Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR MNSD FF
MNDC MNSD FF

Introduction

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

The Landlord 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 from the Tenant.

The Tenant filed seeking a Monetary Order for the return of double his security deposit, for money owed or compensation for damage or loss under the Act, and to recover the cost of the filing fee from the Landlord.

The parties 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, has the Landlord met the burden of proof to obtain a Monetary Order as a result of that breach?
3. Has the Landlord 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 a result of that breach?

Background and Evidence

The Landlord testified that he attempted to serve his hearing documents to the Tenant via registered mail to the address provided on the Tenant's application for dispute

resolution; however the package was returned and marked “no such address”. He attempted to serve his evidence in the same manner and that package was also returned and marked “refused”.

The Tenant confirmed he did not receive the Landlord’s application or his evidence. When I read out the address the Tenant had written on his application for dispute resolution he stated that he did not know where that address came from and he was not familiar with it. He stated that his address is still the rental unit address because he has his mail forwarded to him through Canada Post. He did not want to provide his current address to the Landlord and requested that everyone use the rental address for his service address.

The Tenant stated that he provided his forwarding address to the Landlord in a letter that he sent regular mail as per the instructions he was told at the *Residential Tenancy Branch.* He stated he provided a copy of the letter in his evidence which instructed the Landlord to use the rental unit address as his forwarding address. I questioned the Tenant why an original signed letter, addressed to the Landlord, was provided in his evidence dated March 7, 2011 and listed a different forwarding address than the rental unit. The Tenant was adamant that he did not use this different address and that he sent the Landlord this letter which included the rental address as his forwarding address.

The Landlord denied ever receiving the letter referenced in the Tenant’s evidence.

I heard undisputed testimony that the parties entered into their original tenancy agreement which began December 1, 2008 for only the upstairs of the rental house and as of April 1, 2009 they entered into a second fixed term tenancy agreement for the entire house that was set to switch to a month to month tenancy after March 31, 2010. As of April 1, 2009, rent was payable on the first of each month in the amount of $1,850.00. The Tenant initially paid $637.50 on December 1, 2008 as the security deposit and then an additional $287.50 was paid April 1, 2009 for a total security deposit of $925.00. No move in or move out inspection reports were completed.

The Landlord testified the rental house was sold and the new owners requested vacant possession. Title was transferred February 1, 2011 which is the same date the Tenant vacated the property.

The Landlord is seeking $833.79 which includes $134.95 which the Tenant withheld from his March 2009 rent; $355.20 for the balance of rent owed between August 2010 to January 2011 when the Tenant failed to pay the rent increase amount that was

served to him on April 29, 2010 and was effective August 1, 2010 (6 months x $59.20); $63.64 for one days rent for February 1, 2011 as the Tenant did not vacate on January 31, 2011, $280.00 that was provided to the new owners for $85.00 of carpet cleaning and $195.00 to reconnect the natural gas line. The Landlord did not have receipts for the amounts paid to the new owner as that was worked out with the sale of the house.

The Landlord stated that he made no attempts to collect the unpaid rent for March 2009 and the six month period between August 2010 and January 2011 because “it was not worth the hassle”. He advised his relationship with the Tenant had broken down and he did not want the mental stress or aggravation. I asked why he did not evict the Tenant if he was refusing to pay the full rent to which he replied that he had no intention of evicting the Tenant.

The Tenant testified that the house had first been put up for sale in the spring of 2010 and was taken off the market because the Landlord told him he was just testing the real estate market. Shortly after the house was taken off the market the Landlord served him with the notice of rent increase so the Tenant suggested that he would paint the exterior of the house in exchange for the Landlord waiving the rent increase. The Landlord agreed, the Tenant painted the house and the Landlord listed it for sale again.

The Tenant advised that he had done work on the house for the Landlord in previous months which is why his rent was reduced in March 2009. The Tenant stated he had painted the sundeck and did other small jobs around the house and the Landlord agreed to reduce his rent in exchange for the work. He does not agree with the rest of the amounts being claimed by the Landlord because he vacated the property as scheduled, before noon on February 1, 2011, he did not disconnect any natural gas lines, and he left the carpets in the same state of cleanliness they had been at the beginning of the tenancy.

The Tenant agreed that his relationship with the Landlord was bad at the beginning however they did come to agreements with the Tenant doing work on the property for the Landlord.

In closing the Landlord stated that he did not have an agreement with the Tenant to wave the rent increase. Upon further questioning the Landlord confirmed the Tenant had done periodic work around the house such as painting part of the house. The Landlord said he provided the paint and the Tenant did the work. Upon further clarification the Landlord confirmed the Tenant painted the exterior of the house over a period of weeks in 2010 while the house was listed for sale.

At the closing of the hearing I requested each party send me additional documentary evidence no later than July 15, 2011, as follows:

1) The Landlord was instructed to provide me with copies of both tenancy agreements with the Tenant and the two original envelopes that were sent registered mail to the Tenant and were returned to the Landlord;
2) The Tenant was instructed to provide me with copies of his tenancy agreements for this rental property.

Both parties were instructed not to provide any evidence other than what I instructed and which is listed above as it would not be used in my decision.

