DECISION

Dispute Codes MNR, MND, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for a Monetary Order for unpaid rent, for compensation for damages to the rental unit and for damage or loss under the Act or tenancy agreement, to recover the filing fee for this proceeding and to keep the Tenants' security deposit and pet damage deposit in partial payment of those amounts.

This matter was originally scheduled as an oral hearing however for the reasons set out in an interim Decision issued on May 30, 2012 it was reconvened as a written hearing. During a teleconference call held on May 2, 2012, the Landlord advised the Dispute Resolution Officer that her address for service had changed and that it was now the rental unit address. A notice of reconvened hearing was sent to the Landlord at that address as well as documentary evidence from the Tenant. At a further conference call held on May 29, 2012, the Landlord confirmed that she received these documents.

The interim decision issued May 30, 2012 was also sent to the Landlord at the rental unit address. That decision set out instructions to the Parties as to what further evidence would have to be submitted and the time limits for serving that evidence. The Respondents complied with the direction in the Decision and provided statutory declarations of witnesses as well as proof of service of the same on the Landlord by the date stipulated for doing so. The Tenants provided a statutory declaration of T.Z., sworn June, 2012 who claimed that documents were delivered to the Landlord by courier on June 20, 2012 however the Landlord although present, refused to open the door or acknowledge service so the documents were posted to the door. T.Z. claimed she also sent the same documents to the Landlord by registered mail on June 19, 2012. T.Z. provided a proof of service that shows that the Landlord was served with two notices by Canada Post to pick up the documents but she failed or refused to do so. Consequently, on June 21, 2012, T.Z. said she sent the Landlord an e-mail advising her about the attempted service and attaching the documents.

The Landlord provided no further evidence in accordance with the directions set out in the Decision issued May 30, 2012. Section 90(a) of the Act says that a document delivered by mail is deemed to be received by the recipient 5 days after it is mailed. Consequently, I find that the Landlord was served with interim Decision dated May 30, 2012 and the Tenants' new sworn witness evidence and the hearing proceeded in the absence of any sworn evidence from the Landlord.

Issue(s) to be Decided

1. Are there rent arrears and if so, how much?
2. Is the Landlord entitled to compensation for damages to the rental unit and if so, how much?
3. Is the Landlord entitled to keep a security deposit and pet damage deposit?

Background and Evidence

This fixed term tenancy started on August 15, 2011 and was to expire on June 30, 2012 however it ended on February 14, 2012 when the Tenants moved out. According to the Parties' tenancy agreement, rent was $3,500.00 per month payable in advance on the 1st day of each month. The Tenants paid a security deposit of $1,750.00 and a pet damage deposit of $1,750.00 at the beginning of the tenancy.

On or about January 10, 2012, the Landlord served the Tenants with a One Month Notice to End Tenancy for Cause dated January 10, 2012 (for repeated late payment of rent). The Tenants' application to cancel that Notice was heard on February 6, 2012 however it was dismissed with leave to reapply. The Tenants did not reapply. In her unsworn written submissions, the Landlord claimed she received written notice from the Tenants' lawyer on February 10, 2012 that they would be vacating the rental unit on February 14, 2012. On her application for Dispute Resolution, the Landlord wrote that the Tenants paid rent for only one-half of February 2012.

In support of her claim for unpaid rent, the Landlord provided copies of the Tenants' cheques. In her unsworn written submissions, the Landlord argued that at the beginning of the tenancy, the Tenants gave her post-dated rent cheques dated for the 15th day of each month. The Landlord said she advised the Tenants that rent was due on the 1st day of each month as per the tenancy agreement and refused to accept their rent cheques dated August and September 15, 2011, respectively. The Landlord claimed in some undated and unsigned written submissions that on August 14, 2011, the Tenants gave her $3,500.00 cash for rent for the period, August 15 – September 14, 2011, a cheque in the amount of $1,750.00 for rent for the period, September 15 – 30, 2011 and a cheque for $1,750.00 in payment of the pet damage deposit. The Landlord further claimed in her written submissions that she cashed the Tenants' rent cheques dated October 15, 2011, November 15, 2011, December 15, 2011 and January 15, 2012 under protest. The Landlord claimed the Tenants put a stop payment on their rent cheque dated February 15, 2012. Consequently, the Landlord claims that the Tenants have rent arrears of $1,750.00 for the period, February 15 - 29, 2012.

