

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for compensation for a loss of rental income, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts. The Tenant applied for compensation for damage or loss under the Act or tenancy agreement, for the return of a security deposit and to recover the filing fee for this proceeding.

Issue(s) to be Decided

1. Is the Landlord entitled to compensation for a loss of rental income?
2. Is the Tenant entitled to compensation and if so, how much?
3. Is the Tenant entitled to the return of a security deposit?

Background and Evidence

This fixed term tenancy started on August 1, 2011 and was to expire on July 31, 2011 however it ended on February 28, 2011 when the Tenant moved out. Rent was \$800.00 per month plus \$50.00 for heat and hydro and \$25.00 for the use of laundry facilities. The Tenant paid a security deposit of \$400.00 at the beginning of the tenancy.

The Landlord claims that the Tenant ended the tenancy early and that he was unable to re-rent the rental unit again until April 2011 and he provided a copy of a one year fixed term tenancy agreement with his new tenant in support. The Landlord did not call this person as a witness and he admitted that this person ended the tenancy early and is no longer residing there. Consequently, the Landlord sought compensation for a loss of rental income for March 2011. The Tenant said she was advised by a former neighbour of the rental property that a new tenant moved into the rental unit on March 7, 2011 and she provided a witness statement to that effect.

The Tenant also argued that she was entitled to end the tenancy early because the Landlord misrepresented the state of repair of the rental unit and the safety of the rental property prior to entering into the tenancy agreement. The Tenant admitted that she inspected the rental property with the Landlord prior to entering into the tenancy but claimed that the Landlord assured her he would address any problems that might arise. The Tenant said in September 2010 she discovered that there was a leak around a window frame when it rained for long periods of time and in October 2010 a rodent

infestation. The Tenant said she also had two or three frightening encounters with one of the pre-existing tenants of the rental property who had violent verbal outbursts. The Tenant said the RCMP recommended that the Landlord evict this tenant. The Tenant said although she told the Landlord she didn't feel safe, he just told her that the tenant was mentally unstable and to let him know if it happened again.

The Tenant said that in September 2010 the Landlord cut two sections out of the drywall to let them dry out but did not return to repair them. Consequently, the Tenant said she repeatedly asked the Landlord over a 4 month period to repair the leaking window and patch the holes but he failed to do so. The Tenant said on January 13 or 14, 2011 the Landlord told her that he was fed up with her complaints and that if she was unhappy living there, it was fine with him if she left. However, the Tenant and her witness said the window continued to leak after January 15, 2011 so on January 17, 2011, she advised the Landlord that she would take him up on his offer but he said he would not allow her to end the tenancy early. The Tenant gave the Landlord written notice on January 17, 2011 that she was ending the tenancy on February 28, 2011 and provided her forwarding address (in writing) at the same time.

The Landlord admitted that he told the Tenant she could leave if she was unhappy with the window but claimed that he only said that out of frustration. The Landlord claimed that he was always in the rental property and was available to patch the holes but that it was never convenient for the Tenant. The Landlord also denied that there was a water leak around the window frame and argued that none was discovered by a building inspector in February 2011.

The Tenant said she contacted the municipal by-law enforcement authorities with her complaints about the rental property and inspections of the property by a health inspector, fire inspector building inspector and by-law officer were conducted on February 11 and 17, 2011. Several violations in the rental property were noted at these times which included fire code deficiencies, health code or pest control issues and building code violations as a result of renovations having been done without a permit. As a further result of the inspection, the Landlord was ordered to restore a missing wall in the rental unit and fill and paint an area above the bathtub where the plaster was missing or damaged.

The Tenant argued that the Landlord had a practice of failing to maintain and repair the rental property in a manner that complied with health, safety and housing standards. For example, the Tenant provided a document which showed that in 2007 the Landlord had been found to have made renovations to the rental property without a permit and was ordered to stop work until he obtained a permit but then failed to comply with the approved building plans. The Tenant also provided a witness statement dated January 26, 2011 from a previous tenant of the rental unit who had vacated in August or September of 2009. This witness claimed that the leaking window and rodent infestation were also problems during her tenancy and that the Landlord failed or refused to address them despite requests to do so.

Consequently, the Tenant sought the return of her \$400.00 security deposit which she said the Landlord had not returned to her despite not having her written authorization to keep it. The Tenant also sought \$400.00 for her living expenses while she resided with family members after she ended the tenancy. The Tenant also argued that she was entitled to recover penalties of \$625.00 for having to cancel an internet and digital television contract. The Tenant said she tried to assign this contract to another tenant of the rental property without success and was unable to transfer it to her new residence because her family members used other providers of those services. The Tenant said the penalty represented the total charges for these services over the term of the 2 year contract (which commenced in October or November of 2010).

