Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ff, mndc, mnr, mnsd

Introduction

The landlord applies for a Monetary Order for unpaid rent and/or loss of rental income; and an order to retain the security deposit.

Issues to Be Decided

- Is the landlord entitled to a monetary award as against the tenant?
- Is the landlord entitled to retain the deposit in partial satisfaction of the sum owed?

Background and Evidence

The landlord's agent is the son of the landlord. His testimony and evidence is that the tenancy ended May 31, 2013 pursuant to a 2 month Notice to End Tenancy. The tenant failed to vacate as required on or before May 31, 2013, and eventually vacated June 18, 2013. On that date he moved out his final boxes, and met with the landlord's son. When his security deposit was not returned to him, he refused to return the landlord's keys, and the landlord then changed the locks and took possession. No rent was paid by the tenant for any portion of the month of June. The premises were left in a very dirty condition by the tenant and needed cleaning.

The landlord's son further testified that he and his sister intended to reside in the premises beginning June 1, 2013. Between them, they were to pay the landlord a monthly sum of rent of $2,350.00. As the tenant was not out of the premises by June 1, he and his sister had to cancel and revise her relocation plans, and did not move in until July 1. As a result, the landlord received no rental income at all for the month of June,

and claims the sum of $2,379.50 from the tenant, which was the monthly rent at the end of the tenancy.

The tenant's advocate submitted that the issue of the disposition of the tenant's security was dealt with in a prior decision (file #823483). In the outcome, the landlord was ordered to pay double the deposit to the tenant.

The tenant's testimony and evidence was that the landlord came to the premises every day in June, pestering him to move out. He fully vacated the premises on June 14, 2013. The landlord arranged to meet him on June 18, 2013 for return of the keys, but did not arrive, and informed the tenant by phone that he had changed the locks. The tenant submitted he left the premise in a spotless and sanitary condition, as evidenced by his photographs. No condition inspection report was prepared by the landlord either at the start or the end of the tenancy.

Analysis

The fact there was a previous hearing and decision regarding the disposition of the tenant of his deposit now raises the issue of the doctrine of *res judicata* and the related principle of issue estoppel. The doctrine of res judicata operates to prevent a claim being litigated more than once, and applies to arbitrations under the Residential Tenancy Act (see for example the case of *Jonke v. Kessler; Kessler v. Jonke* (January 15, 1991) Vernon Registry No. 3416, Kelowna Registry No. 7174 (B.C.S.C.). An issue estoppel arises in situations where although the claim may be different, a specific issue has already been decided. In this case, the issue of the security deposit has already been determined in a previous decision, with the landlord ordered to pay the tenant double the deposit. I therefore have no authority over this portion of the current claim, as the principals of *res judicata* and issue estoppel apply to prevent a further claim over the deposit from being re-adjudicated. The landlord's claim to retain the tenant's security deposit is dismissed accordingly.

The two month Notice served upon the tenant in this case was effective to end the tenancy May 31, 2013, but the tenant failed to deliver vacant possession to the landlord as required on or before that date. Given the tenant's testimony that the landlord came to the premises every day in June, and knowing how anxious the landlord was to regain possession, I would have expected that if the tenant in fact vacated on June 14, he would have returned the keys on that date to the landlord. I find no reason to disbelieve the landlord's son and accept as credible his testimony that the tenant still had a few boxes to move out on June 18, and then met the landlord's son but refused to return the key because the landlord didn't return his deposit. I find that the locks were changed by the landlord following this encounter.

By retaining possession beyond May 31, 2013, the tenant became an "overholding" tenant as defined in section 57 of the Residential Tenancy Act. Section 57(3) permits a landlord to claim compensation from an overholding tenant for any period that the tenant occupies the rental unit after the tenancy ends. This entitles the landlord to claim rent from the tenant for the period from June 1 to June 18. The pro-rated value of the overholding rent payable by the tenant to the landlord for 18 days in June is $1,427.70.

As pointed out by the tenant's advocate, the landlord or his son provided no supporting evidence for the contention the premises were left in a dirty condition by the tenant, whereas the tenant submitted photographs and witness statements demonstrating the premises were left in a clean condition. I further note that the landlord failed in his obligation to prepare condition inspection reports either at the start or the end of the tenancy. A move-in inspection report would have provided baseline evidence as to the condition of the premises at the start of the tenancy, and a move-out report would demonstrate any change in condition at the end of the tenancy. In the absence of this evidence from the landlord, I accept the testimony and evidence of the tenant that the premises were left in a clean condition.

The landlord's son's testified that he and his sister paid rent to their father once they moved into the premises on or about July 1, 2013, and that between them, the rent paid

was $2,350.00 per month. Because they did not move in as intended on June 1 and paid no rent for June, the landlord lost this income and now clams this loss from the tenant. I note that the Residential Tenancy Act permits a landlord to end a tenancy on the basis that a close family member intends to occupy the premises. The Act does not prohibit the close family member from paying rent or a similar payment to the landlord, and I accept the landlord's son's testimony that he and his sister began paying rent of $2,350.00 on July 1. I further find that they would have paid such rent effective June 1 had the premises been available then, but as it was not available they were obliged on short notice to change their plans and made July 1 their new move in date. Had the tenant vacated on May 31 as required, no such loss of income for June would have occurred, and I therefore find the landlord may recover this loss from the tenant. The actual loss of the landlord for the entire month equals $2,350.00, the sum the landlord should have received from his children. Accordingly, the tenant must pay a further $922.30 to the landlord, in addition to the overholding rent noted above.

As the landlord is successful with his claim, he may also recover his $50.00 filing fee from the tenant. The total amount due to the landlord by the tenant is $2,400.00.

Conclusion

The tenant must pay to the landlord the sum of $2,400.00.

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 24, 2015

Residential Tenancy Branch