Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT MNDCT MNSD

Introduction

In this dispute, the tenant applied for dispute resolution on January 7, 2019 and a dispute resolution hearing was held on April 30, 2019. The tenant seeks compensation pursuant to section 38 (security deposit) of the *Residential Tenancy Act* (the "Act"), compensation pursuant to section 51 of the Act (12 months' equivalent of rent compensation), and compensation for the filing fee pursuant to section 72 of the Act.

The landlord and his lawyer, and the tenant and his girlfriend, attended the hearing and were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses. The tenant's girlfriend, who was both a witness and an assistant to the tenant during the hearing, advised me that they had not received any evidence from the landlord; I deal with this preliminary issue below.

I have reviewed evidence submitted that met the requirements of the *Rules of Procedure*, and to which I was referred, but only evidence relevant to the preliminary issue and the issues of this application are considered in my decision.

Preliminary Issue: Landlord's Service of Documentary Evidence

The tenant's girlfriend testified that they never received copies of any of the landlord's evidence.

Rule 3.15 of the *Rules of Procedure* requires that the respondent's evidence "must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing."

While the tenant's girlfriend testified that they never received the landlord's evidence, landlord's counsel submitted both a Canada Post tracking document and a copy of the registered mail receipt, and a copy of the mailing label to which the evidence was mailed. The receipt and tracking document indicated that the mail was sent on April 18, 2019, but that it remained unclaimed. The address on the mailing label matches the tenant's address for service in his application. Refusing or failing to pick up registered mail is not a ground by which an opposing party can declare not having received evidence. The opposing party is responsible for claiming mail sent to them.

For the purposes of section 90 of the Act, mail is deemed to have been received on the fifth day after it is mailed, even if the recipient refuses or fails to receive that mail. I conclude, on a balance of probabilities, that the landlord served their evidence on the tenant in compliance with section 89 of the Act. As such, the landlord's evidence will be admitted, and considered, in my decision.

Preliminary Issue: Tenant's Claim for Security Deposit under Section 38 of the Act

The parties settled this aspect of the tenant's claim during the hearing: the landlord agreed to return the tenant's deposit, doubled, in the amount of $1,350.00. As such, I will not address or discuss this aspect of the tenant's application further. I issue a monetary order along with this decision that will include this amount.

Issues

1. Is the tenant entitled to compensation under section 51 of the Act?
2. Is the tenant entitled to compensation under section 72 of the Act?

Background and Evidence

The tenant and his girlfriend testified (I use "tenant" interchangeably throughout the decision, as both testified at various times; indeed, the tenant's girlfriend frequently answered for the tenant) that the tenancy began in early 2011 but it was renewed in October 2018. A copy of the tenancy agreement was submitted into evidence. Monthly rent was $1,350.00 at the time the tenant vacated the rental unit, which was on November 9, 2018.

The received a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") in August 2018, but the move out date was incorrect. A lawyer (not the counsel who represented the landlord at this hearing) for the landlord sent a corrected Notice

shortly thereafter. The Notice indicated that the tenancy was ending because the landlord or a close family member would be occupying the rental unit.

After the tenant moved out, he and his girlfriend came across a Craigslist ad (which was submitted into evidence) listing what they thought was the rental unit. This time, however, it was listed for a higher rent. A friend of the tenant went to visit the rental unit being advertised. The friend ("P.B.") testified that he visited the rental unit being advertised and said that the landlord's father (who was showing the rental unit) was clear that *this* was the rental unit being made available to rent.

Landlord's counsel argued, and the landlord testified, that the rental unit was being shown, but that it was not the rental unit that was to be rented out. Counsel explained that the landlord owns three rental units: a rental unit on the fifth floor, a rental unit on the sixth floor, and a rental unit on the seventh floor. The three rental unit are stacked vertically above each other, so the suite numbers are 502, 602 and 702. They have, according to the landlord, identical floor plans are relatively similar in terms of furnishings and appliances.

Counsel explained that the tenants in 502 had given notice to end their tenancy, and that the unit being advertised in the Craigslist ad was for 502. However, the tenant in 702 (the rental unit in dispute) had since moved out, so the landlord decided to show 702 as being representative of the actual rental unit (502) that would be available.

The landlord's counsel argued that nowhere in the Craigslist or in any of the text messages submitted as evidence by the tenant indicates the suite number. Moreover, the landlord testified that the rental was never rented out and is used as a place for his son to stay when he is home from studying overseas. In support of his position, a copy of a BC Hydro bill was submitted into evidence (Exhibit F of the Respondent's Submission Package). The bill is for a billing period of November 10, 2018 to March 29, 2019 and shows the landlord as the account holder and the address of the rental unit ("702").

Also submitted into evidence is a copy of the tenancy agreement for the tenants who occupied rental unit 502, and a copy of an email (dated October 30, 2018) from those tenants to the landlord indicating that they had recently become condo owners and that they were likely to leave rental unit 502 in January 2019.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

In this case, the tenant claims that the landlord did not use the rental unit, or accomplish the stated purpose, as stated in the Notice. Thus, they seek compensation under section 51(2) of the Act, which reads, in part (along with section 51(3) of the Act):

> (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
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> (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
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> (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
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> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
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> (c) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

In this case, the tenant argued that the landlord went out showing the rental unit to prospective tenants instead of occupying the rental unit, as was stated in the Notice. The tenant's witness testified that the landlord's father made it clear to him that unit 702 was the rental unit being offered; this is disputed by the landlord and his counsel. I must comment that I found the witness to be exaggerated in his testimony, referring to a "pattern of lies" by the landlord, and spending a lot of time talking about the colour of a painted wall and stinky carpets. He commented that he has known the tenant for "a number of years" and frequently attends dinner parties with the tenant. I found his demeanor to be that of a supportive friend and not one of a balanced, unbiased third-

party witness. In short, I found him to be a less than credible witness, and I place little weight on his evidence regarding what the landlord's father may or may not have said.

The landlord testified, and counsel submitted that at no time was the rental unit shown the one that was being rented. Rather, it was shown as a stand-in for rental unit 502. Nowhere in the tenant's evidence is there anything indicating that it was 702 that was to be rented. There is no evidence establishing that anyone other than the landlord (or his close family) ever occupied the rental unit after the tenancy. The BC Hydro bill is evidence that the landlord occupies the rental unit and have done so since the tenancy.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenant has not met the onus of proving that the landlord breached section 51(2)(a) or (b) of the Act. As such, this aspect of his claim is dismissed without leave to reapply.

I grant the tenant a monetary award of $50.00 for partial recovery of the filing fee.

Conclusion

I dismiss the tenant's claim under section 51 of the Act without leave to reapply.

I grant the tenant a monetary order in the amount of $1,400.00 (comprised of $1,350.00 for the security deposit and $50.00 for the filing fee). This order must be served on the landlord, and the order may be enforced in the Provincial Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: May 1, 2019

Residential Tenancy Branch