Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

Decision

Dispute Codes:

MNDC, MNSD, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act and an order for the return of the security deposit wrongfully retained by the landlord.

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

Issue(s) to be Decided

The tenant was seeking to receive a monetary order for the return of the security deposit and partial compensation for rent paid for the month of February 2009.

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

- Whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act.
- Whether the tenant is entitled to monetary compensation under section 67 of the *Act* for damages or loss. This determination depends on the following:

Preliminary Matter

The landlord objected to the fact that she had only received the tenant's evidence on February 9, 2010 and had little time to respond.

Pursuant to Residential Tenancy Rules of Procedure Rule 3.4, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

In this instance I found that the tenant's evidence was received by the landlord more than five days prior to the hearing. Accordingly, the tenant's evidence , having been properly served, was taken into consideration in the determination of this dispute.

In regard to the landlord's evidence, Rule 4.1 of the Residential Tenancy Rules of Procedure requires that copies of all available documents and other evidence the respondent intends to rely upon as evidence at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding as those days are defined in the "Definitions" part of the Rules of Procedure.

The landlord had submitted a substantial amount of evidence that was sent to the Residential Tenancy Branch by express registered mail and was apparently signed received on February 11, 2010. Although this evidence was not in the file when the hearing began, the landlord's verbal testimony was heard and the landlord's documentary evidence was subsequently located and reviewed. The landlord also confirmed, through verifiable tracking numbers from Canada Post, that the evidence was sent by registered mail to the tenant, who evidently failed to pick it up.

I accept that the landlord's evidence was duly served on the tenant within the required time lines and was duly served to the file as well. In light of the above, the landlord's evidentiary submissions were fully considered in the determination.

.**Background and Evidence**

The landlord confirmed that the tenancy began on December 10, 2008 with rent of $600.00 payable on the 10th day of each month, and a $300.00 security deposit was paid by the tenant. There was no written tenancy agreement. According to the landlord, the tenant was also required to pay $100.00 per month for hydro. The tenant stated that there were three units on the same hydro service and the hydro rate agreed-upon was $50.00 per month.

The tenant was claiming the return of security deposit and a refund of rent already paid for the period from February 6 to February 9, 2009, and for rent paid in advance for the period from February 10, 2009 until March 9, 2009. Submitted into evidence by the tenant was written testimony about what had transpired during the tenancy.

The tenant stated that, prior to February 6, 2010 when the landlord ended the tenancy, she had already paid rent for the month. However the tenancy was suddenly terminated without notice on February 6, 2009 and she was forced to move out. The tenant testified that the written forwarding address was sent to the landlord requesting the return of the tenant's security deposit but the funds were not returned. The tenant had

submitted into evidence a copy of a letter from the tenant to the landlord dated April 17, 2009, featuring the tenant's written forwarding address, along with a request for the return of the security deposit.

The tenant testified that, during the tenancy, the landlord had provided her with keys to the unit. But on February 6, 2009, when she returned from work, the tenant found that the landlord had placed a chain on the door blocking her access leading to the rental unit. The tenant testified that the landlord then demanded that the tenant provide the landlord with a copy of the key to the unit. The tenant stated that she left the premises to obtain a copy of the key and returned to immediately give it to the landlord. The tenant testified that the landlord proceeded to test the key, which worked, but still refused to permit the tenant to enter, demanding immediate payment of $180.00 in utilities allegedly owed.

The tenant testified that, when the landlord refused to allow her to enter, she called the police and the landlord then agreed to remove the chain off of the upper access door. The tenant said that the previously secured door to the tenant's suite was found to be left wide open. The tenant testified that the landlord had apparently taken some of the tenant's records from her suite, including receipts for rent. The tenant testified that the police remained on site while she removed some basic necessities and the remainder of her possessions were retrieved the following day.

The tenant stated that she had already paid the rent due on January 10, 2009 and also paid the next month's rent due on February 10, 2009, before the wrongful eviction. The tenant is claiming compensation for the final 3 days included in January rent which was current up to February 9, 2009. The tenant is also seeking reimbursement for the followingmonth beginning on February 10, 2009 and ending on March 9, 2009, during which the tenant was not able to reside in the unit despite having paid. The tenant testified that she lost three days wages from work due to the confiscation of her home by the landlord. No evidence, other than testimony, was submitted in support the loss of wages claim.

The landlord confirmed that the $300.00 security deposit, paid at the start of the tenancy was not refunded to the tenant at the end of the tenancy, although she did receive the tenant's letter with the forwarding address dated April 17, 2009. The landlord confirmed that she had never received written permission from the tenant to keep the security deposit and also confirmed that the landlord never made an application for dispute resolution to permit her to retain the deposit. However, according to the landlord, she felt entitled to retain the deposit anyway since the tenant had told her that the security deposit would be used in lieu of rent owed to the landlord.

The landlord testified that the access door was chained on February 6, 2009 in order to bar the tenant from entering because the tenant had refused to give the landlord a copy of the key to her rental unit, despite repeated demands to do so. The landlord did not explain why she did not already have a key. The landlord stated that she terminated the tenancy for cause based on four different reasons. A copy of an undated, hand-written letter from the landlord to the tenant was in evidence stating: "*Please consider this an Eviction Notice to vacate your premises……You have a maximum of one month (1st week of Feb.), provided you give me a key so I can monitor your utilities."* (excerpts reproduced as written).The landlord admitted that she had issued the letter purporting to end the tenancy instead of using the approved form for One-Month Notice to End Tenancy for Cause. Despite failing to issue the Notice on an approved form as required by the Act, the landlord indicated that she still believed that the tenancy was validly ended and no compensation to the tenant was warranted.

