DECISION

Dispute Codes OPR, OPC, CNR, CNC, MNR, MNSD, MNDC, LRE, RR, FF

Introduction

This hearing dealt with cross applications. The landlord applied for an Order of Possession for unpaid rent and cause; for a Monetary Order for unpaid rent and to retain all or part of the tenant's security deposit; and, to recover the filing fee paid for this application. The tenant applied to cancel Notices to End Tenancy for unpaid rent and cause; for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; for orders setting conditions on the landlord's right to enter the rental unit; authorization to reduce rent for repairs, services or facilities not provided; and, to recover the filing fee paid for this application.

Both parties appeared at the hearing and confirmed service of documents upon them. Both parties were provided the opportunity to be heard and to respond to submissions of the other party. The tenant was assisted by legal counsel during the hearing and in this decision submissions by the tenant or his legal counsel are collectively referred to as submissions of the tenant.

At the commencement of the hearing I determined the tenant had vacated the rental unit. Accordingly, it was no longer necessary to hear portions of both applications. Rather, the hearing proceeded with a view to determine only the amount monetary compensation owed to the parties, if any, and the retention or return of the security deposit, if any.

Issues(s) to be Decided

1. Is the landlord entitled to compensation from the tenant for unpaid rent?

2. Is the tenant entitled to monetary compensation for damage or loss under the Act, regulations or tenancy agreement?
3. Is a security deposit held by the landlord and, if so, should it be returned to the tenant or retained by the landlord?

Background and Evidence

The parties provided undisputed evidence as follows. The tenancy commenced September 1, 2006 and ended June 1, 2010. The tenant was required to pay rent of $1,000.00 on the 1st day of every month. The tenant paid a $500.00 security deposit on October 13, 2006 in cash but the security deposit was applied to rent owed in June and July 2007. The tenant often paid rent in US funds and the landlord would track the exchange credit received by the landlord upon depositing the rent. The tenant would also pay for several months of rent at one time. For 2009 the landlord calculated an exchange credit of $751.50. In March 2010 the tenant gave the landlord three rent cheques: one for $250.00 to pay January 2010 rent and the other two were for $1,000.00 each for February and March 2010 rent. The landlord returned the $250.00 cheque to the tenant. The tenant subsequently provided the landlord with another cheque for $250.00 which the landlord has in his possession and had not cashed as at the date of the hearing.

It was not in dispute that the landlord listed the rental unit for sale February 1, 2010 and on February 16, 2010 issued a letter to terminate the tenancy effective March 17, 2010. The landlord subsequently cancelled the listing contract March 10, 2010 and issued the tenant a Notice to End Tenancy for unpaid rent on March 14, 2010 and a Notice to End Tenancy for cause on March 22, 2010.

Landlord's application

The landlord is seeking to recover $1,000.00 for unpaid rent for January 2010; $120.00 for four returned cheque fees in 2006 and 2007; and, $186.00 to repair the washing machine.

As the landlord acknowledged an exchange credit of $751.50 and had possession of a $250.00 cheque that the tenant confirmed was negotiable, I found the landlord had been sufficiently compensated for January 2010 rent and I informed the landlord he was at liberty to cash the $250.00 cheque in satisfaction of the rent due for January 2010.

The tenant did not dispute that four cheques were returned in 2006 and 2007 but was of the position that the landlord should have raised the issue of return cheque fees back then. The tenant also pointed out that in December 2007 the parties had reached an agreement with respect to compensation for the tenant for a ruptured pipe and that an exchange credit was not given to him at that time. The tenant was of the position that the returned cheque fees would also be resolved by then. The landlord acknowledged that rent was not payable by the tenant for December 2007 as compensation for the ruptured water pipe. The landlord did not dispute that the exchange credit owing to the tenant as of December 2007 was unpaid.

With respect to the washing machine repair the landlord submitted that the washing machine was new in 2006 and that new shocks had to be installed in 2009 because the tenant was overloading the machine. The landlord determined this was the cause based on information provided by the repair technician. The tenant denied overloading the washing machine. The parties were in dispute as to whether the landlord provided the tenant with a copy of the operating manual for the washing machine.

