Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Landlord on October 10, 2014, and amended on May 1, 2015, seeking to obtain a Monetary Order for: unpaid rent or Utilities; to keep all or part of the security deposit; for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement; and to recover the cost of the filing fee from the Tenants for this application.

The hearing was conducted via teleconference and was attended by the Landlord who gave affirmed testimony.

Section 89(1) of the *Act* stipulates that an application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to a landlord, 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;

The Landlord provided documentary evidence that each Tenant was served notice of the original application and hearing documents by registered mail on October 10, 2014. Canada Post tracking information confirms that Canada Post attempted delivery of each package on October 14, 2014 and that a notice card was left that date to advise the tenant they could pick up the registered mail. The tracking information also confirms Canada Post gave a second and final notice on October 30, 2014 that the registered mail was available for pick up.

As of November 29, 2014 the Canada Post tracking information confirms that neither Tenant picked up the registered mail. Based on this information, I find that each Tenant was provided with 3 opportunities to receive the registered mail and they did not make an attempt to retrieve it. I find this to be a deliberate effort on the part of each Tenant to avoid service; therefore, I find each Tenant was sufficiently served with Notice of this hearing and the Landlord's original application, pursuant to Section 71 of the *Act;* and I continued in absence of the Tenants.

The Landlord amended her application on May 1, 2015, increasing the amount claimed from $5,197.00 to $6,164.11. The Landlord submitted additional evidence to support the increase in the amounts claimed. The Landlord testified that she served each Tenant with copies of her amended application and additional evidence on May 1, 2015, by placing them in the Tenants' mailbox.

When an applicant is seeking a monetary order against a tenant, the application and any amended applications must be served upon each tenant, either in person or by registered mail. Based on the foregoing, I find the amended application was not served in accordance with section 89(1) of the Act. Therefore, I proceeded with the Landlord's original claim and I dismiss the increased amounts claimed, without leave to reapply.

Issue(s) to be Decided

Has the Landlord proven entitlement to monetary compensation?

Background and Evidence

The Landlord submitted evidence that the Tenants entered into a written fixed term tenancy that began on September 5, 2014 and was scheduled to end on February 28, 2015. Rent of $4,900.00 was due on or before the first of each month and on September 3, 2014 the Tenants paid $2,450.00 as the security deposit.

The Landlord testified that at the end of September 2014 the Tenants called her to say they were moving out of the rental unit. The Landlord said she told the Tenants that they would have to pay her the rent until February 28, 2015, the end of the lease, if she could not find new tenants. Despite the Landlord not having replacement tenants, the Tenants vacated the property by October 5, 2014 and did not pay rent or utilities for the month of October.

The Landlord submitted a copy of an envelope and a cheque issued to the Landlord from the Tenants dated October 18, 2014, in the amount of $255.85. The memo on the cheque indicated that the cheque was issued for "cleaning and utility". The Landlord stated that she was able to cash this cheque okay and that it was used to cover the costs of the September 2014 utilities and cleaning costs.

The Landlord argued that she was not been able to find a replacement tenant until November 5, 2014; therefore, she is seeking to recover the cost of her time to find a new tenant, equal to an amount an agent would have charged her which was $2,450.00, a half month of rent. She is also seeking the unpaid rent of $5,716.66 (Oct 2014 @ $4,900.00, plus 5 days in Nov 2014 of $816.66); plus unpaid utilities of $448.11 which includes: alarm fees, hydro, natural gas, and cable television up to November 5, 2014.

The Landlord clarified that at the time the Tenants vacated the property she had not received the hydro or natural gas bills. She argued that the Tenants were required to pay the full amount of the house alarm fee and the television cable bills, plus 2/3 of the hydro and natural gas bills, as per her tenancy agreement. She described the Tenants' rental unit as having radiant floor heat which she thought was heated by natural gas, and two natural gas fireplaces. The basement suite had electric baseboard heaters and no natural gas appliances. Upon further

clarification the Landlord stated that she could not say for certain how the radiant heat was powered.

