

DECISION

Dispute Codes MNDC, FF

Introduction

This hearing dealt with an application by the tenant for a monetary order. Both parties participated in the conference call hearing.

At the hearing the tenant advised that she had a witness in China who was waiting by the telephone to testify. The tenant submitted a written statement from the witness. The landlord indicated that she was prepared to accept the written statement of the witness and as the landlord indicated no desire to cross-examine the witness, I advised the tenant that it would be unnecessary to telephone her witness and I would accept the witness' written statement as her complete testimony.

Issue to be Decided

Is the tenant entitled to a monetary order as claimed?

Background and Evidence

The following facts are not in dispute. On or about January 6, 2010 the parties entered into a tenancy agreement which was set to commence on February 1. The tenant paid a \$650.00 security deposit and also paid February's rent in the amount of \$1,300.00. At some point in January, the tenant advised the landlord that she was concerned that the suite be thoroughly cleaned as she was pregnant and was concerned about cleanliness. There was some discussion between the parties as to whether the tenant would be permitted to move in earlier than February 1, but she was not granted possession until that date. The tenant did not move into the rental unit and the tenant's security deposit was refunded in full but the landlord retained the \$1,300.00 paid for February's rent. The rental unit was re-rented and a new tenancy began on March 1.

The tenant testified that when she came to the rental unit on February 1 she viewed the rental unit and was not pleased with the cleanliness of the unit. The tenant claimed that there were nail holes in the walls which had not been repaired, there was litter on the carpet, the toilet seat was discoloured and the draperies were missing. The tenant testified that she brought the condition of the unit to the attention of the manager, P.P., and that rather than offering to perform further cleaning, he stated that this was "all they could do" and offered to permit her to cancel the agreement and receive a full refund of her deposit. The tenant testified that she confirmed with P.P. that he meant that she would receive a refund of both the security deposit and the first month's rent. The tenant immediately prepared a written statement indicating that she would receive a full refund of all monies paid and asked P.P. to sign the statement. P.P. refused to sign the statement and the tenant testified that he told her he was not authorized to sign. P.P. made a telephone call in the presence of the tenant and the tenant testified that she could overhear the other party telling P.P. that the tenant would only receive a refund of the rent if the unit was re-rented. The tenant eventually telephoned the police and the tenant testified that when they arrived, they spoke separately to the manager and reported to the tenant that the manager had agreed to refund her money. The tenant testified that she chose to end the tenancy based on P.P.'s representation that she would receive a full refund of both her security deposit and the first month's rent. The tenant further testified that she was aware that the problems in the rental unit could easily be repaired or cleaned by the landlord and that if the landlord had been more friendly, she would have taken the unit. The tenant submitted a statement from a witness who was with her on February 1 in which the witness stated that P.P. had promised a full refund of the rent.

P.P. denied having told the tenant that she would receive a full refund of her rent. P.P. testified that the tenant followed him to his own suite and that she would not leave the suite or permit him to leave so he telephoned the police.

Analysis

There is no dispute that the rental unit could easily have been cleaned and drapes hung in order to meet the tenant's expectations. The tenant acknowledged that she is not asking for a finding that the rental unit was unfit for occupation, as it clearly was suitable for occupation although not cleaned to her standards. The issue before me is whether the landlord made a representation to the tenant that she would be released from her contractual obligation and be given a full refund and if so, whether the landlord is bound by that representation.

As the parties each have very different positions on whether P.P. offered the tenant a refund, it is necessary for me to make a finding of credibility. The following passage from O'Halloran J.'s judgment in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.) provides a guideline for adjudicators to determine credibility, at p. 357:

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 currently 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 this case, the tenant would have me believe that an experienced landlord would, on the day the tenancy was to begin and without knowing whether the unit would be re-rented, offer to fully refund the tenant's money because she was unhappy over several insignificant cleaning issues. I find that a practical and informed person would not consider such an offer to be reasonable or expected in those circumstances. In other words, the tenant's version of events does not accord with reasonable business behaviour or common sense. The fact that P.P. refused to sign the release drawn up by the tenant lends further weight to the argument that P.P. did not make the representation alleged by the tenant.

I find that the tenant has failed to prove on the balance of probabilities that the landlord promised her a full refund.

Conclusion

The tenant's claim is dismissed.

Dated: June 08, 2010