The landlord also disputed the tenant's testimony that the rent was paid in advance. The landlord stated that the rent due on February 10, 2009 was never paid by the tenant at all. The landlord testified that the hydro charged at the rate of $100.00 per month was also in significant arrears and the tenant refused to pay. The landlord had submitted into evidence copies of receipts for rent paid by the tenant and copies of invoices from BC Hydro.

The landlord's evidence included written testimony with a chronology of what had transpired during the tenancy. The landlord concurred with some of the information related by the tenant. However, the landlord disputed the tenant's claims for compensation and the return of the deposit.

The landlord's position was that she should also be permitted to make a monetary claim against the tenant during these proceedings. The landlord's evidence contained the following written request for compensation from the tenant:

> "*1)$1,200 of rent for Feb. & March (no access to show the suite), 2), Hydro expenses $300.00 - $400.00 based on bills I've submitted & 3) any monies you wish to award me for trauma and fear ……."* (reproduced as written)

All of the material evidence and testimony presented by the landlord was heard and considered. However, during the hearing, the landlord persisted in giving additional irrelevant testimony about damages and losses she had incurred due to the tenant's actions. The landlord was intent on justifying her action in terminating this tenancy without obtaining an order of possession or writ. When advised that this testimony was not relevant nor material to the matter before me, the landlord became irate and stated that she no longer wished to participate in the proceedings. The landlord left the conference call approximately 15 minutes before the hearing had concluded.

Analysis

Claim for Return of Security Deposit

In regard to the return of the security deposit, I find that section 38 of the Act states that, 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 repay the security deposit or make an application for dispute resolution claiming against the security deposit. The Act states that the landlord can retain a deposit if the tenant agrees in writing that the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the landlord obtains an order to retain the amount. Based on the testimony of both the landlord and tenant, I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make any application for an order to keep the deposit.

I find that the landlord's evidence about utilities and damages allegedly owed by the tenant is not relevant to the application before me at present. This hearing was solely to deal with the tenant's application and my authority to determine the dispute only pertains to the application before me. However, the landlord is at liberty to pursue a claim against the tenant seeking compensation for any damages and losses resulting from a violation of the Act, by making her own application for dispute resolution.

In any case, I find that the landlord's testimony about the security deposit matter provided during these proceedings functioned to support the tenant's claim that the landlord failed to refund the security deposit. Section 38(6) provides that if a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit.

Based on the evidence I find that the tenant's security deposit was $300.00 and under the Act the tenant must be paid double the remaining security deposit of $600.00.

Claim for Damages and Loss

The tenant is claiming the return of a portion of rent paid for the month of January and February 2009. With respect to an applicant's right to claim damages from another 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 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 tenant, 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 landlord.

Section 44 of the Act states that a landlord cannot end a tenancy, except in accordance with the Act and section 52(e) of the Act requires that when a Notice to End Tenancy is issued by a landlord it must be "*in the approved form*".

In this situation I find that the landlord had failed to use the approved form and merely composed a letter terminating the tenancy. I find that the letter, even if served on the tenant, had no force nor effect with respect to ending this tenancy. In fact, I find that the tenancy was still in place and the tenant was entitled to possession of the rental unit at the time she was locked out by the landlord.

Based on the evidence and testimony provided by the landlord, it is clear that the tenancy was prematurely ended in a manner not in compliance with the Act.

I find that, even if the landlord had issued a proper Notice on the correct form in compliance with the Act, the landlord would still not be justified in seizing the tenant's unit as she did. If the tenant still remained in the unit after a legal order of possession was served, section 57 of the Act provides that a landlord is not permitted to take possession of a rental unit still occupied by a tenant, without first obtaining a valid writ of possession issued under the Supreme Court Civil Rules. (My emphasis)

Section 31 of the Act states that a landlord must not change locks or other means that give access to residential property unless a) the tenant agrees to the change and; (b) the landlord provides the tenant with new keys or other means of access to the rental unit.

Section 30 of the Act provides that a landlord must not unreasonably restrict access to residential property the tenant of a rental unit that is part of the residential property.

Section 28 of the Act states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following: (a) reasonable privacy; (b) freedom from unreasonable disturbance; (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 and; (d) use of common areas for reasonable and lawful purposes, free from significant interference.

In addition to the above, section 29 of the Act states that landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless: (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry; (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the purpose for entering, which must be reasonable, and the date and the time of the entry.

Given the landlord's own testimony, as well as the landlord's evidentiary submissions confirming that she chained the upper entry door prohibiting the tenant's access, entered the unit without proper notice and terminated the tenancy without an order, I find that the burden of proof has been met to conclude that the landlord had willfully contravened sections 44, 52, 57, 31, 30 and 28 of the Act and failed to follow due process under the law. I find that the test for damages has been satisfied as it was established that the landlord's multiple violations of the Act did result in the monetary loss being claimed by the tenant. I find that the landlord is therefore entitled to $78.90 rent abatement for loss of use of the unit for the period from February 6 to February 9, 2009 inclusive, and a further $600.00, representing reimbursement of rent for the one-month period from February 10, 2009 until March 9, 2009.

However, I find that the tenant has not adequately met the test for damages relating to her claim for the loss of wages for three days, due to insufficient evidentiary support for this portion of the tenant's application. Accordingly, I find that this portion of the claim must be dismissed.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of $1,278.90 comprised of $600.00 for double the security deposit and $678.90 rent abatement for having no use of the rental premises from February 6, 2009 onward. This order must be served on the Respondent in person or by registered mail and if unpaid, may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

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