

DECISION

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

Introduction

This hearing dealt with the landlord's application for a Monetary Order for damage to the rental unit; unpaid rent; damage or loss under the Act, regulations or tenancy agreement; authorization to retain the security deposit; recovery of the filing fee and other issues. Both parties appeared at the hearing and were provided the opportunity to be heard.

Despite the claim for nearly \$12,600.00 against the tenants there was an absence of documentary evidence accompanying this application. At the commencement of the hearing the landlord's agent was asked if the landlord had sent in any evidence in support of the landlord's claims. The landlord's agent initially stated that no evidence had been sent in prior to the hearing. However, during the course of the hearing, the landlord's agent testified that a listing of the amounts claimed had been supplied to the Residential Tenancy Branch at the time of making the Landlord's Application for Dispute Resolution. The tenants confirmed they had been provided a listing dated December 5, 2009 of the amounts sought by the landlord. I agreed to permit the landlord to verbally describe the amounts claimed; however, upon hearing further testimony of the parties I determined it was not necessary to hear the entire listing for reasons outlined in this decision.

As a procedural note, both parties had to be cautioned about speaking out of turn and providing testimony not relevant to the issues before me. Upon being cautioned both parties conducted themselves appropriately for the remainder of the hearing.

Issues(s) to be Decided

1. Is the landlord entitled to compensation for damages to the rental unit?

2. Is the landlord entitled to unpaid rent?
3. Is the landlord entitled to compensation for damage or loss under the Act, regulations or tenancy agreement?
4. Is the landlord authorized to retain the tenants' security deposit?

Background and Evidence

The parties provided undisputed testimony as follows. The one-year fixed term tenancy commenced May 29, 2009. The tenants were required to pay rent of \$1,600.00 on the 1st day of every month. The tenants had paid a \$800.00 security deposit. The landlord served the tenants with a *10 Day Notice to End Tenancy for Unpaid Rent* (the 10 Day Notice) with respect to rent owing for December 2009 by posting it on the gate of the residential property. The tenants did not pay rent for December 2009. The landlord changed the locks to the rental unit before December 9, 2009. The tenants authorized the landlord to retain the tenants' security deposit for rent owed for December 2009.

The parties provided disputed testimony as to the date the 10 Day Notice was issued. The tenants stated the 10 Day Notice was dated November 29, 2009, received by them on the gate on November 30, 2009 and had an effective date of December 10, 2009. The landlord initially testified the 10 Day Notice was dated December 1, 2009 and then changed testimony to say it was dated December 2, 2009 and stated the effective date was December 11, 2009.

The tenants testified the landlord's changed the locks to the rental unit on December 1, 2009 and the landlord had stored their possessions in a garage. The tenants claim they had made an arrangement to pick up their belongings from the rental unit on December 6, 2009. The landlord testified that she was unsure as to what day the locks were changed but acknowledged the locks were changed before December 9, 2009 with the explanation that the tenants were damaging the rental unit when they were moving out their belongings.

The tenants stated they could not clean the rental unit and make any repairs since the landlord had changed the locks to the rental unit. Further, the landlord has listed the unit for sale and repairs were made in preparation of selling the property. I also heard the landlord's claim included unpaid rent, loss of rent up until May 2010, furniture purchase and amounts related to other chattels. I refused to consider issues related to furniture payments or other amounts owing for chattels as that does not form part of a tenancy dispute for which I have jurisdiction.

The tenants attempted to raise issues related to damage of personal property removed by the landlords. The landlord attempted to explain that precautions were taken to protect the tenants' possessions. I refused to hear these issues as the tenants had not made an application against the landlord and such issues would be part of a tenant's application against the landlord.

Analysis

My jurisdiction to resolve disputes is limited to amounts related to a tenancy. I find amounts owed for furniture or other chattels that did not form part of the tenancy agreement or the residential property are not issues related to the tenancy and I make no findings with respect to such matters. Rather, this decision pertains to any claims the landlord has made against the tenants for unpaid rent, loss of rent and damages to the rental unit.

