

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) 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 her filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenant testified that on February 27, 2011 she handed the landlord a printed (written) notice to end her tenancy by the end of March 2011. The landlord and her agent who was looking after the property for her mother, the landlord, in March 2011, testified that the tenant did not provide any written notice to end this tenancy. The landlord's agent said that she did not realize the tenant was vacating the rental property until March 20, 2011.

The tenant confirmed that she received a copy of the landlord's dispute resolution hearing package in April 2011. I am satisfied that the landlord served this package and her written evidence in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for loss of rent for the first half of April 2011? Is the landlord entitled to a monetary award for damage arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This month-to-month tenancy commenced on September 23, 2009. Monthly rent was set at \$750.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$375.00 security deposit paid on September 17, 2009.

The landlord applied for a monetary award of \$485.00. As part of this amount, she applied for \$375.00 in lost rent for half of April 2011, as a result of the tenant's lack of adequate notice to end this tenancy. The landlord's agent testified that she advertised the rental unit on Craigslist on Sunday, March 20, 2011, as soon as the tenant notified her that she was moving out by the end of March 2011. She said that a new tenant was

located who commenced paying the same amount of rent as of April 15, 2011. She said that the landlord received one-half month's rent from the new tenant for April 2011.

The landlord also applied for \$60.00 in rug shampooing costs, although she did not submit any receipts for this item. The landlord entered written evidence that she spent a full day cleaning due to the dirty condition of the rental unit at the end of this tenancy. She also applied for recovery of the \$50.00 filing fee for her application.

Analysis

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.

Analysis – Loss of Rent for April 2011

Section 45(1) of the *Act* requires a tenant to end a month-to-month (periodic) tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for April 2011, the tenant would have needed to provide her notice to end this tenancy before March 1, 2011. Section 52 of the *Act* requires that a tenant provide this notice in writing.

There is conflicting evidence regarding whether a written notice to end this tenancy was provided by the tenant. Although the tenant said that she provided her written notice to end this tenancy on February 27, 2011, the landlord and her agent testified that no such written notice was provided on that date. Furthermore, the landlord's agent testified that she did not know that the tenant was vacating the rental unit until March 20, 2011, at which time she commenced immediate efforts to find another tenant.

Given the conflicting testimony, much of this case 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 witness' evidence, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

The landlord's agent's demeanour during the hearing has convinced me of her credibility. She answered all questions asked of her in a calm and candid manner, and never wavered in her version of what happened. She also made some important admissions, including the fact that she prepared the written evidence signed by the landlord. When it became apparent that she could not speak directly to the tenant's claim that she handed her written notice to end this tenancy to the landlord on February 27, 2011, the landlord's agent said that the landlord was likely available at home to provide her sworn oral testimony regarding this issue.

I find that the oral testimony provided by the landlord and her agent was consistent with the written evidence submitted on the landlord's behalf. The tenant agreed that she did meet with the landlord's agent on March 6 and March 20, 2011. Based on the oral and written evidence regarding these meetings, I find it more reasonable than not that the landlord's agent first realized on March 20, 2011 that the tenant was vacating the rental unit by the end of that month. The landlord's agent took immediate action to advertise the rental unit and in obtain a new tenant as of April 15, 2011 to reduce the tenant's liability for rent for the landlord's lost rent for April 2011. These actions lend credibility to the landlord's agent's account of the events leading to the end of this tenancy.

I find that the tenant's failure to provide a copy of her written notice to end this tenancy is a significant deficiency in her claim that she provided written notice to end this tenancy. She said that she retained a copy but was told that she had 12 months before she had to provide it to support her claim for the return of her security deposit. However, the tenant testified that she received the landlord's two page written summary of events and the landlord's application for a monetary award and for permission to retain the tenant's security deposit. Under these circumstances, the tenant was aware that the landlord was claiming that she was entitled to one-half month's rent for April 2011. She also knew that there was no reference to her February 27, 2011 written notice to end this tenancy in the landlord's written summary. If the tenant did have a

copy of her written notice of February 27, 2011 as she claimed, she chose not to enter this document into written evidence for this hearing. I find that the absence of this alleged supporting documentation significantly weakens the tenant's oral testimony that she provided a written notice to end this tenancy on February 27, 2011.

I have considered the testimony of the parties in an effort to establish credibility in relation to the disputed testimony. The real test of the truth of the information provided by a witness must align with the balance of probabilities. In the circumstances before me, I find the version of events provided by the landlord's agent and the landlord to be highly probable given the conditions that existed at the time. Considered in its totality, I find the evidence presented by the landlord and her agent more credible than that of the tenant. The landlord's agent's testimony and that of the landlord, combined with the other evidence, has persuaded me on the balance of probabilities that the tenant did not provide a written notice to end this tenancy on February 27, 2011.

For these reasons, I find that the tenant did not comply with the provisions of section 45(1) of the *Act* and the requirement under section 52 of the *Act* that a notice to end tenancy must be in writing. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. As such, the landlord is entitled to compensation for losses she incurred as a result of the tenants' failure to comply with the terms of their tenancy agreement and the *Act*.

There is undisputed evidence that the tenant did not pay any rent for April 2011. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises for April 2011. She was successful in finding a new tenant for April 15, 2011, which reduced the tenant's liability for losses to one-half month's rent. I am satisfied that the landlord has discharged her duty under section 7(2) of the *Act* to minimize the tenants' loss. I find that the landlord is entitled to a monetary award in the amount of \$375.00 for the landlord's loss of rent for April 2011.

Analysis – Damage

The parties entered conflicting evidence regarding the condition of the rental unit when this tenancy ended. 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. In this case, the landlord's agent admitted that no such inspections or inspection reports were requested by the landlord or conducted.

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. 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...

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-out condition inspection and inspection report, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. In addition, she did not enter into evidence any photographic evidence or any receipts or invoices to substantiate her claim that she incurred costs to repair or clean the premises after the tenant vacated the rental unit. Under these circumstances, the landlord has not met the burden of proof required to entitle her to a monetary award for damage arising out of this tenancy. I dismiss her claim for damage arising out of this tenancy without leave to reapply.

Analysis – Security Deposit and Filing Fee

I allow the landlord to retain the tenant's security deposit plus interest in partial satisfaction of the monetary award issued in this decision. No interest is payable over this period.

Since the landlord has been successful in her application, I allow her to recover her \$50.00 filing fee for her application from the tenant.

Conclusion

I issue a monetary award of \$375.00 in the landlord's favour to recover one-half month's rent from April 2011. I allow the landlord to retain all of the tenant's \$375.00 security deposit to satisfy this monetary award.

I issue a monetary Order in the landlord's favour in the amount of \$50.00 to recover the landlord's filing fee for this application from the tenant.

The landlord is provided with these Orders in the above terms and the tenant must be served with a copy of these Orders as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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*.