The Tenant also argued that the amount charged by the Landlord for utilities (gas and hydro) was excessive and she sought an accounting of the actual charges paid by the Landlord during the tenancy and to be reimbursed for any overpayment. The Tenant claimed that she was unaware that she had the option of putting these utilities in her own name however the Landlord argued that the Tenant was aware that she had this option at the beginning of the tenancy but chose not to do so. The Tenant also sought to recover veterinarian expenses. The Tenant said her cat developed an eye infection which she believed was caused by the rodent infestation (or from their feces) in the rental unit. The Tenant further sought to recover expenses for purchasing fuses at the request of the Landlord.

Analysis

The Landlord's Claim:

Section 45(2) of the Act says that a tenant of a fixed term tenancy cannot end the tenancy earlier than the date set out in the tenancy agreement as the last day of the tenancy. If a tenant ends a tenancy earlier, they may have to compensate the landlord for a loss of rental income that he incurs as a result. Section 7(2) of the Act states that a party who suffers damages must do whatever is reasonable to minimize their losses. This means that a landlord must try to re-rent a rental unit as soon as possible to minimize a loss of rental income.

The Tenant argued that in a telephone message to her on January 13, or 14, 2011 the Landlord offered her the option of ending the tenancy if the window leak could not be repaired. The Tenant said the Landlord's attempts to repair the window leak on January 15, 2011 were unsuccessful so she contacted him on January 17, 2011 and told him she would accept his offer to end the tenancy. The Tenant said that the Landlord then tried to revoke his offer so later that day she delivered to the Landlord's residence her written notice ending the tenancy effective February 28, 2011. The Tenant provided a copy of the audio recording of the telephone message left by the Landlord on January 13 or 14, 2011 in which the Landlord states,

“...this is [Landlord's name]....I just got your message about the window...This must be the 4th message about the window....you know [Tenant's name] I'm really getting sick and tired of you complaining about this window day after day leaving messages when I already told you I'd take care of it on Saturday...So if you're really unhappy about it hey, [and] you're more than willing to move, that's fine with me okay....I'll try to fix it on Saturday but if it can't be fixed you might have to move.”

Based on this evidence, I find that the Landlord did offer the Tenant the option of ending the tenancy early if she was unhappy about the leaking window especially if he was unable to repair it on January 15, 2011. Although the Landlord argued that the window frame did not leak, I find on a balance of probabilities that it did. In particular, I am persuaded by the witness statement of a previous tenant and especially the witness evidence of the Tenant's partner (R.M.) who had an opportunity to view the leak. I find that the Tenant accepted the Landlord's offer on January 17, 2011 prior to him revoking it. Consequently, I find that there was an agreement between the Parties to end the tenancy early and for this reason, the Landlord's application for a loss of rental income for March 2011 is dismissed without leave to reapply.

The Tenant's Claim:

The Tenant applied for an accounting of the utility expenses incurred by the Landlord during the tenancy and a rebate of any overpayment she may have made. The Landlord argued that the Tenant was aware at the beginning of the tenancy that there were separate gas and hydro meters for each unit and that she had the option of putting the utility accounts in her name but chose not to do so but instead to pay a flat rate. Neither party provided a copy of the on-line advertisement to which the Tenant said she responded and the copy of the Parties' tenancy agreement that was submitted as evidence simply states that hydro, gas and laundry are included in rent of \$875.00.

I find it irrelevant whether the Tenant was aware at the beginning of the tenancy that she could pay for utilities rather than have them included in the rent. Even if the Tenant is correct that \$50.00 of her rent each month was for utilities (gas and heat) and that this was more than the actual cost to the Landlord, there is no evidence that this agreement was unconscionable or that the Tenant was under any disability or coercion. Consequently, I find that the parties' agreement is enforceable and the Tenant cannot now seek to re-write that agreement and her application(s) for an accounting of utility expenses and a rebate for any overpayment are dismissed without leave to reapply.

The Tenant also sought compensation for veterinarian expenses as she claimed that one of her cats had to be treated for an eye infection in early February 2011. The Tenant admitted that there was no evidence linking a rodent infestation with the eye infection but she argued that there was no other plausible contributing factor. However, I find that the Tenant's assertion is speculative at best and lacking any evidence to satisfy the burden of proof on her. In other words, I find that there could have been

other reasons for the cat's eye infection such as a bacteria or virus carried by other things including the Tenant herself. Consequently, the Tenant's application to be reimbursed veterinary expenses is dismissed without leave to reapply