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.

A tenancy remains in effect until such time it ends under section 44 of the Act. In this case I heard that rent was unpaid for December 2009. In order for the landlord to have ended the tenancy for unpaid rent, the landlord would have had to serve the tenants with a valid 10 Day Notice to End Tenancy for Unpaid Rent on a day after the rent was due. A 10 Day Notice provides the tenant the opportunity to pay the outstanding rent five days after receiving such a Notice, dispute the Notice, or accept that the tenancy will end on the effective date. The effective date must comply with the Act and an incorrect date is automatically changed to comply with the requirements of the Act.

I found the landlord's testimony changed on two occasions during the hearing when initial testimony was insufficient to establish the landlord's claims. With respect to the 10 Day Notice, the landlord initially testified the 10 Day Notice was issued December 1, 2009 and then changed testimony to say December 2, 2009 after I informed the landlord a 10 Day Notice cannot be issued until the day after the rent is due. However, if the 10 Day Notice had been issued December 2, 2009 an effective date of December 11, 2009 would be less than 10 days later. In the absence of a copy of the 10 Day Notice I find it more likely than not that the 10 Day Notice was issued December 1, 2009 or earlier. Therefore, I find based on the balance of probabilities that the landlord issued an invalid 10 Day Notice; however, the tenants did not dispute the Notice and I find the tenants accepted that their tenancy would end on the effective date of the Notice.

As the parties were informed during the hearing the Act prohibits the landlord from taking possession of the rental unit without a Writ of Possession issued by The Supreme Court of British Columbia. Even if the tenancy has legally ended or the tenant

has damaged the rental unit, if the tenant remains in possession of the rental unit, the landlord still requires a Writ of Possession to regain possession of the rental unit. A landlord does not require a Writ of Possession where the tenant has vacated or abandoned the rental unit.

In order to obtain a Writ of Possession, where the *Residential Tenancy Act* applies, the landlord must first obtain an Order of Possession from the Residential Tenancy Branch. I find that no Order of Possession was granted to the landlord with respect to this tenancy. Therefore, I do not find the landlord had a Writ of Possession to evict the tenants and take possession of the rental unit.

As I heard testimony from both parties that the tenants still had possessions in the rental unit I do not find the tenants had vacated or abandoned the rental unit when the landlord changed the locks.

In light of the above, I find the landlord illegally took possession of the rental unit and ended the tenancy early by changing the locks without the legal authority to do so.

A tenant has until the end of the tenancy to clean and repair damages they may have caused. I find that since the landlord effectively ended the tenancy before the first day it could have legally ended, the landlord's actions precluded the tenants from cleaning and making any repairs to damages they may have caused. Therefore, I do not find the landlord entitled to claim for damages and cleaning against the tenants.

I also find that the tenants are not responsible for any loss of rent after December 2009 since the landlord violated the Act by illegally taking possession of the rental unit in December 2009. I further find the landlord has been sufficiently compensated for unpaid rent for the portion of December 2009 for which the tenants had possession of the rental unit by forfeiture of the security deposit.

Since the tenants authorized the landlord to retain the tenants' security deposit I find the landlord entitled to retain the security deposit.

I do not award the filing fee paid for this application to the landlord.

In summary, the tenants were required to pay rent for the month of December 2009; however, the landlord illegally ended the tenancy in early December 2009 by changing the locks and I have found the forfeiture of the security deposit has sufficiently compensated the landlord for the unpaid rent for December 2009. The remainder of the landlord's claim for loss of rent and damage to the rental unit are dismissed without leave as I found the landlord's actions precluded the tenants from meeting their obligations to clean and repair the rental unit before the tenancy legally ended.

Conclusion

The landlord has been authorized to retain the tenants' security deposit and the remainder of the landlord's claims against the tenants has been 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 25, 2010.

Dispute Resolution Officer