



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

Decision

Dispute Codes:

MND, MNDC, MNSD, FF

Introduction

This Dispute Resolution hearing was set to deal with an Application by the landlord for an Order of Possession for unpaid rent, monetary order for damage to the unit, rental arrears and a request to retain the tenant's security deposit. Both parties appeared and gave testimony during the conference call.

At the outset of the hearing the landlord stated that the tenant had vacated the unit in January 2010. Therefore the application for an Order of Possession based on unpaid rent is moot as the tenant no longer lives in the unit. The landlord's request for an order of possession is dismissed without leave.

Preliminary Matter: Service of Respondent's Evidence

The tenant had submitted documentary evidence on file to dispute the landlord's claims. However, the landlord testified that the evidence was never received by the landlord. The tenant stated that she had sent the evidence by registered mail to a written address provided by the landlord by email confirming it as his service address. The tenant acknowledged that she had not served the evidence to the address shown on the landlord's application.

The Residential Tenancy Rules of Procedure, Rule 3.1, requires 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. If the respondent intends to dispute an Application for Dispute Resolution, Rule 4 states that copies of all available documents, photographs, video or audio tape evidence the respondent intends to rely upon as evidence at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding but if the date of the dispute resolution proceeding does not allow the five (5) day requirement in a) to be met, then all of the respondent's evidence must

be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

If copies of the evidence are not served on the respondent or the applicant as required, and if the evidence is relevant, the Dispute Resolution Officer must decide whether or not accepting the evidence would prejudice the other party, or would violate the principles of natural justice. The other party must be given an opportunity to review the unseen evidence before the application can be heard. This would necessitate a determination about whether or not the matter should be adjourned to a future date to allow service of the evidence.

I note that the Landlord and Tenant Fact Sheet contained in the hearing package makes it clear that *"copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible.."*

Given the above, I declined to accept or consider any evidence that was not properly served on the other party. However, verbal testimony from both parties was considered.

Preliminary Matter: Jurisdiction

The landlord's application included a request to retain the security deposit and for compensation for rent owed for January 2010. However, a previous hearing was held on the tenant's application for damages and the return of double the security deposit on June 18, 2010. At the previous hearing it was found that the landlord had not applied to keep the security deposit within 15 days as required by the Act. As a result, under the Act, the decision stated that tenant was entitled to receive double the deposit and the landlord was not permitted to claim against the deposit. It was also found that the tenant was entitled to a partial refund of rent for January 2010 and a monetary order was issued against the landlord.

Section 77 of the *Act* states that, except as otherwise provided in the *Act*, a decision or an order is final and binding on the parties. Therefore any findings made by the Dispute Resolution Officer that presided over the prior hearing are not matters that I have any authority to alter and any decision that I render must honour the existing findings.

The portion of the landlord's application relating to the request for an order to retain the security deposit is therefore dismissed as this matter had already been dealt with and the outcome determined at the previous hearing. The portion of the landlord's application seeking compensation for rent owed was also a matter already dealt with and resolved at the previous hearing. Accordingly, the portion of the landlord's

application pertaining to the claim for rent owed and damages for terminating the fixed term tenancy early are also dismissed without leave to reapply.

Issue(s) to be Decided

The remaining issue 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 damages and losses caused by the tenant.

Background and Evidence

The landlord testified that the tenancy began on February 1 2009 with rent of \$1,450.00.. The landlord testified that the fixed term tenancy ended in January 2010 by the tenant moving out prior to the expiry date of the tenancy.

The landlord testified that the tenant had left the unit in a damaged state requiring repainting of the walls at a cost of \$450.00. According to the landlord a friend of the tenant's participated in the end-of-tenancy walkthrough and agreed with the assessment of damage and arranged for the painter. The landlord was seeking compensation for the cost of repainting. No evidence was submitted.

The landlord testified that when the tenant vacated, the tenant only returned two or the five keys to the unit and the landlord had to obtain copies at a cost of \$85.00. No invoices had been submitted into evidence.

The tenant disagreed that the walls were damaged and disputed the claim for the repainting. The tenant also disputed that the keys were not returned.

Analysis

The landlord was claiming compensation for damage to the rental property allegedly caused by the tenant. 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 was 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. Once that has been established, the landlord must then provide evidence that can verify the actual monetary amount of the loss or damage.

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, and give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

However, the burden of proof was on the landlord to provide evidence to prove the existence of the damage and the amount of loss. No copy of the move-in or move out condition inspection report was in evidence, nor any receipts or invoices to verify the expenditures being claimed. The landlord only provided 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. The landlord had the onus of proving during these proceedings, that the damages and compensation being claimed was justified under the Act. In situations where the proof consists only of conflicting and disputed verbal testimony in the absence of independent evidence, then the party who bears the burden of proof is not likely to prevail.

Based on the testimony and evidence presented during these proceedings, I find that the landlord's monetary claim has no merit due to insufficient evidentiary proof and the claim must therefore be dismissed.

Conclusion

Based on the testimony and evidence I hereby dismiss the landlord's claim in its entirety without leave to reapply. 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: February 2011.

Residential Tenancy Branch