Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNDC, FF

Introduction

This matter dealt with an application by the tenants to obtain a Monetary Order for double the security deposit and damages and to recover the filing fee for this application. Both parties appeared and gave testimony. A witness for the tenant also appeared. All of the relevant testimony and evidence presented at the hearing was considered.

Issues(s) to be Decided

The issue to be determined is whether the tenant is entitled to a Monetary Order for the return of the security deposit and whether the tenant is entitled to compensation for damages stemming from the landlord's violation of the Act.

Preliminary Matter

There have been six previous applications for dispute resolution between this tenant and the landlord and four separate hearings have been held. The outcomes these proceedings have resulted in various findings and orders.

- There was a hearing in August 2010 on the tenant's application to cancel a One-Month Notice to End Tenancy for Cause, to cancel a Ten Day Notice to End Tenancy for Unpaid Rent, for monetary compensation, to suspend or set conditions on the landlord's right to enter, an order to authorize the tenant to change locks and for an order allowing the tenant to reduce the rent for the cost of repairs or services not provided. The tenant's request to dismiss the two Notices to End Tenancy was granted and the tenant was awarded $10.00 in damages and the $50.00 cost of filing. The remainder of the tenant's application was dismissed.

- The same hearing in August also dealt with the landlord's cross application seeking an a monetary order and orders of possession based on the notices.

- A hearing was held in October 2010 on the tenant's application seeking compensation for emergency repairs and an order to compel the landlord to make emergency repairs. The portion of the tenant's application seeking compensation was dismissed with the exception of the $50.00 filing fee which was to be deducted from the following month's rent. The tenant succeeded in being granted an order against the landlord to complete emergency repairs. However, the tenants were also ordered to cease obstructing the landlord's access and to permit the landlord to enter the property along with the electrician to inspect the property and arrange for the electrical repairs.

- A hearing was held in November 2010 on the tenant's application to cancel a One-Month Notice to End Tenancy for Cause, an Order to compel the landlord to make repairs and Emergency Repairs, and an order to allow the tenants to reduce rent for repairs, facilities and services not provided.
  This same hearing also dealt with a cross application by the landlord as well, seeking immediate termination of the tenancy without notice under section 56 of the Act. In the decision, the following finding was made:

  > *"I find that that there is an emergency situation on the property and the landlord's right of entry has been refused by the tenants. As a result of the tenant's refusals to allow the landlord and/or his agents onto the property to make the repairs ordered by the Residential Tenancy Branch and the City ...has disconnected the electrical power to the property and the landlord's property has been placed at significant risk of further damage.*"

  The landlord's application to terminate the tenancy without notice succeeded and the landlord was granted an immediate Order of Possession. The tenant's application was dismissed without leave.

- A hearing was held in January 2011 on the landlord's application seeking monetary damages for destruction to the rental unit, for compensation owed and to retain the tenant's security deposit. The landlord's application failed based on insufficient service of evidence and no further findings were made. The landlord's application for monetary compensation for damages was dismissed *without leave to reapply*.

Section 77 of the *Act* states that, except as otherwise provided in the *Act*, a decision or an order of the director is final and binding on the parties. I find that, where there have been prior findings made relating to a previous hearing with respect to any specific

matter that is now before me, I am bound by the previous findings and have no authority nor jurisdiction to rule otherwise on the same matter. I find that the principle of res judicata would apply in such circumstances, meaning that the matter had already been decided and is therefore considered to be final and binding on the parties. It is not possible to over-rule past decisions nor make an alternate finding that contradicts any earlier finding of fact with respect to a determination made in a previous decision.

However, under section 79 of the Act a party to a dispute resolution proceeding may apply to the director for a review of the director's decision or orders on certain limited grounds within the timelines permitted.

Beyond that, a decision or finding already rendered through dispute resolution under the Residential Tenancy Act can only be varied or over-ruled by a court of higher authority through a judicial review.

Background and Evidence

Both Parties agree that this tenancy started on April 21, 2010. Rent for this property is $1,650.00 per month and is due on the first of each month. The tenants paid a security deposit of $1,000.00 on March 23, 2010. The tenancy ended on November 27, 2010 with an immediate order of possession granted to the landlord under section 56 of the Act and the landlord was provided with written notification of the tenant's forwarding address at the end of the tenancy. The landlord did not repay the security deposit but on December 7, 2010 made an unsuccessful application to retain the deposit for damages, which was dismissed without leave.

The tenant testified that the landlord failed to return the security deposit within 15 days of the end of the tenancy and pointed out that the landlord's application for damages and to keep the deposit was dismissed at the hearing held on January 13, 2011. The tenant is claiming double the deposit in the amount of $2,000.00.

The tenant testified that, due to problems in the unit with essential services that were not adequately addressed by the landlord, the tenancy was devalued and the tenant was forced to move out.

The tenant's witness, a representative from the municipality, stated that the municipality had issued a repair order against the landlord to do electrical repairs and had granted several extensions on the deadline. However, the municipality received a communication from the electrical contractor stating that he could not proceed with the ordered work because the tenant residing in the unit refused to permit access to the unit if the landlord was present accompanying the electrician. The witness testified that the municipality was not apprised of the details, but it was understood that there was some

conflict between the landlord and the tenant that impeded access and the ordered repairs could not be done as a result. The witness stated that because the landlord was in noncompliance, the municipality finally had no choice but to cut off the electrical power to the rental unit for safety reasons and this was done on November 22, 2010

The tenant stated that they moved into a hotel for several days, when essential services were cut off incurring expenses for accommodation. The tenant testified that after being forced to move out because of the termination of vital facilities, they also had to pay meal expenses and additional moving and storage costs which the tenant is claiming.

