DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with applications from the landlord and the tenant pursuant to the Residential Tenancy Act (the Act). The landlord applied for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

The tenant applied for authorization to obtain double her security deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. Neither party asked for an adjournment of this hearing. The tenant encountered initial difficulty in obtaining an ongoing connection to this telephone conference hearing. When it became apparent that she was attempting to participate in the conference hearing, I delayed proceeding further until she re-established a proper and continuing connection with the conference hearing. After approximately twenty minutes, the tenant was able to establish an ongoing connection to the conference call which remained in place for the remainder of the hearing.

The landlord testified that he sent the tenant copies of his dispute resolution hearing package by registered mail on two occasions. The first of these packages, sent on March 22, 2011, was returned by Canada Post as he had an incorrect mailing address for the tenant. He said that he obtained the tenant's correct mailing address from a woman who the landlord knew was a friend of the tenant's. He testified that he mailed the package a second time to the tenant's correct address on March 24, 2011. He provided Canada Post Tracking Numbers for both of these mailings. The tenant confirmed that she received the landlord's dispute resolution hearing package by registered mail. I am satisfied that the landlord served this package to the tenant in accordance with the *Act*.

The tenant first testified that she handed a copy of her dispute resolution hearing package to the landlord at his home. Although she could not recall the date when this occurred, she said that this may have happened in April 2011. The landlord said that he did receive the tenant's dispute resolution hearing package, but it was delivered to him

by another woman, Ms. NJ, as was subsequently revealed during this hearing. After the landlord said this, the tenant changed her testimony to say that she did not actually hand the landlord her dispute resolution hearing package, but one of her friends, Ms. NJ, did so while the tenant waited in the car and watched the delivery of this package to the landlord. I am satisfied that the tenant's dispute resolution hearing package was served to the landlord in accordance with the *Act*.

Issues(s) to be Decided

Did either of the parties serve their written evidence to one another in accordance with the *Act*? If not, should I accept any of the parties' written evidence that was not served to one another in making my decision? Which of the parties is entitled to obtain the tenant's security deposit? Is the landlord entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to recover his filing fee for this application from the tenant?

Background and Evidence

This month-to-month tenancy commenced on January 1, 2010. Monthly rent was set at $900.00 plus 70% of the overall utilities for this property. The landlord continues to hold the tenant's $450.00 security deposit paid on December 30, 2009. The landlord confirmed that no joint move-in or move-out inspection was conducted for this tenancy, although he said that the tenant was shown the rental unit before she commenced her tenancy. He testified that he did not prepare inspection reports at the beginning or end of this tenancy.

The parties agreed that the tenant sent the landlord a February 23, 2010 letter notifying the landlord that she intended to end her tenancy by April 1, 2010. When her plans changed, the tenant requested and obtained the landlord's permission to extend her tenancy until May 31, 2010. The parties agreed that the tenant vacated the rental unit by May 31, 2010.

The landlord applied for a monetary award of $900.00, comprised of $600.00 for unpaid utilities (gas and hydro) arising from her tenancy and $300.00 for professional carpet cleaning which the landlord maintained was necessary at the end of this tenancy. He said that he did show the tenant utility bills after she moved out, but she refused to pay these bills. He also testified that the carpets were not cleaned when she vacated the rental unit and required extensive professional cleaning. He submitted written evidence of the utility bills and the professional carpet cleaning receipt.

The tenant applied for a monetary award of $1,500.00 for the return of double her security deposit because the landlord did not return her security deposit within 15 days

of her providing her forwarding address to the landlord. I am uncertain as to why the tenant was seeking a monetary award of $1,500.00, when double her $450.00 security deposit would only lead to a monetary award of $900.00. Although her written evidence and oral testimony were unclear on this point, it would seem that she attempted to include a cleaning charge of her own in her application to recover the security deposit she paid at the beginning of her tenancy. She testified that she handed the landlord her forwarding address in writing on or about July 10, 2010. She entered into written evidence a copy of her letter of July 10, 2010, in which she included her forwarding address

Background and Evidence - Service of Evidence Packages

The landlord testified that he did not send a copy of his evidence package to the tenant as he believed that it was the Residential Tenancy Branch's responsibility to do so. He said that he has been a landlord for 35 years and has never had occasion to send written evidence to a tenant. The tenant confirmed that the only documents provided to her by the landlord for this hearing was a copy of the landlord's application for dispute resolution and the notice for this hearing.

The tenant initially testified that she did not send the landlord a copy of her evidence package. During the course of the hearing, she corrected this statement to indicate that she and her witness, NJ, handed her evidence package to the landlord from her car when she went to the landlord's residence. The landlord denied ever having received any written evidence from the tenant other than her application for dispute resolution and notice of a hearing of her application at his door.

