Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MND MNR MNSD MNDC FF

Preliminary Issues

Upon checking everyone into the hearing and reviewing the Landlord's application the Tenant and Occupant provided the correct spelling of their surnames and confirmed they wished the Decision to reflect the correct spelling. Accordingly, the style of cause on this Decision and Order were amended to show the correct spelling of their names, pursuant to section 64(3)(c) of the Act.

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Landlord on April 16, 2015 seeking to obtain an Order of Possession for unpaid rent and a Monetary Order for: damage to the unit, site or property; for unpaid rent or Utilities; to keep all or part of the security and or pet 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 Respondents for this application.

The hearing was conducted via teleconference and was attended by the Landlord, his Witness, the Tenant and the Occupant. While checking everyone into the hearing I asked the Landlord if his witness was in the room with him. He stated that she was in the car with in and that she was driving. I explained to the Landlord that I could not hear testimony from someone who was driving and requested that they pull over and park somewhere while we conducted the hearing. The Landlord refused to stop travelling or to pull over and stated that he would not have his witness speak.

Each party gave affirmed testimony and the Tenant confirmed receipt of evidence served by the Landlord. The Tenant described the evidence that she had received which was different than the evidence received on file at the Residential Tenancy Branch (RTB) from the Landlord. Specifically the Tenant said she received two packages from the Landlord which included the application, hearing documents, the tenancy agreement, the move in condition inspection report form, a blank monetary order worksheet, 7 pages of print photographs with 4 photos per page, receipts for cleaning, lightbulbs, a key fob and emails from the Landlord's agent.

The Landlord testified that he sent the exact same documents to both the Tenant and the RTB and both packages were sent by registered mail. The Landlord was not able to provide evidence as to the date the registered mail was sent or the Canada Post tracking information. He stated that he did not have his documents with him in the car. I informed the Landlord that the RTB file contained the tenancy agreement, move in condition inspection report form, and a Monetary Order Worksheet listing items totaling $10,000.00 and that those documents were submitted with his application. A second submission was received from the Landlord via fax on May 15, 2015 at 11:00 p.m. which included a copy of a receipt for hardware dated March 20, 2015 and one picture.

The Residential Tenancy Rules of Procedure 3.14 provides that the applicant's documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the RTB not less than 14 days before the hearing.

Based on the forgoing, and in absence of proof to the contrary I find the Landlord did not serve the Tenant with the exact same documentary evidence as he had served to the RTB. As such, I considered only the documentary evidence which both the Tenant and the RTB had received which was the application for Dispute Resolution, the tenancy agreement, and the move-in condition inspection report form. That being said, I did consider all oral testimony that was submitted during this 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.

At 11:02 a.m. the Landlord was disconnected from the hearing. He dialed back into the hearing at 11:05 a.m. and stated that his cellphone dropped the call. The Landlord confirmed that he was still travelling in a moving car and refused a second time to pull over until the hearing was completed. Upon the second refusal to stop the car I informed the Landlord that the onus was on him to ensure that he attended this hearing in a manner in which the hearing could be conducted uninterrupted. I explained that if his cellphone dropped the call again that I would continue with the hearing in his absence, the Landlord stated that he understood and that he still refused to stop the car. The Landlord was disconnected from the hearing again at 11:16 a.m. for three minutes and at 11:29 a.m. for one minute.

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. Following is a summary of the submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1) Has the Landlord regained possession of the rental unit?
2) Has the Landlord proven entitlement to a Monetary Order?

Background and Evidence

The undisputed evidence was that the Tenant, M.H. entered into a written fixed term tenancy agreement that began on February 15, 2015 which was scheduled to end on March 30, 2016. The tenancy agreement indicated that rent of $3,750.00 was due on or before the first of each month however at the time the tenancy agreement was signed the parties agreed upon a reduced rent of $3,650.00. On February 9, 2015 the Tenants paid $1,825.00 as the security deposit based on the reduced rent; even though the tenancy agreement indicated that $1,875.00 had been paid as the security deposit.

The Landlord testified that the Tenant entered into the written tenancy agreement and that her boyfriend showed up afterwards. The boyfriend, M.C. was also named as a respondent to this dispute. The Landlord argued that despite his requests to have the boyfriend added to the tenancy agreement it did not happen.

The Landlord submitted that the Tenant's April 1, 2015 rent cheque bounced and when no one would answer his calls he left a messaging telling them they had to move out. He stated that he was told by the concierge that the Tenant had moved out at the beginning of April because she was getting into fights with her boyfriend. He said he was later told that the boyfriend moved out around April 14 or 15, 2015.

