Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's claim for a monetary order and an order authorizing her to retain the security deposit. Both parties participated in the conference call hearing, with the tenant represented by counsel.

At the hearing, the tenant's counsel advised that the day before the hearing, she couriered the tenant's evidence to both the landlord and the Residential Tenancy Branch. While the landlord acknowledged having received the evidence, I did not have the evidence before me as the Burnaby office of the Branch to which the evidence was couriered had not yet been able to process and send it to me. As I did not have the tenant's evidence before me and as the tenant did not comply with the Rules of Procedure and submit his evidence at least 7 days prior to the hearing, I have not considered the tenant's documentary evidence.

Issue to be Decided

Is the landlord entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on April 1, 2014, that the tenant paid a $850.00 security deposit and that rent was set at $1,650.00 per month. The tenancy agreement states that the tenancy is set for a fixed term, expiring on March 31, 2015.

The landlord testified that the tenant's rent cheque for the month of February was returned by the bank for insufficient funds, so she contacted the tenant and was told that he had vacated the rental unit. The landlord seeks to recover lost income for February and March. She testified that she made no attempt to re-rent the unit as she intends to sell the unit.

The tenant's counsel stated that the tenant claimed he received an informal notice from the landlord which was posted on his door in early January, advising that he had to vacate the unit by January 31. The tenant did not keep a copy of the notice. He vacated the unit because he understood that his tenancy was over which was further underscored by the landlord having

made a significant number of telephone calls to him and cutting off his access to the unit for at least a day by disconnecting the fob. The tenant's position was that the informal notice in addition to restricting his access to the rental unit amounted to an ending of the tenancy by the landlord.

The landlord testified that she placed over 100 telephone calls to the tenant during the month of January and he did not respond to her telephone calls, so she cancelled his fob so he could not access the rental unit. She denied having given him a notice of any kind advising that he had to vacate the unit at the end of January.

The landlord seeks to recover $200.00 in strata charges for move-in/move-out fees. The landlord's testimony on this point was extremely confusing and became more so as both I and the tenant's counsel questioned her. The tenancy agreement states that a $200.00 move-in fee was owing, but that provision is crossed out and initialled. Another provision which is not crossed out states "200 (Deposit Moving Fee)". The tenant provided a $200.00 cheque to the landlord which was dated March 1, 2015 and when the landlord attempted to negotiate the cheque, it was returned for insufficient funds. The cheque's memo line states, "Move-in fee". The landlord seemed to take the position that the cheque represented all of the fees payable to the strata for moving in and moving out.

The tenant's counsel argued that the tenancy agreement is unclear whether this money is owing, there appears to be no reason why the cheque would be dated March 1, 2015 when the tenancy was not set to end until March 31 and asked why the landlord had not provided proof that she paid the fees to the strata.

The landlord testified that she incurred expense cleaning the rental unit at the end of the tenancy as a result of the tenant having failed to adequately clean. She provided a $200.00 invoice from CW, who she said is an employee at the building, in which he provided a very specific, itemized list of repairs and items and rooms cleaned. She also provided her own invoice for $192.00 and testified that she spent significant time cleaning items that CW was unable to complete. She further provided a copy of a $105.00 invoice for carpet cleaning.

The landlord also provided copies of invoices to replace a mailbox key ($69.30) and a fob ($75.00).

The landlord further provided invoices showing she paid $278.25 to repair a shower and $5.57 to repair a peephole.

The tenant agreed that he was responsible for the mailbox and fob fees, the carpet cleaning charge and CW's invoice. The tenant denied responsibility for the landlord's personal cleaning invoice, claiming that her work seemed to mirror that of CW and the carpet cleaner. The tenant claimed that the shower did not function at the beginning of the tenancy and that the peephole was also in disrepair at that time and denied responsibility for those items.

Although the tenant admitted responsibility for some of the invoices as outlined above, he argued through his counsel that because the landlord did not perform a move-in or move-out condition inspection of the unit, she had extinguished her right to claim against the security deposit and therefore he should not be obligated to pay those charges.

The landlord also seeks to recover the $50.00 filing fee paid to bring her application.

Analysis

Although the tenant claimed that the landlord gave him an informal notice requiring him to vacate the rental unit by January 31, he did not provide a copy of that notice. The landlord denied having served such a notice and I am unable to find on the balance of probabilities that the tenant received such a notice. I accept that the tenant's access to the unit was restricted for up to 2 days, but I am not persuaded that this act alone can be considered an ending of the tenancy by the landlord, particularly as she and the tenant discussed the situation and he was again granted full access.

I find that the tenant ended the fixed term tenancy without notice and that he had no legal basis on which do so. I find that the landlord is entitled to recover lost income from the tenant. However, section 7(2) of the Act requires the landlord to act reasonably to minimize her losses. The landlord acknowledged that she has made no attempt to re-rent the unit and I find that her failure to mitigate caused most of her loss of income. I therefore find that she is entitled to one half of one month's rent as I find it likely that she could have re-rented the unit for February 15 had she made reasonable efforts to do so. I dismiss the claim for lost income for the latter half of February and for March and I award her $825.00.

The landlord did not provide a copy of the strata bylaws showing what charges would be levied for moving in and out, nor did she provide a copy of a receipt showing that she paid these fees, despite her having testified that she has this documentation. I find that the landlord has not provided evidence to prove on the balance of probabilities that she incurred these charges and I therefore dismiss the claim for recovery of strata fees.

Sections 23 and 35 of the Act require the landlord to provide the tenants with 2 opportunities to participate in a condition inspection of the unit and complete a condition inspection report. The landlord did not do so. Sections 24 and 36 of the Act provide that when a landlord fails to comply with their obligations under sections 23 and 35, they extinguish their right to make a claim against the security deposit. I find that this is the case here and that the landlord's right to make a claim has been extinguished.

Despite this extinguishment, there is nothing in the Act barring a landlord from making a claim for damages apart from a claim against the security deposit and section 72 of the Act allows an Arbitrator to apply a security deposit to any amount awarded to a landlord. Therefore, the extinguishment has little practical effect in this case.

As the tenant agreed that he was responsible for mailbox and fob fees, the carpet cleaning charge and CW's invoice, I award the landlord $449.30 for these charges.

The landlord did not provide evidence showing that the shower and peephole were in working order at the beginning of the tenancy and I find insufficient evidence to show that this damage occurred during the tenancy. I therefore dismiss those claims. I agree with the tenant that the landlord's invoice seems to cover the same charges as the carpet cleaning invoice and CW's invoice. In order for the landlord to recover monies for her own labour, she must prove that this labour is not duplicative of other labour and I am not persuaded that this is the case. I dismiss the claim for the landlord's labour.

As the landlord has been successful in part of her claim, I find she should recover the $50.00 filing fee and I award her that fee for a total entitlement of $1,324.30. I order the landlord to retain the $850.00 security deposit in partial satisfaction of the claim and I grant her a monetary order under section 67 for the balance of $474.30. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The landlord will retain the security deposit and is granted a monetary order for $474.30.

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: August 18, 2015

Residential Tenancy Branch