The Tenant, Y.W., argued in her statutory declaration sworn June 19, 2012 that the copy of the (standard form of) tenancy agreement provided by the Landlord to the Tenants was missing pages 4 and 5 (containing the standard terms) and therefore it relieved the Tenants of their obligations under the tenancy agreement. The Tenants denied that they were late paying rent because they gave the Landlord post-dated

cheques. The Tenants claimed that they were entitled to pay on the 15th day of each month because that was the date the tenancy started. The Tenants claim that they decided to vacate due to the Landlord's breaches. The Tenants advocate argued that the Landlord's act of trying to wrongfully evict them was a breach of a material term of the tenancy agreement or alternatively, the Landlord rescinded the tenancy agreement by serving a Notice to End Tenancy on them thereby relieving the Tenants of the requirement to give full notice. The Tenants çlaim that their dispute with the Landlord arose when she demanded rent payments made in cash (so there would be no evidence of a tenancy) and that the issue was not the date the payments were made.

The Landlord also claims on her application that the Tenants caused damages to the rental unit. In her written submissions, the Landlord claims that the Tenants were responsible for a gouge in a sandstone tile floor of the dining room, for a deep scratch in the flooring of the entrance, for repairing damage to a bathroom wall where a towel and toilet paper holder had allegedly been pulled away, for repairing a lazy-susan, for repairing and repainting a window and door frame in the master bedroom, and for bank charges for a returned cheque.

The Landlord provided a copy of a Condition Inspection report that was completed at the beginning of the tenancy. That report shows that at the beginning of the tenancy, there were no condition issues and that much of the premises had been newly renovated including new paint and flooring. The Landlord provided a signed but unsworn statement of a witness, M.E.A., who claimed she was present on the rental property on August 14, 2012 when the Parties conducted their move in inspection. M.E.A. claimed that the rental unit was newly renovated and that the inspection took a long time. The Landlord also relied on a signed but unsworn written statement of a witness, M.G., who claimed that he installed new sandstone tile floors in the rental unit and claimed that another employee sealed the floors on August 12, 2011 at which time there were no gouges or scratches in the flooring.

The Landlord provided as evidence a copy of a letter she said she received a letter from the Tenants' lawyer dated February 6, 2012 by registered mail which stated that the Tenants would be ending the tenancy on February 14, 2012 and they proposed that a move out condition inspection be conducted that day. The Landlord claimed it was her belief that the tenancy could not end before February 29, 2012 (the effective date of a One Month Notice to End tenancy) and that she therefore did not have to do a move out inspection before that date. Consequently, the Landlord said she met the Tenants at the rental property on February 14, 2012 but only to serve them with a letter proposing February 29, 2012 as a date to do a move out inspection and Notice of Final Opportunity to Schedule a Condition Inspection for March 1, 2012 at 2:00 p.m.

The Landlord said the Tenants did not attend the rental property on March 1, 2012 and she provided an unsworn written statement of a witness, D.B., to that effect. The Landlord further claimed that she completed a move out condition inspection report but she did not submit it as evidence at the hearing. The Landlord relied on a signed but unsworn written statement from her witness D.B., who claimed that he was present with

the Landlord during her inspection on March 1, 2012 and observed a gouge in the dining room floor, a scratch on the entrance floor, a gouge in the wood casing around the master bedroom window and door and wall damage in a guest bathroom where it appeared a towel and toilet paper roll holder had been pulled from the wall. The Landlord provided photographs of the alleged damages that she claimed she took in December 2011 during an inspection as well as on March 1, 2012. The Landlord also provided a written estimate for the cost to repair the alleged floor damages.

In her statutory declaration sworn June 19, 2012, the Tenant, Y.W., claimed that the move in condition inspection report was missing page 4 (instructions) and that the Landlord did not give the Tenants a copy of this document until it was served as part of an evidence package in January 2012. The Tenant, Y.W., claimed that she was not given sufficient time to read it before she signed it and that she believes the Landlord added wording to it after she signed it. Y.W., said her spouse took photographs of the rental unit on August 15, 2012 two of which show areas of damage to the newly installed floor. The Tenant's sworn statement also includes the Tenants' forwarding address in writing.

The Tenants provided a written statement of a witness, K.T., sworn on April 24, 2012 who claimed that when she attended the rental unit on number of occasions during the tenancy, she noticed that renovations were still being completed. K.T. claimed that in September 2011 she discovered that the Landlord was building a water feature in the backyard and that some walls appeared to have not been painted. K.T. also claimed that she was present on February 14, 2012 when the Landlord arrived at the rental unit, threw a letter at the Tenants from her car and drove off yelling obscenities at them. The Tenants also relied on a written statement of a witness, L.Y., who claimed that when she visited the rental property in late-September 2011, renovations were not fully completed inside and work was still being done outside. Both K.T. and L.Y. claimed that the property was supposed to be fully renovated by the beginning of the tenancy.

The Tenants' advocate argued in her written submissions that the Landlord failed to conduct a move out condition inspection on February 14, 2012 without adequate reason and rescheduled it without giving the Tenants an opportunity to propose an alternate time or date. The Tenants claim that they never received a copy of a move out Condition Inspection Report from the Landlord. The Tenants' advocate argued that the quotation for tile repairs provided by the Landlord was not evidence of damage but rather merely evidence of the cost of tile replacement and that this was unreliable given that the Landlord had written other information on it.

