Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for unpaid rent and utilities pursuant to section 67; 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 their sworn testimony, to make submissions and to cross-examine one another. The landlord testified that she sent the tenant a copy of her dispute resolution hearing package by registered mail, but was uncertain as to when this occurred. The tenant confirmed that she received a copy of the landlord's hearing package by registered mail approximately three or four weeks before this hearing. I am satisfied that the landlord served this package to the tenant in accordance with the *Act*.

The Residential Tenancy Branch (the RTB) received 21 pages of written evidence from the landlord on July 12, 2013, and a further 5 pages of written evidence from the landlord by fax on August 28, 2013. The tenant testified that she had not received any written evidence from the landlord. The landlord was uncertain as to whether she had sent her written evidence to the tenant. She testified that she thought that she had sent it to the tenant "around the same time" as she sent her dispute resolution hearing package to the tenant. She had no precise details as to how or when she provided her written evidence to the tenant. Since the landlord could not demonstrate how or if she had provided her written evidence to the tenant and the tenant denied having received it, I advised the parties that I would not be considering the landlord's written evidence.

Issues(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent or utilities? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This one-year fixed term tenancy for a strata unit beginning on October 23, 2010 was scheduled to end on October 31, 2011. Monthly rent was set at $1,900.00, payable in advance on the first of each month, plus utilities. The written Residential Tenancy Agreement (the Agreement) also called for the tenant's payment of $100.00 for use of the garage if and when she chose to use the garage. The tenant testified that the landlord refused to remove many of the landlord's items from the garage, forcing the tenant to eventually pay for sole use of the garage after five months. The tenant paid a $950.00 security deposit on October 23, 2010. This tenancy ended on July 17, 2011, when the tenant vacated the rental unit.

Although the parties agreed that they participated in a joint move-in condition inspection, the tenant testified that she was never given a copy of a report of this inspection by the landlord. The landlord testified that the tenant asked the landlord to conduct a move-out condition inspection on her own. However, the landlord also said that she conducted her move-out condition inspection with the tenant's mother on July 24, 2011, who had been appointed by the tenant as the tenant's agent at the end of this tenancy. Rather than a formal joint move-out condition inspection report, the landlord sent the results of the joint move-out condition inspection to the tenant by email. The tenant had no recollection of a joint move-out condition inspection having been conducted with her mother, nor did she recall having seen any such report.

As per a July 4, 2011 decision of an Arbitrator, the landlord was allowed to retain the tenant's security deposit in partial satisfaction of a monetary award issued to the landlord for unpaid rent and loss of rent owing from June 2011 and from July 1-15, 2011. The landlord had applied for an Order of Possession based on her issuance of a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) on June 5, 2011, a monetary award for unpaid rent and loss of rent arising from the tenant's failure to pay rent for June or July 2011. In addition to the monetary Order of $2,067.74 issued by the Arbitrator on July 4, 2011, the Arbitrator stated the following:

> *...If the Landlord is unable to re-rent the rental unit for the balance of the fixed term, she may re-apply for a loss of rental income...*

The landlord testified that she had initiated her current application for dispute resolution because the Arbitrator had allowed her to apply for unpaid rent until October 31, 2011. While this was correct, I noted that the landlord would still need to demonstrate her entitlement to a monetary award for loss of rent for any remaining portion of this fixed term tenancy after July 15, 2011. I also observed that the landlord's application for a monetary award was within the two-year time period for filing an application for a monetary award from the tenant.

At the hearing, I asked the landlord to describe the written evidence she had submitted so as to assist in enabling the tenant and her lawyer to understand the nature of her claim. As the landlord could not find key portions of her written evidence, I reviewed the contents of the landlord's Monetary Order Worksheet in which the landlord outlined the specifics of her claim. The landlord confirmed that the numbers I read from her Worksheet were accurate and correctly represented her claim for a monetary Order.