The tenant testified that, since the tenancy ended in mid November, a month for which the tenant paid full rent, the tenant is entitled to a rent rebate for the portion paid from November 22 to November 30 2010, during which the tenant was not actually living in the unit.

The tenant testified that the tenant was forced to pay higher rent from December 1, 2010 until April 30, 2011 because the landlord ended the tenancy and the tenant is claiming compensation.

The tenant took the position that the landlord had issued a “de facto” Notice terminating the tenancy for landlord use to do repairs and therefore should be required to give the tenant the equivalent of one month rent in compensation. According to the tenant, the Act provides that the landlord must also pay the tenant another one-month compensation for putting the property up for sale within 6 months of terminating the tenancy for landlord’s use.

Finally the tenant was claiming reimbursement for the filing fee for this application and a monetary order stemming from a previous award allowing the tenant to deduct the $50.00 cost of filing from future rent owed to the landlord, a solution that was not possible to effect under the circumstances as the tenancy ended shortly thereafter.

The total amount of compensation being claimed by the tenant was $10,472.82.

The landlord disputed all of the tenant’s claims. The landlord testified that the tenancy was legally ended under section 56 of the Act when the landlord obtained an immediate order of possession specifically because the tenants had violated an order by refusing to allow the landlord into the building to make necessary repairs ordered by the municipality and this resulted in the electricity to the building being disconnected by the municipality. The landlord stated that he had not returned the security deposit but instead made an application to keep it within the required 15 days, because the tenants had caused extreme damage to the rental unit. The landlord’s position was that the tenants’ claimed expenditures and losses were caused by their own violations of the Act

and as a consequence of their refusal to cooperate in the repairs which ultimately resulted in their eviction. The landlord pointed out that a Two-Month Notice to End Tenancy for Landlord's Use was never issued to the tenant at any time.

Analysis

Claim for Return of Security Deposit

In regard to the return of the security deposit I find that section 38 of the Act is clear on this issue. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either:

a) repay the security deposit to the tenant with interest or;

b) make application for dispute resolution claiming against the security deposit.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit. However, the landlord *did* make application for an order to keep the deposit for claimed damages within the required 15 days and this application was dismissed without leave. I find that the tenant is therefore entitled to the return of the security deposit in the amount of $1,000.00.

Other Damages

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 reasonable steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the tenant, to prove the existence and value of the damage/loss stemming directly from a violation of the agreement or a contravention of the Act by the respondent and verify that a reasonable attempt was made to mitigate the damage or losses incurred

I find that the landlord did not comply with section 32 of the Act in regard to the deficient electrical service. However, I not accept the tenant's claim that the tenant was forced to relocate to a hotel and incurred extra moving costs and meal expenditures solely due to the landlord's failure to comply with the Act. I find that, despite the landlord's violation of the Act, the tenant also violated the Act by hampering the landlord's efforts to comply with the municipal order and the Act. I find that the delay in remedying the electrical situation prior to the final cut-off deadline, was partly, if not entirely, caused by the tenant I find that this was already determined in the prior decision dated November 25, 2010 in which the dispute resolution officer specifically stated "*As a result of the tenants' refusal to allow the landlord into the building to make repairs, the repairs have not been completed and the City…disconnected the electricity to the building* .

Accordingly, I find that the tenant is not entitled to a rent abatement for loss of services and facilities, nor to reimbursement for the cost of the hotel, meals and storage.

With respect to the tenant's claim for a partial rent rebate for the portion of rent paid from November 22 to November 30 2010, during which the tenant was not actually living in the unit and the tenant's claim for the costs incurred by having to move to accommodation with higher rent, I find that the situation that created these extra expenditures was the termination of the tenancy. However, the order of possession ending the tenancy early was legally obtained through due process and as such did not constitute a violation of the Act. I find that the tenant's claim fails to satisfy element 2 of the test for damages and must be dismissed..

I reject the tenant's assertion that the landlord had issued a "de facto" Notice terminating the tenancy for landlord use to do repairs. There is no recognition in the Act of such a Notice. Section 52 requires that any Notice to end tenancy issued by a landlord must be on an approved form. Accordingly the tenant's claim for the equivalent of one month rent in compensation for landlord's use and a second month rent in compensation for placing the home for sale have no basis in law nor the facts of this situation. I find that this portion of the tenant's claim must be dismissed.

The tenant 's request for the cost of this application is denied.

However, I find that the tenant is entitled to a monetary order for the cost of a previous application. The compensation was granted with instructions that the $50.00 could be withheld from the rent owed. However, the tenancy ended shortly thereafter and the tenant did not have an opportunity to deduct the amount from rent.

I find that the tenant is entitled to total monetary compensation in the amount of $1,050.00 comprised of $1,000.00 refund of the security deposit and $50.00 still unpaid from a previous determination.

Conclusion

I hereby grant a monetary order for $1,050.00 in favour of the tenant. This order must be served on the landlord and may be enforced through Small Claims Court if unpaid.

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: February, 2011

Residential Tenancy Branch