Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPB, MNR, MNSD, MNDC, FF
Tenant: MNDC, OLC, LRE, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution with the landlord seeking an order of possession and a monetary order and the tenant seeking a monetary order.

The hearing was conducted via teleconference and was attended by the landlord; her witness; the tenant's agent and a witness for the tenant.

The landlord clarified at the outset of the hearing that an order of possession was not required, I accept the landlord's amendment and exclude the matter of possession in this decision.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent and liquidated damages; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 44, 67, and 72 of the *Residential Tenancy Act (Act).*

It must also be decided if the tenant is entitled to a monetary order for compensation for loss of personal property; for an order to have the landlord comply with the *Act*, regulation or tenancy agreement; and an order to return the tenant's personal property and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 67, and 72 of the *Act.*

Background and Evidence

Both parties submitted into evidence a copy of a tenancy agreement signed by the parties on May 17, 2012 for a 1 year fixed term tenancy beginning on June 1, 2012 with a monthly rent of $1,200.00 due on the 1st of each month with a security deposit of $600.00 paid.

The tenancy agreement contained an addendum with 34 additional terms including a liquidated damages clause stating that if the tenant ends the tenancy prior to the end of the fixed term the tenant will pay the landlord $850.00 in liquidated damages but that this did not prevent the landlord from seeking compensation for any lost rental income due to the tenant's breach of the tenancy agreement.

The landlord has submitted that the amount for the liquidated damages was established based on her travel costs from her home community to the community where the rental property is located; the costs for hiring an agent; and additional fees such as for the completion of credit cheques.

The tenancy agreement also has a clause in the addendum regarding late payment of rent that indicates that should the tenant be late or in the event of a returned or dishonoured cheque the landlord will charge a $25.00 NSF charge and a $15.00 administrative fee each time.

The parties submit that on July 20, 2012 the tenant informed the landlord, by email, he would be ending the tenancy. The tenant submits the landlord had accepted his notice and started to advertise the rental unit on various free websites but that he later got an email from the landlord saying she could not accept the notice because it was in email format and that she removed the advertisements after this.

The landlord submitted that she had been informed by the Residential Tenancy Branch (RTB) that she could not accept an email notice to end tenancy and that she should not act on the notice until she receives a notice in writing and signed by the tenant.

The tenant submits that the end date and date of inspection had always been agreed to as August 11, 2012 and that despite this the landlord had advertised on local websites on July 21, 2012 but then removed her ads from those sites for the period between July 31, 2012 and August 8, 2012.

The landlord submitted that because of the advice provided by the RTB she felt she should not advertise for a new tenant until such time as she had a written and signed notice from the tenant regarding his intent to vacate the rental unit.

The tenant submits that the landlord failed to mitigate appropriately by withdrawing her advertisements online and should not be entitled to any rent for months following the date that he vacated the rental unit.

The parties agree the tenant did not pay rent for August 2012 as a result of the tenant putting a stop payment on his August rent cheque. The tenant's agent submitted in the hearing the tenant acknowledges that he owes the landlord rent for the month of August 2012.

The tenant submits that the parties had agreed to a move out inspection on August 11, 2012. The tenant acknowledges receipt of an email from the landlord on August 10, 2012 cancelling the August 11 inspection, yet despite this cancellation the tenant attended the rental unit on that date but the landlord did not. The tenant submits the landlord could have sent someone to represent her as she had at the start of the tenancy.

The landlord testified she had cancelled the August 11, 2012 date because she was recuperating from surgery and could not travel to complete the inspection and that she later, on August 24, 2012, sent the tenant an email with a Notice of Final Opportunity to Schedule a Condition Inspection attached scheduling a new time for August 31, 2012. The tenant did not attend, nor did he send a representative. The tenant did submit that he was on course and not available at all that date.

The landlord submitted into evidence a copy of a Condition Inspection Report recording the condition of the rental unit at the start and at the end of the tenancy. The landlord has also included 8 photographs. The landlord claims only for cleaning and not for repairs of any damage to the unit.

The tenant submits that his mother cleaned the rental unit and has provided a written statement from his mother attesting to what cleaning she had completed and one from her husband confirming that he had picked his wife up at the rental unit after she had been cleaning it on August 8, 2012.

