Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes OPC OPB MND MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order of Possession for Cause and Breach of agreement, for damage to the unit site or property, to keep all or part of the security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee for this application.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, sent via registered mail on January 20, 2011. Mail receipt numbers were provided in the Landlord's verbal testimony. The Tenant is deemed to be served the hearing documents on January 25, 2011, the fifth day after they were mailed as per section 90(a) of the *Act*.

The Landlords appeared at the teleconference hearing, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Has the Tenant breached the *Residential Tenancy Act*, regulation or tenancy agreement?
2. If so, have the Landlords met the burden of proof to obtain an Order of Possession and a Monetary Order as a result of that breach?

Background and Evidence

The Landlords testified that they entered into a written tenancy agreement with the Tenant. They were not able to provide testimony as to the effective date of the tenancy and they believe it is a month to month tenancy. Rent is payable on the first of each month in the amount of $400.00 and the Tenant paid a security deposit of $200.00 prior to the tenancy but they did not know when. Later in their testimony they stated that they

had completed an “intent to rent form” for income assistance and they were referring to that document as their tenancy agreement.

Upon review of the Landlord’s evidence which included: a statement from another tenant, a typed statement of costs to repair their store, a retail sales recap, a document signed by the Tenant for the conditions or rules of the tenancy; I noted that they did not submit a copy of a Notice to End Tenancy.

Neither Landlord was able to provide testimony to confirm which Notice to End Tenancy was served to the Tenant or how and when it was served.

With respect to their monetary claim of $16,127.49 the Landlords advised they purchased this building back in approximately April 2010 and just transferred the existing insurance over into their name. The building has commercial space on the main floor and residential suites on the upper floor. They had the plumbing redone in all the apartments in May 2010 where they removed the old water pipes and had the new flex type pipe installed. The hot water tanks are located in the kitchen of each unit.

The Tenant had a habit of losing her keys so she would break into her unit. Then in November 2010 the Tenant gained entry with the assistance of the neighbour and when the door was forced open a 2 x 4 slid across the room. The neighbor noticed water spraying from the water line going to the hot water tank so he went outside and shut the main water tap off. The Landlord’s daughter who was managing the store called them and informed them that the water leak caused the ceiling to collapse and other damage in the store.

The Landlords contacted their insurance company who instructed them to call in a restoration company. The store had to be closed for two weeks while the restoration company removed wet ceiling and drywall and placed drying fans inside. Then they found out that their insurance would not cover the damage. They initially stated that their insurance was declined because the damage was caused by a Tenant and then later stated it was because it was water from within the building. They are currently working with Lawyers to deal with their insurance company because they were initially told they had coverage and then after they incurred the cost of the restoration company they were told they did not have coverage.

They stated their statement of claim is based on an estimate they determined from the costs they incurred when they renovated the store back in April 2010. This claim includes $3,484.00 for materials, $1,939.96 for travel costs as the Landlords live in a different city, flooring for the rental suite $2,809.30, labour $2,150.00, and lost revenue

for the store of $5,744.23. None of the work has been completed, no receipts were provided to support the amounts claimed, and they have not received estimates from any contractors to determine the actual cost that will be involved.

Analysis

The Landlords applied to obtain an Order of Possession for Cause and for breach of agreement. However, they did not submit a copy of a Notice to End Tenancy.

The hearing package contains instructions on evidence and the deadlines to submit evidence, as does the Notice of Hearing provided to the Landlords.

The Notice to End Tenancy document is not a mere technicality. In fact, it is hard to imagine another document being more relevant or material to the Landlords' claim, in particular when they are asking to end the tenancy based on this Notice.

The responsibility of proving a claim is on the person making the claim. As the Landlords failed to provide a copy of the Notice, I find the Landlords have provided insufficient evidence to prove their claim and I dismiss their request for Orders of Possession without leave to reapply.

Section 7(1) of the Act provides 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 the damage or loss which results. That being said, section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

The evidence supports the neighbouring tenant assisted the Tenant in breaking into the apartment and it was the neighbour who saw the water leak and immediately turned off

the water supply. If the water line was damaged as a result of the 2x4 sliding across the floor because of them breaking into the unit, and if the water was turned off right away, how could so much damage have been caused to the ceiling and store down below? It would be reasonable to conclude the water had been leaking for a longer length of time which creates doubt as to how the leak occurred. Therefore there is insufficient evidence to support the leak was caused by the Tenant's actions in breach of the Act, Regulation, or tenancy agreement or that the Landlords suffered a loss due to a Tenant's violation.

There are no photographs or written documentary evidence to support that damage was caused to the rental unit and store. There are no estimates of repair, no invoices from the restoration company, and no evidence provided from the insurance company. Therefore there is insufficient evidence to verify the actual amount required to compensate for loss or to rectify the damage.

The Landlord is required to mitigate their losses which would include having adequate insurance coverage for loss of business income and damage to the retail building. Therefore there is insufficient evidence to support the Landlords mitigated their loss by ensuring they had adequate insurance coverage.

Based on the above, I find the Landlords provided insufficient evidence to meet the burden of proof and establish a claim for damages. Therefore the request for a monetary order is hereby dismissed without leave to reapply.

The Landlords have not been successful with their application and therefore must suffer the burden of the filing fee.

Conclusion

The Landlord's application is HEREBY DISSMISSED, 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 11, 2011.

Residential Tenancy Branch