Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, RPP, FF

Introduction
This hearing dealt with an application by the tenant for a monetary order and return of personal property. As personal property is a refrigerator and the tenant now lives a long way away from where the appliance is located, his application is actually for compensation for the cost of the refrigerator.

The hearing was originally scheduled for February 13, 2014 at 9:30 am. Only the tenant appeared at that time. The tenant asked for an adjournment on the grounds that he had had difficulty in obtaining some documents from the bank which he wished to file as part of his evidence. He also explained that his efforts to obtain these documents had been delayed by his recent several week long stay in the hospital. I granted his request and the hearing was rescheduled to April 7 at 9:00 am.

On April 7 the tenant, the landlord, and the landlord's lawyer appeared at the hearing. At 9:18 the tenant had to make some different arrangements for his telephone. He checked out of the hearing at 9:18 am and called back in at 9:26.

The landlord acknowledged receipt of the original application for dispute resolution and notice of hearing; as well as the notice of adjourned hearing sent on March 10. The tenant had filed proof of service of the additional evidence package on the landlord by registered mail, which was actually received by the landlord on March 31.

The landlord did not consult her lawyer until March 31. The landlord's evidence package was filed with the Residential Tenancy Branch on April 3 and sent to the tenant by courier on that date. As of April 7 the landlord's evidence package had not been delivered to the tenant.

I considered the landlord's request to have their evidence considered and Rule 11.5(b) which states as follows: "The Arbitrator may refuse to accept the evidence is the Arbitrator determines that there has been a willful or recurring failure to comply with the

Act or the Rules of Procedure, or, if for some other reasons, the acceptance of the evidence would prejudice the other party, or result in a breach of the principles of natural justice."

I decided that acceptance of the landlord's evidence would not result in a breach of the principles of natural justice as long as the tenant had adequate time to review and respond to it. I explained to the parties that I would only hear the tenant's evidence-in-chief on this date and that I would not be closing the hearing or making any decision until after I had heard the landlord's evidence and the tenant had had an opportunity to review and respond to the landlord's written evidence.

The landlord had filed evidence in support of a claim against the deposit. When given the option of having the landlord's claim heard and decided at the same time as his own, the tenant decided to have the hearing proceed on his application only. The landlord was advised that she would have to file and serve her own application for any claim she may have against the tenant.

The tenant advised that he was moving from the address stated as his address for service on the application for dispute resolution and provided an address at which all future documents, including any application for dispute resolution from the landlord, could be served.

On April 7 only the tenant's evidence-in-chief was heard.

The hearing was adjourned to April 28, 2014, at 1:00 pm, Pacific Time; a date and time convenient to all participants.

The hearing reconvened at that date and time. The tenant appeared at the hearing; the landlord did not. After waiting for ten minutes I hear the balance of the tenant's evidence. The tenant acknowledged receipt the landlord's written evidence, including an affidavit of the landlord, filed after the last hearing. The hearing ended at 1:36 pm without the landlord ever calling in.

The landlord's written evidence has been considered in the preparation of this decision.

Issue(s) to be Decided

Is the tenant entitled to a monetary order and, if so, in what amount?

Background and Evidence

The rental unit is a furnished apartment in a ski resort. The landlord lives in Ontario.

The tenancy agreement was negotiated by telephone and fax. The parties agreed that the rent would be $1000.00 per month. The landlord's affidavit says they agreed to a five month lease but the tenancy agreement, which she signed, is for a one year term. The landlord says the tenant offered to pay the rent for the full term of the short-term agreement in advance; the tenant says the landlord insisted on payment of the first five months in advance before she would allow possession. Both agree that the tenant deposited $5000.00 into the landlord's bank account on February 23, 2013.

Although the written tenancy agreement said the tenancy would commence February 21 and the landlord's affidavit says the agreement was signed on February 21 the date on beside the landlord's signature on the tenancy agreement is February 23. The tenant did not obtain the keys until February 23. The tenancy agreement says the rent is due on the 22nd day of the month.

The tenancy agreement says that $1000.00 of the money paid by the tenant was paid as a security deposit. The landlord's affidavit described the $5000.00 as advanced rent.

A move-in inspection was not conducted nor was a move-in condition inspection report completed.

The tenant testified that he was shown the unit by the next door neighbour who was also a tenant of the landlord's. He observed this person turn off the breaker when they left the apartment. The tenant testified that he did not look in the refrigerator when he looked at the unit.

