Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

Decision

Dispute Codes:

CNR, MNDC,

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a Ten-Day Notice to End Tenancy for Unpaid Rent dated January 6, 2011 and effective January 16, 2011.The tenant's application also requested a monetary Order of $5,000.00 for money owed or compensation for damage or loss under the Act, Regulation or tenancy agreement.

Both the landlord and the tenant appeared and each gave testimony in turn.

Issue(s) to be Decided

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

- Whether the landlord's issuance of the Ten-Day Notice to End Tenancy for Unpaid was warranted.
- Whether the tenant is entitled to monetary compensation under section 67 of the Act for damages or loss.

The burden of proof is on the landlord/respondent to justify the reason for the Ten-Day Notice. The burden of proof is on the applicant to prove the monetary claim.

Preliminary Matter

The tenant questioned the respondent's authority as landlord of the subject property including her right to receive rent and to issue the Ten-day Notice. The tenant's stated basis for this position was that the property had been sold to another owner. No supporting evidence was submitted by the tenant. However the tenant pointed out that the Dispute Resolution Officer's findings in a previous hearing held in December 2010 on the tenant's application in which the tenant successfully disputed a Two Month Notice to End Tenancy for Landlord's Use, fully supported the tenant's position on this matter.

The landlord refuted this allegation and stated that, while there was a pending sale, it had not yet been finalized when the Ten Day Notice to End Tenancy for Unpaid Rent was issued. The landlord testified that the decision for the previous hearing held on December 22, 2010 did not make a determination that she was not the landlord.

Section 77(1)(3) of the Act states that "a decision or order of the director is final and binding on the parties. Therefore, a dispute resolution officer would lack authority to hear and rule on a matter already previously determined. A copy of the previous decision of December 22, 2010 was obtained and reviewed and is excerpted below:

> *"A landlord may end a tenancy on two months notice if he intends to demolish the rental property and has all the permits and approvals required to do so but the Residential Tenancy Act does not have a provision that allows a landlord to end a tenancy because the purchaser of his property intends to demolish the rental unit. In such a case it is up to the purchaser after completion of the purchase and sale of the rental property to give his own notice as landlord to end the tenancy on that ground.*
>
> *The landlord did not have a written request from the purchaser stating that the purchaser intends to occupy the rental unit when she gave the Notices to End Tenancy and the evidence presented to me confirms that the purchaser has no intention to occupy the rental property. I therefore order that the Notices to End Tenancy dated November 30, 2010 be, and are hereby cancelled. <u>The tenancies will continue</u>". (my emphasis<u>)</u>*

I find that no determination was made by the dispute resolution officer presiding at the previous hearing concluding that the respondent was not the current landlord.

Moreover, section 1 of the Act contains a definition of "*landlord*" and this includes any of the following:

- the owner of the rental unit, the owner's agent or one who, on behalf of the landlord, permits occupation of the rental unit under a tenancy agreement, or exercises powers and performs duties under the Act or agreement;
- the heirs, assigns, personal representatives and successors in title to a person referred to above
- a person, other than a tenant occupying the rental unit, who (i) is entitled to possession of the rental unit, and (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;

- a former landlord, when the context requires this; (my emphasis)

Accordingly, I find that the applicant was, or is, the landlord and had authority to issue and serve a Ten-Day Notice to the tenant due to non-payment of rent due on January 1, 2011.

Background and Evidence

Notice to end Tenancy

The landlord testified that the tenancy began on August 1, 2010 with rent of $400.00 and a $200.00 security deposit was paid. The landlord testified that the tenant failed to pay rent of $400.00 owed on January 1, 2011 and a Ten Day Notice to End Tenancy for Unpaid Rent was issued, which is being disputed by the tenant. The landlord's position was that the rent was not paid, the Ten-day Notice was valid and enforceable and an Order of Possession should be issued to the landlord.

The tenant acknowledged that the $400.00 rent for January 2011 was not paid. The tenant stated that he believed that the respondent was not the landlord as the building has been sold. The tenant also stated that he relied on the Two-Month Notice issued by the landlord, which permitted compensation for a tenant of one-month free rent. The tenant further testified that there were serious ongoing issues with the tenancy and the unit that affected the value of the tenancy. The tenant was of the opinion that the Ten-Day Notice was not valid and should therefore be cancelled.

Monetary Claim

The tenant testified that payment of compensation in the amount of $5,000.00 was warranted on the basis that services promised as part of the tenancy were withheld, valuable property was stolen, and the tenant was subjected to physical threats by the landlord. The tenant testified that access to laundry was supposed to be included as part of the tenancy, but no laundry was provided requiring the tenant to take a bus to the laundromat. The tenant testified that this loss should be valued at a 33% abatement in rent over the tenancy. The tenant also alleged that there was insufficient heat during the tenancy forcing the tenant to keep the oven on to provide heat. The tenant claimed that this deficiency violated the Act and justified an abatement of and additional 33% of the rent owed over the tenancy. In regard to the missing property, the tenant stated that three rings were taken valued at $3,500.00 but no report was made to the landlord nor the police. With respect to the threats allegedly made by the landlord's husband, the tenant and a witness who testified during the hearing stated that the landlord's husband had menaced the tenant with an electric drill when the tenant accused the landlord of

overcharging the tenant by $150.00. However, the tenants stated that because the landlord did surrender the disputed funds, he did not summon police at the time. The tenant felt that a rent abatement of 33% was warranted for loss of quiet enjoyment due to the threat. The tenant was also seeking aggravated damages for being subjected to ongoing harassment from the landlord.