The landlord's application for a monetary Order of $5,570.13 was set out as follows in the landlord's Monetary Order Worksheet, the only specific outline of the items included in her application for a monetary award:

Item	**Amount**
BC Hydro – August 27 – September 30	$81.59
BC Hydro – July 18 – August 26	27.84
A-S Cleaning (carpet and drape cleaning)	123.20
Landlord's Clearing Items and Time (13.5 hours)	337.50
Loss of Rent	5,000.00
Total of Above Items	**$5,570.13**

The loss of rent was calculated on the basis of the landlord's claim that she was entitled to a monetary award of 2.5 months of rent, covering the period from July 15, 2011 until September 30, 2011. She testified that she was able to rent the premises to another tenant who took possession of this rental unit on October 1, 2011. In response to a question from the tenant's lawyer, the landlord testified that the new tenant was paying a total of $2,350.00 per month, her asking rent for this rental suite.

The tenant testified that the premises were in better condition after her tenancy than when she took occupancy of the rental unit. She said that the carpet had been vacuumed before she moved in, but the carpet was badly stained and dirty. She testified that she had to hire her own cleaner at the beginning of this tenancy because the walls were stained and greasy and there was slime on the deck. She said that she hired a cleaner to look after the rental unit after she moved out.

The tenant gave undisputed sworn testimony that the landlord had this strata unit listed for sale during the final portions of her tenancy. She said that her mother lives at this strata complex and the "for sale" sign was still up on the property in late September 2011.

The landlord confirmed that she did try to sell the strata unit, but was careful to advise the realtor that the tenancy continued until the end of October 2011, and any prospective purchaser would have to realize that there was an existing tenancy in place. The landlord could not recall exactly when she signed her contract to list this property. She estimated that she entered into this contract about the second week of May 2011 and that it was likely a three-month contract. She said that she started placing advertisements on Craigslist, Kijiji and another popular local rental website during the last week in August 2011. She said that she listed the rental property for a monthly rent of $2,350.00, the eventual rent she received from the new tenant as of October 1, 2011.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator 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. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

The landlord's claim covered the following three separate areas:

Hydro
Cleaning
Loss of Rent

I will address each of these in sequence.

Analysis – Hydro

As noted above, the landlord did not provide any written evidence to the tenant. As such, I cannot consider the landlord's written evidence of receipts covering the periods from July 18 to August 26, and from August 27 to September 30. While this on its own would prevent me from issuing a monetary award in the landlord's favour for this item, I also consider it unusual and more than a little peculiar that the landlord was seeking a monetary award for the landlord's use of hydro **after** the tenant vacated the rental unit and while the landlord was trying to sell this property. If major repairs were required as a result of damage arising out of a tenancy, I might be willing to accept that it was necessary to keep a source of power in operation to enable such repairs to be completed. That is by no means the case in this instance. In order to show a rental unit

to prospective renters, a source of power would be necessary, but this would be minimal and would normally be a cost that a landlord would be expected to incur. In fact, until at least the latter part of August 2011, the premises were not even advertised for rent, but were listed for sale, a totally separate endeavour undertaken by the landlord well before this tenancy ended. For all of the reasons outlined above, I dismiss the landlord's application for a monetary award for the recovery of her hydro expenses without leave to reapply.

Analysis – Cleaning

There is conflicting sworn oral testimony regarding the condition of the rental unit both at the beginning and end of this tenancy. Under such circumstances, it is helpful to consider the reports that resulted from joint move-in and move-out condition inspections. In this case, there is disputed testimony regarding whether the landlord provided copies of these reports to the tenant. The landlord did not provide copies of written evidence in this regard to the tenant.

Based on a balance of probabilities, I find that the landlord has not provided sufficient evidence to entitle her to a monetary award for her own general cleaning or professional carpet and drape cleaning. In making this finding, I am not satisfied that the condition of the rental unit was in any worse condition at the end of this tenancy than when the tenancy began. In this regard, I note that the tenant provided undisputed detailed descriptions of the deficiencies in the rental unit when she took possession of the rental unit. I dismiss the landlord's application for a monetary award for cleaning without leave to reapply.

