Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

CNR, MNR, OLC, RP, PSF, LRE, RR, FF

Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for unpaid rent and to recover the fee for filing this Application for Dispute Resolution.

The Tenant filed an Application for Dispute Resolution, in which the Tenant applied to set aside a Notice to End Tenancy for Unpaid Rent or Utilities; for an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act), Regulation*, or tenancy agreement; for an Order requiring the Landlord to make repairs; for an Order requiring the Landlord to provide services or facilities required by law; for an Order suspending or setting conditions on the Landlord's right to enter the rental unit; and for authorization to reduce rent for repairs, services, or facilities agreed upon but no provided. It is apparent on the Application for Dispute Resolution that the Tenant's are claiming compensation, in the amount of $500.00, although the Application for Dispute Resolution does not clearly articulate the reason for the monetary claim.

At the hearing on October 19, 2010 the Tenant withdrew the application to set aside a Notice to End Tenancy for Unpaid Rent or Utilities; for an Order requiring the Landlord to comply with the *Act, Regulation*, or tenancy agreement; for an Order requiring the Landlord to make repairs; for an Order requiring the Landlord to provide services or facilities required by law; and for an Order suspending or setting conditions on the Landlord's right to enter the rental unit, as the rental unit has been vacated.

On October 08, 2010 the Tenant submitted a package of evidence to the Residential Tenancy Branch, which included a submission that was prepared by the law student assisting the Tenants. On the last page of the submission that law student indicated that the Tenants were originally seeking $270.00, which represents the return of their security deposit and $30.00 for the loss of facilities and services. On page eight of the law student's submission the student indicated that the Tenants are seeking $15.00 for being without heat for one month and $15.00 for being without television for one month, for a total of $30.00.

The Law Student stated that on October 08, 2010 she faxed the same package that was submitted to the Residential Tenancy Branch on October 08, 2010 to the Landlord. The Agent for the Landlord stated that she located the evidence package at her office on October 14, 2010 when she returned to work. I find that the information included in this submission the Landlord with details of the monetary claim made in the Tenant's original Application for Dispute Resolution.

On page nine of the Law Student's submission she declared that the Tenant's are also seeking compensation, in the amount of $1,000.00, for pain and suffering and to recover the cost of filing the Application for Dispute Resolution. Apart from the reference in the evidence package to the additional claims, there is no indication that the Tenants amended the Application for Dispute Resolution itself.

At the original hearing I advised the Tenant that I was not permitting the Tenant to amend the application to include a claim for compensation, in the amount of $1,000.00, for pain and suffering and to recover the cost of filing the Application for Dispute Resolution. I based this decision on the fact that although the Tenant made reference to the additional monetary claims in the evidence package the Tenant did not clearly advise the Landlord of the amendment by physically amending the Application for Dispute Resolution and serving an amended copy of the Application for Dispute Resolution on the Landlord, as is required by rule 2.5 of the Residential Tenancy Branch Rules of Procedure. In my view simply making reference to additional claims in a written submission is not adequate notice of an amendment.

There was insufficient time to conclude the hearing on October 19, 2010. Once it became apparent that the hearing would be reconvened at a later date the parties were advised that I had reconsidered my decision to refuse the amendments proposed by the Tenant. Given that it was necessary to reconvene the hearing at a later date, I advised both parties that I will allow the Tenant to amend their Application for Dispute Resolution to include a claim for compensation, in the amount of $1,000.00, for pain and suffering and to recover the cost of filing the Application for Dispute Resolution. I determined that allowing the amendment would not unduly prejudice the Landlord as the Landlord now has significant time to prepare a response to the Tenant's claims.

Both parties were represented at both hearings. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided

The issues to be decided in relation to the Landlord's Application for Dispute Resolution are whether the Landlord is entitled to compensation for loss of revenue related to a premature end to this fixed term tenancy and to recover the filing fee for the cost of this Application for Dispute Resolution.

The issues to be decided in relation to the Tenant's Application for Dispute Resolution are whether the Tenant is entitled to the return of $270.00 paid at the beginning of this tenancy; $15.00 in compensation for being without heat in the rental unit for approximately one month; $15.00 in compensation for being without television in the rental unit for approximately one month; $1,000.00 in compensation for pain and suffering; and to recover the filing fee for the cost of this Application for Dispute Resolution.