Since the service of evidence was at issue and the tenant said that NJ was available to testify as a witness at this hearing, the tenant asked that I connect Witness NJ to the hearing so that she could provide sworn testimony regarding the documents she served or witnessed served to the landlord. Witness NJ testified that she attended the landlord's property with the tenant once about three or four months before the hearing to serve material to the landlord. She said that she was not sure what documents were included in that package at that time. She could not identify the date when this occurred, but was certain that this did not happen during the past few weeks. She confirmed the landlord's claim that his son answered the door and his son asked him to speak with Witness NJ who gave him the package at the door. Witness NJ was certain that she never attended the landlord's house on any other occasion nor did she witness any other service of documents to the landlord.

Analysis – Service of Documents by the Landlord and Consideration of Whether to Refuse to Accept Landlord's Evidence

I find that the landlord did not serve his evidence package to the tenant in accordance with the *Act*, despite his evidence that he is an experienced landlord who has been renting to tenants for many years.

Rule 11.5 of the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure) outlines the process for consideration of evidence not provided to the other party in advance of the dispute resolution proceeding. A Dispute Resolution Officer (DRO) may accept evidence that was not provided to the other party before the proceeding and give the party who was not provided the evidence beforehand an opportunity to review the evidence in question and request an adjournment. However, Rule 11.5(b) allows a DRO to refuse to accept evidence not provided to the other party if the DRO "determines that there has been a wilful or recurring failure to comply with the Act or the Rules of Procedure."

From the commencement of this tenancy, the landlord has demonstrated a failure to comply with the *Act*. The one-page December 30, 2009 document he submitted is lacking many of the requirements set out in section 13(2) of the *Act* for a tenancy agreement. This document is also silent with respect to any tenant responsibility for a percentage of utilities that the landlord maintains were a provision of this tenancy agreement. The landlord confirmed that he did not comply with any of the requirements set out in section 23 of the *Act* regarding a joint move-in condition inspection, a move-in condition inspection report and providing a copy of that report to the tenant. Similarly, the landlord failed to comply with any of the requirements of section 35 of the *Act* with respect to a joint move-out condition inspection, a move-out condition inspection report and providing a copy of that report to the tenant. In his application for dispute resolution and in his oral testimony, the landlord asserted that he received the tenant's oral agreement to retain the tenant's $450.00 security deposit and believed that this was sufficient to enable him to retain her deposit. Section 38(4)(a) of the *Act* allows a landlord to retain a tenant's security deposit if "the tenant agrees in writing...to pay a liability or obligation of the tenant." The landlord's failure to obtain the tenant's agreement in writing to retain this deposit also contravenes the *Act*.

On the Notice of Hearing that the landlord was given to serve to the tenant, the first item listed as his responsibility in the GENERAL INFORMATION category reads as follows:

1. *Evidence to support your position is important and must be given to the other party and to the Residential Tenancy Branch before the hearing. Instructions for evidence processing are included in this package. Deadlines are critical.*

The landlord's failure to serve written evidence to the tenant contravenes Rule 3 of the Rules of Procedure regarding "Serving the Application and the Applicant's Evidence."

Since I find that there has been a recurring failure by the landlord to comply with the *Act* and the Rules of Procedure and in accordance with Rule 11.5(b) of the Rules of Procedure, I refuse to accept the landlord's written evidence that was not provided to the tenant. I have not considered his written evidence in reaching my decision.

Analysis – Service of Documents by the Tenant and Consideration of Whether to Refuse to Accept Tenant's Evidence

In considering whether to consider her written evidence in my decision-making on these applications, I have once again given regard to Rule 11.5(b) of the Rules of Procedure.

As an applicant for dispute resolution, the tenant also received GENERAL INFORMATION on the Notice of Hearing directing her to forward her evidence to the landlord. She claimed to have delivered her evidence to the landlord, but the landlord said that this did not occur.

At the hearing, I told the parties that I found that the documents served to the landlord by Witness NJ were not the tenant's evidence package received by the Residential Tenancy Branch on May 26, 2011. Witness NJ's description of delivering a package to the landlord three or four months earlier coincides with the time frame when the tenant served her dispute resolution hearing package to the landlord. I find that the descriptions provided by both the landlord and Witness NJ of the service of the dispute resolution hearing package are similar in all meaningful ways.

At the hearing, I advised the parties that I found that the tenant's claim that Witness NJ observed the tenant serve her evidence package to the landlord was incorrect. At that stage, the tenant revised her earlier sworn testimony. She said that a male friend who was living with her at that time but who was unavailable for this hearing witnessed her hand her written evidence package to the landlord from her car.

Based on the oral testimony of the parties, particularly that provided by the tenant's own witness, Witness NJ, I find on a balance of probabilities that the tenant did not serve her written evidence to the landlord. The tenant's account of the service of her evidence changed frequently during this hearing and appeared to vary depending on other evidence that was submitted. In her changing accounts of how she served documents and who was present, I find that there is very little credibility that can be attached to the tenant's statements regarding her service of documents to the landlord.

In considering whether to allow the tenant's written evidence, I have taken into account the extent to which the tenant's written evidence factors into the issues before me. Much of the tenant's written evidence involves the landlord's application for a monetary award for unpaid utilities, and the landlord's application for a monetary award for carpet cleaning. The burden of proof for these claims rests with the landlord.