Analysis – Loss of Rent

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. Based on the Arbitrator's earlier decision regarding this tenancy and the evidence before me, the tenant was clearly in breach of her Agreement because she vacated the rental premises prior to the October 31, 2011 date specified in that Agreement. As such, the landlord is entitled to further compensation for losses she incurred as a result of the tenant's failure to comply with the terms of their Agreement and the *Act*.

There is undisputed evidence that the monetary Order issued by the Arbitrator did not provide the landlord with any compensation for loss of rent after July 15, 2011, and allowed the landlord to seek a monetary award for loss of rent after that date. 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.

In this case, the landlord testified that she did not begin advertising the availability of the rental premises until at least the last week of August 2011. Before that time, the landlord continued her efforts to sell the strata unit. When the landlord did attempt to locate a new tenant, the landlord increased the asking rent for the premises from $1,900.00 (or $2,000.00 including the garage) to $2,350.00, the eventual rent that she received from the new tenant as of October 1, 2011. While the landlord can request whatever rent she chooses, her pursuit of a much higher rent than was being paid by the tenant does affect my assessment of the extent to which the landlord truly tried to mitigate the tenant's losses. By waiting until the last week in August to try to rent the premises and seeking a much higher monthly rent when she did advertise the rental unit, I find that the landlord has not satisfied her responsibility under section 7(2) of the *Act* to mitigate the tenant's losses for the remainder of her fixed term tenancy Agreement. For these reasons, I find that the landlord is not eligible to recover her losses for the period from August 2011 until the end of this fixed term tenancy Agreement.

Under these circumstances, I find that the landlord is entitled to receive a pro-rated amount of $129.03, an amount which allows the landlord to recover unpaid rent for July 16 and 17, 2011, the last two days of the tenant's occupancy of this rental unit (i.e., $2,000.00 x 2/31 = $129.03).

I have also considered whether the landlord is eligible to receive a monetary award for the remaining portion of July 2011 (i.e., for the period from July 18, 2011 until July 31, 2011). Had the landlord not have been trying to sell the strata unit over this period, I would find that it would have been unlikely for the landlord to have been able to mitigate the tenant's losses for any portion of July 2011. However, I find that the landlord's attempt to sell the strata unit clearly impacted the landlord's ability to mitigate the tenant's losses for the remaining days of July 2011. I find it very unlikely that a tenant would agree to enter into such a short term tenancy with a landlord who was actively attempting to sell the strata unit, a fact clearly evident from the "for sale" listing the property. I find that the tenant should not become responsible for the landlord's inability to rent the premises for any portion of July because the landlord had been actively trying to sell the property since May 2011. Under these circumstances and for the reasons that apply to my comments regarding the landlord's attempt to seek compensation for losses for August and September 2011, I find that the landlord is responsible for failing to take adequate measures to mitigate the tenant's losses for the

remainder of July 2011. I dismiss the landlord's application to recover her losses for the period from July 18, 2011 until July 31, 2011, without leave to reapply.

I also find that the landlord actually received what could be considered to have been a profit of at least $350.00 for the last month of the Agreement. This occurred because the landlord was able to re-rent the premises to a new tenant who agreed to pay her $2,350.00 in monthly rent for October 2011, as opposed to the $2,000.00 that the tenant would have paid over that month of her fixed term tenancy had the original tenancy continued until the scheduled end date. For this reason, I find that this $350.00 amount more than offsets the amount of unpaid rent the landlord is entitled to receive for July 16 and 17, 2011. Under these circumstances, I find that the landlord has not demonstrated that she has suffered losses arising out of this tenancy, which require the issuance of a monetary Order in her favour. By applying the above-noted deduction to the very limited successful portion of the landlord's claim, I find that the landlord is not entitled to any monetary Order resulting from her application.

As the landlord has been unsuccessful in obtaining a monetary Order, I find that the landlord bears responsibility for her filing fee.

Conclusion

I dismiss the landlord's application for the issuance of a monetary Order without leave to apply.

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 10, 2013

Residential Tenancy Branch