The landlord disputed all of the tenant's monetary claims. With respect to the allegation of no heat, the landlord submitted a gas bill for usage in December 2010 that showed $393.71 was charged for gas for the building, which the landlord believes solidly verified that the heat was working. The landlord stated that if the tenant was cold, it was due to his practice of leaving the windows open. The landlord disputed that laundry was ever included in the tenancy and stated that this was never promised nor even discussed. The landlord pointed out that the concerns about the landlord's alleged refusal to provide of heat or laundry were never brought up as issues of dispute during the course of the tenancy and only became matters of concern when the Notice to End Tenancy was served on the tenant. The landlord denied the allegations of theft and that physical threats were ever made.

The landlord testified that there was no basis for awarding any aggravated damages. The landlord submitted a letter sent to the landlord by the tenant which the landlord felt was a pressure tactic aimed at intimidating the landlord into agreeing to a financial settlement to avoid "*an awful lot of removal expense without revenue*".

Analysis – Notice to End Tenancy

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement.

I find that the tenant did not pay the rent when rent was due within 5 days of receiving the Notice to end Tenancy for Unpaid Rent and did not have a valid reason under the Act not to pay the rent. Accordingly, I must dismiss the portion of the tenant's application requesting an order to cancel the Ten-Day Notice.

During the hearing the landlord made a request for an order of possession. Under the provisions of section 55(1) of the Act, upon the request of a landlord, I must issue an order of possession when I have upheld a notice to end tenancy. I find that the landlord is entitled to an Order of Possession effective two days after service on the tenant.

Analysis - Monetary Compensation

The tenant was requesting monetary compensation in the amount of $5,000.00. I find that the amount requested exceeds the total rent paid by the tenant for the entire duration of the tenancy, which amounts to $2,000.00. However, the tenant explained that he was seeking 100% rent abatement of $2,000.00 and in addition to these pecuniary damages was requesting aggravated damages, presumably valued at $3,000.00.

In regards to an Applicant's right to claim pecuniary damages from the other party, Section 7 of the Act states 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 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant has a burden of proof to establish that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7and 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 tenant.

In regard to the tenant's claim that laundry was included as part of the tenancy, I find that only disputed verbal testimony was offered to support this claim. However, the burden of proof was on the tenant to verify that this item was a genuine term in the tenancy agreement.

It is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof.

In this instance I find that the parties were completely at odds with one another's facts. Nonetheless, I find it is not necessary to determine which side is more credible or which set of "facts" is more believable. The reason that this is so is because the party seeking monetary compensation, that being the tenant, is required to sufficiently prove on a balance of probabilities that the landlord had violated the tenancy agreement.

I find that, in any dispute when the evidence consists of conflicting and disputed verbal or written testimony, such as the case before me, one party's statement may ultimately function to cancel out the other's and in the absence of independent documentary evidence then the party who bears the burden of proof is not likely to prevail.

Accordingly, I find that the portion of the tenant's application seeking a rent abatement for the denial of laundry facilities must be dismissed.

In regard to the claim pertaining to the alleged problem with heat in the building, I find that, based on the invoice from the gas company showing the current and previous usage readings, I can accept the landlord's evidence that sufficient heat was apparently provided at least during the months of November and December 2010. I find that, if there were unaddressed complaints about lack of heat made to the landlord during the tenancy, these should have been followed up on by first putting them in writing and if the landlord did not respond appropriately, the tenant could have made an application for dispute resolution under section 62(3), seeking an order that the landlord comply with the Act. I find that the tenant's claim for a rent abatement of 33% for lack of heat must be dismissed as not sufficiently proven.

I find that the tenant's claim regarding the alleged theft of property has not met the test for damages and must be dismissed.

In regard to the tenant's claim that he was physically threatened by the landlord, I am willing to accept that this did occur and find that such an incident would impact the tenant's right to peaceful enjoyment of his suite. That being said, I find that a rent abatement of 33% for the duration of the tenancy would not be appropriate. I find that an abatement of 20% of the rent for the month in which this incident occurred would be warranted and I order a rent reduction of $80.00 which the tenant may deduct from the $400.00 rental arrears owed for the month of January 2011.

An arbitrator may grant aggravated damages as an award, or an augmentation of an award, of damages in compensation for physical inconvenience and discomfort, pain and suffering, grief, humiliation, loss of self-confidence, loss of amenities, mental distress and other intangible losses, which are considered to be "non-pecuniary" in

nature and are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's wilful or reckless indifferent behaviour. They must be sufficiently significant in depth, or duration, or both, that they represent a significant influence on the wronged person's life. They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses. Aggravated damages are rarely awarded and must specifically be sought. (my emphasis)

I find that the tenant's application did not contain a specific request for aggravated damages. In any case, I find that there is not sufficient grounds to award aggravated damages under these circumstances. Accordingly the tenant's claim for $3,000.00 in aggravated damages must be dismissed.

Based on the testimony and evidence, I find that the tenant is entitled to a rental abatement in the amount of $80.00 for the loss of peaceful enjoyment which will be deducted from rental arrears owed for the month of January 2011.

Conclusion

Based on the testimony and evidence discussed above, I hereby issue an Order of Possession in favour of the landlord effective two days after service. The tenant must be served with the order of possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

I find that the tenant is entitled to a rental abatement in the amount of $80.00 to be deducted from rent owed for the month of January 2011.

The remainder of the tenant's application is dismissed without leave to reapply.

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: January 2011.

Residential Tenancy Branch