Tenant's application

Ruptured water pipe

It was not in dispute that a water pipe in the kitchen ceiling ruptured in October or November 2007. With respect to the ruptured water pipe the tenant is seeking compensation of $4,000.00 on a declining basis for the months of November 2007 through November 2008. The tenant submitted that repairs were slow and it was not until May or June 2008 that drywall was replaced and light fixtures were not installed until early 2009. The tenant explained that he endured frequent disturbances from construction crews, fans, insulation falling in the kitchen and lack of sufficient lighting.

The landlord submitted that the tenant made accessing the rental unit difficult for the contractors. The landlord explained that both the tenant and contractor were complaining to him about access to the rental unit so the landlord stepped in. The landlord claims he was unaware light fixtures had not been installed so such a long period of time. The tenant disputed the landlord's statement about the light fixtures by explaining that the landlord had been in the rental unit numerous times and would have seen the lack of light fixtures.

Balcony repairs

It was not in dispute that the residential property was undergoing remediation and that the tenant was unable to use the balcony for the months of April through September 2008. The tenant is seeking compensation of $150.00 per month for six months for loss of use of the balcony. The tenant submitted that the balcony is quite large and was one of major attractions to entering into this tenancy.

The landlord was of the position the repairs to the balconies were unavoidable as the entire building was being remediated and the tenant was given notice with respect to the necessary repair work required.

Aggravated damages and other compensation

The tenant submitted that the landlord listed the rental property for sale and that the rental unit was wrongfully entered by realtors and a photographer. The tenant came home to discover doors unlocked and windows open. The tenant asked the landlord to attend showings or provide the names of people accessing the unit but the landlord would not agree to this. The tenant is seeking $500.00 as compensation for wrongful entry.

> The landlord stated that the photographer entered the unit but that the landlord had left a voice mail message for the tenant advising the tenant of the anticipated entry. The landlord acknowledged the tenant did not return the landlord's call and give consent for the entry.

The tenant is seeking $500.00 on the basis the landlord harassed the tenant when the landlord decided to list the property for sale by trying to evict him and avoid paying the tenant compensation. The tenant submitted that the landlord gave the tenant a letter dated February 16, 2010 in an attempt to end the tenancy as of March 17, 2010 with the reason given as the landlord was selling the rental unit. When the tenant requested a proper Notice to End Tenancy the landlord gave the tenant a Notice to End Tenancy for unpaid rent and a Notice to End Tenancy for cause.

> The landlord stated he was unfamiliar with the requirements of the Act with respect to Notices to End Tenancy when he issued the letter of February 16, 2010. The landlord also explained that it was difficult providing realtors with access to the rental unit while the tenant was in possession of the rental unit.

The tenant is seeking $434.04 for cancelling a trip booked on February 15, 2010 set to depart February 23, 2010 due to receiving the landlord's eviction letter.

The landlord claims the tenant could have requested an extended termination date before cancelling his trip. The tenant was of the position the landlord had been speaking aggressively in a previous phone message and did not consider asking for an extension.

The tenant is seeking $500.00 for stress related to coordinating with contractors and realtors during the tenancy. The tenant was of the position that coordinating access is the responsibility of the landlord.

The landlord was of the position the tenant had the ability to schedule access to the rental unit that worked best for the tenant. The landlord also cancelled the sales agreement as of March 10, 2010.

The tenant is seeking $112.40 for an exchange credit calculated for the period between January 2008 and December 2008 that was not received by the tenant.

The landlord claims the tenant told the landlord not to worry about this exchange credit in recognition of the returned cheque fees.

As evidence for the hearing I was provided copies of various written correspondence between the parties, rent receipts, exchange credits, Notices to End Tenancy, the tenancy agreement, bank statements of the landlord, the washing machine repair invoice and a letter from the appliance technician, correspondence from the contractor restoring the rental unit after the water leak, and the listing contract cancellation, among other documents.

Analysis

With respect to a security deposit, the Act prohibits a landlord from requiring a security deposit except at the commencement of a tenancy and must not collect more than one

security deposit in respect of a tenancy agreement. I accept there was a requirement to pay a security deposit at the beginning of the tenancy and payment was subsequently made. However, I also find that the security deposit was applied to rent payable in 2007. The landlord is not permitted to deduct a security deposit from the exchange credit for 2009 as submitted by the landlord. Therefore, I find the tenant had an exchange credit of $751.50 for 2009 and that no security deposit remains in trust.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided in sections 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 or quantum of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

As both parties have made applications, the parties have the burden to establish an entitlement to the amounts claimed with their respective applications. Burden of proof is based on the balance of probabilities which means one version is more likely than another version of events. Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further

evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

I have reviewed and considered the evidence before me and make the following findings.