The tenant testified that when he moved in the refrigerator was moldy. He contacted the landlord who asked him if it could be cleaned. He cleaned the refrigerator but when he put food into it quickly spoiled. After some conversations with the landlord she told him to buy a new refrigerator and to donate the old one to a charity. On February 26 the tenant bought a new refrigerator at a total cost of $727.99, including taxes and delivery. The delivery people took the old refrigerator away.

The landlord's affidavit says that when the tenant called to complain about the condition of the refrigerator she told him to clean it with baking soda, vinegar and water. Her evidence is that the tenant "was persistent and told me he would purchase a new fridge regardless of my wishes, but that the fridge could remain in the suite after he left due to

his financial comfort. I did not agree with [the tenant] and suggested that he arrange for [building] personnel to freshen it up and that a new fridge was not necessary."

The landlord's evidence is that after receiving a number of complaints about the tenant's behaviour (no determination is made in this decision as to whether those complaints were well-founded or not) the landlord had her agent – her other tenant – issue and post a 1 Month Notice to End Tenancy for Cause dated March 26. The effective date of the notice is stated to be April 26.

The tenant testified that when he called the landlord about the notice she told him to disregard it. The landlord's evidence is that when the tenant called her about the notice she told him he had to move out. The tenant testified that on April 7 he had a telephone conversation with the landlord and as a result of that conversation he moved out of the unit on April 8. He never filed an application disputing the notice.

The tenant also testified that when he spoke to the landlord about the refrigerator in the last conversation she told him it was his problem.

A move-out inspection was not conducted nor was a move-out condition inspection report completed.

The tenant moved to a different ski resort and he mailed the keys to the landlord from there. He did not include a letter with his forwarding address with the keys. There is no evidence that the tenant ever gave his forwarding address in writing to the landlord before serving this application for dispute resolution.

Analysis

"Security deposit" is defined by the *Residential Tenancy Act* as money paid, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property not including postdated cheques for rent, pet damage deposit or payment for fees described in section 7 of *the Residential Tenancy Regulation.*

The tenancy agreement specifies that the rent is to be paid monthly. As the rents for March, April and May were not due until the 22nd day of each of those months, the $3000.00 paid by the tenant in addition to the first month's rent and the amount stated to be the security deposit, was collected and was being held as security against any liability or obligation of the tenant. These monies are a security deposit within the meaning of the legislation.

Section 19(1) of the *Act* states that a landlord must not require or accept a security deposit or pet damage deposit that is greater than the equivalent of one half of one month's rent payable under the tenancy agreement. Subsection (2) allows a tenant to deduct the overpayment from rent or to otherwise recover the overpayment.

By legislation the landlord should only have collected a security deposit of $500.00; instead she collected $3500.00.

The rent for the period March 22 to April 21 is deducted from the money held by the landlord pursuant to section 19(2).

The tenant argued that he should be entitled to repayment of the rent paid for the period April 9 to April 21. This argument is rejected. The tenant was not legally required to move out of the unit on April 8. He could either have stayed until the effective date of the notice to end tenancy or he could have contested the notice – he did neither. He chose to move out of the rental unit early and he is responsible for the rent to the end of that rental period.

The landlord has no right to retain the balance of the security deposit. Section 23 sets out the landlord's obligation to conduct an inspection and complete a condition inspection report at the beginning of a tenancy. Section 35 imposes the same obligation at the end of a tenancy. Sections 24(2) and 36(2) extinguish a landlord's right to claim against the security deposit if they do not comply with either section 23 or 35. Accordingly, I find that the landlord must repay to the tenant the sum of $3000.00, being the balance of the security deposit held by her.

The tenant's claim to compensation for the refrigerator is dismissed. A tenant cannot make changes to a rental unit without the landlord's consent or an order from the Residential Tenancy branch, obtained in advance, authorizing the repair. The tenant did not make any application to the Residential Tenancy Branch before taking this action. The only evidence before me about the landlord's consent is the conflicting testimony of the parties about their conversations. There is no additional evidence such as faxes, e-mails or text messages, between the parties to tip the balance of probabilities in the tenant's favour.

Conclusion

I find that the tenant has established a total monetary claim of $3050.00 comprised of an overpayment of the security deposit of $3000.00 and the $50.00 fee paid by the tenant for this application. I grant the tenant an order pursuant to section 67 in that

amount. If necessary, this order may be filed in the 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: April 29, 2014

Residential Tenancy Branch