Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes: MNSD, MNDC, FF

Introduction

The hearing was convened to deal with an application by the tenant for the return of double the $650.00 security deposit under the Act. The tenant was also seeking reimbursement for the $50.00 fee paid for this application.

This Dispute Resolution hearing was also convened to deal with a cross application by the landlord for a monetary claim of $667.15 for the cost of cleaning, damages, returned cheque and telephone charges. The landlord was also seeking reimbursement for the $50.00 fee paid for this application. .

Both the landlord and tenant were present and each gave testimony in turn.

Issues to be Decided for the Tenant's Application

The issue to be determined based on the testimony and the evidence is whether the tenant is entitled to return of double the security deposit under section 38 of the Act.

Issues to be Decided for the Landlord's Application

The landlord was seeking a monetary order for cleaning, loss of rent, and damages.

The issues to be determined based on the testimony and the evidence is whether the landlord is entitled to compensation under section 67 of the *Act* for loss and damages.

The tenant had the burden of proof to establish that the deposit existed and that 15 days had expired from the time that the tenancy ended without the landlord either refunding the deposit of making an application to keep it. The landlord had the burden of proof to show that compensation for damages and loss was warranted and supported by the evidence submitted.

Background and Evidence

A substantial amount of evidence was included by both parties including email communications, written statements, invoices and receipts. No tenancy agreement, nor Move-In and Move-Out Condition Inspection Reports were submitted into evidence.

The tenant testified that the landlord had not returned the tenant's security deposit within fifteen days after being given a forwarding address for the tenant in writing and, in fact, has not returned the deposit to date. The tenant is seeking double the security deposit pursuant to the provisions in section 38 of the Act.

The landlord testified that the tenancy began as a 6-month fixed term with rent of $1,650.00 and a security deposit of 825.00 was paid. The agreement began on April 1, 2010 and was scheduled to end on September 30, 2010. However the tenant gave notice in May 2010 to end the tenancy early and vacated on June 30, 2010. The landlord acknowledged that the security deposit was not returned within 15 days of receiving the tenant's written forwarding address.

The landlord testified that efforts to re-rent were commenced immediately on- line and although the unit was initially advertised for a higher amount than the tenant was paying, more than one ad was placed showing both a lower price and higher price in order to test the market. The landlord stated that they also continued to lower the rental rate shown in the ads, eventually accepting a tenant who moved in on July 15, 2010 with rent set at $1,600.00. The landlord stated that, because the unit was vacant for the first half of July 2010, there was a loss of one-half a month in the amount of $825.00 and an additional loss of $50.00 per month was incurred due to the lower rent charged to obtain a new tenant during the remaining defaulted 3 months. The landlord was claiming compensation of total $975.00 for the loss of rent suffered by the landlord.

The landlord stated that he had in his possession documents to confirm the date that the unit was re-rented in support of the claim. The landlord stated that, however, he did not realize that this evidence needed to be submitted and the landlord requested more time to send the evidence in and serve it on the other party.

The tenant disputed the claim for loss of rent, arguing that the landlord did not properly mitigate his losses, given the fact that the advertised rental rate was initially higher than what the tenant was paying. The tenant also testified that, based on an alleged conversation with the current occupant in the unit, the landlord had apparently re-rented the unit as of July 1, 2010 and therefore no loss occurred for the latter half of the month of July 2010. The tenant pointed out that the landlord had failed to submit evidence supporting the claim that the unit was vacant for the first half of July and to prove it was not re-rented until July 15, 2010.

The tenant also stated that they received an email from the landlord dated May 18, 2010 freeing the tenant from paying rent for July 2010 and this communication was in evidence. However, the landlord alleged that the email messages had been "tampered with" and did not accurately reflect what was actually communicated.

The landlord was claiming damages of $128.80 for carpet cleaning, $200.00 for cleaning including a $50.00 charge for short notice) and a $100.00 move-out fee required by in the tenancy agreement pursuant to strata council bylaws.

The tenant accepted the $128.80 carpet cleaning claim and the $100.00 strata move-out fee but disputed the cleaning costs of $200.00. The tenant's position was that the unit was left in a reasonably clean state and pointed out that this issue was not brought up by the landlord, nor was a move-out condition inspection arranged.

The landlord was claiming compensation for other administrative costs including $200.00 representing 10 hours at $20.00 per hour to advertise and set up showings, $100.00 for gas used in travelling from Vancouver to Port Moody, $300.00 labour including travel time to show and prescreen tenants for 20 hours at $15.00 per hour and $300.00 lost income and for paying bonuses for workers to cover the landlord at work.

The tenant disputed all of the above administrative expenditures as being matters related to the cost of doing business rather than to a violation of the Act or agreement.

Analysis: Tenant's Application

The tenant made application for the return of the security deposit and section 38 of the Act deals with this issue. Section 38(1) states that within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either:

- repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations OR
- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The landlord was in possession of the tenant's security deposit held in trust on behalf of the tenant at the time that the tenancy ended. I find that because the tenancy was ended and the forwarding address was given to the landlord on July 6, 2010, under the Act the landlord should either have returned the deposit or made an application for dispute resolution within the following 15 days. However, the landlord's application for dispute resolution was not processed until July 29, 2010 beyond the fifteen days.

Section 38(6) If a landlord does not act within the above deadline, the landlord; (a) may not make a claim against the security deposit or any pet damage deposit, and; (b) must pay the tenant double the amount of the security deposit.

Based on the above, I find that the tenant is entitled to receive double the $825.00 security deposit paid plus interest on the original deposit .