While I find that the tenant provided misleading and incorrect information regarding her provision of evidence to the landlord, no pattern of recurring failure to comply with the provisions of the *Act* or the Rules of Procedure emerges from my review of the tenant's actions. Consequently, I have not refused to accept the tenant's written evidence, even though I find that it was not forwarded to the landlord in advance of this hearing. Those portions of the tenant's written evidence that have a bearing on my decision were reviewed with the landlord at the hearing and he did not request an adjournment to obtain more time to review the tenant's evidence.

Analysis – Security Deposit

As noted above, both parties applied to recover the tenant's security deposit.

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the deposit (section 38(6) of the *Act*). If the tenant does not supply his forwarding address in writing within a year, the landlord may retain the deposit. With respect to the return of the security deposit, the triggering event is the latter of the tenant's provision of the forwarding address in writing or the end of the tenancy.

In this case, the tenant maintained that she handed the landlord her forwarding address in writing when she gave him her July 10, 2010 letter. The landlord denied ever receiving this letter from the tenant.

Given the conflicting testimony, much of my decision regarding the security deposit hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal

> demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

In addition to the manner and tone (demeanour) of the oral testimony, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

The landlord's demeanour regarding this part of the hearing has convinced me of his credibility. He answered all questions asked of him in a calm and candid manner, and never wavered in his version of what happened. He also made some important admissions, including the fact that he sent his original application for dispute resolution to obtain authorization to retain the security deposit to an incorrect mailing address. A few days later, he obtained the tenant's correct mailing address, but not from the tenant. The tenant confirmed that she received the landlord's application for dispute resolution at the second mailing address he used for his dispute resolution hearing package. I also note that the landlord's evidence regarding the tenant's service of documents to him was corroborated by the tenant's own witness, Witness NJ.

The tenant's evidence, on the other hand, was not credible. She could not remember when she provided her forwarding address to the landlord in writing and had no witness available who could attest to her hand delivery of this letter to the landlord. The frequent changes in her evidence throughout this hearing did not lend credibility to her assurance that she hand delivered her forwarding address in writing to the landlord.

Based on a balance of probabilities, I find it more likely than not that the landlord is correct in his claim that the tenant never sent him her forwarding address in writing in July 2010 as she maintained. In accordance with section 39 of the *Act*, I find that the tenant has not provided her forwarding address in writing to the landlord for the purposes of obtaining a return of her security deposit within one year of the end of her tenancy. I find that the tenant's mailing address the landlord did obtain came through his own efforts to locate her for the purposes of serving his own application for dispute resolution.

Under these circumstances, I dismiss the tenant's application to obtain a return of her security deposit as she has not provided evidence to demonstrate her entitlement to a

return of this deposit. I allow the landlord to retain the tenant's security deposit plus interest in accordance with section 39 of the *Act*. No interest is payable over this period.

Analysis – Landlord's Application for a Monetary Award

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant 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 other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, there is conflicting evidence from the parties regarding the condition of the rental unit when this tenancy commenced. The landlord claimed that the tenant did not clean the carpets and that he incurred considerable costs in returning the rental unit to the condition it was in when the tenancy began. The tenant testified that the rental unit was in poor condition when she moved in and that she spent 12 hours cleaning the premises including the carpet before she could occupy the rental unit.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in and move-out condition inspections and inspection reports are very helpful. Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy. In this case, there is undisputed evidence that no joint move in or move-out condition inspections were conducted and no reports were issued and provided to the tenant by the landlord.

Section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***36*** *(2) Unless the tenant has abandoned the rental unit, 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...*

Section 24 includes similar provisions with respect to a landlord's failure to follow the requirements regarding move-in condition inspections.

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-in or move-out condition inspections and inspection reports, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. However, I have given consideration to whether the landlord is entitled to compensation for losses that arose as a result of this tenancy.

The landlord has not demonstrated to the extent necessary that damage to the rental unit exceeded that which was present when the tenant commenced her tenancy. The tenant maintained that the rental unit and particularly the carpet required considerable cleaning by her before she could move into the rental unit. I have refused to accept the landlord's written evidence regarding utility bills and a cleaning receipt that he did not send to the tenant. Under these circumstances and for the reasons outlined above, I am not satisfied that the landlord has met the burden of proof required by section 67 of the *Act* to entitle him to a monetary award for damage or loss arising out of this tenancy because he has failed to provide evidence to verify the actual amount of loss and that this loss resulted from the tenant's violation of the tenancy agreement or the *Act*. I dismiss the landlord's application for a monetary award for damage or loss arising out of this tenancy.

Under these circumstances, I find that the parties are responsible for their own filing fees for their applications.

Conclusion

I dismiss the tenant's application in its entirety. I dismiss the landlord's application for a monetary award for damage or loss arising out of this tenancy. I allow the landlord to retain the tenant's security deposit plus interest. I make no order regarding the recovery of filing fees for the landlord's application.

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*.