Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MND FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the landlord for a monetary order for money owed or compensation for damage or loss under the Residential Tenancy Act, (the Act).

Although served in person on November 27, 2008, the tenant did not appear.

Issue(s) to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for damage to the unit and for loss of rent and compensation for damage and loss under the Act for a total claim of $1,625.00

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for damages or loss. This determination is dependant upon answers to the following questions:
    - Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing:
        - a) that the damage or loss was caused by the tenant in violation of the Act or tenancy agreement:

- b) a verification of the actual costs to repair the damage
- c) that the landlord fulfilled the obligation to do what ever is reasonable to mitigate the costs

The burden of proof regarding the above is on the landlord/claimant.

Background and Evidence

The tenancy began on October 1, 2008 and the written agreement included terms of employment as well as terms of the tenancy. A copy of this agreement was submitted into evidence, along with email correspondence discussing terms of the employment and tenancy. The term in the agreement relating to the payment of rent specified that rent of $1,000.00 would be collected in advance from the employee's pay. The landlord testified that $1,000.00 was deducted from the employee's pay on October 1, 2008 in payment for rent for the month of October 2008. The landlord testified that on October 14, 2008, the tenancy component of the relationship was terminated by the employer. The landlord testified that the intent was to retain the tenancy and the tenant was offered a revised tenancy agreement. No copy of the termination nor proposed tenancy agreement was submitted into evidence. The landlord testified that the tenant did not sign any revised agreement but remained in the unit until October 26, 2008 and then vacated the unit without notice. The landlord testified that, although the employment was terminated in mid October and no subsequent tenancy agreement was ever signed, there was an implied verbal tenancy agreement and the tenant was still required to comply with the Act. Moreover, according to the landlord, the fact that the tenant remained in the unit past October 14, 2008 would serve to confirm that the tenant had agreed to continue the tenancy component of the agreement or at least implied the tenant's consent to be a tenant with terms governed by the Act.

In regards to the landlord's claim for damages for painting the unit, the landlord testified that the parties had agreed that the tenant could paint the unit, but that the tenant would leave the unit painted in a neutral colour. The landlord submitted evidence in the form

of email where the tenant had asked about painting and the landlord had answered the tenant indicating that "*we will obviously need the walls put back to the original neutral colour at the end of your residency*". The landlord's position is that this requirement constituted a term of the tenancy that was agreed upon by the tenant. The landlord testified that because the tenant moved out without complying with the obligation under the agreement to repaint the unit in a neutral colour, the tenant should be ordered to compensate the landlord for the costs of repainting.

Analysis

An applicant's right to claim damages from the another party is supported by Section 7 of the Act which states that 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. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and order payment in such circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act or agreement and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened *solely because of the actions or neglect of the Respondent in violation of the Act or 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 by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the tenant. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to mitigate the damage or losses that were incurred.

I find that on October 1, 2008, the parties entered into a tenancy/employment agreement and that this agreement was unilaterally terminated by the employer on October 14, 2008. Under section 14 of the Act a tenancy agreement may not be amended to change or remove a standard term and can not even be amended to add, remove or change a term, other than a standard term, unless both the landlord and tenant agree to the amendment and confirm this in writing. I find that it is not possible under the Act for one party to merely terminate or alter in any way only a *portion* of a tenancy agreement.

Therefore. without specific evidence of a document signed by both parties consenting to a change, I cannot accept that all of the employment-related terms in the agreement were isolated and severed and that the tenancy-related components survived. I find that the terms for the two aspects of the relationship were not segregated and in fact some were inextricably integrated. For example, the payment of rent was to be deducted from employment earnings. I do not accept the landlord's position that the employment terms would be excised and the tenancy portion of the integrated agreement would merely continue under these circumstances.

Nor do I accept the alternative argument that if the entire employment/tenancy agreement was terminated on October 14, 2008, then a new implied or unwritten tenancy agreement was automatically created.

The first barrier to this would be that the unilateral termination of a tenancy agreement by a landlord is simply not permitted under the Act. Section 44 (1) of the Act states that a tenancy can only be ended in if a landlord gives notice to end the tenancy in accordance with one of the following:

(ii) section 46 *[landlord's notice: non-payment of rent]*;

(iii) section 47 *[landlord's notice: cause]*;

(iv) section 48 *[landlord's notice: end of employment]*;

(v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

Other than section 56(1) there is no provision in the legislation that would permit a landlord to terminate a tenancy relationship without the requisite notice under the Act.

The second problem is the landlord's assumption that the fact that the tenant/employee remained past October 14, 2008 would automatically serve to confirm or create a continued or renewed tenancy. I find that the landlord's presumption that there is an onus on the tenant to prevent an implied tenancy agreement, by immediately vacating the unit without advance notice and surrendering possession to the landlord, to be unconscionable, particularly as the tenant had paid full rent for the month.

In any case, I find that the tenant had clearly verified that the tenancy was finished and would not be renewed, by virtue of the fact that the tenant did not sign the subsequent tenancy agreement offered by the Landlord.

I find that the rent for the month of October 2008 was collected on October 1, 2008 under the terms of the *original* combined agreement. The landlord had deducted $1,000.00 from the tenant's pay on October 1, 2008 and by doing so had obviously

contemplated that the tenant would remain for the month of October. When the agreement was terminated by the landlord on October 14, 2008, there remained an outstanding credit in favour of the tenant which was retained by the landlord.

I find that a renewed tenancy was not created after October 14, 2008 and I also find that, even if the claim was based on the original tenancy, it would be absurd for the landlord to be seeking enforcement of terms in an agreement that the landlord himself had unilaterally terminated. In fact, entitlement for damages under such circumstances, would more likely fall to the tenant than to the landlord.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that under the Act, the landlord is not entitled to monetary compensation from the tenant. Accordingly, I hereby dismiss the landlord's application without leave to reapply.

Dated: January 2009