Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

Decision

Dispute Codes: MNR, MNSD, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for partial rent owed for the month of August 2009, loss of rent owed for September 2009, cleaning costs, arrears for cable, gas utilities, hydro, the cost of filing and additional costs including legal fees, tracing services, management expenses and postage.

This matter was heard and decided on January 18, 2011. However, the tenant applied for and was granted a review hearing on the matter.

Both parties appeared and gave testimony.

Issue(s) to be Decided

The issue to be determined, based on the testimony and evidence, is whether or not the landlord is entitled to monetary compensation for rent, utilities, loss of rent and other damages.

Preliminary Matter

The landlord testified that once the matter was scheduled for a rehearing, the landlord decided to amend the application to include additional monetary amounts from the original $7,439.99, to include an additional $1,298.24 reflecting the costs of legal fees, tracing service costs, management expenses and postage.

The landlord's original application was made in September 2009 and the original hearing was held on January 18, 2010. On January 5, 2011 a new hearing was ordered on review. The landlord then submitted an amendment of the prior amount claimed on January 28, 2011 to include legal and other costs subsequently incurred between August 20, 2010 and January 27, 2011.

Rule 2.5 of the *Residential Tenancy Rules of Procedure* does permit an applicant to amend an application but imposes the following criteria:

- The applicant may amend the application without consent if the dispute resolution proceeding has not yet commenced. If applications have not been

served on any respondents, the applicant must submit an amended copy to the Residential Tenancy Branch and serve the amended application. (My emphasis.)

- The application will not be amended where it would result in prejudice to the other party. If the amendment is allowed, the arbitrator may adjourn the hearing to allow the respondent time to respond to the amended application.

In this instance I find that the landlord's amended application was completed after the initial decision had been rendered and was scheduled be reheard. I find that the proceeding on the landlord's application was already in process at that time. I find that, under the Rules of Procedure an applicant is only at liberty to amend the application without consent provided this is done prior to the commencement of the proceedings.

Since the matter had been considered and was then adjourned to be continued through a review hearing dealing specifically with the landlord's original application, it was therefore not possible to permit any amendment of the application to add subsequent monetary claims. Accordingly, I find that the landlord's request to amend the claim must be denied.

Background and Evidence

The tenancy began as a fixed term in September 2008 and rent was set at $1,700.00 per month with a security deposit of $850.00. The tenancy agreement, signed by both parties, indicated that the rent did not include heat, hydro nor cable and the addendum specified that the tenant would be required to contact the utility companies at the start of the tenancy and would be expected to ensure that the utility bills were paid promptly.

The landlord testified that, instead of requiring the tenant to set up an account and connect the utilities in the tenant's name as specified in the contract, the landlord had decided to change the written term by leaving the utilities in the landlord's name and to continue the arrangement with the utility firms in which the invoices would be paid by automatic debit from the landlord's account . The landlord testified that the tenant was verbally instructed to open any mail, addressed to the landlord as soon as it was received from the utility companies, and then forward a cheque to the landlord to reimburse for the amounts shown on the utility invoices. The landlord stated that, with hydro costs, the tenant was only required to reimburse the landlord for 90% of the usage because some of the electric heat in the building was directed to the lower suite used as the landlord's storage area. These instructions were apparently given verbally.

The landlord testified that, several months into the tenancy, the landlord realized that the tenant had not been sending any payments to reimburse the landlord for the cost of

the utility invoices. The landlord testified that sometime in April 2009, the landlord had a conversation with the tenant about the unpaid utilities but issued no written demands for payment at that time nor at any time. The landlord testified that they did not terminate the landlord's accounts with the utility company, but instead instructed the companies to add the tenant's name to the invoices as an addressee. The landlord also terminated the prior arrangement it had with the utility companies for automatic payments to be taken from the landlord's bank account. The landlord had submitted copies of the utility bills into evidence.

According to the landlord, near the end of the tenancy, the tenant eventually paid some of the outstanding utility bills directly to the utility company in order to avoid a service disconnect.