The Tenant also sought to be reimbursed what she claimed were penalties for cancelling a contract with a provider of internet and cable services which was equal to the unexpired term of a 2 year contract. The Tenant argued that due to the Landlord's misrepresentation that he would take care of any problems, she had to end the tenancy and cancel this contract because she could not transfer it to her new residence. However, I find that there are no grounds for this part of the Tenant's claim. While the Landlord's alleged failure to make repairs may have contributed to the Tenant's decision to move out, it was not the Landlord's alleged breach of this duty that caused the tenancy to end; instead ***it ended by the agreement of the Parties***. Furthermore, I find that it was not reasonably foreseeable that the Tenant would incur expenses for ending a 2 year contract given in part that the tenancy was only for a one year fixed term. I also find that the Tenant cannot hold the Landlord responsible for this expense because she chose to move in with a family member (who did not want it) rather than to move into accommodations similar to those she vacated (where she could have it). Consequently, this part of the Tenant's application is dismissed without leave to reapply.

The Tenant also sought to recover \$400.00 for living expenses for March 2011 when she moved in with family members after the tenancy ended. However, I find that there are no grounds for this part of the Tenant's claim. The Tenant is only entitled under s. 7 of the Act to compensation for damages arising out of a breach by the Landlord of the Act or the tenancy agreement. I find that the Tenant would have had living expenses for March 2011 whether there was a breach by the Landlord or not. Consequently, I cannot conclude that the Tenant incurred this expense due to a breach by the Landlord and as a result, this part of her application is dismissed without leave to reapply.

Section 38(1) of the Act says that a Landlord has 15 days from either the end of the tenancy or the date he receives the Tenant's forwarding address in writing (whichever is later) to either return the Tenant's security deposit or to make an application for dispute resolution to make a claim against it. If the Landlord does not do either one of these things and does not have the Tenant's written authorization to keep the security deposit then pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit.

The Parties agree and I find that the Landlord received the Tenant's forwarding address in writing on January 17, 2011 and that the tenancy ended on February 28, 2011 when the Tenant moved out. The Parties also agree and I find that the Landlord did not return the Tenant's security deposit of \$400.00 and did not have her written authorization to keep the security deposit. Although the Landlord made an application for dispute resolution to make a claim against the security deposit for a loss of rental income within the 15 days granted under s. 38(1) of the Act, I find that this claim is frivolous for the following reasons:

- As indicated above, I find that the tenancy ended by agreement of the Parties; and
- I find on a balance of probabilities that there was a new tenant occupying the rental unit as of approximately March 9, 2011. Where the Parties evidence on this issue differs, I prefer the evidence of the Tenant as I found it more reliable and consistent with the rest of the evidence. The Tenant said she obtained a witness statement from her former neighbour after her former neighbour advised her that the new tenant of the rental unit claimed at the end of March 2011 that he had been living in the rental unit for approximately 3 weeks. I am also persuaded that this is likely the case given that the tenancy agreement was signed on March 9, 2011.

RTB Policy Guideline #17 (Security Deposit and Set off) says at p. 2 as follows:

“Unless the Tenant has specifically waived doubling of the deposit, either on the application for the return of the deposit or at the hearing, the arbitrator will order double the return of the security deposit if the Landlord has filed a claim against the security deposit that is found to be frivolous or an abuse of the arbitration process.”

I find that the Tenant did not waive doubling of the deposit. As a result, I order pursuant to s. 38(6) of the Act, that the Landlord must return double the amount of the security deposit or \$800.00 to the Tenant. I also find that the Tenant is entitled to be reimbursed \$5.59 for the cost of fuses she purchased at the Landlord's request. Although the Landlord argued that the Tenant was responsible for this expense because she was responsible for the fuse blowing, there is no evidence that this was the case as opposed to being the result of a problem with the electrical system. I also find that the Tenant is entitled pursuant to s. 72(1) of the Act to recover from the Landlord the \$50.00 filing fee for this proceeding. Consequently, I find that the Tenant has made out a total claim for **\$855.59**.

On a final note, the Tenant submitted a large amount of documentary evidence in support of her allegation that the Landlord failed to repair and maintain the rental unit and property as required by s. 32 of the Act. However, I have found that many of the Tenant's claims in this matter are not recoverable because the tenancy ended by agreement of the Parties (rather than due to a misrepresentation or a breach of a duty under the Act or tenancy agreement) and because some of the specific claims made by the Tenant were without merit for other reasons. Consequently, it was unnecessary for me to make a finding in this matter as to whether the Landlord was in breach of a duty under the Act.

Conclusion

The Landlord's application is dismissed without leave to reapply. The Tenant's application is granted in part. A Monetary Order in the amount of **\$855.59** has been issued to the Tenant and a copy of it must be served on the Landlord. If the amount is not paid by the Landlord, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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: July 18, 2011.

Residential Tenancy Branch