Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR MNSD O FF
MNSD

Preliminary Issues

The Landlord's agent indicated that she was simply relaying or translating information on behalf of the Landlord who was present at the hearing. The majority of the testimony was presented by the agent during the course of this proceeding, on behalf of the Landlord. Accordingly, all testimony provided by the agent and the Landlord will be recorded, herein after, as being provided by the Landlord.

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed on November 18, 2013, to obtain a Monetary Order for: damage to the unit, site or property; for unpaid rent or utilities; to keep the security deposit; for other reasons; and to recover the cost of the filing fee from the Tenant for their application.

The Tenant filed on September 12, 2013, to obtain a Monetary Order for the return of their security deposit.

The parties appeared at the teleconference hearing, and gave affirmed testimony. The Tenant acknowledged receipt of all of the Landlord's evidence. The Landlord indicated that he had received a notice to pick up registered mail consisting of the Tenant's written statement, the day before the hearing and that they had not had opportunity to pick it up. The Tenant confirmed that he had sent the document late and that he would provide oral testimony in place of the written statement.

At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure.

Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Is the Landlord entitled to a monetary order?
2. Is the Tenant entitled to a monetary order?

Background and Evidence

The Landlord testified that he entered into a verbal tenancy agreement with the Tenant effective May 6, 2012. Rent in the amount of $750.00 was payable on the last day of every month and on May 6, 2012, the Landlord received a payment of $800.00 which was $700.00 for the balance of May 2012 rent plus $100.00 security deposit. The Landlord confirmed that sometime in June 2013 or early July 2013, he and the Tenant mutually agreed that the tenancy would end on August 15, 2013; however the Tenant did not return the keys until approximately 1:30 a.m. on August 16, 2013. No move in or move out condition inspection report forms were completed. The Landlord received the Tenant's forwarding address, in writing, on August 23, 2013.

The Tenants disputed the Landlord's testimony and argued that their verbal agreement was for a tenancy that began on May 6, 2012 and rent in the amount of $700.00 was payable on the first day of every month. On May 6, 2012, the Tenant paid $800.00 which was $500.00 for the balance of May 2012 rent plus $300.00 as the security deposit. Although the Tenant continuously requested receipts for cash payments the Landlord refused saying they were like family.

As proof of the terms of the tenancy, the Tenant noted that he had paid $700.00 on the first of each month from June 2012 to July 31, 2013. He paid only one half of a month's rent ($350.00) for August 2013 as per their mutual agreement to end the tenancy on August 15, 2013. He also noted that the Landlord made no effort to collect additional rent of the alleged $50.00 per month until filing his application on November 18, 2013. They were forced out of the unit within an hour and were not given any time to clean. The keys for the unit were returned to the Landlord shortly after midnight on August 15, 2013.

The Landlord submitted that he is seeking $6,268.33 for compensation for damage and loss. He stated that his claim consists of: (1) $725.00 of outstanding rent accumulated at $50.00 per month for the entire tenancy; (2) $4,150.00 plus tax for renovations required to the unit, as per the quote provided in evidence; (3) $750.00 for one month's loss of rent because they were not able to re-rent the unit until September 15, 2013; (4) $43.33 for photographs provided in evidence; (5) $500.00 to replace the burnt stove and hood fan; and (6) registered mail fees of approximately $30.00. He pointed to his evidence which included photographs taken by himself and his agent on September 2, 2013. He confirmed that the only work that has been performed to date was a small amount of cleaning and washing the walls to ready the unit for the next tenant.

The Tenant argued that the majority of the damage was present prior to his tenancy, and alleges that the damage to the counter and electric heaters was caused after he had moved out. He pointed to photos that show the damage to the counter top with the pieces and sawdust lying in the sink. He argued that this damage had to have happened after they moved out because they used the sink during their tenancy. Also, the electric heaters would not have been in that condition during his tenancy because he has two small children who were residing in the unit with him, and the heaters would have been a hazard if in that condition.

In closing, the Landlord pointed to a letter submitted from their previous tenant which indicates the unit was not damaged during his tenancy.

The Tenant argued that the Landlord made no effort to make a claim against him until two months after he filed his claim for the return of his deposit. He is of the opinion that the Landlord's claim was filed simply as intimidation toward him.

Analysis

The *Residential Tenancy Act* defines a "**tenancy agreement**" as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

Section 91 of the Act stipulates that except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia.

Common law has established that oral contracts and/or agreements are enforceable. Therefore, based on the above, I find that the terms of this verbal tenancy agreement are recognized and enforceable under the *Residential Tenancy Act*.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement;
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation;
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Only when the applicant has met the burden of proof for all four criteria will an award be granted for damage or loss.

