Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing was convened by way of conference call in response to an application made by the landlord for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of this application.

The landlord attended the conference call hearing, gave affirmed testimony and provided evidence in advance of the hearing. The hearing did not conclude on the first day, and was adjourned for a continuation of testimony because a crucial witness of the landlord was called away to an emergency prior to the time scheduled for the hearing on January 25, 2012 and was not able to attend on that date. The landlord and the witness of the landlord attended the conference call on February 22, 2012 at which time the witness provided affirmed testimony. The landlord also called a witness on the first day of the hearing who provided affirmed testimony.

Despite being served with the Landlord's Application for Dispute Resolution and notice of hearing documents by registered mail on November 10, 2011, the tenant did not attend on either date. The landlord testified that the Canada Post website reveals that the tenant picked up and signed for the Registered Mail package on November 14, 2011, and I find that the tenant has been served in accordance with the *Residential Tenancy Act.*

All evidence and testimony provided have been reviewed and are considered in this Decision.

Issue(s) to be Decided

- Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement?
- Is the landlord entitled to keep all or part of the pet damage deposit or security deposit in full or partial satisfaction of the claim?

Background and Evidence

The landlord testified that the parties entered into a fixed term tenancy agreement on August 19, 2011 for a tenancy to begin on September 1, 2011 and to expire on August 31, 2012. A property manager was looking after the rental unit at that time who signed the tenancy agreement on behalf of the landlord. Rent in the amount of $1,500.00 per month was payable in advance on the 1st day of each month. On August 11, 2011 the landlord's property manager collected a pet damage deposit from the tenant in the amount of $500.00 and collected a security deposit in the amount of $750.00 on August 19, 2011. The parties completed a move-in condition inspection report on August 24, 2011. The tenant also provided the landlord's property manager with post-dated cheques for the first 6 months of the tenancy. A copy of the tenancy agreement and a copy of the move-in condition inspection report were provided in advance of the hearing.

The landlord further testified that the tenant did not move into the rental unit, but called the landlord's property manager on August 26, 2011 stating that an odour lingered in the rental unit, and believing it might be the remnants of a marihuana grow-operation or previous meth lab, the tenant did not want to move into the rental unit. The property manager wrote "Cancelled" on the tenancy agreement, however, the landlord claims unpaid rent for the month of September, 2011, and requests a monetary order for the entire fixed term.

The tenancy agreement also contains a liquidated damages clause which states that in the event that the tenant ends the tenancy prior to the end of the fixed term, the tenant will be required to pay the landlord liquidated damages in the amount of $1,500.00. The landlord claims liquidated damages for that amount. However, the landlord also testified that a previous hearing was conducted before a Dispute Resolution Officer on October 24, 2011 under file number 780690, which resulted in a Decision dismissing the landlord's claim for liquidated damages.

The landlord also claims recovery of the $50.00 filing fee for the hearing that took place on October 24, 2011, as well as recovery of the $50.00 filing fee for the cost of this application.

The landlord further provided evidence of attempting to re-rent the rental unit, by placing advertisements in the Vancouver Sun and other newspapers, and testified that advertisements were also placed on Craig's List. The invoices provided by the landlord shows that the advertisements were placed commencing on September 3, 2011 and were continuous until September 23, 2011. The landlord claims recovery of the costs

associated with advertising the rental unit in the amount of $728.75, and provided receipts to substantiate that claim. The invoices and receipts provided show that the landlord advertised the rental unit at $1,550.00 per month, which is more than the tenant was required to pay under the tenancy agreement, although the landlord did not mention that during the hearing, nor was it noticed during the hearing. The rental unit was re-rented October 1, 2011.

The landlord also provided a copy of a note written by the tenant dated October 27, 2011 which contained the tenant's forwarding address, but the landlord does not know when that note was received by the landlord or by the landlord's property manager.

The landlord's first witness testified to being an employee of the property manager, and that the word, "Cancelled" had been written across the tenancy agreement because the witness' boss advised the witness to do so, and that the tenant would not be moving into the rental unit.

The landlord's second witness testified to being the property manager for the landlord and that the day after the move-in condition inspection report was completed, the tenant called the witness stating that the tenant had a heavy-chest feeling. The witness told the tenant that the landlord would not be happy, and that several people had applied to rent the unit and this tenant was chosen. The parties met at the rental unit and the tenant gave back the key. The witness explained that until the unit was re-rented, the tenant was liable for the lease and that the landlord already had the security deposit.

In September, 2011 the tenant sent a text message to the witness requesting the security deposit, but the witness replied to that text message stating that the witness had no access to the landlord by phone because the landlord was in Asia. On October 27, 2011 the tenant made a request in writing for return of the security deposit.

