

DECISION

Dispute Codes MNDC, MNR, FF

Introduction

This hearing dealt with applications by the landlord and the tenants pursuant to the *Residential Tenancy Act* (the *Act*). The landlord applied for a monetary Order of \$600.00 pursuant to section 67 of the *Act* for unpaid rent. The tenants applied for a monetary Order of \$1,900.00 pursuant to sections 67 and 51(1) of the *Act* for an amount equivalent to one month's rent as they received a notice to end tenancy for the landlord's use of the property pursuant to section 49 of the *Act*. Both parties asked to recover their filing fees from the other party pursuant to section 72 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenants testified that they sent the landlord a copy of their application for dispute resolution hearing package and evidence they had assembled to that date by registered mail on July 7, 2010. They provided Canada Post Tracking Numbers to confirm that mailing and the landlord confirmed having received this registered mail. The landlord testified that he handed the tenants a 2 Month Notice to End Tenancy for Landlord Use of the Property on April 27, 2010, as he was selling the property to a new owner who planned to live in the rental unit. This notice required the tenants to vacate by June 30, 2010. The landlord testified that he sent the tenants a copy of his application for dispute resolution hearing package by registered mail on or about August 16, 2010. The tenants confirmed receiving this package. I am satisfied that the parties served one another with their respective applications and notices in accordance with the *Act*.

The landlord said that he had sent a copy of the tenants' May 1, 2010 rent cheque to the Residential Tenancy Branch and the tenants by mail. Neither the Residential Tenancy Branch nor the tenants had received this evidence. However, as the tenants did not dispute that they paid \$1,750.00 in rent for May 2010, I proceeded with the hearing as this evidence was not in dispute.

Issues(s) to be Decided

Are the tenants entitled to a monetary award for the equivalent of one month's rent in accordance with section 51(1) of the *Act*? Is the landlord entitled to a monetary award for unpaid rent? Are either of the parties entitled to recover the filing fees for their applications?

Background and Evidence

This tenancy commenced by way of a one-year fixed term tenancy agreement on July 1, 2008. At the expiration of the first year of this tenancy, the tenancy converted to a periodic tenancy. Monthly rent was set at \$1,900.00 according to the tenancy agreement, payable on the first of each month. A security deposit of \$950.00 and a pet damage deposit of \$300.00 were paid by the tenants at the commencement of this tenancy. The landlord returned these deposits on June 15, 2010.

The tenants entered written evidence of a May 14, 2010 notice to end tenancy they said that they handed to the landlord's wife on May 17, 2010 when the landlord was not home. In this notice, they advised the landlord that they would be vacating the rental unit on May 31, 2010. They also entered into evidence an undated document outlining the details of their dispute in which they maintained that the landlord refused to issue them one month's compensation for the two month notice he had provided to them for landlord use of the property. They maintained in this document and in sworn oral testimony that the male tenant met with the landlord on May 31, 2010 to conduct a walk through the rental unit and to give him the keys to the rental unit.

The landlord testified that the tenants never provided the May 14, 2010 notice advising him that they were leaving the rental unit earlier than the June 30, 2010 deadline he had provided to them in his notice to end tenancy. He said that he did not know that they were leaving at the end of May and denied having made arrangements to conduct an inspection with them on May 31, 2010. He testified that he did not know they had left until June and that they did not return their keys to him, although the tenants did return the keys at some point in June.

The landlord's application for a monetary award was for the tenants' withholding of \$150.00 from their rent for four months in 2010. The tenants agreed that they paid \$1,750.00 per month in rent as of March 2010, as they said that they had entered into an oral agreement with the landlord to reduce their rent to that amount. The landlord denied having made any such agreement.

Analysis

Given the conflicting testimony regarding the end to this tenancy and the basis for the tenants' reduction in their monthly rental payments, much of the consideration of these applications hinge on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

"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 addition to the manner and tone (demeanour) of the witness' evidence, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

Both tenant's demeanour during the hearing has convinced me of their credibility. They answered all questions asked in a calm and candid manner, and never wavered in their version of what happened. They also made some important admissions, including the admission that they paid \$1,750.00 in rent from March 2010 until May 2010, one month earlier than the landlord was claiming, which suggests that they were being truthful. They also offered to produce witnesses, including the person who purchased the property and took occupancy of the property after they vacated the premises. They said

that their former next door neighbor could also attest to the fact that they met with the landlord on May 31, 2010, the day they claim to have vacated the property.

