Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNR, MND, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for a monetary order for unpaid rent, for compensation for a loss of rental income and for damages to the rental unit, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in payment of those amounts.

Issues(s) to be Decided

1. Are there rent arrears and if so, how much?
2. Is the Landlord entitled to compensation for a loss of rental income and if so, how much?
3. Is the Landlord entitled to compensation for damages to the rental unit and if so, how much?
4. Is the Landlord entitled to keep the Tenant's security deposit?

Background and Evidence

This fixed term tenancy started on September 1, 2009 and was to expire on August 31, 2010, however it ended on January 31, 2010 when the Tenant moved out. Rent was $1,300.00 per month payable in advance on the 1st of each month. The Tenant paid a security deposit of $650.00 at the beginning of the tenancy. The Tenant says he also paid a pet deposit of $650.00 which the Landlord denied. The Landlord said the Tenant gave her a cheque for $325.00 in payment of a pet deposit but that it was returned for insufficient funds.

The Landlord admitted that she authorized her friend, K.W. who is a real estate agent with a property management licence, to assist her in finding a tenant for the rental unit because she was living outside of the Province of B.C. but denied that K.W. was acting as her agent. The Landlord admitted that a move in condition inspection report was not done at the beginning of the tenancy with the Tenant but she claimed the rental unit was in good condition with the exception of the carpet which was "not in great shape." The Landlord said at the end of the tenancy, the rental unit carpet was destroyed by the Tenant and had to be removed and replaced with laminate flooring. The Landlord also said that there were holes in the walls and that the unit needed to be repainted. The Landlord further claimed that the Tenant left garbage in the common areas of the rental property and as a result, she incurred expenses of $75.00 to have it removed.

The Landlord said she only discovered that the Tenant moved out of the rental unit after he vacated and that he did not advise her of any problems with noise prior to that time. The Landlord also said that the Tenant put a stop payment on his February 2010 rent cheque. The Landlord admitted that she did not try to re-rent the rental unit once the tenancy ended because, she claimed, it required extensive renovations. The Landlord also admitted that she listed the rental unit it for sale in March 2010 and that it sold in early April 2010. Consequently, the Landlord sought to recover the cost of the damaged carpeting, part of the cost of the replacement laminate, a loss of rental income for February and March and garbage disposal fees.

The Landlord's witness, K.W., gave evidence that when she showed the rental property to the Tenant, she advised him that she did not believe there would be construction in the adjacent vacant lot but that she had not checked with the City of Vancouver so he would have to do so in order to be certain. K.W. also claimed that she was not paid to be the Landlord's agent and only showed the rental unit to the Tenant as a favour to the Landlord. K.W. said she advised the Tenant early in the tenancy that he should deal with the Landlord about any issues that arose. K.W. said that the Tenant did contact the Landlord about issues with improperly dated cheques at the beginning of the tenancy but later contacted her about a microwave and then again in January 2010 about the construction noise. K.W. said she told the Tenant he could move out if he wanted to but that because he had a lease he could be liable for damages for ending it early.

The Tenant claimed that prior to entering into the tenancy agreement, he asked K.W. if there would be any construction taking place in the vacant lot adjacent to the rental unit during the term of the tenancy and she advised him that there would not be. The Tenant claimed that the day he moved in however, construction started. The Tenant said he sent an e-mail to K.W. advising her about this on September 9, 2009. The Tenant said the noise from the construction was tolerable until approximately November 2009 when it became problematic. The Tenant said he was trying to start a home-based business but the noise and vibrations from the construction made the rental unit uninhabitable. The Tenant said that by January 2010, the constant noise was unbearable and as a result on January 22, 2010, he contacted K.W. who advised him that he should move. On January 24, 2010, the Tenant sent K.W. an e-mail advising her that he would be moving out on February 15, 2010 due to the noise from the construction.

The Tenant said that K.W. was aware that he moved out on January 31, 2010 because he left the keys to the rental unit with her. On February 23, 2010, the Tenant said he e-mailed K.W. with his forwarding address and requested the return of his security deposit and pet damage deposit. The Tenant said a few days later K.W. advised him that he

should contact the Landlord directly about the security deposit which he did on March 2, 2010.