The landlord testified that in July 2009 the tenant gave notice to end the tenancy, a month before the fixed term was to expire, and only paid $250.00 of the rent owed for August 2009plus an additional $15.80 later on. The landlord testified that the tenant had deducted from rent owed, all of the utility payments the tenant had made directly to the utility company. In this communication the tenant included a written calculation concluding that there were no further funds for rent owed by the tenant beyond the $265.80 paid for rent for the month of August 2009. The landlord testified that the tenant had also failed to pay rent for September 2009, which was the final month of the fixed term. The landlord testified that the tenant vacated the unit without participating in a move-out condition Inspection and without leaving a forwarding address.

The landlord testified that the tenant also failed to leave the unit in a reasonably clean condition as required by the Act. The landlord was seeking a monetary order for $1,434.20 for partial rent still unpaid for August 2009, $1,700.00 loss of rent owed for September 2009, $75.00 cleaning costs,$850.00 for liquidated damages under the terms of the lease, $913.77 Cable, $764.89 gas utilities, $2,627.13 for hydro utilities, $100.00 cost of filing and $1,298.24 for additional costs including legal fees, tracing services, management expenses and postage.

The tenant acknowledged that the tenancy agreement did indicate that utilities, including heat, hydro and cable, were *not* included in rent. The tenant pointed out that this same section of the tenancy agreement was not accurately completed otherwise, and incorrectly showed that window coverings and other items were not included, although they were, in fact, included. The tenant testified that a term in the tenancy agreement addendum required that the tenant place the utility accounts in the tenant's name. However, the landlord did not assist with this transition and attempts made to transfer the accounts were not successful as the utility companies refused to permit the tenant to change the customer name until the original account-holder had terminated

their account and finalized the payments. The tenant stated that the landlord assured them that the payments would be made automatically by the landlord.

The tenant stated that no verbal nor written instructions were ever given as to how and when payment, if expected at all, would be submitted. The tenant's evidence contained copies of email communications between the parties and the tenant pointed out that none of these communications made any mention about payment arrangements for the utility charges, nor did the landlord ever discuss any payment defaults on the part of the tenant.

The tenant testified that despite the landlord's testimony that the tenant was allegedly instructed to open the bills addressed to the landlord and reimburse the landlord for the automatic payments made, there was never any verbal agreement or arrangement between the parties for the tenant to pay utility charges directly to the landlord as was described in the landlord's testimony. The tenant stated that they never would have verbally agreed to open mail addressed to another person in any case, as this would be unlawful.

According to the tenant, when they started to receive mail addressed to the landlord from the utility companies, they contacted the landlord and asked about getting the utilities taken out of the landlord's name and put into the tenant's name. The tenant testified that, at that time, the landlord had told the tenant not to worry about it. The tenant stated that they took this as an indication that the landlord was assuming responsibility for the cost of these services and no further discussion ever occurred regarding this matter. The tenant testified that after April 2009 the landlord then evidently cancelled the automatic payment of utilities without alerting the tenant to this and the tenant was then forced to pay utilities to avoid losing the service.

The tenant testified that the first time the landlord ever contacted the tenant seeking payment for outstanding utilities was in July 2009, ten months after the tenancy began. The tenant also took issue with the fact that the landlord's agent had not fully clarified the utility payment issue on behalf of the landlord.

The tenant did not agree with the landlord's claim for rent for August and loss of rent for the month of September 2009. The tenant stated that the cost of utilities was deducted from the August rent because the landlord was responsible to pay the utilities and the tenant was forced to pay to avoid a service cutoff.

The tenant stated that Notice to vacate was given in July 2009 and the landlord's agent verbally agreed that the tenant could end the lease without liability. The tenant stated that by giving this consent, the landlord would not be justified in imposing the liquidated damages of one-half a month rent. The tenant stated that the landlord could also have

advised the tenant that he would be required to find someone to sublet, but this was never brought up at all. The tenant believed that the landlord also had ample time to find a replacement tenant but neglected to take reasonable steps to do so. The tenant stated that the unit was left reasonably clean and did not agree with the cleaning costs being claimed. The tenant disputed all of the landlord's claims.

.**Analysis**

With respect to the rent owed for August 2009, I find that section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement whether or not the landlord has complied with the Act or Agreement. In this instance, I find that the tenant did not have a legal right under the Act to deduct any amount from the rent owed for August 2009 without obtaining an order permitting the tenant to do so. Therefore I find that the landlord is entitled to $1,434.20 for the remaining rent for August 2009.