The landlord's evidence, on the other hand, was not credible. He provided conflicting statements and seemed uncertain of the details surrounding the end to this tenancy. When questioned regarding apparent inconsistencies or deficiencies in his oral testimony, he provided little reassurance that his evidence was accurate. Early in the hearing, he agreed that he had received the tenants' evidence package included with their application for dispute resolution. Later, he maintained that he had not received those portions of the tenants' evidence package that seemed damaging to his case. Similarly, the circumstances surrounding his return of the tenants' security deposit seem far more consistent with the tenants' account of the end of this tenancy than that entered into evidence by the landlord. At one point, the landlord said that he did not know that the tenants had vacated the premises until mid-June 2010 and that he was expecting them to vacate the premises in accordance with his original notice to end tenancy by June 30, 2010. However, he returned the tenants' security and pet damage deposits in their entirety on June 15, 2010.

The tenants submitted a document in which they described how they provided their written notice to end tenancy to the landlord by giving it to the landlord's wife on May 17, 2010. Knowing that the delivery of this document was critical to this matter, he did not provide any written or oral evidence from his wife regarding this matter. Rather, he asked that I accept his oral testimony that he never received the tenants' notice.

The landlord's credibility also came into question with respect to his application for a monetary award of \$150.00 per month for the tenants' underpayment of their rent for a four month period. His initial application stated that the tenants did not pay the required \$1,900.00 monthly rent from April until June 2010, a three month and not a four month period. At the hearing, he testified that he was seeking \$150.00 in unpaid rent from April until July 2010. However, he later admitted that the tenants could not have underpaid their rent by \$150.00 per month for June or July 2010 because they did not pay any rent for these months. It was left to the tenants to clarify this matter when they

admitted that they commenced paying \$1,750.00 in monthly rent in March 2010 and that any claim for underpaid rent would have applied from March 2010 until the end of this tenancy.

Tenants' Application

The following portions of sections 50 and 51 of the Act apply to the tenants' application for a monetary award of the equivalent of one month's rent:

Tenant may end tenancy early following notice under certain sections

50 (1) *If a landlord gives a tenant notice to end a periodic tenancy under section 49 [landlord's use of property]..., the tenant may end the tenancy early by*

(a) giving the landlord at least 10 days' written notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice, and

(b) paying the landlord, on the date the tenant's notice is given, the proportion of the rent due to the effective date of the tenant's notice, unless subsection (2) applies.

(2) If the tenant paid rent before giving a notice under subsection (1), on receiving the tenant's notice, the landlord must refund any rent paid for a period after the effective date of the tenant's notice.

(3) A notice under this section does not affect the tenant's right to compensation under section 51 [tenant's compensation: section 49 notice].

Tenant's compensation: section 49 notice

51 (1) *A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.*

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2) If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

The parties provided conflicting evidence and oral testimony regarding whether the tenants provided notice to the landlord pursuant to section 50 of the *Act* of their intention to end the tenancy by May 31, 2010. Both parties agreed that the tenants' last rent payment was in the amount of \$1,750.00 for May 2010. The landlord testified that he did not charge the tenants rent for June 2010 in order to comply with the one month rental requirement of section 51(1) of the *Act*. The tenants said that they paid rent for May 2010 and vacated the premises in accordance with the *Act* before June 1, 2010.

The sworn testimony of the tenants and the landlord, combined with the other evidence, has persuaded me on the balance of probabilities that the tenants gave this notice as they maintain on May 17, 2010. They did so in accordance with subsection 50(1)(a) of the *Act* and as such are entitled to a monetary award equivalent to one month's rent. I find that this tenancy ended in accordance with section 50 of the *Act* on May 31, 2010. As such, I find that the landlord has not complied with the requirements of section 51(1) of the *Act*. I grant the tenants a monetary Order in the amount of \$1,750.00, an amount equivalent to their most recent monthly rent payment for this tenancy.

Landlord's Application

As noted above, there were inconsistencies in the landlord's application and the oral testimony he provided with respect to his claim for unpaid rent. Based on the evidence presented, the landlord's claim of \$600.00 in unpaid rent for four months is actually a claim for three months unpaid rent of \$450.00, from March until May 2010.

I find that the landlord failed to take any form of action regarding the tenant's withholding of \$150.00 from their rent during this tenancy. The landlord did not make any attempt to retain a portion of the tenants' security deposit at the end of this tenancy. The landlord failed to avail himself of these opportunities to take action to recover the alleged unpaid rent until such time as he received the tenants' application for a

monetary Order. This evidence and my assessment of the credibility of the oral testimony leads me to find that on a balance of probabilities it is more likely than not that the landlord and the tenants entered into an oral agreement whereby the tenants could reduce their monthly rent from \$1,900.00 to \$1,750.00 as of March 2010. I dismiss the landlord's application for a monetary Order.

Since the tenants have been successful in their application and the landlord has not, I allow only the tenants' application to recover their \$50.00 filing fee from the landlord as part of the attached monetary Order. I dismiss the landlord's similar application.

Conclusion

I issue a monetary Order in the amount of \$1,800.00 in the tenants' favour. I dismiss the landlord's applications for a monetary Order and recovery of his filing fee.

The tenants are provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.