Analysis: Landlord's Application

Section 6 of the Act states that the rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement and that a landlord or tenant may make an application for dispute resolution if the parties cannot resolve a dispute referred to in section 58 (1) of the Act. (my emphasis)

Section 58 of the Act states that, except as restricted under the Act, a person may make an application for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of: (a) rights, obligations and prohibitions under this Act; (b) rights and obligations under the terms of a tenancy agreement that are required or prohibited under the Act, or that relate to the tenant's use, occupation or maintenance of the rental unit, or common areas or services or facilities.

In regard to the landlord's claim for monetary damages, an applicant's right to claim damages from the other party is covered under, Section 7 of the Act which states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount of , and order a party to pay, compensation to the other party.. 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 landlord, to 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 respondent.

I find that the evidence and testimony of both parties clearly establish that the tenant did violate the tenancy agreement by terminating the tenancy prior to its expiry date.

In respect of the claimed $825.00 loss due to the tenant's violation of the agreement, I find that the landlord's verbal allegation that the unit was not re-rented until mid July 2010 was challenged by the tenant. The question of precisely when the unit was re-rented is material to the claim meeting elements 1 and 2 of the test for damages.

In regards to assigning evidentiary weight to disputed verbal testimony, it is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof. In other words, the applicant, in this case the landlord, has the onus of proving during these proceedings, that the compensation being claimed as damages is justified under the Act.

In this instance I find that the parties offered conflicting testimony about the date the unit was re-rented. I find it un necessary to determine which side is more credible or which set of "facts" is more believable because, when evidence consists of solely of conflicting verbal testimony, in the absence of independent documentary evidence, then the party who bears the burden of proof will not prevail. In this case, I find that the landlord had the ability to submit independent proof of the starting date of the re-rental but failed to do so and instead relied on verbal testimony challenged by the tenant.

In regard to the landlord's request to submit the missing evidence after the hearing, it is not possible to accept evidence after the hearing has concluded. I find that the Residential Tenancy Rules of Procedure, Rule 3.1, states that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed, or if that is not possible, at least (5) days before the dispute resolution proceeding. It appears that the applicant landlord was asking to be given more time to submit additional evidence to prove the monetary claim. In such circumstances, the Rules of Procedure, Rule 6.1, specifies what factors must be considered in allowing an adjournment for the purpose of receiving additional evidence from one, or both, parties. One of the factors to be weighed is the degree to which the need for the adjournment arises out of the actions or neglect of the party seeking the

adjournment. In this instance, the hearing was on the landlord's application and the landlord did not submit relevant documents that were only under the control of the landlord. I found insufficient proof that that the landlord did not have a fair opportunity to make this evidentiary submission.

Given the above I found that adjourning the hearing further, particularly for the purpose of allowing the applicant a second opportunity to submit evidence that could have been served on the other party and placed into evidence in advance of the hearing, would be prejudicial to the respondent and contrary to natural justice. I found that there was not adequate justification under the Act and Rules of Procedure to adjourn to allow the landlord to submit additional evidence.

I find that in the absence of evidence, the landlord's burden of proof has not adequately been met to support the claim and I find that the portion of landlord's application relating to the $825.00 loss of rent for July must be dismissed.

In respect to claim for compensation of the loss for the reduced amount rent each month of $50.00 each month of July, August and September 2010, I accept that this loss stemmed directly from the tenant's contravention of the agreement and the landlord's effort to mitigate. This portion of the claim met the test for damages and I find that the landlord is entitled to be compensated in the amount of $150.00 for the loss.

With respect to the claimed $200.00 cost for cleaning, I find that section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. In establishing whether or not the tenant had complied with this requirement, I find that this can best be established with a comparison of the unit‘s condition when the tenancy began with the final condition of the unit after the tenancy ended. In other words, through the submission of move-in and move-out condition inspection reports containing both party's signatures. Section 23(3) of the Act covering move-in inspections and section 35 of the Act for the move-out inspections places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and both the landlord and tenant must sign the condition inspection report after which the landlord must give the tenant a copy of that report in accordance with the regulations.

In this instance, the landlord admitted that neither a move-in condition inspection report nor move-out condition inspection report was completed. I find the failure to comply with sections 23 and 35 of the Act has hindered the landlord's ability to establish the end-of-tenancy condition and I find that the landlord's claim for reimbursement for the cleaning cost must therefore be dismissed.

Based on the fact that the tenant acknowledged the liability for the carpet cleaning and the move-out feel required in the tenancy agreement, I find that he landlord is entitled to be compensated for the claims for $128.80 for carpet cleaning and $100.00 for the condo move-out fee.

I find that the remaining claims of the landlord totalling $900.00 relate to compensation for labour and expenditures incurred in arranging the re-rental of the unit. I find that none of the expenses were supported by documentary evidence and moreover, these tasks would have needed to be done at the end of the tenancy in any case. I find that the screening of new tenants, cost of transit to an out-of-town rental property and the time spent in travelling to or showing a rental unit would normally be considered as the cost of doing business which falls under the responsibility of a landlord to fund, not the tenant. Accordingly I find that the claim for other costs in the amount of $900.00 must be dismissed.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of $1,700.00 including double the deposit and the $50.00 cost of filing the application.

Based on the testimony and evidence presented during these proceedings I find that the landlord is entitled to total monetary compensation of $378.80 comprised of $128.80 for carpet cleaning costs, $100.00 move-out fee and $150.00 rent loss. The remainder of the landlord's application is dismissed without leave.

Pursuant to my authority under section 72 of the Act, I order that the monetary award of $1,700.00 to which the tenant is entitled, be reduced by the $378.80 in compensation for damages and loss owed to the landlord. Accordingly I hereby issue a monetary order in favour of the tenant for the remainder of $1,321.20. 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. I find that neither party is entitled to compensation for the cost of filing their respective applications. .

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