Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MND MNR MNSD FF
MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlords and the Tenant.

The Landlords filed seeking a Monetary Order for damage to the unit, site or property, for unpaid rent or utilities, to keep all or part of the security deposit, and to recover the cost of the filing fee for this application from the Tenant.

The Tenant filed seeking a Monetary Order for the return of double his security deposit, and to recover the cost of the filing fee from the Landlord.

Service of the hearing documents by the Landlords to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on February 8, 2011. The Tenant confirmed receipt of the Landlord's hearing documents.

Service of the hearing documents by the Tenant to the Landlords was done in accordance with section 89 of the *Act*, sent via registered mail November 15, 2010. The Landlords confirmed receipt of the Tenant's hearing documents.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other, 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 a Monetary Order as a result of that breach?

3. Have the Landlords breached the *Residential Tenancy Act*, regulation or tenancy agreement?
4. If so, has the Tenant met the burden of proof to obtain a Monetary Order as result of that breach?

Background and Evidence

I heard undisputed testimony that the parties entered into a written month to month tenancy agreement effective May 1, 2010. Rent was payable on the first of each month in the amount of $2,000.00 and on May 1, 2010 the Tenant paid $1,000.00 towards the security deposit. No move-in inspection or move-out inspection were completed. The Landlords reside in another city and they had the tenant who resided in the basement suite act as their Agent. The tenancy ended September 15, 2010 by written mutual agreement.

The Tenant testified that when he realized the Agent had been breaking into his rental unit and steeling his possessions he contacted the Landlords to end this tenancy. He met with the male Landlord on September 11, 2010 in the kitchen of the rental unit where they each signed two copies of the mutual agreement to end the tenancy. He wrote his forwarding address on the back of each mutual agreement form, as he had been instructed by the *Residential Tenancy Branch* to ensure he provided his forwarding address to the Landlords. After the meeting the Landlord did not take his copy of the mutual agreement to end form with him and left it at the rental unit.

The Tenant stated he is pretty sure he was out of the rental unit by September 15, 2010. He did not return keys to the Landlord because his last day there a locksmith showed up and changed all the locks. The cleaners he had hired to clean the unit just closed the door and locked it behind them. After moving he sent a text message to the Landlords requesting his security deposit and was told “no way” by the Landlords. He is seeking the return of double his deposit as the Landlords have held it without due course. He argued that the rental unit was left in better shape at the end of the tenancy than it was at the beginning. In addition he was robbed by the Landlord’s Agent who ended up damaging the basement suite before he abandoned it. The Tenant even had his contracting company come in and conduct the repairs on the basement suite.

The male Landlord testified he had attended the rental unit on September 11, 2010 and signed two copies of the mutual agreement to end the tenancy but he did not take a copy of it with him when he left. He stated that his was an oversight on his part.

The female Landlord testified the Tenant did not move out by September 15, 2010 as their new Agent told them he was not completely moved out until September 24, 2010. She stated that in early September 2010 they decided to hire a close friend to be their Agent as he lives only a few blocks away from the unit. She stated they entered into an agreement to pay the Agent $50.00 per hour however she was not able to provide testimony as to which date they entered into this agreement and confirmed it was via e-mail and not in a written contract. She confirmed she does not possess an Order allowing them to keep the security deposit and do not have the Tenant's permission in writing to keep the security deposit. I noted the Tenant made his application for the return of his security deposit on November 15, 2010 and I asked why the Landlords waited until February 7, 2011, to make their application for dispute resolution to keep the security deposit. She advised they did not make application sooner as she was researching the *Residential Tenancy Act* and was afraid to make their application sooner for fear of retribution from the Tenant.

The Landlords stated they did not know the Tenant had been advertising the rental unit on the internet and they found themselves having to fly into town to interview prospective tenants that the Tenant arranged.

The Landlords are seeking monetary compensation in the amount of $5,415.46 which is comprised of the following:

1) $4000.00 in unpaid rent which is comprised of August and September 2010 rents when the Tenant's post dated cheques were returned "insufficient funds". The female Landlord acknowledged that they told the Tenant "not to worry about paying the rent" when they were discussing the issue of theft of the Tenant's possessions by their Agent.
2) $788.26 for the natural gas utility costs. A discussion followed whereby I noted the tenancy agreement which was provided in evidence by the Tenant indicated electricity and heat were included in the rent. The Landlords advised they "recycled" their copy of the tenancy agreement so could not refer to it; however their understanding was the tenants paid the utilities. There is one natural gas meter which is for the entire house. They note that the account was to be put in the Tenant's name however it has the Tenant's first name and the male Landlord's surname.
3) $336.00 for the cleaning company to clean the stove and walls. The female Landlord first stated the cleaning was done on September 29, 2010 and then said it was actually done on October 2, 2010 based on the copy of the invoice she provided in her evidence.

