Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNSD, MNDC, and FF

Introduction

This hearing was convened in response to an Application for Dispute Resolution, in which the Tenant applied for the return of the security deposit, a monetary Order for money owed or compensation for damage or loss, and to recover the filing fee from the Landlord for the cost of filing this application.

Both parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present relevant oral evidence, to ask relevant questions, and to make relevant submissions to me.

With the consent of both parties, the Application for Dispute Resolution was amended to reflect the correct spelling of the Landlord's name.

Issue(s) to be Decided

The issue to be decided is whether the Tenant is entitled to the return of the security deposit, the return of rent paid for June of 2010, and to recover the cost of filing this Application for Dispute Resolution.

Background and Evidence

The Landlord and the Tenant agree that this tenancy began on May 10, 2010; that there was a written tenancy agreement; and that the Tenant was required to pay monthly rent of $1,300.00 on the tenth day of each month.

The Tenant contends that a security deposit of $1,000.00 was paid, in cash, on May 06, 2010 or May 07, 2010. The Tenant contends that he gave the Landlord a cheque, in the amount of $1,600.00, on May 11, 2010, which represented a security deposit of $300.00 and a rent payment of $1,300.00 for May of 2010.

The Landlord denied receiving a cash payment of $1,000.00. He stated that he received a cheque, in the amount of $1,600.00, which represented a security deposit of a rent payment of $1,300.00 for May of 2010 and $300.00 fee. He stated that the

$300.00 fee was, in part, because he loaned the Tenant his car to assist with moving and he collected a fee in case the Tenant did not leave the house clean at the end of the tenancy. The Landlord could not recall how much the Tenant agreed to pay for the use of the car but he estimated it was approximately $100.00.

The Tenant agreed that the Landlord's car was used to move the Tenant's property but the Tenant contends that the use of the car was a favour and that there was no agreement that the Tenant would pay for the use of the car.

The Landlord and the Tenant agree that this tenancy ended on June 13, 2010; that the Tenant did not authorize the Landlord to retain the security deposit; that the Landlord did not return any portion of the security deposit; that the Landlord did not file an Application for Dispute Resolution claiming against the security deposit; and that the Tenant provided the Landlord with a forwarding address for the Tenant, in writing, on June 16, 2010.

The Tenant contends that the Tenant had a dispute with the Landlord on June 10, 2010, at which time the Landlord told the Tenant she could move immediately and that she would not have to pay rent. The Tenant submitted an unsigned letter from a witness, in which the author declared that she overheard the Landlord tell the Tenant he would not charge her if she moved immediately.

The Landlord acknowledged the parties had a disagreement sometime prior to June 10, 2010 but he denies telling her to leave during that argument and he denies ever telling the Tenant that she could leave immediately without paying rent. He stated that the Tenant phoned him on June 13, 2010 and advised him that she was leaving.

Analysis

There is a general legal principle that places the burden of proving a fact on the person who is claiming compensation, not on respondent to the claim. In these circumstances, the burden of proof rests with the Tenant.

I find that the Tenant has submitted insufficient evidence to show that the Tenant paid a security deposit of $1,000.00 at any point in this tenancy. In reaching this conclusion, I was strongly influenced by the absence of evidence that corroborates the Tenant's statement that $1,000.00 was paid or that refutes the Landlord's statement that it was not paid. On this basis, I dismiss the Tenant's application to recover this payment.

The *Act* defines a "security deposit" as money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property. Based on the Landlord's testimony that part of the $300.00 payment was in case the Tenant did not leave the house clean at the end of the tenancy, I find that this payment represented a security deposit.

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.*

I favor the testimony of the Tenant, who stated that the car loan was a favor for which money was not exchanged, over the testimony of the Landlord, who stated that part of the $300.00 payment was for the use of his car. I find the Tenant's version of events more probable, given the Landlord could not recall how much the Tenant agreed to pay for the use of the car. On this basis, I find that the entire $300.00 must be considered a security deposit.

The evidence shows that the Landlord did not return any portion of the $300.00 security deposit; that the Tenant did not authorize the Landlord to retain any portion of the $300.00 security deposit; that the Landlord did not file an Application for Dispute Resolution claiming against the deposit; and that the Landlord did not have authorization to retain any portion of it.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit plus interest or make an application for dispute resolution claiming against the deposits. In the circumstances before me, I find that the Landlord failed to comply with section 38(1), as the Landlord has not repaid the $300.00 security deposit or filed an Application for Dispute Resolution.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1), the Landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(1) of the *Act,* I find that the Landlord must pay the Tenant double the security deposit that was paid.

Section 44(1)(a) of the *Act* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act.* The evidence shows that neither party gave proper notice to end this tenancy in accordance with these sections and I therefore find that the tenancy did not end pursuant to section 44(1)(a) of the *Act.*

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. As there is no evidence that this was a

fixed term tenancy, I find that the tenancy did not end pursuant to section 44(1)(b).

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. As there is no evidence that the parties agreed in writing to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(c) of the *Act.*

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. I find that this tenancy ended when the Tenant abandoned the rental unit.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. As there is no evidence that this tenancy agreement was frustrated, I find that the tenancy did not end pursuant to section 44(1)(e) of the *Act.*

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act.*

I find that the Tenant failed to comply with section 45 of the *Act* when she failed to provide the Landlord with notice of her intent to end the tenancy on a date that is not earlier than one month after the date the Landlord received the notice and is the day before the date that rent is due. As the Tenant had not properly ended the tenancy prior to June 10, 2010, I find that she was obligated to pay all of the rent that was due on June 10, 2010, pursuant to section 26 of the *Act*. On this basis, I find that the Tenant is not entitled to a rent refund for the rent that was paid for the period between June 10, 2010 and July 09, 2010.

I find that the Tenant's Application for Dispute Resolution has merit and that the Tenant is entitled to recover the fee for filing the Application for Dispute Resolution.

Conclusion

I find that the Tenant has established a monetary claim of $650.00, which is comprised of double the $300.00 security deposit and $50.00 as compensation for the cost of filing this Application for Dispute Resolution, and I am issuing a monetary Order in that amount. In the event that the Landlord does not voluntarily comply with this Order, it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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: November 23, 2010.

Dispute Resolution Officer