The Tenant said that although K.W. knew he was moving out, she did not make any attempt to schedule a move out condition inspection. The Tenant said that the rental unit was in substantially the same condition at the end of the tenancy as it was at the beginning of the tenancy. This evidence was corroborated by the Tenants' witnesses. One of the Tenant's witnesses (S.B.) also claimed that due to an error in dating post-dated rent cheques at the beginning of the tenancy, the Landlord cashed a partial rent cheque dated August 1, 2009 in the amount of $650.00 and that this was applied to the pet deposit.

Analysis

Section 1 of the Act defines a Landlord as "the owner of a rental unit, the owner's agent or ***another person who, on behalf of the landlord permits occupation of the rental unit under a tenancy agreement or exercises powers and performs duties under the Act or tenancy agreement."*** There is nothing in the definition of a Landlord under the Act that says an agent must be remunerated in order to be an agent of the Landlord.

I find that the Landlord's friend, K.W., acted as an agent on behalf of the Landlord and with the authority of the Landlord when she showed the rental unit to the Tenant and exercised her authority to select the Tenant to occupy it. I also find that K.W. did not cease to act as an agent of the Landlord during the tenancy. Although K.W. claimed that she told the Tenant that he had to deal with the Landlord regarding all other issues during the tenancy, I find that the evidence suggests otherwise. In particular, I find that because the Landlord was not physically present in the Province of B.C., she relied on K.W. to deal with the Tenant over certain issues such as forwarding rent cheques to her and replacing a microwave in the rental unit, for example.

The Tenant argued that the Landlord's agent (K.W.) made a material misrepresentation when she advised him at the beginning of the tenancy that there would be no construction activity in the vacant lot adjacent to the rental property, that this was untrue and thereby entitled the Tenant to rescind the tenancy agreement. The Tenant also said that he "probably" would not have entered into the tenancy agreement had he known that construction would occur during the tenancy. K.W. denied that she made the representation alleged and claimed instead that she did not think there would be construction but that he should contact the City of Vancouver to verify if any building permits had been issued. The Landlord and her agent argued that it was unlikely that K.W., a professional realtor and property manager, would have made the representation alleged by the Tenant given that she had no personal knowledge of that property.

Where the evidence of the Landlord and the Tenant differ on this point, I prefer the evidence of the Landlord as I find it unlikely that the Landlord's agent would have advised the Tenant *unequivocally* that there would be no construction. In particular, I am persuaded by K.W.'s evidence that she knew the only way to determine if construction was imminent was to check with the City of Vancouver to see if a building permit application had been made and that she had not done so. I also accept K.W.'s evidence that she advised the Tenant that he would have to contact the City of Vancouver to find out for certain if construction was planned on the vacant lot. Furthermore, in his e-mail dated September 9, 2010 to the Landlord's agent, the Tenant said nothing about any representation by the Landlord's agent but instead wrote, "I was under the impression" construction would not occur. Consequently, I find on a balance of probabilities that the Landlord's agent, K.W., did not make a representation to the Tenant that there would be no construction on the adjacent site during the term of the tenancy and as a result, the Tenant was not entitled to rescind the tenancy agreement.

Section 45(3) of the Act states that if a Tenant gives a Landlord ***written notice*** that there has been a breach of a material term of the tenancy agreement and the Landlord fails to rectify the problem within a reasonable period of time, the Tenant may end the tenancy without further notice to the Landlord. However, even if I were to find that the noise from the construction was a significant interference with the Tenant's right to quiet enjoyment and therefore a breach of a material term of the tenancy agreement, there is no evidence that the Tenant gave the Landlord written notice of a breach of a material term. Although the Tenant sent the Landlord's agent an e-mail on September 9, 2009 advising her that construction had started on the vacant lot and sent a further e-mail on January 24, 2010 stating he was moving out due to the noise, the Tenant did not ask the Landlord or her agent to do anything about the noise or give them any advance notice that he would end the tenancy if it was not rectified. Consequently, I find that the Tenant cannot rely on this section of the Act.