The Landlord asserted that the rental unit was a "pig sty", had punched in walls, cigarette burns in the floor, and was left with over six bags of debris which included several pictures, needles that were used for drugs, and burnt out light bulbs. He said it was a walking disaster and he had to get an electrician in to check the place because he was concerned they damaged the electrical with whatever they were doing in this place.

The Landlord stated that he is seeking $10,000.00 which was comprised of $3,650.00 for April 2015 rent, $3,650.00 for May because he was not able to rent the place in May until he got it fixed, an NSF fee, and the costs for cleaning, electrician inspection, and the floor repair. He argued that the floor has since been repaired but he did not have the invoice in front of him to provide specific details about when it was fixed or the exact cost, but that these amounts easily added up to $10,000.00.

The Tenant and her boyfriend testified that they had paid their February 2015 rent in cash. Then for some reason the Landlord lied and said he was not paid for February rent and he issued them a 10 Day Notice for unpaid February rent and a 1 Month Notice to end tenancy for cause. The Tenant said they filed an application with the RTB to

dispute both notices and had a hearing scheduled for April 23, 2015. The RTB record was review during the hearing which confirmed the Tenant filed her application to dispute the two Notices on March 19, 2015. The Tenant's application indicated that the Notices were received by the Tenant on March 15, 2015.

The Tenant argued that their situation continued to get worse and then someone made an anonymous call to the police. The police attended and broke the door to inspect the rental unit. The Tenant asserted that given the current circumstances they decided to move out of the rental unit before their April 23, 2015 hearing.

The Tenant argued that they have evidence that they had moved out on April 9, 2015 which included their truck rental, their storage rental, and their booking of the elevator for moving out on April 9, 2015, not April 14 or 15 as submitted by the Landlord.
The Tenant and her boyfriend testified that the pictures of the rental unit did not represent the condition of the unit when they moved out. They admitted that they had left a hole in the wall where they had their television mounted but that they did not punch holes in other walls. They asserted that they kept the rental unit clean and did not damage the hardwood floor. The Tenant stated that they have never been issued or told about a strata fine, nor was she given evidence of a strata fine.

The Tenant admitted that she had placed a stop payment on the April 1, 2015 rent cheque because they moved out of the rental unit in accordance with the eviction Notices. She argued that they should not have to pay a NSF fee because the Landlord had evicted them so they did not have to pay April rent. They admitted that they had left some garbage behind and that they did not clean the rental unit because the Landlord had told them they were not getting their security deposit back.

The Tenant reviewed the receipts she had received in the Landlord's evidence and noted that: one of the receipts was dated February 13, 2014 a year before she moved into the unit; several receipts were simply written on a generic receipt book receipt; and one of the receipts from a drug store did not describe the item purchased.

In closing, the Landlord stated that this tenancy was "pathetic". He argued that he told the Tenant that they would have to give him 15 days' notice that they would be moving out in order for him to return their security deposit.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

An occupant is defined in the Residential Tenancy Policy Guideline 3 as follows: where a tenant allows a person who is not a tenant to move into the premises and share the rent, the new occupant has no rights or obligations under the original tenancy agreement, unless all parties (owner/agent, tenant, occupant) agree to enter into a tenancy agreement to include the new occupant as a tenant.

Based upon the aforementioned, I find the male Respondent to this dispute does not meet the definition of a tenant; rather he is an occupant as he was not a party to the tenancy agreement. Thus, there is not a tenancy agreement in place between the Applicant and male Respondent to which the *Residential Tenancy Act* applies. Accordingly, the style of cause on any Orders issued will be amended to show only the Tenant's name and not the male Respondent.

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.

When a tenant receives a 10 Day Notice to end tenancy for unpaid rent they have (5) days to either pay the rent in full or to make application to dispute the Notice or the tenancy ends and they are required to vacate the rental unit.

When a tenant receives a 1 Month Notice to end tenancy for cause, they have (10) days to make application to dispute the Notice or the tenancy ends and they are required to vacate the rental unit.

Residential Tenancy Policy Guideline 11 provides that as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In this case the Tenants were issued a 10 Day Notice and a 1 Month Notice together on March 15, 2015. The Tenants filed their application to dispute both Notices on March 19, 2015, then changed their mind and vacated the unit prior to the April 23, 2015 hearing.

Section 44(1)(a)(ii) of the *Act* stipulates that a tenancy ends in accordance with a landlord's notice to end tenancy. That is to say the tenancy ends on the effective date of a notice to end tenancy.

