

Decision

Dispute Codes:

MNDC Money Owed or Compensation for Damage or Loss

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act stemming from an unlawful eviction by the landlord.

The tenant appeared and gave affirmed testimony.

The tenant testified that the landlord was personally served by the tenant on the afternoon of July 16, 2010. I accept that the documents were served according to the Act. Although served with the Application for Dispute Resolution and Notice of Hearing, the landlord did not appear.

Preliminary Matter

A previous hearing was held on cross applications by the tenant and the landlord on July 8, 2010 in which the tenant was seeking the return of his security deposit and the landlord sought, and was granted, a monetary order for rental arrears and the right to retain the security deposit. The possibility that a prior finding or decision that may have affected my jurisdiction over the matter before me was explored.

On May 15, 2010, prior to the first hearing, the tenancy ended and according to the tenant landlord had allegedly taken physical possession of the rental unit against the tenant's will and removed all of the tenant's possessions to an unsecure area in the parking lot. During the original hearing that was held on July 8, 2010, the tenant had requested to amend his cross application to include a monetary claim for damages caused by the landlord's actions in evicting him without obtaining a writ from the Court or even an Order of Possession. However, the dispute resolution officer declined to allow the tenant's request for an amendment to hear this monetary claim which was not part of the tenant's original application. Therefore, it is clear that no previous findings were made in regards to the merits of the tenant's claims for the damages in this case and I find that the issue of damages, had not already been determined. Accordingly, I

found that I did have the authority to hear and consider the tenant's monetary claim for damages, despite the fact that there was an earlier hearing on different matters relating to this tenancy.

Issue(s) to be Decided

The tenant was seeking to receive a monetary order for damages and loss allegedly caused by the landlord taking possession of the unit without first obtaining a writ of possession from the Supreme Court nor even an order of possession under the Residential Tenancy Act. The issues to be determined based on the evidence is whether the tenant is entitled to monetary compensation under section 67 of the *Act* for damages or loss.

The burden of proof is on the applicant.

Background and Evidence

The tenant testified that the tenancy began on April 1, 2010 and the rent was \$780.00. the tenant testified that after issuing a Ten-Day Notice for Unpaid Rent, the tenancy was abruptly terminated by the landlord on May 15, 2010 when the landlord removed the tenant's possessions. .

The tenant submitted into evidence written testimony, witness statements, correspondence, including a letter to police and a list of items that were missing from his household effects and their replacement value. Although the landlord did not appear, a written statement from the landlord was in evidence stating that the tenant had removed his own furniture and possessions and made the decision to keep them in the parking lot.

The tenant testified that after the landlord had served him with the Ten Day Notice to End Tenancy for Unpaid Rent, the landlord and another person, apparently a resident in the same complex, then physically forced the tenant to vacate the unit by removing all of the tenant's possessions which were then piled in a big heap in the parking area. The tenant testified that the landlord's action violated the *Act*.

The tenant testified that the landlord's failure to return the security deposit made it impossible for him to find another place or rent storage on short notice and the tenant resorted to living in the parking area with his possessions. The tenant testified that he was not able to remain on guard around the clock for twenty-four hours per day and seven days a week. Therefore, while he was away looking for work and tending to his survival, his possessions were exposed to theft. The tenant stated he discovered that the landlord had told at least two other residents in the complex that the tenant's valuable property was available for the taking.

The tenant testified that because he was unable to protect his possessions, many items went missing and this loss stemmed directly from the landlord's violation of the Act. The tenant is claiming compensation in the amount of \$5,773.00 representing the replacement cost of all of the missing belongings listed in his evidence. The tenant testified that the amounts listed reflected the retail costs of the items and this data was compiled from memory. The tenant testified that he could not locate receipts for any of the items listed.

The tenant was also claiming compensation for \$200.00 cost of bus fare to the Residential Tenancy Branch and to and from free meal locations, \$300.00 moving costs and \$250.00 storage costs that the tenant alleges occurred because of the landlord's failure to follow the Act in terminating the tenancy.

Analysis

In regard to an Applicant's right to claim damages from another party, Section 7 of the Act states that if tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under these circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the tenant, who must prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the landlord. Once that has been established, the claimant must then provide sufficient evidence to verify the actual monetary value of the loss or damage. And finally the tenant must prove that he took reasonable measures to mitigate the losses that were incurred.

In regards to the \$300.00 cost of moving, \$250.00 cost of storage and other costs such as \$200.00 for transportation associated with losing the rental unit, I find that the tenant likely would not have avoided these costs because the landlord was in a legal position to properly terminate the tenancy and should have done so in accordance with the law. The tenant's evidence made mention of a monetary claim due to being made "homeless for six months by the landlord. However, I find that the tenant, having failed to pay his rent, would have lost this tenancy in due course being that the landlord had issued a valid and enforceable 10-Day Notice to End Tenancy for Unpaid Rent. In fact, it was found at the previous hearing that the tenant did not pay the rental arrears owed. The tenancy was ending in the near future and I find that the tenant would still have faced costs of moving, storage and possibly transportation, as well as the challenge of finding new accommodation, regardless of how or when the actual process of eviction was accomplished. These events were already in motion due to the tenant's own failure to comply with the Act and pay his rent. Accordingly, I find that the claims relating to the loss of the tenancy do not meet element 2 of the test for damages and must be dismissed.