Background and Evidence

The undisputed evidence is that the Landlord and the Tenant entered into a fixed term tenancy agreement for a period of one year; that the tenancy agreement was written in Chinese, that that the tenancy agreement declares that the Tenants moved to the rental unit on December 16, 2010; that the tenancy agreement declares that rent will be $540.00; that the tenancy agreement declares that rent is due on the first day of each month; that the tenancy agreement declares that the Tenants must pay a security deposit of $250.00; and that the parties understood that the Tenants would have to pay a portion of the utilities, which would be calculated by dividing the utility charges by the number of people occupying the residential complex.

The Landlord and the Tenant do not agree on the date the tenancy started.

The Landlord contends that the tenancy began on December 16, 2009, for which the Tenants were required to pay pro-rated rent of $270.00. The Landlord argues that the start date is clearly defined by the tenancy agreement.

The Tenant contends that the written tenancy agreement does not accurately reflect the tenancy; that the parties entered into the tenancy agreement on December 16, 2009; and that they did not move to the rental unit until January 01, 2010.

The Landlord and the Tenant agree that in May of 2010 the Landlord provided the Tenant with a receipt, dated December 16, 2010, that declares the Tenants paid a damage deposit of $250.00.

The Landlord and the Tenant agree that in May of 2010 the Landlord also provided the Tenant with a receipt, dated December 16, 2010, that declares the Tenants paid an additional $270.00. This receipt indicates that the payment was for one-half of rent for December of 2009.

The Landlord contends that the receipt for $270.00 corroborates her claim that the tenancy began on December 16, 2010. The Tenant contends that the receipt was written many months after the payment was made and that it does not accurately reflect the purpose of the payment. The Tenant contends this receipt was a "reservation fee" which they were required to pay to secure the residence for January 01, 2010.

The Landlord and the Tenant agree that the $250.00 security deposit that was paid by the Tenant on December 16, 2009 was applied to rent that was due for September of 2010. The Tenant is now seeking to recover the $270.00 that was also paid on December 16, 2009, which the Tenant contends was a reservation fee.

The Landlord and the Tenant agree that the Landlord normally makes arrangements to meet with the Tenant on the first day of each month, at which time the rent is paid in cash. The Landlord and the Tenant agree that the Landlord did not arrange a meeting until September 04, 2010.

The Landlord contends that when the parties met on September 04, 2010 the Tenants advised her that they would not pay their rent until she provided them with a receipt for the payment. The Landlord refused to provide a receipt for rent for September until she physically received the rent for that month. The Tenant stated that they had the money for rent for September when they met on September 04, 2010 but they refused to give it to the Landlord until she provided them with a receipt for the payment.

The Landlord stated that a Notice to End Tenancy, dated September 05, 2010, was posted on the door of the rental unit on September 05, 2010. The Tenant acknowledged locating this Notice on the door on, or about, September 05, 2010.

The Landlord stated that a Notice to End Tenancy, dated September 14, 2010, was personally served to the Tenant on September 14, 2010. The Tenant acknowledged service of this Notice on September 14, 2010.

The Landlord and the Tenant agreed that the Tenant moved out of the rental unit on September 20, 2010. The Landlord is seeking compensation, in the amount of $540.00, for loss of rental revenue from the month of October, due to the fact that the Tenant ended this tenancy before the end of the fixed term tenancy. The Landlord is seeking compensation, in the amount of $13.64, for utility fees that would have been collected if the tenancy had continued in October.

The Agent for the Landlord stated that the rental unit is still vacant. She stated that the Landlord attempted to rent the rental unit by placing a notice on the bulletin board at the community centre on October 01, 2010. She stated that the Landlord did not make efforts to find new tenants prior to October 01, 2010 because the manner in which this tenancy ended had been extremely stressful.

The Law Student argued that the Landlord should not be entitled to compensation for loss of revenue as the Landlord ended the fixed term tenancy when she served the Tenant with a Ten Day Notice to End Tenancy for Unpaid Rent.

Analysis

After considering the conflicting positions taken by the opposing parties, I find that this tenancy began on December 16, 2010. I favor the Landlord's position over the Tenant's position in this regard, as the Landlord's position is supported by the written tenancy agreement.