In regard to the landlord's claim for loss of rent for the month of September 2009, I find that an applicant's right to claim damages from another party is dealt with in section 7 of the Act which provides that if a party fails to comply with the Act or agreement, the non-complying party must compensate the other for any damage or loss that results. 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

I find that this was a fixed-term tenancy set to end on September 30, 2010 and I do not accept the tenant's testimony that the landlord verbally agreed to the early ending of this tenancy before its expiry date. I find the tenant in violation of the tenancy agreement and the Act by terminating the tenancy prematurely. I find that the landlord has met elements 1, 2, and 3 of the test for damages. To satisfy element 4, I find that the landlord would be required to prove that reasonable steps were taken to mitigate the losses by marketing the unit. Although the landlord testified that the unit had been advertised, no evidence had been submitted to verify this. Accordingly I find that the

landlord's entitlement for loss of rent for September must be reduced to $1,200.00 to reflect the deficiency in proof to verify that reasonable steps were taken to mitigate the losses.

With respect to the portion of the landlord's application seeking reimbursement for the utility costs, I find that section 6 of the Act states that the rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement. Accordingly, a dispute resolution officer has authority to enforce the Act or the tenancy agreement or both. I find that terms regarding utilities, including who must pay, as well as specific details of how, when and to whom a tenant is required to submit payment, must be clearly stated in the tenancy agreement since the Act is silent on these specific items.

On the subject of whether or not terms of a tenancy agreement can be enforced, Section 6(3)(c) of the Act states that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it.

In this instance I find that there appeared to be clear terms in the written tenancy agreement requiring the tenant to take total responsibility for the utility accounts. However, these terms were apparently altered by the landlord who decided to leave the accounts in the landlord's name and relied on verbal instructions allegedly given to the tenants requiring them to open and read the landlord's mail, and then reimburse the landlord after-the-fact for the automatic payments made by the landlord to the companies.

In the case of verbal agreements, I find that where verbal terms are clear and both the landlord and the tenant agree on the interpretation, such terms can be enforced. However, when the parties disagree with what was offered and accepted, then these verbal terms, by their nature, are virtually impossible for a third party to interpret for the purpose of resolving disputes as they arise. I find that relying solely on verbal terms is not adequate to establish a disputed claim, particularly when the purported terms conflict with written terms in the agreement.

I find that there was no written notification issued to the tenant by the landlord regarding the tenant's continued non-payment of the utilities for several months. Given this fact, even if I accepted that both parties agreed to the unusual method of handling the utility invoices, I would still have to find that the landlord's failure to act in a timely fashion to address the tenant's violation of the verbal agreement in question, constituted a failure to meet element 4 of the test for damages.

Based on the evidence and testimony and in light of the above, I find that the portion of the landlord's application claiming compensation for $913.77 for cable, $764.89 for gas and $2,627.13 for electricity must be dismissed.

In regard to the claim for liquidated damages of one-half month for the tenant's breach of the agreement, I find that the tenant had not succeeded in proving that the landlord willingly waived the liquidated damages clause. I find that the parties had both agreed to this term in writing as verified in the addendum of the tenancy agreement and the term must therefore be enforced. Accordingly, find that the landlord is entitled to $850.00 in liquidated damages for the tenant's early termination of the contract.

As there was no move-in or move-out condition inspection reports completed in compliance with the Act, I find that the landlord is not entitled to the costs of cleaning in the amount of $75.00 and this portion of the application is dismissed.

The landlord's amended application and claims for legal fees of $690.44, tracing services of $179.20, management expenses of $400.40 and postage expenses of $28.20 are dismissed without leave.

Based on the evidence and testimony, I find that the landlord has established a total monetary claim of $3,584.20 comprised of $1,434.20 for the remaining rent for August 2009, $1,200.00 rent loss for September, $850.00 in liquidated damages and the $100.00 fee paid by the landlord for this application. I order that the landlord retain the security deposit of $850.00 in partial satisfaction of the claim leaving a balance due of $2,734.20.

Conclusion

I hereby grant the Landlord an order under section 67 for $2,734.20. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court. The remainder of the landlord's application is dismissed without leave.

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