Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MND, MNDC, MNR, FF

Introduction

This hearing dealt with the landlords' Application for Dispute Resolution seeking an order of possession and a monetary order.

The hearing was conducted via teleconference and was attended by both landlords only.

The landlords provided documentary evidence to confirm the tenant was served with the notice of hearing documents and this Application for Dispute Resolution, pursuant to Section 59(3) of the *Residential Tenancy Act (Act)* by registered mail on May 21, 2016 in accordance with Section 89. Section 90 of the *Act* deems documents served in such a manner to be received on the 5th day after they have been mailed.

Based on the testimony and documentary evidence of the landlords, I find that the tenant has been sufficiently served with the documents for their original Application pursuant to the *Act*.

The landlords confirmed at the start of the hearing the tenant vacated the rental unit sometime before May 31, 2016. The landlords submitted that the move out condition inspection was scheduled for that date and when they arrived the tenant was not there and her possessions had been removed. The landlords confirmed they no longer required an order of possession.

The landlords submitted evidence and documents to the Residential Tenancy Branch that was received on June 6, 2016 and June 13, 2016. In these submissions the landlords identified that the tenant had caused damage to the rental unit in an amount of at least $1,400.00. The submission also stated that the tenant did not leave a forwarding address and the landlords could not serve the tenant with this additional evidence.

The landlords submitted, at the hearing, that she was told by an Information Officer at the Residential Tenancy Branch that because their claim was over $5,000.00 she did not need to submit any documented request for an amendment to her Application.

The landlords submitted that in addition to seeking compensation for unpaid rent for the months of April and May 2016 ($1,900.00); for lost revenue for the months of June, July, and August 2016 (the end of the fixed term of this tenancy agreement) ($2,850.00); and the tenant's failure to pay a security deposit ($475.00) they also sought compensation for the damage to this rental unit as noted above.

Residential Tenancy Branch Rule of Procedure #4.1 states an applicant may amend a claim by:

- completing an Amendment to an Application for Dispute Resolution form; and
- filing the completed Amendment to an Application for Dispute Resolution form and supporting evidence with the Residential Tenancy Branch directly or through a Service BC office.

An amendment may add to, alter or remove claims made in the original application.

In the case before me, despite the landlord's assertion that she was advised by the Branch that she did not have to submit an amendment form I note that Rule of Procedure #4.1 requires the submission of an Amendment to an Application for Dispute Resolution form and that there is no exception of that requirement if the claim is for an amount greater than $5,000.00 or for any other reason.

Rule of Procedure #4.3 stipulates that amended applications and supporting evidence should be submitted to the Residential Tenancy Branch directly or through a Service BC office as soon as possible and in any event early enough to allow the applicant to comply with Rule #4.6.

Rule #4.6 states as soon as possible, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served on the respondent in a manner required by the applicable *Act* and these Rules of Procedure. In any event, a copy of the amended application and supporting evidence must be received by the respondent(s) not less than 14 days before the hearing.

As the landlords were aware that they wanted to amend their Application as of at least June 1, 2016 I find the landlords would have had time to follow the above noted rules in making an amendment to their original Application.

However, I also accept that the landlords do not currently have a service address for the tenant and as such they would not be able to serve the tenant with their amendment documents. Therefore, I find the tenant was never made aware of any changes to the landlords' Application or claim.

Rule of Procedure #4.2 allows an application to be amended at the hearing in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made.

If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

In this case, I find the landlords are asking to amend their Application to include a claim that was not part of the original Application and as such, the tenant would not and could not be made aware of this amendment. As a result, I find the circumstances that have given rise to the requested amendment could not be reasonably anticipated by the tenant. As such, in the interest of natural justice, I find it would prejudice the tenant to proceed with the landlords' requested amendment.

For these reasons, I decline to accept the landlord's monetary claim amendments and note that the landlords may seek this additional compensation by filing a separate Application for Dispute Resolution for any additional claims they believe they may have suffered as a result of this tenant in accordance with any limitations outlined in the *Act*.

However, as the tenant is no longer living in the rental unit and the landlords have regained possession of the rental unit I find that matter of possession of the rental unit and the landlords' need for an order to grant them possession is now moot. As such, I find it is reasonably to amend the landlords' Application to exclude the matter of possession of the rental unit. I order the landlords' Application is amended to exclude the mater of possession.

Despite the above, I will accept the landlords' additional evidence submitted to the Branch but not serve to the tenant. I find the tenant's failure to provide the landlords with her forwarding address has prevented them from being able to serve this additional evidence. I have considered this evidence only as it relates to the accepted claims considered in this Application, as noted above.

I note that during the hearing I did advise the landlords that they would be entitled to a monetary order for the lost rent for April and May 2016, based on their evidence, I did not provide any oral decision on their claims for lost revenue for June, July, and August 2016 or a security deposit.

Issue(s) to be Decided

The issues to be decided are whether the landlords are entitled to a monetary order for unpaid rent; for lost revenue; for a security deposit; and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 20, 47, 67, and 72 of the *Act.*

Background and Evidence

The landlords submitted into evidence the following relevant documents:

- A copy of a tenancy agreement signed by the parties on August 27, 2015 for a 1 year fixed term tenancy beginning on September 1, 2015 for a monthly rent of $950.00 due on the 1st of each month. The agreement required a security deposit of $475.00. There is a handwritten notation on the agreement near the term of the security deposit that states: "To be paid";
- A copy of a 1 Month Notice to End Tenancy for Cause issued by the landlords on April 26, 2016 with an effective vacancy date of May 31, 2016 citing the tenant failed to pay a security deposit within 30 days of it being required by the landlord; and
- A copy of a Proof of Service – Notice to End Tenancy document confirming the landlord's 1 Month Notice to End Tenancy was served to the tenant by attaching it to her door on April 27, 2016 at 10:08 a.m. and that this service was witnessed by a third party.