The Landlord and the Tenant agree that the tenancy agreement clearly stipulates that the Tenant moved to the rental unit on December 16, 2010. Generally a written document is evidence of the terms of an agreement between two parties unless one of the parties has a preponderance of evidence to the contrary. As the Tenant provided no evidence to corroborate their testimony that the start date outlined in the tenancy agreement is inaccurate or to refute the Landlord's testimony that the start date outlined in the tenancy agreement is accurate, I find that the written document is the most reliable evidence.

After considering the conflicting positions taken by the opposing parties, I find that the $270.00 that the Tenants paid on December 16, 2009 represented a rent payment for the period between December 16, 2009 and December 31, 2009 and was not, as the Tenant contends, a "reservation fee".

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

> *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 current 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 the circumstances before me, I find the Landlord's version of events regarding the payment of $270.00 in rent on December 16, 2009 to be highly probable, given that the I have determined that the tenancy began on December 16, 2009; that rent would normally be paid at the beginning of the tenancy; and that $270.00 is the equivalent of one half of one month's rent for this rental unit.

I find that the Tenant's contention that the $270.00 was a "reservation fee" to be significantly less plausible. In reaching this conclusion I was influenced, in part, by the absence of any reference to this payment in a tenancy agreement which does specify that a security deposit is required.

As I have found that the $270.00 that was paid on December 16, 2010 was paid for rent for that month, I dismiss the Tenant's application for the return of this payment.

Based on the Tenant's admission that they would not provide the Landlord with the rent for September until they physically received a receipt for the rent payment, I find that the Tenant did not pay rent for September of 2010 when the Landlord requested it on September 04, 2010. I find that the Tenant was not justified in withholding the rent until they were provided with a receipt for the rent. Section 26(2) of the *Act* stipulates that a landlord must provide a receipt for rent paid in cash. This does not compel the Landlord to provide a receipt until after the payment is made. As receipts are typically provided after a payment is made, I find that it was reasonable for the Landlord to withhold the receipt until she had physically received the payment.

In the event that the Tenant believed that the Landlord would not provide a receipt once the rent payment was made and they were concerned about their ability to prove that rent had been paid, the Tenant had the ability to choose another payment option, such as a cheque or money order, or to have the payment witnessed by a third party. They did not, in my view, have the right to withhold the rent, as providing a receipt to a party prior to receiving payment would have placed the Landlord in significant jeopardy.

While I accept that the Landlord served the Tenant with a Notice to End Tenancy for Unpaid Rent, I find that it was the Tenant's failure to pay rent for September that initiated the end of this fixed term tenancy. I find that the Tenant did not comply with section 45(2) of the *Act* when the Tenant, by failing to pay rent that is due, caused this fixed term tenancy to end on a date that was earlier than the end date specified in the tenancy agreement. I therefore find that the Tenant must compensate the Landlord for any losses the Landlord experienced as a result of the Tenant's non-compliance with the *Act*.

Section 7(2) of the *Act* stipulates, in part, that a landlord who claims compensation for damage or loss that results from a tenant's non-compliance with the *Act*, the regulations, or a tenancy agreement, must do whatever is reasonable to minimize the damage or loss. In these circumstances, I find that the Landlord did not take reasonable steps to minimize her loss of revenue.

In determining that the Landlord did not take reasonable steps to minimize her loss, I was heavily influenced by the Landlord's evidence that she did not advertise the rental unit until October 01, 2010. As the rental unit was vacated on September 20, 2010, I find that the Landlord had the opportunity to advertise the rental unit on September 20, 2010. I find that the delay in advertising had a direct impact on the loss of revenue experienced by the Landlord, as it would be extremely difficult to find a new tenant for October 01, 2010 when the rental unit was not advertised until that date.

In determining that the Landlord did not take reasonable steps to minimize her loss, I was further influenced by the Landlord's evidence that she advertised the rental unit by placing a notice on a community bulletin board. I find that the it would have been reasonable to advertise the rental unit on a popular website or in a local newspaper, either in addition to, or in lieu of, placing an add on the bulletin board. I find that the method of advertising has likely contributed to the Landlord's failure to find new tenants.

As I have determined that the Landlord did not properly mitigate her losses, I dismiss the Landlord's application for loss of revenue.

Conclusion

As the Landlord has failed to establish that she is entitled to compensation for loss of revenue, I dismiss the Landlords application to recover the fee for filing this Application for Dispute Resolution.

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: October 20, 2010.

Dispute Resolution Officer