Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 0899630 BC LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MND, MNR, MNSD MNDC FF

Introduction

The hearing was convened to deal with an application by the landlord for a monetary order for damages and loss and to retain the security deposit in partial satisfaction of the claim.

The application was also convened to hear a cross application by tenant for the return of the tenant's security deposit and to obtain a monetary order for compensation for damage or loss under the Act.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served on the other party and submitted to the file at the Residential Tenancy Branch at least 5 days in advance of the hearing pursuant to the Act. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing.

Preliminary Matter:

Service of Tenant's Application

The landlord stated that they had not received a copy of the tenant's Notice of Dispute Resolution.

Rule 3 of the Residential Tenancy Rules of Procedure states that, together with a copy of the Application for Dispute Resolution, the applicant must serve each respondent with copies of the notice of dispute resolution proceeding letter provided to the applicant by the Residential Tenancy Branch, the dispute resolution proceeding information package provided by the Residential Tenancy Branch, the details of any monetary claim being made, and any other evidence accepted by the Residential Tenancy Branch with the application or that is available to be served.

Section 89(1) of the Act states that an application for dispute resolution must be given in one of the following ways:

> (a) by leaving a copy with the person;
>
> (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
>
> (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
>
> (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
>
> (e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

The tenant provided the Canada Post tracking number to confirm that the Notice of Hearing and copies of their cross application documents were sent to the landlord by registered mail. On-line records from Canada Post confirm that, although a notice card was delivered to the landlord instructing them to pick up the package, apparently it was never picked up by the landlord.

I note that section 90 of the Act provides direction for when a document is deemed to have been served, as follows:

> (a) if given or served by mail, on the 5th day after it is mailed.

Given that the tenant did comply with the Act and Rules of Procedure with respect to serving the application on the landlord, I find as a fact that the landlord was deemed to be properly served with the Notice of Hearing.

Landlord's Additional Evidence

The landlord filed their application on July 8, 2013. A notation was made in the file at that time, by the RTB, stating that evidence was to come.

The landlord did submit an evidence package that arrived at Residential Tenancy Branch on September 25, 2013. The evidence package consisted of 51 photographs that purport to show various areas of the rental unit that were damaged.

However, the landlord testified that additional documentary evidence had also been submitted and served on the tenant.

The tenant denied receiving any other evidence besides the photos and no additional evidence was found in the file at Residential Tenancy Branch.

The landlord stated that the missing evidence had been faxed into RTB. Although the landlord testified that this other evidence package was also served to the tenant, the landlord was not able to provide the Canada Post tracking number to verify the mailing.

Issues to be Decided for the Tenant's Application

- Whether the tenant is entitled to the return of the security deposit paid.
- Whether or not the tenant was entitled to a reduction in rent based on the landlord's failure to provide services and facilities or do repairs that were required by the Act or included in rent as part of the agreement.

Issues to be Decided for the Landlord's Application.

- Whether the landlord is entitled to compensation under section 67 of the *Act* for loss of rent and damages.

Background and Evidence

The tenancy began on June 1, 2013 as a one-year fixed term. The tenancy ended June 30, 2013. The monthly rent was $1,425.00 and a security deposit of $725.00 was paid.

The tenant testified that the landlord accused the tenant of not utilizing the premises as a residence and operating a business in the rental unit. The landlord had demanded that the tenant cease operating his business from the rental unit or, in the alternative, move out.

The tenant testified that the landlord's allegations were partly true. Although he was operating an email-based business, he was also living in the rental unit as his home. The tenant stated that the business did not involve any customer contacts and consisted of computer work being done over internet lines that did not entail use of the premises in any respect. The tenant testified that his at-home employment did not disturb any other residents.

The tenant testified that there is nothing in the Residential Tenancy Act nor in the tenancy agreement signed between the parties that would permit the landlord terminate his tenancy for this alleged cause. No copies of the tenancy agreement was in evidence. The tenant testified that he was never provided with the strata bylaws at the start of the tenancy as required by the Act and he did not receive them until the landlord sent the communication insisting that the tenant cease his internet business or move.