The landlord originally sought, in her Application, compensation in the amount of $5,890.00, which included lost rent for the months of October and November 2012 but she stated at the start of the hearing that she had rented the unit effective October 2012 and that she wanted to reduce her claim by $2,400.00 to $3,490.00.

This amount includes:

Description	Amount
Rent for August 2012	$1,200.00
NSF charge	$40.00
Liquidated Damages	$850.00
Cleaning rental unit	$200.00
Lost rental income for September 2012	$1,200.00
Total	$3,490.00

The tenant submits that the landlord's agent who showed him the rental unit and locker space identified locker number 44 as the one assigned to this rental unit. The tenant has submitted a letter from a witness corroborating the tenant's position.

The tenant's witness attended the hearing and testified that while he cannot recall the numbers he does remember that the landlord's agent pointed out which specific locker the tenant was to use.

The landlord submits her agent did not give the tenant the locker number but was just shown the locker space by the agent and the landlord gave the tenant the number verbally by phone. The landlord has submitted a letter from her agent indicating that he had never provided the tenant with a locker number.

The landlord's witness testified that he took the tenant and his friend do show them where the locker was but that he had no knowledge of which locker was to be used. The witness testified that when the tenant and his friend identified that there were two empty lockers he advised the tenant that he must contact the landlord to find out which one was the one that went with the unit.

The tenant submits that after placing his belongings in locker 44 when he went to retrieve them when he was moving out his belongings were all gone and the lock changed. The tenant has submitted an email from a neighbour who had indicated that locker 44 actually belonged to her and she had thought the belongings in the locker had belonged to her previous tenant and as such she had had the items removed by a friend who kept some of the items but threw out the rest.

The tenant lists among his missing items; snorkelling gear; two digital cameras; to electronic game players and games; computer equipment; a book collection; hockey sticks; a kite surfing harness; miscellaneous DVD's, CD's, and other electronics; and family photos and heirlooms and various uniforms and military gear.

The tenant submits these items in total are valued at $5,490.00 but is only claiming $4,999.00. The tenant's agent clarified that the tenant had discounted the value of the items in recognition of depreciation. No receipts or documentary evidence of the value of any items was submitted into evidence.

The tenant's agent, at the start of the hearing, testified the tenant had received his rims and a couple of hockey sticks back. The rims were not identified in the tenant's list of items missing.

The landlord also submitted an email from the true owner of the storage locker which states:

> "First off, Sandy was met by my boyfriend Brian, and all the items that held any value from the locker were returned to him.
> Returned items included: 2 carbon fiber hockey sticks, kiteboarding harness, 4 rims for a truck, hockey bag with hockey gear.
> Brian went through all the boxes and bags in the locker and did not come across a Playstation, a Nintendo Wii, a laptop, a hard drive, or a video camera. He threw out what he considered to be garbage, which include a few bags of clothes and books."

The tenant's agent testified that all of the belongings were in plastic totes and the true owner's friend had not gone through the totes but just threw the totes out without knowledge of the contents.

The email submitted by the tenant from the true owner of the storage locker states:

> "I advised him [her friend she had asked to remove the items from the locker] to keep anything that I could sell and throw away the rest. The [her] tenant who was evicted owed me $1900.00, and I had no way of getting ahold of her, so I figured she left everything in the locker because she had nowhere else to put it. I knew she wouldn't be coming back for it. My friend kept a few items but threw out the rest."

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

As such, in the cases before me the landlord has the burden of providing sufficient evidence to establish the four points above in relation to her claim and the tenant has the burden to provide sufficient evidence to establish the four points in relation to his claim.

In relation to the landlord's claim for rent for the month of August 2012, as the tenant's agent acknowledged in the hearing that the tenant recognizes he did not have a right to withhold August 2012 rent, I find the landlord is entitled to receive this amount from the tenant.

In relation to the landlord's claim for $40.00 for NSF charges, I note that Section 7 of the Residential Tenancy Regulation states a landlord may, if the tenancy agreement provides for it, charge a service fee from a financial institution to the landlord for the return of a cheque and an administration fee of not more than $25.00 for the return of a tenant's cheque by a financial institution or for late payment of rent.