With respect to the loss of possessions, the tenant's position was that this occurred due to the illegal manner in which the tenancy was terminated. I find that a tenancy remains in effect until such time it ends under section 44 of the Act. Before a landlord can validly end a tenancy for unpaid rent, the landlord must first serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent and if the tenant then refuses to vacate the rental unit, the Act requires a landlord to then make an application for dispute resolution, to obtain and serve an Order of Possession. Following this, should the tenant remain in possession of the rental unit, the landlord would need to make application and obtain a Writ of Possession issued by The Supreme Court of British Columbia and utilize the services of a bailiff. I find that no Order of Possession was granted to the landlord with respect to this tenancy. Therefore, I find the landlord did not have the requisite Writ of Possession to physically take possession of the unit and evict the tenant against his will. I find as a fact that the tenant was occupying the rental unit at the time the landlord removed the contents of the rental unit. Notwithstanding the fact that the tenant had contravened the Act by not paying rent and the fact that the tenant had not complied with the Act by over-holding after receiving the Ten-Day Notice, I find that the landlord was still not entitled to retaliate by circumventing the Act in forcefully removing the tenant without following due process.

Section 44 of the Act also provides that a tenancy may be considered to be at an end if a tenant abandons the rental unit. Abandonment would permit a landlord to remove the tenant's possessions from the rental unit without a court order. I find that section 24 of the Residential Tenancy Regulation contains criteria that must be met for a landlord to

consider a tenant to have abandoned personal property. Given the evidence before me, it is clear that the tenant did not abandon the unit nor his personal property. I find that the tenant still had possession of the unit, and the tenant's belongings were wrongfully removed by the landlord in contravention of the Act. In this respect, I find that the landlord's violations pursuant to sections 7 and 67 of the Act the landlord would therefore would be liable for any damage that resulted.

Based on the testimony, I find that the landlord also wilfully contravened several other sections of the Act including section 28, tenant's right to quiet enjoyment; section 30, tenant's right of access protected; and section 29, landlord's right to enter rental unit restricted;

In addition to the above violations, section 26(3) of the Act states that, whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not:

- (a) seize any personal property of the tenant, or
- (b) prevent or interfere with the tenant's access to the tenant's personal property.

Even in the cases when a tenant has abandoned the unit, the landlord would still be required to comply with section 25 of the Residential Tenancy Regulations which states that the landlord must store the tenant's personal property in a safe place and manner for a period of not less than 60 days following the date of removal and keep a written inventory of the property. Moreover, section 30 of the Regulations states that the landlord owes a duty of care to the tenant when dealing with a tenant's personal property and must exercise due diligence and caution as required by the nature of the items to ensure that the property is not damaged, lost or stolen. Therefore, by assuming the right to take charge of the tenant's property, I find that the landlord's treatment of the tenant's possessions was not consistent with the duty of care obligations specified in the Regulations.

Having found that the tenant met elements 1 and 2 of the test for damages, I find that the tenant must meet element 3 of the test by proving the value of the loss to support the amount of damages being claimed. Value is normally confirmed through providing documentary evidence and records including receipts. I find that the tenant's list of missing items along with the stated value of each composed from the tenant's memory does not hold the same evidentiary weight that actual receipts would have. The tenant may be certain of the item and the value, but to support a claim for compensation, the tenant is required to prove the value to the dispute resolution officer. In this case, the tenant explained that he could not provide records due to the manner in which he was evicted.

I find that the tenant was not able to provide proof that he ever owned the specific items in question, not able to verify that they actually cost what was being claimed, nor could he prove that these particular items were then taken by others. Although, based on the evidence, I do find that the tenant likely did suffer a loss of property for which the landlord was at fault, and did incur expenses to replace household effects as a result of the landlord's failure to comply with the provisions of the Act, it is difficult to assess the pro-rated value of the tenant's loss based only on the testimonial evidence.

The tenant has valued the missing property at the purchase cost. However, awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to take into account the age of the lost item and reduce the replacement cost to reflect the depreciation of the original value. An item that is used, will not be valued the same as a new purchase. Reference can be made to Residential Tenancy Policy Guideline 37 in order to accurately assess what the normal useful life of a particular item would be.

In respect to meeting element 4 of the test for damages, I find that under section 7(2) of the Act the tenant was required to take reasonable steps to mitigate his losses. I find that there would be a reasonable expectation that the tenant could have retrieved some of the smaller items such as the camera, ipod, binoculars and harmonica from the pile and should have shown he attempted to find a safe place where they could be taken for temporary storage. Regarding the tenant's obligation to minimize loss, I find that, while the landlord was responsible for initially exposing the tenant's household effects to risk by removing them and leaving them in the parking lot in a large pile, after two weeks the tenant had an obligation to mitigate his potential losses by taking responsibility to move his belongings to a safer location. I find that, after the initial two weeks, the tenant's inability to make arrangements to move his property was not caused or impeded by the landlord. That being said, I find that the loss of items would likely have occurred mostly within the first two weeks.

Given all of the above considerations and despite the tenant's inability to meet the burden of proof by providing evidence for each specific item on his list, I find that the tenant is entitled to some compensation. Accordingly I set these damages at \$650.00.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation from the landlord in the amount of \$650.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) 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: December 2010.

Dispute Resolution Officer