The landlords submit that the tenant never did pay any rent for the months of April and May 2016.

The landlords also submit that they have re-rented the rental unit to a new tenant effective August 1, 2016. They testified that until the tenant moved out they could not begin to advertise the availability of the rental unit because the tenant would not communicate her plans to them. They stated they began advertising the unit approximately a week before the hearing.

The landlords also submit that the rental unit required so much cleaning and repairs that the rental unit will be uninhabitable until August 1, 2016. The landlords referred to the Condition Inspection Report and photographic evidence they have submitted in support of this position. The landlords submitted that only one of the landlords has been doing the work and due to his age he cannot do it any faster than he has been doing.

The landlords seek compensation for lost revenue for the months of June, July, and August 2016.

The landlords also seek to be given a security deposit in the amount of $475.00 that was requested at the time the tenancy began but remained unpaid throughout the tenancy and was the cause cited by the landlords in the 1 Month Notice to End Tenancy for Cause that ended the tenancy.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the Act, regulation or tenancy agreement;

3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

Specifically Section 7 (1) of the *Act* stipulates that if a landlord or tenant does not comply with the *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

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

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy the tenant does not pay the security deposit or pet damage deposit within 30 days of the date it is required to be paid under the tenancy agreement.

Section 47(4) allows a tenant who receives a notice under Section 47 to apply to dispute the notice within 10 days of receiving it. Section 47(5) states that if a tenant does not file an Application for Dispute Resolution seeking to cancel such a notice the tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the unit by the effective date of the notice.

Based on the landlords' undisputed documentary evidence and submissions and no evidence before me that the tenant attempted to dispute the 1 Month Notice, I find the tenancy ended prior to the end of the fixed term of the tenancy as a result of the tenant's failure to pay a security deposit at the start of the tenancy.

Based on the landlords' undisputed testimony and evidence I find the tenant failed to pay rent for the months of April and May 2016 and the landlords are entitled to the amounts claim totalling $1,900.00 for this period. As this amount was owed and the tenant still in possession of the rental unit I find there is no need for the landlord to take steps to mitigate this loss.

As to the lost revenue I have considered the claim in two separate parts. First I have considered the claim for June and July 2016 and then the claim for August 2016. As the landlords' have confirmed that they have entered into a new tenancy agreement and they are anticipating rent for the unit for the month of August 2016, I find the landlords will suffer no loss for the month of August 2016. I dismiss this portion of the landlords' claim.

As to the period of June and July 2016 I find the landlords are entitled to compensation for this period subject their obligation to mitigate their losses. In that regard, I find the uncertainty of knowing the tenant's plans justifies the landlords' failure to advertise the rental unit earlier than the end of May 2016. I find the landlords are entitled to $975.00 for the lost revenue for the month of June 2016.

However, as the landlords could confirm on May 31, 2016 that the tenant had vacated the rental unit and they provided no explanation as to why they did not advertise the rental unit until the week of June 13, 2016 I find the landlords did not take reasonable steps to start advertising the rental unit in a timely fashion.

In addition, upon review of the landlord's documentary and photographic evidence I find that while there was some work that needed to be completed at the end of the tenancy none of the work required that rental unit could not be re-rented while some of the work was completed.

Further, I find that the landlords' documentary photographic evidence does not provide evidence of extensive or excessive damage requiring 2 months to complete. As such, I find there is no reason why the landlord could not have completed the work or hired someone to complete the work in an earlier time frame.

As a result of these findings, I find the landlords have failed to take reasonable steps to minimize the loss of revenue for the month of July 2016, pursuant to Section 7 of the *Act*. I dismiss the portion of the landlords' claim for lost revenue for July 2016.

Section 17 of the *Act* allows that a landlord may require, in accordance with the *Act* and regulations, a tenant to pay a security deposit as a condition of entering into a tenancy agreement or as a term of a tenancy agreement. Section 20 states that a landlord must not require a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement.

As clarified throughout the hearing the intent of the landlords in their original Application for Dispute Resolution was to be granted a monetary order for, in part, the payment of a security deposit that the tenant had failed to pay at the start of the hearing. In addition, I have found above that the tenancy ended as a result of the tenant's failure to pay the security deposit.

As the tenancy is now over there is no authourity under the *Act* to allow a landlord to collect a security deposit. As noted above, under Section 17, a landlord may request a deposit as a condition of entering into agreement but Section 20 limits that requirement to the start of the tenancy.

While the landlords may have legitimate claims to be made against a deposit, if they held one, such as for the failure to pay rent; lost revenue; or damage to the rental unit, the losses are now incurred and the landlords may apply for compensation for those items and there is no need to be granted a deposit to be a security against those losses which would then be used to set off any of the losses suffered by the landlord.

As result, I dismiss the portion of the landlords' claim seeking to be granted a security deposit.

Conclusion

I find the landlords are entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **$2,925.00** comprised of $1,900.00 rent owed; $975.00 lost revenue; and $50.00 of the $100.00 fee paid by the landlords for this application, as they were only partially successful.

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 20, 2016

Residential Tenancy Branch