Analysis

The Tenant did not submit copies of his tenancy agreements as requested. Instead, the Tenant provided a written statement which was not requested by me. Therefore, pursuant to rule # 11.5(b), I will not consider this additional statement in my decision as it would prejudice the Landlord as he was not given an opportunity to reformulate his statement in writing after the hearing had concluded

Additional evidence was received as requested from the Landlord and included copies of tenancy agreements the parties had entered into, copies and the original envelopes that the Landlord sent to the Tenant registered mail and were returned to the Landlord.

The aforementioned supports the Landlord's testimony that he had sent his Application for Dispute Resolution documents to the address provided by the Tenant on the Tenant's application for dispute resolution as his address for service of documents.

Section 89(1)(d) of the Act provides that service of an Application for Dispute Resolution must be given by sending a copy by registered mail to a forwarding address provided by the tenant. Based on the aforementioned I find the Tenant was served the Landlord's application and evidence in accordance with the Act.

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

Landlord's Application

I favor the evidence of the Tenant, who stated that the Landlord reduced his March 2009 rent in exchange for labour to paint the deck and that the Landlord agreed to withdraw the rent increase in exchange for the Tenant's labour to paint the exterior of the house, over the evidence of the Landlord who stated that no such agreements were made yet the Landlord made no effort to seek a remedy to collect the unpaid rent.

I favored the evidence of the Tenant over the Landlord, in part, because the Tenant's evidence was forthright and credible. The Tenant readily acknowledged that he did not pay the claimed rent amounts; that he vacated the property as agreed which was before noon on February 1, 2011; and he did not have the carpets cleaned. In my view the Tenant's willingness to admit fault when he could easily have stated he did have the carpets cleaned or the rent was paid in full lends credibility to all of the Tenant's evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *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 current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Landlord's explanation of why he did not make an effort to collect the unpaid rent to be improbable. Given that the Landlord had provided the Tenant with proper

written notice of the rent increase it is reasonable to conclude he was aware of his legal entitlement to the additional rent money, had the notice been upheld. I find that the Landlord's explanation that he simply did not want the aggravation of collecting the funds to be improbable, not to mention that avoidance does not meet the requirement under section 7 of the Act for mitigation. Rather, I find the Tenant's explanation that the parties had entered into agreements for reduced rent in March 2009 and no rent increase from August 2010 to January 2011 in exchange for the Tenant's labour to be plausible. Also, I find the Tenant's explanation that they had agreed he would vacate the property by noon on February 1, 2011, the date the property title was transferring to be plausible given the circumstances presented to me during the hearing.

For all the aforementioned reasons, I find parties entered into verbal agreements whereby the Tenant would reduce his March 2009 rent in the amount of $134.95 in exchange for work performed on the rental property by the Tenant; that the parties agreed the rent increase that was to be in effect as of August 1, 2010 would be withdrawn in exchange for the Tenant's labour to paint the exterior of the rental house; and the Tenant was to vacate the rental house no later than February 1, 2011 at twelve noon. Therefore I dismiss the Landlord's application $553.79 for unpaid rent ($134.95, $355.20, $63.64), without leave to reapply.

In the absence of inspection reports or receipts for proof of payment for carpet cleaning and reconnection of the natural gas line I find the Landlord provided insufficient evidence to meet the test for damage or loss, as listed above, and I dismiss his claim of $280.00 ($195.00 + 85.00), without leave to reapply.

The Landlord has not been successful with his application; therefore he must bear the burden of the cost to file his own application.

Tenant's Application

I favoured the evidence of the Landlord that the Tenant did not provide him with a forwarding address until he received the Tenants application for dispute resolution which listed the "unknown" address used by the Tenant. I find it improbable that this would be the Tenant's forwarding address if he could not recognize it during the hearing. Furthermore I find it improbable that the Landlord was sent the letter dated March 7, 2011, if the original was provided in the Tenant's evidence.

For the above mentioned reasons I find the Landlord was not provided with a forwarding address for the Tenant until March 31, 2011 when the Landlord received the Tenant's application for dispute resolution.

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 Landlord was required to return the Tenant's security deposit in full or file for dispute resolution no later than April 15, 2011. The Landlord made application for dispute resolution on April 1, 2011.

Based on the above, I find that the Landlord has not failed to comply with Section 38(1) of the *Act* and that the Landlord is not 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 and pet deposit and the landlord must pay the tenant double the security deposit.

Based on the aforementioned the Tenant has not succeeded in meeting the burden of proof to be entitled to the return of double his security deposit. However, having dismissed the Landlord's application above, I find the Landlord has no entitlement to retain the security deposit and interest. Therefore the Tenant is entitled to a monetary award in the amount of **$925.81** ($925.00 security deposit + $0.81 interest).

The Tenant has been partially successful with his application, therefore I award recovery of the filing fee in the amount of **$25.00.**

Conclusion

I HEREBY DISMISS the Landlord's application.

The Tenant's decision will be accompanied by a Monetary Order for **$950.81** ($925.81 + 25.00). This Order is legally binding and must be served upon the Landlord.

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 20, 2011.

Residential Tenancy Branch