Landlord's Application

With respect to unpaid rent for January 2010, I find landlord has been sufficiently compensated the rent owed by way of the exchange credit of $751.50 and the tenant's cheque for $250.00. I do not find the landlord entitled to further payment for the month of January 2010.

I find it more likely than not that the parties absolved each other of amounts owed to the other party for compensation, exchange credits and returned cheque fees when the parties agreed that the tenant did not have to pay rent for the month of December 2007. As the returned cheque fees pertain to 2006 and 2007 I am satisfied this charge was extinguished and I do not award the landlord returned cheque fees of $120.00.

I find the landlord provided sufficient evidence to demonstrate the washing machine required repair due to overloading of the machine. Difficulty in awarding the landlord for repair for the washing machine arises because I was provided with disputed testimony as to whether the tenant was provided instructions for the machine. I am inclined to believe the landlord would have left the operating manual at the rental unit since the machine was new at the beginning of the tenancy. However, the letter written by the appliance technician does not sufficiently describe the ordinary useful life of shocks. To award the full cost of replacement shocks to the landlord would place the landlord in a better position than had the damage not occurred since the landlord would have the benefit of new shocks after three years of use. In light of these considerations, I award the landlord one-half of the amount claimed for the washing machine repair or $93.00.

Tenant's application

Ruptured water pipe

It is clear the parties reached an agreement in December 2007 that included compensation to the tenant for the ruptured water pipe; however, the difficulty with the compensation agreement is that this agreement was verbal and its terms are subject to memory of the parties and different interpretation. Based upon the evidence before me and the actions of the parties during the remainder of the tenancy, I find it likely that the parties had reached an agreement in December 2007 and that the tenant would be compensated for the loss of quiet enjoyment related to the ruptured water pipe up to and including the month of December 2007. Therefore, I will only consider awarding the tenant further compensation for the months of January 2008 onwards.

In the tenant's summary of damages the tenant is seeking $500.00 in compensation for the months of January 2008 through April 2008 and $100.00 for May 2008 through November 2008. The contractor submitted that under ordinary circumstances the repair work would be completed in approximately 14 days but that the repair work took until June 2008 due to the tenant denying access to the rental unit. Yet, the tenant claims he was in contact with the contractor many times.

The Act provides that a landlord may obtain access to the rental unit for the purpose of making repairs by giving the tenant a written 24 hour notice. From the contractor's notes it would appear as though the contractor did not communicate with the landlord until March 2008 with respect to gaining access to the rental unit. Up to that point, I accept that the contractor and the tenant were dealing directly with one another. It appears from the contractor's notes that the landlord could not provide access to the contractors until June 2008. It is unclear why the landlord did not post a written 24 hour notice to accomplish the repairs sooner than June 2008.

I find the landlord could have done more to expedite the repair work by posting a written 24 hour Notice of entry; however, since it is the tenant who is seeking compensation for loss of quiet enjoyment it is upon the tenant to show that he did whatever was

reasonable to minimize the damages or loss he suffered. What I find significant is that there is a lack of evidence indicating the tenant made attempts to request the landlord take action to have the repairs made or to enquire as to the nature of the delay. (I find a request of one-half of the monthly rent indicative that the tenant was of the position he suffered a significant loss.) I find it reasonable that if the tenant was suffering a significant loss of quiet enjoyment he would have made such requests of the landlord. Therefore, I find there is a lack of evidence to show that the tenant made every reasonable effort to minimize his damage or loss after December 2007. Since the tenant was compensated by the landlord for the period of time up to December 2007 I make no award for further compensation with respect to the ruptured pipe.

Balcony repairs

Based upon the undisputed evidence before me, I am satisfied the tenant suffered a loss of use and enjoyment of the balcony for six months due to remediation of the building. Policy Guideline 6 provides that a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption in making repairs or completing renovations. While I find that the loss of use of the balcony was no fault of the landlord it remains that the tenant suffered a loss of use of that space and is entitled to compensation. I find the tenant's request for compensation of $150.00 per month to be excessive and I award the tenant $100.00 per month, for a total of $600.00, for loss of use of the balcony.