The tenant testified that the landlord did not issue a valid Notice To End Tenancy under the Act. The tenant testified that, on June 15, 2013, the landlord only issued the tenant with an email ultimatum that stated,

> "*It has come to our attention that you are running a business out of your unit. We do not permit business operations from our rented units. Please do one of the following:*
>
> *1. Close the business, or*
>
> *2. Vacate your unit.*
>
> *If you choose option #2, you will be responsible for the rent until it is rented out again…*"

The evidence indicates that the tenant wrote back to the landlord protesting that the tenant was only corresponding by computer to overseas customers and this did not in any way interfere with the landlord or other residents. The tenant's communication stated that the tenant was not aware of the alleged rule against in-home businesses prior to agreeing to the tenancy and informed the landlord that he could not simply close down his employment-related activities being conducted in the privacy of his own residence. The tenant pointed out that they needed to receive proper notice from the landlord in order to vacate. The tenant also stated that they felt they should be compensated for the landlord's noncompliant eviction as it was not based on the Act or agreement.

The landlord's June 15, 2013 response to this communication indicated that they would not relent on the matter. The landlord apparently attached a copy of the strata bylaws and the following excerpt in reference to the restriction,

> *"The resident or visitor must not use a strata lot, the common property or common assets in a way that….(d) is for a commercial or professional purpose"*.

The tenant testified that, although they did not agree that their internet-based business constituted a violation of the by-laws, they still decided to comply with the landlord's request to terminate their tenancy, as they felt they had no choice. The tenant stated that it was not a viable option to close up a business that took years to establish and to jeopardize his livelihood.

The tenant stated, in his application, that he had signed a 1 year tenancy agreement in good faith, but feels that he was wrongfully evicted by the landlord by the end of the first month. The tenant pointed out that it was the landlord who terminated the fixed-term tenancy prematurely and on short notice.

For this reason, the tenant stated he is entitled to the equivalent of 2 month's compensation, in the amount of $2,850.00. The tenant is also requesting the return of his $725.00 security deposit and additional compensation of $380.00 for moving costs.

The landlord testified that the strata rules clearly prohibit business operations and this was the basis for the landlord asking the tenant to cease the business or vacate. The landlord stated that the strata bylaws were given to the tenant at the start of the tenancy.

According to the landlord, the fact that the strata bylaws do not permit any residents to use the building for a commercial operation, was pointed out to the tenant and no formal notice to vacate was served. The landlord disagrees that the tenant was wrongfully evicted and stated that the tenant chose to leave of his own volition. The landlord's position is that the tenant, once made aware of the violation, willingly consented to vacate the unit. The landlord pointed out that this fact does not support the tenant's claim for compensation.

The landlord testified that they, on the other hand, have a supportable claim against the tenant.

The landlord is seeking monetary compensation of $4,400.00, including the following:

- $125.00 to clean the suite,
- $1,600.00 to patch and repaint the entire interior,
- $500.00 to replace the carpet,
- $700.00 to repair/replace the hardwood flooring,
- $50.00 to repair bathroom accessories, and
- $1,425.00 loss of one month revenue.

No copies of the tenancy agreement, strata bylaws, move-in and move-out condition inspection reports, invoices, estimates or receipts were in evidence.

However, the landlord submitted photos showing the damaged areas of the suite.

The tenant is disputing all of the landlord's monetary claims listed above.

Analysis – Tenant's Claim for Return of Security Deposit

> In regard to the return of the security deposit, I find that section 38 of the Act is clear on this issue. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant or make an application for dispute resolution to claim against the security deposit.

I find that the tenant did not give the landlord written permission to keep the deposit. However, the landlord did file the application seeking an order to keep the deposit within 15 days.

I find that the security deposit is always considered a credit in favour of the tenant and the funds are held in trust. Therefore, the landlord is currently holding $725.00 in trust for this tenant.

Analysis: Tenant's Monetary Claim

With respect to a monetary claim for damages or rent abatement, it is important that the evidence furnished by each applicant/claimant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage, and
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In regard to the tenant's allegation that his tenancy was terminated by the landlord not in compliance with the Act, I find that section 47(1) of the Act permits a landlord to issue a One-Month Notice to end Tenancy if (in addition to other causes):

> (h) the tenant
>
> > (i) has failed to comply with a material term, and
> >
> > (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so; (my emphasis)

I find that the landlord appeared to be giving the tenant a written notification requiring that the tenant must vacate the unit or close down his business on the alleged basis that the tenant was not in compliance with the tenancy agreement. I find that this type of Notice is governed under section 47 of the Act above, and entails serving a One Month Notice to End Tenancy for Cause.