The witness also explained the notation of "Cancelled" on the tenancy agreement. The witness would have an assistant write "Rejected" on applications where tenants are not accepted and "Void" on cheques that were not cashed or deposited. Once a tenancy agreement is cancelled, the witness stated that "Cancelled" is written on it and it's filed away. When asked if it means that it's agreed by the parties that the tenancy agreement is cancelled, or written to keep active from inactive tenancies separate, the witness stated that not until after the unit was re-rented did the witness have the staff member write "Cancelled" on the tenancy agreement. Further, at the first hearing, "Cancelled" was not written on the tenancy agreement.

Analysis

Firstly, with respect to the landlord's request for a monetary order for the entire fixed term, the *Residential Tenancy Act* requires the landlord to do whatever is reasonable to mitigate, or reduce the amount of loss suffered as a result of the tenant's failure to comply with the tenancy agreement. I find that the landlord did so, by placing advertisements in local newspapers and elsewhere, and provided evidence of having done so. The rental unit was re-rented on October 1, 2011, and therefore, the landlord is only out-of-pocket one month of rent, or $1,500.00. Any monetary award made as a result of a dispute cannot place the landlord in a better financial position than the landlord would be if the tenant had not breached the tenancy agreement. In this case, the landlord would be collecting double the rent for the months of October, 2011 to August, 2012 if such an award was made, and I decline to order a monetary amount for the entire fixed term for that reason.

I do find, however, that the tenant entered into a tenancy agreement, and is required by law to meet the terms of that agreement. If a tenant can prove that the rental unit could not be occupied or that the tenant was justified in breaking the agreement for some other reason, the landlord's claim may not be successful. The tenant did not attend this hearing to provide any evidence to justify breaking the agreement, and therefore, I find that the landlord has established a claim for unpaid rent.

The tenancy agreement shows that the rental amount was $1,500.00 and all advertisements show $1,550.00. I refer to Residential Tenancy Policy Guideline 3, Claims for Rent and Damages for Loss of Rent, which states that:

> "In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.
>
> "In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent or damages, but any remainder is not recoverable by the tenant. In a month to month tenancy the fact that the landlord may have been able to re-let the premises at a higher rent for a subsequent tenancy does not serve to reduce the liability of the previous tenant."

Therefore, I find that the landlord ought to have received a total rent of $18,000.00 over the term of the tenancy. The landlord has re-rented the rental unit at an increased rent

and will receive the sum of $17,050.00 for the balance of the term of the tenancy, and the landlord is entitled to recovery of the difference, or $950.00.

With respect to the landlord's claim for advertising costs, the tenant entered into a fixed term tenancy, and therefore, I find that the landlord would not have incurred those costs had the tenant not breached the tenancy agreement. I further find that the landlord has established a claim in the amount of $728.75.

With respect to the landlord's claim for liquidated damages, that matter has already been dealt with in the Decision resulting from the hearing that took place on October 24, 2011. The matter is considered *res judicata,* meaning that the matter cannot be re-heard and the Decision of the Dispute Resolution Officer remains outstanding. I have no authority to re-consider the issue of liquidated damages with respect to this tenancy. The landlord's application for liquidated damages is hereby dismissed without leave to reapply.

With respect to the landlord's claim for recovery of the filing fees for this hearing and the hearing held on October 24, 2011, the *Act* states that a Dispute Resolution Officer may order recovery of the filing fee, however recovery is usually awarded when the party who has filed an application is successful, or at least partially successful with the application. In the October 24, 2011 hearing, the landlord was not successful in obtaining an order for liquidated damages, and therefore, the landlord is not entitled to recover the filing fee for that application from the tenant.

With respect to the landlord's application to keep the security deposit and pet damage deposit, the *Act* states that a landlord may only apply to keep a pet damage deposit for damages caused by a pet. The tenant in this case did not move into the rental unit, and therefore, there is no evidence that any damage was caused by a pet. The *Act* also states that where a Dispute Resolution Officer orders one party to pay an amount to the other party, the amount may be deducted from any rent owed to the landlord, or in the case of money owed by a tenant to a landlord, from any security deposit or pet damage deposit held by the landlord. It should be noted that the security deposit and pet damage deposit held by the landlord are held in trust on behalf of the tenant, and the landlord is not entitled to keep it without the written consent of the tenant or an order of a Dispute Resolution Officer, Residential Tenancy Branch. In this case, I find that the amount of rent owed to the landlord by the tenant exceeds the amount of deposits held in trust by the landlord. Therefore, pursuant to the *Act,* I order the landlord to keep both deposits in partial satisfaction of the landlord's claim.

Because the landlord has been partially successful with the claim, the landlord is entitled to recovery of the $50.00 filing fee for the cost of this application.

Conclusion

For the reasons set out above, I hereby order the landlord to keep the security deposit and pet damage deposit totalling $1,250.00, and I grant a monetary order in favour of the landlord for the difference pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $478.75.

This order is final and binding on the parties and may be enforced.

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 28, 2012.

Residential Tenancy Branch