The landlord had provided into evidence a copy of the returned cheque and statement from the financial institution indicating there was no service fee required and despite the clause in the tenancy agreement that the landlord may charge $25.00 plus a $15.00 administration fee for this circumstance, I find that the total amount exceeds the allowable amount in the Regulation. I find the landlord is entitled to $25.00 for late fees.

Section 45(2) of the *Act* stipulates that a tenant may end a fixed term tenancy by giving the landlord a notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy and is the day before the day in the month that rent is payable under the tenancy agreement. Section 45(4) goes

on to say that a notice to end tenancy given under Section 45 must comply with Section 52.

Section 52 states, in order to be effective, a notice to end a tenancy must be in writing and must:

- Be signed by the tenant giving the notice;
- Give the address of the rental unit; and
- State the effective date of the notice.

As such the earliest the tenant could have ended the tenancy was the end of the fixed term itself or May 31, 2013 and as such the tenant remains responsible for the payment of rent until the end of the fixed term.

However, Section 7 of the *Act* stipulates that if a landlord claims for compensation for damage or loss that results from the tenant's non-compliance with the *Act*, regulations or tenancy agreement the landlord must do whatever is reasonable to minimize the damage.

Despite knowing of the tenant's intention to vacate the rental unit the landlord was under no obligation to take mitigating steps until such time as the tenant had provided her with a notice that was compliant with the requirements under Section 52. As such, I find the landlord did not need to start advertising the availability of the rental unit until she received the tenant's signed notice of his intent to vacate the rental unit.

From the tenant's evidence he sent that to her on August 7, 2012 by registered mail. I find the fact that the landlord had advertised previous to this date surpassed the requirement to advertise once she received the tenant's notice.

For these reasons I find the landlord took sufficient steps to mitigate rental loss and based on the landlord's testimony that she entered into a new tenancy agreement on September 9, 2012 for new tenants effective October 1, 2012, I find the landlord is entitled to compensation for loss of rent for the month of September 2012.

In relation to the landlord's claim for liquidated damages, Residential Tenancy Policy Guideline 4 states that the amount agreed to must be a genuine pre-estimate of the loss at the time the contract was entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

From the tenancy agreement I find the clause clearly identifies that the intention of the liquidated damages is to cover administrative costs of re-renting the unit and I accept that regardless of whether or not the landlord hired a property manager at the end of the tenancy is not relevant. I find the landlord, in the case before me, has established the charge is for liquidated damages and is not a penalty.

Section 37 of the *Act* requires a tenant who is vacating a rental unit to leave the unit reasonably clean, and undamaged except for reasonable wear and tear, and give the landlord all keys or other means of access that are in the possession and control of the tenant and that allow access to and within the residential property.

Despite the testimony of both parties in relation to the inspection date, from the evidence submitted, primarily from the landlord, I find the cleanliness as depicted in the photographic evidence is "reasonably clean" and therefore I find the tenant has complied with his obligations under Section 37. I dismiss this portion of the landlord's Application.

In relation to the tenant's Application, I find based on the submissions of both parties that the tenant did lose items that were placed into the wrong storage locker. However, when both parties to a dispute have provided witnesses who have very divergent recollections of how an event occurred, I find it is difficult for a third party to determine what actually occurred.

In a case like this the burden rests with the party making the claim to provide additional or corroborating evidence that might establish the basis of their claim. As such, I find the tenant has failed to establish that it was an action taken by or negligence on the part of the landlord or her agent (representative) that caused the tenant to use the wrong locker and I dismiss the tenant's Application in its entirety.

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **$3,375.00** comprised of $1,200.00 rent owed; $25.00 late fees; $850.00 liquidated damages; $1,200.00 lost rental income and the $100.00 fee paid by the landlord for this application.

I order the landlord may deduct the security deposit and interest held in the amount of $600.00 in partial satisfaction of this claim. I grant a monetary order in the amount of **$2,775.00**.

This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be 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: September 13, 2012.

Residential Tenancy Branch