However, section 52 of the Act requires that a Notice to End Tenancy be issued on an approved form. In this case, the correct form would be a One Month Notice to End Tenancy for Cause under section 47 of the Act. The approved notification, to be valid, would have required proof that the tenant violated a material term of the tenancy and that the tenant was given a reasonable amount of time to correct the situation. The form used for a termination of the tenancy for Cause would also have featured data to provide the tenant with information about their rights under the Act, including the right to dispute the Notice of Termination.

I find that, by issuing a communication that purported to be notifying the tenant that the tenancy would be terminated in this format, the landlord was attempting to enforce tenancy terms in a manner not sanctioned by the Act. I find that tenant was unfairly deprived of the opportunity to dispute the "Notice" because of the faulty format used by the landlord.

Although I find that the tenant did make the choice to give up his tenancy, over the second option provided by the landlord, it is clear that the tenant made the choice based on misleading information and was unfairly prejudiced by the format of the landlord's Notice an the missing information about how to dispute such a Notice..

Had the landlord issued and served the correct Notice form under section 47 of the Act, and had the tenant failed to dispute the Notice, the landlord would be in compliance with the Act and would have been validly entitled to an Order of Possession through dispute resolution.

Given the above, I do not find that the tenant vacated of his own free will but was convinced by the landlord's communication to vacate when the landlord violated the Act by attempting to enforce terms or terminate the tenancy in a manner not condoned by the legislation.

Accordingly, I find that some compensation to the tenant is warranted due to the fact that the landlord circumvented provisions of the Act and the fact that the tenant felt forced to relocate, despite signing a one-year fixed term.

However, I do not find that the tenant is entitled to a payment of the equivalent of two month's rent, as the tenant has not proven a loss of this amount. I do, however accept that the tenant incurred moving costs and award the tenant $200.00 in compensation towards the moving costs.

Analysis – Landlord's Application

Section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

To determine whether or not the tenant had complied with this requirement, I find that this can best be established by comparing the unit‘s condition as it was when the tenancy began with the final condition of the unit after the tenancy ended. In other words, through the submission of move-in and move-out condition inspection reports containing both party’s signatures.

Completing move-in and move out condition inspection reports is a requirement under the Act under sections 23(3) and section 35. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations. Both the landlord and tenant must sign the condition inspection report after which the landlord must give the tenant a copy of that report in accordance with the regulations.

In this instance, neither a move-in condition inspection report nor move-out condition inspection report was completed. I find the landlord’s failure to comply with the Act, and the absence of these reports, has hindered the landlord’s ability to prove that the tenant caused the damage and should be held accountable for the costs of cleaning or repairs.

Even if I accept as a fact that the damage, as shown in the photos, did exist at the end of the tenancy, it is not possible to verify what condition the rental unit was in when the tenancy began and therefore, I am unable to determine what damage had actually occurred during the tenancy, by the actions of these tenants. I therefore find that the landlord’s monetary claims fail to meet element 2 of the test for damages and must be dismissed.

In addition to the above, I find that the landlord did not furnish sufficient proof of the claimed expenditures. I therefore find that the landlord's monetary claims also failed to satisfy element 3 of the test for damages.

With respect to the claim of $1,425.00 for loss of rent, I accept that this loss was incurred by the landlord. However, I find that the landlord has based the claim on being unable to re-rent the unit in the condition it was in, until repairs were completed. As stated above, I have already found that the landlord has not sufficiently proven that the tenant must be held liable for these repairs and this would include the resulting losses.

I also find that, in order to satisfy element 4 of the test for damages, the landlord would need to prove that they made a reasonable attempt to mitigate the losses under section 7(2) of the Act by trying to show and market the suite.

Given the above, I find that the landlord’s monetary claims for cleaning and damages are not sufficiently proven and must be dismissed.

I find that the total compensation owed to the tenant is $975.00 comprised of $725.00 refund of the security deposit, $200.00 towards moving costs and the $50.00 cost of the application.

I hereby grant the tenant a monetary order in the amount of $975.00. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The remainder of the landlord's and the tenant's applications are dismissed without leave.

Conclusion

The tenant is partly successful in the cross application and is granted a monetary order for the refund of the security deposit and a portion of the moving costs. The landlord's application for monetary compensation is dismissed.

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: October 07, 2013

Residential Tenancy Branch