The effective date of the 10 Day Notice would have been March 25, 2015 and the effective date of the 1 Month Notice would have been April 30, 2015. The Tenants did not proceed with their application to dispute the Notices therefore both Notices were still in full force and effect. The 1 Month Notice would be considered the second notice as it had a later effective date and the 1 Month Notice would not cancel out the 10 Day Notice, as per Residential Tenancy Policy Guideline 11 listed above. Accordingly, I find this tenancy ended in accordance with the 10 Day Notice on **March 25, 2015.**

The undisputed evidence was that the Tenant vacated the property either on April 9, 2015 or April 14 or 15, 2015. The Tenant placed a stop payment on the April 1, 2015 postdated rent cheque because she had been evicted and was planning to vacate the rental unit.

Residential Tenancy Policy Guideline 3 provides that a tenant is not liable to pay rent after a tenancy agreement has ended; however, if a tenant remains in possession of the premises (over holds), the tenant will be liable to pay occupation rent on a per diem basis until the landlord recovers possession of the premises. In certain circumstances a tenant may be liable to compensate a landlord for loss of rent.

In the case of verbal testimony when one party submits their version of events, in support of their claim, and the other party disputes that version, it is incumbent on the party making the claim to provide sufficient evidence to corroborate their version of events. In the absence of any documentary evidence to support their version of events or to doubt the credibility of the parties, the party making the claim would fail to meet this burden.

In this case the Landlord holds the burden to prove the date he regained possession of the rental unit. The Tenant disputed the Landlord's submission saying they vacated the unit by April 9, 2015, leaving the keys with the Landlord's concierge which is where they picked the keys up when they first moved in. Therefore, in absence of documentary evidence to prove the contrary, the Landlord has provided insufficient evidence to prove his testimony and I accept the Tenant's submission that they vacated by April 9, 2015.

Based on the above and in accordance with the 10 Day Notice, the Tenant was required to vacate the rental unit no later than March 25, 2015. There was no evidence before me that March 2015 rent remained unpaid, as the Landlord only claimed for April and

May 2015 rent. Therefore, I conclude that rent was paid for the full month of March 2015 and the Tenant over held the rental unit for nine days, April 1 – 9, 2015. Therefore, I grant the Landlord's application for over holding charges at the daily rate of $120.00 ($3,650.00 x 12 month's ÷ 365 days) for a total amount of **$1,080.00**.

Although the Landlord has claimed for unpaid rent for the full month of April and May, 2015, based on the above information I find the Landlord is seeking loss of rent for the remainder of April and all of May 2015. In making this application the Landlord argued that he could not re-rent the unit due to the condition it was left in. In support of his testimony the Landlord submitted a faxed photograph which is blurry and appears to be of a door knob and one receipt from for what appears to be the purchase of chrome hardware.

In consideration of the Tenant's disputed verbal testimony as to the condition the rental unit was left in I find the Landlord provided insufficient evidence to prove the unit could not be re-rent right away. Furthermore, there was no oral or written evidence before me that would prove the Landlord took immediate action to attempt to re-rent the unit. Accordingly, I find the Landlord has not proven that he did what was reasonable to re-rent the unit as soon as possible and I dismiss his claim for loss of rent for April and May 2015, without leave to reapply.

In response to the Landlord's application for cleaning costs, wall and flooring repairs, lightbulbs and strata fines, there was no documentary evidence before me to support any of the items or amounts claimed. In the presence of the Tenant's disputed testimony regarding the validity of the invoices served upon her, I find the Landlord provided insufficient evidence to support these items claimed. Therefore, I dismiss all claims for damages, 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 partial recovery of the $100.00 filing fee in the amount of **$50.00**, 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:

Over holding use and occupancy	$1,080.00
Filing Fee	50.00
SUBTOTAL	$1,130.00
LESS: Security Deposit $1,825.00 + Interest 0.00	-1,825.00
Offset amount due to the Tenant	**($695.00)**

The Landlord is hereby ordered to return the $695.00 balance of the Tenant's security deposit to the Tenant forthwith.

Conclusion

The second respondent to this application has been determined to be an occupant. Therefore, the style of cause on the Order has been amended to include only the Tenant's name.

The Landlord has only partially succeeded with his application and was awarded $1,130.00 which was offset against the Tenant's $1,825.00 security deposit. The Landlord is ordered to return the balance of $695.00 of the security deposit to the Tenant forthwith.

In the event the Landlord does not comply with the above Order, the Tenant has been issued a Monetary Order for **$695.00**. 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 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: June 15, 2015

Residential Tenancy Branch