overseas, and that she would be occupying the rental unit at the expiry of the fixed term. The unit was instead listed for sale, and pursuant to the *Residential Tenancy Act* the landlord cannot end the tenancy early, that the good faith of the landlord is in question and claims double compensation under Section 51(2) of the *Act*.

The tenant further testified that he withheld rent for the month of March, 2010 pursuant to Section 51(1.1). As a result, he was served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and that pursuant to Section 46(3), the notice has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under the *Act* to deduct from the rent, and that he was entitled to deduct that amount from the rent pursuant to Section 51(1.1). He further submitted that the method of service of the notice to end tenancy was contrary to the *Act* in that the notice was not sent to the service address provided to the landlord by the tenant.

On March 30, 2010 a move-out condition inspection was completed, and the landlord's agent was provided at that time with a written forwarding address, but the tenant was not provided with a copy of the report. In his written submission, the tenant quotes Section 38(5) as follows:

“(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.”

Further, the tenant submitted that the landlords are precluded by Section 38(6) of the *Act* from claiming against the security deposit because they had no order to retain the security deposit from the Director, and the right to claim against it has been extinguished under Section 24(2) and 36(2) by failing to meet the start and end of the tenancy condition report requirements.

The tenant further submitted that the definition of a fixed term tenancy is described in Section 1 as “a tenancy under a tenancy agreement that specifies the date on which the tenancy ends...,” and that a periodic tenancy is a tenancy on a periodic basis under a tenancy agreement that continues until it is ended in accordance with the *Act*, or a fixed term tenancy that does not provide that the tenant will vacate the rental unit at the end

of the fixed term, and that there is no other type of tenancy described in the *Act*. He further submitted that Section 49 applies to both fixed term and periodic tenancies.

The tenancy agreement, as submitted by the tenant contains a clause that the landlord may end the tenancy only for the reasons and in the manner set out in the *Act* and that the landlord must use the approved notice to end the tenancy available from the Residential Tenancy Office. He further submitted that a tenant can move at the end of a fixed-term agreement without giving notice, but the landlord must give notice to end a fixed term tenancy; that there is no provision that dispenses with the landlord's obligation to provide notice to end a tenancy.

The tenant submitted copies of emails wherein an agent for the landlord advised that he spoke to the landlord to ask about extending the lease, but were told that her parents would be moving in and wanted possession of the property upon expiry of the lease.

Counsel for the landlord argued that there is a distinction between fixed term and month-to-month tenancies, and that the last page of the tenancy agreement states that, "If this is a fixed term tenancy and the agreement does not require the tenant to vacate at the end of the tenancy, the agreement is renewed as a monthly tenancy on the same terms until the tenant gives notice to end a tenancy as required under the *Residential Tenancy Act*." The Tenancy Agreement clearly states that the tenant must vacate the unit on March 31, 2010 unless a new agreement is made by the parties at least one month before the end of the fixed term. Therefore, the landlord had no obligation to give any notice to the tenant to end the tenancy.

He further submitted that the emails referred to by the tenant do not constitute any intention on behalf of the landlord to negotiate a further term for this tenancy. He stated that the email simply acknowledges the tenant's request to extend the tenancy and is not a notice. Further, the email is not in the approved form and is therefore not a notice as required under Section 52 of the *Act*.

Analysis

The tenancy agreement is not ambiguous. It clearly states that the tenancy is a fixed term Agreement, "...which begins on April 1, 2009 and expires on March 31, 2010 at 1:00 p.m. At the end of this fixed length of time, the tenancy ends and the Tenant must vacate the residential premises, except where a new rental Agreement or extension has been made at least one month prior to expiry." Therefore, I must find in favour of the landlord that no notice to vacate was required by the landlord, and that Section 49 of the *Act* does not apply. The tenant did not receive a notice under Section 49 from the landlord, and therefore, the tenant is not entitled to compensation under Section 51 and the tenant did not have the right to withhold rent. Further, Section 50 of the *Act* only applies to periodic tenancies, which this clearly was not.

I also find that the tenant has misquoted the *Act* in his submission that the landlord's right to claim against the security deposit is extinguished under Section 24(2) and 36(2) by failing to meet the start and end of the tenancy condition report requirements. His written submission adds ..."24 (2) [*landlord failure to meet start of tenancy condition report requirements*] or 36 (2) [*landlord failure to meet end of tenancy condition report requirements.*]" The *Act* states as follows:

24 (2) The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord

(a) does not comply with section 23 (3) [*2 opportunities for inspection*], ...

I find that the same issue applies to Section 36(2) in the submissions of the tenant. Further, those sections clearly deal with a landlord's claim for damages which do not exist in the Landlord's Application for Dispute Resolution.

I find that the tenant did not have any right to withhold rent under the *Act*, and therefore, the landlord is entitled to the equivalent of one month's rent from the tenant.

I further find that the landlord made an application against the security deposit within the time required under the *Act*, and therefore, the tenant is not entitled to double the amount of the security deposit.

Conclusion

I find that the landlord has established a claim for \$2,300.00 in unpaid rent. The landlord is also entitled to recovery of the \$50.00 filing fee. I order that the landlord retain the deposit and interest of \$1,150.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$1,200.00. This order may be filed in the Small Claims Court and enforced as an order of that Court.

The tenant's applications are hereby dismissed without leave to reapply.

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: May 27, 2010.

Dispute Resolution Officer