4) $95.20 to have the junk removed that remained at the rental unit. She stated the work was completed on September 29, 2010 however they did not get a receipt from the company who removed the junk.
5) $196.00 for the services of her new Agent which is $175.00 + HST. The Landlord did not know if her new Agent has a company or HST number and listed only what he had told her the cost was. She was not issued an actual invoice for these charges; rather she received the information in an e-mail. She then changed her testimony to say she does not think he has a HST number.

In response to the Landlords' testimony the Tenant stated the tenancy agreement he provided in evidence is exactly how it was completed. He had an agreement with the Agent who resided in the basement suite that he would pay 2/3 of the utilities and the Agent would pay 1/3. The Agent was responsible to set up the account for natural gas and when the bill came in he gave the Agent the money. He states he already paid for the cost of the natural gas to the Agent.

He confirmed that both his August and September rent cheques bounced and that he was told not to worry about paying the rent because of the theft of his possessions by the Landlords' Agent. The Landlords called him around the 3rd or 4th day of September when they were notified the September cheque did not clear. They had an argument about the Agent and he was told not to worry about it. He discussed the September NSF cheque with the male Landlord when they signed the mutual agreement to end the tenancy and he was told again not to worry about.

The Tenant said the Landlords thank him for placing the advertisement on the internet to get prospective tenants. He even screened people and made appointments for the Landlords. He questioned their testimony and asked if they did not know he had the place up for rent then why would they fly over to meet the prospective tenants? He wanted to clarify that he had received a phone call from one of the Landlords' friends asking him when they would be moved out of the house. He stated that this person did not identify himself as being their Agent. This person called a second time to advise him that a locksmith company was coming over to change the locks. The Tenant questioned why they would not make an application for dispute resolution sooner to seek the $4,000.00 in rent; if they had not agreed that he did not have to pay it.

The Landlords argued that they were not informed that the September payment bounced until approximately September 24th, when they checked their bank online; so they could not have agreed for him not to worry about it. They confirmed they had hired a locksmith to change the locks however they were not able to provide testimony as to the date the locksmith attended the unit as they did not have the invoice for the work

that was completed. At that point they just wanted the Tenant and his family out of the unit. They did not do anything further as they had no intention of returning the security deposit.

Analysis

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

Landlords' application

I have carefully considered all of the testimony and evidence before me. The evidence supports there were allegations that the Landlords' Agent stole from the Tenant and that the Agent later damaged the rental property, abandoned it, and then went into a rehab facility.

A significant factor in my considerations is the credibility of the Landlords' testimony. I am required to consider the Landlords' evidence not on the basis of whether their testimony "carried the conviction of the truth", but rather to assess their testimony against its consistency with the probabilities that surround the preponderance of the conditions before me. I note that the Landlords contradicted their own testimony during the hearing and some of their testimony contradicts their documentary evidence.

The Landlords are seeking $4,000.00 in unpaid rent. The Landlords stated at the beginning of their testimony that they told the Tenant not to worry about paying rent

when they were arguing about the Agent stealing the Tenant's possession. They stated later in their testimony that this agreement did not included September's rent.

The Landlords submitted evidence that the September returned cheque was mailed to them from their bank with a Returned Item Advice dated September 3, 2010; and an e-mail they wrote to their previous Agent dated September 15, 2010 which clearly states the Tenant has not paid rent for two months. This evidence contradicts their testimony that they did not know about the September returned cheque until September 24, 2010.

In the presence of opposing testimony provided by the Tenant, and in consideration of the contradictory evidence provided by the Landlords, I find that on a balance of probabilities the Tenant was told not to worry about paying rent. Therefore I find the matter of the two returned rent cheques was previously resolved between the parties and the Landlords have failed to meet the burden of proof of a loss, as listed above. Telling someone they do not have to pay the outstanding rent is not mitigating a loss that they make a claim for five months later. Therefore I dismiss their claim for $4,000.00 in unpaid rent, without leave to reapply.