Wrongful entry

Based upon the undisputed testimony, I find the landlord failed to obtain the tenant's verbal consent or give the tenant proper written notice to enter the rental unit with respect to the photographer gaining access to the unit. Leaving a message for the tenant does not constitute consent or written notice. I accept that the tenant would have been disturbed by this occurrence upon arriving home to find windows and doors open and I award the tenant compensation of $100.00.

I heard there were three or four showings involving realtors and that one realtor walked in without knocking. I did not hear that the showings were scheduled without consent of the tenant. Therefore, I do not find sufficient evidence the landlord breached the Act by failing to obtain consent for the showing. Although the realtor that allegedly entered without knocking should not have done so, I do not find this was anticipated or within the control of the landlord and I do not award the tenant compensation related to showings by realtors.

Exchange credit for 2008

I am satisfied the landlord benefitted from an exchange credit relating to the 2008 year in the amount of $112.40. The tenant asserted he had not received a credit for this amount from the landlord. The landlord was of the position the tenant waived return of this credit as compensation for the four returned cheques. However, since the returned cheques related to 2006 and 2007 and the parties reached an agreement to absolve each other of amounts owing to each other in December 2007, I find it more likely than not that the exchange credit pertaining to 2008 has not been realized by the tenant. I find it is unjust for the landlord to obtain the benefit of the 2007 and 2008 exchange credit towards the returned cheque fees. Therefore, I find the tenant entitled to recover the credit of $112.40.

Stress related to coordinating with contractors and realtors

I find it reasonable that the tenant suffered an inconvenience by trying to schedule access with contractors and realtors but I also find it likely that the tenant wanted control over the times access was granted as I heard the tenant worked from home. Further, I do not find sufficient evidence that the tenant requested the landlord make appointments with contractors or realtors and then notify the tenant. For these reasons I do not award the tenant compensation for stress associated to scheduling access to the rental unit.

Harassment and cancelled trip

Upon review of the February 16, 2010 correspondence from the landlord I find it clear that the landlord wished to regain possession to the rental unit for ease of selling the unit. The letter of February 16, 2010 does not comply with the requirements of the Act. In fact, the Act does not permit a landlord to end a tenancy for purposes of selling a rental unit and the end date must be at the end of the rental month.

Upon consideration of all the evidence before me, it is clear to me that both parties were frustrated by circumstances related to ongoing construction and repairs, late payment of rent, frequent need to gain access to the rental unit and the inconveniences that go along with those issues. Unfortunately, both parties took a view to blame the other party for their frustrations and a relatively long term tenancy ended on a bad note.

I find the landlord breached the Act by attempting to end the tenancy in a manner that did not comply with the Act. The February 16, 2010 letter is not in proper form, the reason given for ending the tenancy is not permitted under the Act and the effective date of the termination does not comply with requirements of the Act. The tenant acted upon the letter by cancelling his trip before making enquiries about his rights as a tenant. Clearly, in February 2010 both parties were unaware of their respective rights and obligations under the Act with respect to ending the tenancy. I am satisfied the tenant incurred a loss as a result of both parties not being familiar with their rights and obligations and I find that the landlord should share in the loss. Therefore, I award the tenant $434.04 for the cost of his cancelled flight and I deny the tenant's claim for harassment.

Monetary Order

In accordance with section 72 of the Act I offset the landlord's award against the amounts awarded the tenant. I find the tenant was more successful in this dispute than the landlord and I award the tenant $50.00 towards the $100.00 filing fee paid by the tenant.

The tenant has been provided a Monetary Order in the net amount of:

Loss of use of balcony	$ 600.00
Wrongful entry	100.00
Exchange credit for 2008	112.40
Landlord's improper notice to end tenancy	434.04
Filing fee	50.00
Less: award to landlord for damage to washing machine	(93.00)
Monetary Order for tenant	$ 1,204.33

The tenant must serve the Monetary Order upon the landlord and may file it in Provincial Court (Small Claims) to enforce as an Order of that court.

Conclusion

The tenant has been provided a Monetary Order in the net amount of $1,204.33 to serve upon the landlord.

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: July 08, 2010.

Dispute Resolution Officer