Section 45(2) of the Act says that a tenant of a fixed term tenancy cannot end the tenancy earlier than the date set out in the tenancy agreement as the last day of the tenancy. If a tenant ends a tenancy earlier, they may have to compensate the landlord for a loss of rental income that she incurs as a result. Section 7(2) of the Act states that a party who suffers damages must do whatever is reasonable to minimize their losses. This means that a landlord must try to re-rent a rental unit as soon as possible to minimize a loss of rental income.

I find that the Tenant gave the Landlord's agent written notice on January 24, 2010 that he would likely be ending the tenancy on February 15, 2010 but that instead he moved out on January 31, 2010 and put a stop payment on his rent cheque for February 2010. The Landlord argued that she was entitled (at a minimum) to compensation for February

2010 because the Tenant ended the tenancy agreement early. The Tenant argued that the Landlord's agent knew he was moving at the end of January 2010 and the Landlord did not mitigate her damages because she planned to renovate and sell the rental unit once the tenancy ended.

I find that there is insufficient evidence to conclude that the Landlord or her agent was aware that the Tenant intended to move out at the end of January 2010. The Tenant's written notice stated that he would move out February 15, 2010. The evidence of the Landlord's agent was that the Tenant dropped off the keys at her business office a number of days after he actually moved out. However, I also find that as of March 2010, the Landlord had decided to renovate the rental property for the purposes of selling it and had no intention of re-renting it. Consequently, I find that the Landlord is entitled to a loss of rental income for February 2010 only in the amount of **$1,300.00**.

The Landlord also sought compensation for the cost of new flooring and for garbage removal. However, the evidence of the Tenant and his witnesses was that the carpeting was old and worn at the beginning of the tenancy and the Landlord's agent advised them that the Landlord would be removing it at the end of the tenancy in any event. The Landlord also admitted that the carpeting was "not great", however she argued that it still had some value. The Landlord did not complete a condition inspection report and there is no other evidence to corroborate her evidence as to the condition of the carpet. Consequently, I find that there is insufficient evidence to support this part of the Landlord's claim and it is dismissed without leave to reapply.

The Landlord claimed that the Tenant left garbage in the hallway rental property and garage at the end of the tenancy which the Tenant denied. The Landlord admitted that she did not do a move out condition inspection report at the end of the tenancy but relied on photographs purporting to show the alleged garbage. However, the Landlord did not provide a copy of these photographs to the Tenant and therefore there was no way for him to respond to that evidence at the hearing. Consequently, the Landlord's photographs are excluded from evidence and as a result, I find that there is insufficient evidence to support this part of her claim and it is dismissed without leave to reapply.

The Tenant claimed that he paid a pet deposit of $650.00 which was corroborated by his witness and co-tenant (S.B.). The Landlord denied that a pet deposit was paid. Neither party provided any documentary evidence in support of their allegations. I find that the weight of the evidence suggests that a pet deposit of $650.00 was paid. I make this finding based also on the evidence of the Landlord's witness who corroborated the Tenant's evidence that there were problems with the date on the Tenant's cheques at the beginning of the tenancy.

The Tenant claimed that he was entitled to the return of his security deposit because the Landlord failed to do a move in or a move out condition inspection report. However, sections 24(2) and 36(2) of the Act state that a Landlord may not make a claim against a security deposit or pet damage deposit ***for damages to the rental unit*** if the Landlord has not completed a condition inspection report. The Act does not prohibit the Landlord from making a claim against a pet deposit and security deposit for unpaid rent or a loss of rental income. Consequently, I find that the Landlord is entitled to keep the Tenant's security deposit and pet deposit in payment of the loss of rental income award.

As the Landlord has only been partially successful in this matter, I find that it is not an appropriate case to order the Tenant to reimburse her for the $50.00 filing fee for this proceeding and that part of the Landlord's claim is dismissed without leave to reapply.

Conclusion

I order the Landlord pursuant to s. 38(4), s. 62(3) and s. 72 of the Act to keep the Tenant's security deposit and pet damage deposit in full satisfaction of her loss of rental income claim. The balance of the Landlord's application is 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: August 11, 2010.

Dispute Resolution Officer