The Landlords were not able to provide testimony as to what the original tenancy agreement states as they had "recycled" their copy. However they argued the utilities were not included in the rent. The Tenant's evidence included a copy of his tenancy agreement which states electricity and heat were included in his rent. He also provided opposing testimony that he had paid the Landlord's Agent for his 2/3'd cost of the utilities. The onus lies on the Applicant to provide sufficient evidence to support their claim. As the Landlords were not able to provide evidence of what the original tenancy agreement provided and in the presence of opposing testimony I find the Landlords provided insufficient evidence to support their claim of $788.26 for natural gas, without leave to reapply.

Section 24 (2) of the Act provides that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord (a) does not comply with section 23 (3) *[2 opportunities for inspection]*, (b) having complied with section 23 (3), does not participate on either occasion, or (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

Section 36(2) of the Act states the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is

extinguished if the landlord (a) does not comply with section 35 (2) *[2 opportunities for inspection]*,(b) having complied with section 35 (2), does not participate on either occasion, or (c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

The Landlords sought $366.00 for cleaning costs and relied on a copy of an invoice they submitted into evidence. This invoice is dated October 2, 2010; however it does not specify the date the work was performed, does not have the address of the cleaning company, does not show the Landlords' names, and does not state if there was a charge for the services provided or the amount charged. In the absence of a move-in or move-out inspection report and in the absence of proof of the actual cost charged for the alleged cleaning, I find the Landlords have provided insufficient evidence to support their claim of $336.00 for cleaning and it is dismissed, without leave to reapply.

There was no evidence to support the Landlords paid $95.20 to have the junk removed. Nor is there evidence to support the junk that was removed belonged to the Tenant or the Landlords' Agent who abandoned the property. Furthermore, in the absence of a move-in and move-out inspection reports, I find there to be insufficient evidence to support the Landlords' claim. Therefore I dismiss the Landlords' claim of $95.20 without leave to reapply.

The Landlords have chosen to live in a different city than their rental property and have made the choice to hire an Agent to manage their rental business in their absence. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of Act. This tenancy ended based on a mutual agreement to end tenancy and there is insufficient evidence to support the Tenant breached the Act. Therefore, I find that the Landlords may not claim Agent fees, as they are costs which are not denominated, or named, by the *Residential Tenancy Act.*

The Landlords have not been successful with their application; therefore I find they must bear the burden of the cost of their filing fee.

It is evident that the Landlords are not familiar with their obligations set forth under the *Residential Tenancy Act* and as a result they have become the author of their own misfortune. Therefore, I have included with my decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the Landlords to familiarize themselves with the Act and Regulations.

Tenant's application

The Landlords have admitted that they do not have an Order allowing them to keep the security deposit and they do not have the Tenant's written consent to retain the security deposit.

There is opposing testimony as to when the Tenant provided the Landlords with his forwarding address. He states it was provided on the mutual agreement to end tenancy form on September 11, 2010, as supported by the Tenant's evidence. The Landlord confirmed he did not take his copy of the mutual agreement to end the tenancy.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit.

In this case the Landlords were required to return the Tenant's security deposit in full or file for dispute resolution no later than September 30, 2010; if I consider that the forwarding address was provided September 11, 2010 and the tenancy ended September 15, 2010.

If I accept the Landlords' testimony that they were not provided the Tenant's forwarding address on September 11, 2010, they were provided his forwarding address in the Tenant's application for dispute resolution which was served to the Landlords November 15, 2010 via registered mail. Section 90 of the Act provides registered mail is received five days after it was sent; therefore the Landlords are deemed to have received the Tenant's forwarding address no later than November 20, 2010. Therefore the Landlords would be required to make their application for dispute resolution no later than December 5, 2010. The Landlords did not file their application until February 7, 2011.

Based on the above, I find that the Landlords have failed to comply with Section 38(1) of the *Act* and that the Landlords are now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit. I find that the Tenant has succeeded in proving the test for damage or loss as listed above and I approve his claim for the return of double his security deposit plus interest.

I find that the Tenant has succeeded with his application therefore I award recovery of the $50.00 filing fee.

Monetary Order – I find that the Tenant is entitled to a monetary claim as follows:

Double the Security Deposit plus interest of $0.00 (2 x $1,000.00)	$2,000.00
TOTAL AMOUNT DUE TO THE TENANT	**$2,050.00**

Conclusion

I HEREBY DISMISS the Landlords' application, without leave to reapply.

The Tenant's decision will be accompanied by a Monetary Order for **$2,050.00.** This Order must be served on the Landlords and may be filed in Provincial 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: February 25, 2011.

Residential Tenancy Branch