Analysis

The Tenants' advocate argued that much of the Landlord's evidence was inadmissible because it was unsworn and therefore hearsay. However, section 75 of the Act says that "*the director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the*

director considers to be necessary and appropriate and relevant to the dispute resolution proceeding." The Dispute Resolution Officer directed both parties to submit "sworn statements" for both themselves and their witnesses for the purpose of verifying the true identity of the deponents. The Landlord failed to do so and therefore all of her written submissions and witness statements are admissible but have been given lesser weight for this reason.

Section 26(1) of the Act says that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the Tenant has a right under the Act to deduct all or a portion of it.

The Landlord argued that under the Parties' tenancy agreement rent was due in advance on the 1st day of each month and that the Tenants paid rent only up to February 14, 2012. The Tenant's advocate argued that because the tenancy started on August 15, 2011, the Tenants were entitled to pay rent on the 15th day of each successive month. However; the parties' tenancy agreement clearly states that rent is due in advance on the 1st day of each month for each month during the tenancy. Furthermore, I find that there is no legal authority for the Tenants' proposition that if the tenancy started mid-month they could pay on the 15th contrary to the literal wording of the tenancy agreement. Consequently, I find that rent was due in advance on the 1st day of each month and that ***the Tenants' payments on the 15th day of each month were in fact late***. However, I also find that the Landlord was under the mistaken belief that the tenancy could not end until February 29, 2012, the effective date of the One Month Notice to End Tenancy. I find that the tenancy ended on the date the Tenants moved out, February 14, 2012. After this date the Tenants became responsible not for rent but for any loss of rental income incurred by the Landlord.

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.

I reject the argument of the Tenants' advocate that the Landlord breached a material term of the tenancy agreement by trying to evict the Tenants. There is no such authority for such a proposition and the Supreme Court of B.C. decision of *Whiffin v. Glass & Glass (July 26, 1996) Vancouver Registry No. F882525 (BCSC),* suggest the opposite. In particular, the Court held that attempts by a landlord to end a tenancy, if he believes he has grounds, do not constitute a breach of the covenant of quiet enjoyment of the premises and that as long as the landlord believes he has reason to end the tenancy, he can make that assertion "frequently, emphatically and even rudely" and that a landlord is entitled to threaten proceedings in the courts for possession, even if the landlord is wrong.

I also reject the argument of the advocate from the Tenants that the Landlord rescinded the tenancy agreement by seeking to evict the Tenants. The Act and tenancy agreement make it clear that a Landlord may evict a Tenant for a breach of a term of a tenancy agreement (such as repeated late payment of rent) and still request damages for lost rental income (see also RTB Policy Guideline #3). Consequently, in ending the tenancy early, I find that the Tenants were liable for any loss of rental income incurred by the Landlord up to June 30, 2012 subject to the Landlord's obligation under s. 7(2) of the Act to re-rent it as soon as possible. However, the Landlord provided no evidence that she lost rental income and in the absence of any such evidence, her application to recover unpaid rent or a loss of rental income for February 2012 is dismissed without leave to reapply.

I also find that the advocate for the Tenants was under the mistaken belief that the Landlord's failure to incorporate pages 4 and 5 of the standard form tenancy agreement had the result that the Landlord was disentitled to relief under the Act. Section. 12 of the Act makes it clear that the standard terms are terms apply to every agreement whether it is in writing or not. Consequently, even if the standard terms were omitted in the Parties' written agreement, they would be included by operation of law.

Section 32 of the Act says that a Tenant is responsible for damages caused by his act or neglect but is not responsible for reasonable wear and tear. RTB Policy Guideline #1 defines "reasonable wear and tear" as natural deterioration that occurs due to aging and other natural forces, where the Tenant has used the premises in a reasonable fashion."

Section 20 of the Regulations to the Act says that a Condition Inspection Report completed in accordance with the Act is evidence of the condition of the rental unit on the date of the inspection unless one of the Parties to it has a preponderance of evidence to the contrary. In this case, the Tenant, Y.W., suggested that the move in condition inspection report was unreliable because she believed the Landlord had made handwritten notations on it after she signed it. The Landlord provided no response to this allegation. Even if the Tenant, Y.W., is correct in this regard, I find that this argument is irrelevant in that the hand-written notations neither add nor detract from the condition of the damages alleged in this matter. What is in issue instead is that the Tenants claim the rental unit was not completely renovated inside. On the other hand I find that two of the Tenants' photographs of the new flooring taken on August 15, 2011 show some condition issues and therefore I conclude that they represent a preponderance of evidence necessary to displace the reliability of the move in condition inspection report *where it concerns the flooring*.