Analysis

Section 7 of the Act provides as follows in respect to claims for monetary losses and for damages made herein:

7. Liability for not complying with this Act or a tenancy agreement

7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

The party making the claim for damages must satisfy **each** component of the test below:

1. Proof the loss exists,
2. Proof the damage or loss occurred solely because of the actions or neglect of the Respondent in violation of the Act or an agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act and did whatever was reasonable to minimize the damage or loss.

Section 45 (2) of the Act stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

The undisputed evidence is the Tenants ended the fixed term tenancy prior to the end of the fixed term, in breach of section 45(2) of the Act. The Tenants remained in possession of the rental unit until October 5, 2014, at which time they vacated the unit.

Section 26 of the Act stipulates that a tenant must pay rent in accordance with the tenancy agreement; despite any disagreements the tenant may have with their landlord.

The Tenants did not pay the October 1, 2014 rent of $4,900.00, which I find to be in breach of section 26 of the Act. Accordingly, I grant the Landlord's application for unpaid October 2014 rent and I award them **$4,900.00.**

The undisputed evidence was the Landlord did what was reasonable to mitigate their loss of rent by seeking replacement tenants. The Landlord was not able to re-rent the unit until November 5, 2014 and suffered additional loss of rent for the period of November 1 to 4, 2014.

Therefore I grant the Landlord's application for loss of rent for November in the amount of **$644.40** (4 days at a daily rate of $161.10 determined by dividing the annual (12 x $4,900.00) rent by 365 days in a year).

In regards to the claim for costs equal to that of what an agent would charge, the Landlord is making a claim to be paid for time conducting landlord business. There is no provision in the Act that allows a landlord to charge for their own time conducting the business as a landlord, such as the time incurred to find tenants to rent their own units. The Landlord made a personal choice to be in the business of being a landlord and there was no provision in the tenancy agreement that provided that the Tenants were required to pay the Landlord for her time or wages to conduct her own business. Furthermore, there was no clause in the tenancy agreement that would provide the landlord an opportunity to charge for liquidated damages. Therefore, I find that the Landlord may not claim costs to be a landlord, as that is a cost which is not denominated, or named, by the *Residential Tenancy Act* or tenancy agreement. Accordingly, I dismiss the claim for costs equal to agent fees, without leave to reapply.

Section 44(1)(d) of the *Act* stipulates that tenancy ends on the date the tenant vacates or abandons the rental unit; therefore, in this case I find that the tenancy ended **October 5, 2014**.

The Landlord has sought to recover the cost of utilities from the period of October 1, 2014 to November 5, 2014. I accept that the Tenants were required to pay for utilities during the time they occupied the rental unit from October 1, 2014 to October 5, 2014. However, I do not accept that the Tenants would be required to pay for utilities for a period after they vacated the property, as they were not benefiting from the use of the utilities. In addition, the Landlord was required to mitigate her loss during the period the rental unit was vacant, by turning down or disconnecting the utilities.

Upon review of the invoices provided in evidence, I note that the consumption of natural gas and hydro increased over the period of time the unit was vacant. Furthermore, there was no evidence before me that the Landlord took actions to turn down or disconnect any of the services during the period the unit was empty. In addition, the Landlord submitted that at the time she filed her application on October 10, 2014, the Tenants had not been served copies of the utility bills nor were they issued a thirty day demand for payment.

Based on the above, I find that at the time the Landlord filed her application for dispute resolution, the Tenants were not in arrears for utilities as they had not been served copies of the bills and there is insufficient evidence to prove the Landlord took action to mitigate her losses. Accordingly, I dismiss the claim for utilities, without leave to reapply.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Landlord has partially succeeded with their application; therefore, I award recovery of the filing fee in the amount of **$100.00**, pursuant to section 72(1) of the Act.

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenant's security deposit plus interest as follows:

Unpaid October 2014 Rent		$4,900.00
Unpaid Rent November 1- 4, 2014	644.40	
Filing Fee		100.00
SUBTOTAL		$5,644.40
LESS: Security Deposit $2,450.00 + Interest 0.00	-2,450.00	
Offset amount due to the Landlord		**$3,194.40**

Conclusion

The Landlord has been awarded a Monetary Order for **$3,194.40**. This Order is legally binding and must be served upon the Tenants. In the event that the Tenant 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: May 25, 2015

Residential Tenancy Branch