Landlord's Claim

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

In this case, the Landlord has the burden to prove that rent was to be $750.00 per month and not $700.00 per month. The only evidence before me was evidence that the Tenant paid $700.00 per month for fourteen full months of the tenancy. The Landlord took no action prior to this claim to collect any short payments. Therefore, I find the Landlord's disputed verbal testimony to be insufficient to meet the burden of proof. Accordingly, I dismiss the Landlord's claim that rent was $750.00 and I dismiss the claim for unpaid rent, without leave to reapply.

The evidence supports that in June or July 2013 the parties mutually agreed to end this tenancy effective August 15, 2013. The Landlord has claim for loss of rent for the period after the tenancy ended (between August 16th and September 15, 2013). As this tenancy ended by mutual agreement, on August 15, 2013, the Tenant had no obligation to the Landlord for any period after that date. Therefore, I find there to be insufficient evidence to support the claim for lost rent, and it is dismissed, without leave to reapply.

Sections 23 and 35 of the Act provide that the landlord and tenant ***together*** **must** inspect the condition of the rental unit on the first and last day the tenant is entitled to possession of the rental unit [my emphasis added].

Section 21 of the Regulation stipulates that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection.

In this case the Landlord is relying on photos, which were taken, in the absence of the Tenant, eighteen days after they regained possession of the unit. They are using this as proof of the condition of the unit at the end of the tenancy. They have also provided a letter from someone they allege to be their previous tenant claiming there were no damages to the unit during that tenancy.

Upon consideration that this Landlord has established a pattern of conducting his tenancy business verbally, without any type of paper trail, in breach of the Act, I put very little, to no, evidentiary weight to the letter from the alleged former tenant.

In the absence of signed condition inspection report forms, and in the presence of the Tenant's disputed verbal testimony, I find the Landlord has provided insufficient evidence to prove damages occurred during this tenancy. I make this finding in part because the Tenant presented reasonable doubt to support his argument that some of the damages were present at the outset of his tenancy, and the remaining damages occurred sometime between the early morning of August 16, 2013, and September 2, 2013 when the photos were taken. Accordingly, I dismiss the Landlord's claim for renovations/repairs and replacement of the stove and hood fan, without leave to reapply.

In regards to costs incurred to produce photographic evidence, I find that the Landlord has chosen to incur these costs which cannot be assumed by the Tenant. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of Act, not for costs associated with a choice of how evidence will be presented. Accordingly, I find that the Landlord may not claim costs for photographs, as they are costs which are not denominated, or named, by the *Residential Tenancy Act,* and the claim is dismissed, without leave to reapply.

In regards to registered mail fees for bringing this application forward, I find that the Landlord has chosen to incur these costs that cannot be assumed by the Tenant. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of Act. Section 89 of the Act provides for various methods of service therefore I find costs incurred due to a service method choice are not a breach of the Act. Accordingly, I find that the Landlord may not claim mail costs, as they are costs which are not denominated, or named, by the *Residential Tenancy Act,* and the claim is dismissed, without leave to reapply.

The Landlord has not been successful with their application; therefore I decline to award recovery of the filing fee.

Tenant's Application

Based on the foregoing, and on a balance of probabilities, I favor the Tenant's evidence over the Landlords with respect to the amount of security deposit that was paid.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Landlord's explanation that he collected only $100.00 as a security deposit based on a $750.00 per month rent to be improbable. The Tenant's explanation that he was to pay $500.00 for the month of May 2012 and $300.00 as the security deposit seems probable to me because $500.00 is approximately ¾ of the a month's rent if rent was $700.00, and the tenancy began on May 6, 2012, a quarter or one week into the tenancy. Furthermore, $300.00 is almost half of a month's rent, which is the allowable amount of a security deposit provided for in the *Residential Tenancy Act*.

Based on the above, I find the Tenant paid a security deposit of $300.00; that this tenancy ended August 15, 2013; and the Tenant provided the Landlord with his forwarding address in writing on August 23, 2013.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit.

In this case the Landlord was required to return the Tenant's security deposit in full or file for dispute resolution no later than September 7, 2013. The Landlord did not return

the deposit and did not file his application for dispute resolution until November 18, 2013.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit.

Based on the aforementioned I find the Tenant has met the burden of proof to establish his claim and I award him double his security deposit plus interest in the amount of **$600.00** (2 x $300.00 + $0.00 interest).

Conclusion

I HEREBY DISMISS the Landlord's claim, without leave to reapply.

The Tenant has been awarded a Monetary Order in the amount of **$600.00.** This Order is legally binding and must be served upon the Landlord. In the event that the Landlord does not comply with this Order it may be filed with the Province of British Columbia Small Claims Court 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: December 19, 2013

Residential Tenancy Branch