I also find on a balance of probabilities that the Landlord did not give the Tenants a copy of the move in condition inspection report until almost 5 months after the tenancy started and therefore she is in breach of s. 23(5) of the Act. Although the Tenants argued that the Landlord failed to provide them with an opportunity to suggest alternate move out inspection dates, I find that there is little merit to this argument because there is no evidence that the Tenants attempted to co-ordinate or requested another date for a move out inspection with the Landlord. However, I further find that the Landlord

breached s. 35 of the Act because she did not provide the Tenants a copy of a move out condition inspection report she claims she prepared on March 1, 2012.

Having regard to both the photographic evidence of the Landlord and the Tenants, I find on a balance of probabilities that the Tenants did cause further damage to the new flooring during the tenancy. In particular, while the Tenants' photographs at the beginning of the tenancy show a small area of damage on one tile and a minor scratch on another, the Landlord's photos at the end of the tenancy show much larger and pronounced areas of damage. The advocate for the Tenants argued that the Landlord's repair estimate was unreliable because it did not indicate that it was to repair damages but only to replace the flooring and that it had the Landlord's handwritten notations. However, I find that the quote is sufficiently clear that it would cost $336.00 to replace one large tile in the dining room. On that quote the Landlord has written, "$150.00 + $18.00 tax if entrance tile can be repaired, if entrance tile also requires replacement, $336.00 x 2 or $772.00." I find that the handwritten portion of the invoice is unreliable as the Landlord has provided no evidence as to why she added this information to the quote (and the calculation is obviously incorrect). Consequently, I find that the Landlord is entitled only to the costs she has proven in the amount of $336.00.

The Landlord also sought compensation to repair a gouge to a window and door frame and to repair a lazy suzan. There are no damages to either of these items on the move in condition inspection report. The Landlord provided a photograph on which she wrote, "Lazy susan come loose?" The Landlord also provided a photo of what she claimed were deep gouges to a window frame. However, on the basis of this evidence alone, I find that there is insufficient evidence to conclude that the damages were caused by an act or neglect as opposed to reasonable wear and tear. Furthermore, I can give little weight to the Landlord's witness statement of D.B. as in its unsworn form, the identity of the deponent cannot be verified and therefore it is hearsay and unreliable. Consequently, this part of the Landlord's claim is dismissed without leave to reapply.

The Landlord further sought compensation to repair a bathroom wall. The move in condition inspection report makes no mention of damages to this wall. The Landlord's photographs show a loose toilet paper holder and a towel rack that has come away from the wall. I find that the damage alleged to the loose toilet paper holder is more likely the result of reasonable wear and tear and for that reason the Landlord is not entitled to recover compensation. However, I find that the damage to the towel rack is more likely the result of an act or neglect rather than reasonable wear and tear. The Landlord sought compensation of $134.40 to repair these holes however I find that this amount is unreasonable for a few small holes (especially in the absence of any repair estimates) and instead award her $75.00.

The Landlord also sought to recover $7.00 in bank fees as she claimed the Tenants put a stop payment on a post dated cheque. In particular, the Landlord said she tried to cash a rent cheque for the period, February 15 – March 14, 2012 on February 15, 2012, the day after the tenancy ended. I find that the only reason that the Landlord attempted to cash this cheque was because she was under the mistaken belief that the Tenants

had to pay rent to the end of February. However the Landlord knew or should have known that the Tenants were of the view that they were not responsible for paying rent for that period and did not intend to pay rent. Furthermore, as stated above, the Landlord was not entitled to rent once the tenancy ended but instead had to first prove that she lost rental income which she has failed to do in this matter. Consequently, this part of the Landlord's claim is dismissed without leave to reapply.

As the Landlord has had little success on her application, I find that it is not an appropriate case to order the Tenants to bear the cost of the $50.00 filing fee she paid for this proceeding and that part of the Landlord's claim is also dismissed without leave to reapply. Consequently, I find that the Landlord has made out a total monetary claim for $411.00. ***I Order the Landlord pursuant to s. 38(4) of the Act to keep $411.00 of the Tenants' security deposit in full satisfaction of her monetary claim and I Order the Landlord to return to the Tenants the balance of the security deposit and pet damage deposit in the amount of $3,089.00.***

The Tenants' advocate asked that a monetary award for $405.00 granted in previous proceedings be added to the monetary award in this matter however there is no authority under the Act to do so. The Tenants should have received a monetary order in the previous proceedings which may be enforced either alone or together with the Monetary Order issued in this matter for $3,089.00.

Conclusion

A Monetary Order in the amount of $3,089.00 has been issued to the Tenants 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 23, 2012.

Residential Tenancy Branch