Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNDC FF
MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenants.

The Landlord filed seeking a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, and to recover the cost of the filing fee from the Tenants for this application.

The Tenants filed seeking a Monetary Order for the return of double their security deposit, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents by the Landlord to the Tenants was done in accordance with section 89 of the *Act*, sent via registered mail on January 21, 2011. The Tenants confirmed receipt of the Landlord's hearing documents.

Service of the hearing documents by the Tenants to the Landlord was done in accordance with section 89 of the *Act*, sent via registered mail on October 28, 2010. The Tenants confirmed receipt of the Landlord's hearing documents.

The parties appeared at the teleconference hearing, confirmed receipt of evidence submitted by the other, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Have the Tenants breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
2. If so, has the Landlord met the burden of proof to obtain a Monetary Order as a result of that breach?

3. Has the Landlord breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
4. If so, have the Tenants met the burden of proof to obtain a Monetary Order as a result of that breach?

Background and Evidence

I heard undisputed testimony that the Tenants entered into a written fixed term tenancy agreement with the previous owner of the property effective December 1, 2009 and was set to switch to a month to month tenancy after November 30, 2010. Rent was payable on the first of each month in the amount of $850.00 and on October 20, 2009 the Tenants paid $425.00 as the security deposit. The rental unit is one side of a duplex with the current owner residing in the other side. No move-in inspection was conducted by the previous owner, no inspection was conducted when the Landlord took ownership of the unit, and no move-out inspection was completed at the end of the tenancy.

The Tenants testified they thought their tenancy agreement was a month to month tenancy and that they provided the Landlord with written notice to end their tenancy effective August 31, 2010. They attended the rental unit twice to seek the return of their security deposit. The first time the Landlord was not home and the second visit was September 10, 2010. When they arrived the doors to both duplexes were wide open and they could see that someone's possessions had been moved into the rental unit, the unit was being painted and fixed up, and there was a trailer parked in the back. When they asked the Landlord for their deposit that day they were told that he will not be returning the security deposit until his new tenants paid their deposit. They came back on September 12, 2010 which is when the Landlord wrote them a cheque for a partial refund of $212.50. They stated the Landlord did not have their permission to withhold money from the security deposit so they are seeking the return of the balance plus interest owed. They provided the Landlord their forwarding address in writing on September 27, 2010.

The Landlord testified and confirmed he received the Tenants' notice to end tenancy effective August 31, 2010, that he provided the Tenants $212.50 on September 12, 2010, and that he received the Tenants' forwarding address on September 27, 2010.

The Landlord purchased the rental property sometime around February or March 2010 and the Tenants were already occupying the unit under their previous tenancy agreement. No new written agreement was entered into by these parties and they continued based on the tenancy agreement that was from the previous owner.

The Landlord is seeking a monetary claim of $1,642.74 which is comprised of the following:

- $425.00 for a pet deposit. He states that the Tenants got a pet in May or June without his prior permission so he is seeking compensation for a pet deposit. He first found out about the pet in May or June and did not issue a written request for a pet deposit to be paid.
- $850.00 for loss of rent for September. The Landlord stated that he was not able to re-rent the unit until October 1, 2010, when he entered into a verbal tenancy agreement with his new tenant. He made reference to a letter provided by his new tenant which was included in his tenancy agreement which should indicate when he entered into the agreement with her; however this letter he provided is not dated nor does it make reference to which date this tenant occupied the unit.
- $100.00 for storage of the Tenants' vehicle they left on his property for a few weeks after they moved. He confirmed they asked him permission to leave the vehicle there and that there was no discussion about payment for leaving the vehicle. The Landlord did not issue a written request to have the vehicle removed.
- $80.92 for the cost to repaint the unit. The Landlord stated there was a different color scheme throughout the unit so he felt it necessary to paint and repair small damages as the unit looked old and worn. He confirmed the unit looked that way when he purchased it and he did not know what the condition was when the Tenants first occupied the unit as there was no list of damages or condition of the property.
- $186.82 for advertisement costs as supported by his evidence which included a copy of a receipt from the publication he advertised in for the month of August 2010.

The Tenants stated the previous owner knew they had pets, as supported by their evidence which included a letter from the previous owner. They had a dog at the time the Landlord purchased the property and after their cat went missing they acquired a kitten in April 2010. The Landlord never requested money for a pet deposit nor did he ever request payment for storage of their vehicle. They had asked the Landlord if it would be okay to leave their vehicle there for a few weeks, which he agreed to. With respect to the paint in the unit, it was like that when they moved in as supported by the previous owner's letter.

In response to the Landlord's claim of loss of rent, the Tenants confirmed a second time that there was someone living and working in the unit when they attended September 10, 2010 so it was not available for rent to someone else.

Initially the Landlord stated the new tenants did not begin their tenancy until October 1, 2010 and then after a brief discussion the Landlord confirmed the new tenants were his previous acquaintances who ended up being friends that he socialized with. They decided to rent the unit from him and they came to an agreement where they would assist the Landlord in painting the unit. The new tenants were allowed to casually move their possessions into the unit in September 2010. These new tenants were not required to pay rent until October 1, 2010. The Landlord was adamant that the new tenants did not begin to move their possessions into the unit until after the middle of September. He then stated they were moving stuff in when they began painting.

Analysis

I have carefully considered all of the testimony and evidence before me.

Section 7(1) of the Act provides 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 the damage or loss which results. That being said, section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

Landlord's application

Section 20(c)(ii) of the Act provides that a landlord must not require a pet damage deposit at any time other than if the tenant acquires a pet during the term of a tenancy agreement, when the landlord agrees that the tenant may keep the pet on the residential property.

The evidence supports the Tenants had pets during the tenancy and the Landlord did not request a pet deposit during the course of the tenancy, even though the Landlord

testified he was aware of the presence of a pet several months before the end of the tenancy. A deposit is held by a landlord during the course of a tenancy as security in the event there is damage caused. There is no provision in the Act that would allow a Landlord to demand a pet deposit after the tenancy has ended. Therefore I dismiss the Landlord's claim of $425.00, without leave to reapply.

The Landlord has sought $100.00 for the storage of the Tenants' vehicle after the tenancy has ended and the tenancy agreement did not provide for storage fees. Therefore, there is insufficient evidence to support there has been a breach of the Act, regulation or tenancy agreement. Based on the aforementioned I hereby dismiss the Landlord's claim of $100.00, without leave to reapply.

The evidence supports the paint color scheme was applied by the previous owner, prior to the Tenants' tenancy and was present at the time the Landlord purchased the property. As per the aforementioned and in the absence of a move in inspection report there is insufficient evidence to support the Tenants breached the Act, regulation or tenancy agreement. Based on the aforementioned I hereby dismiss the Landlord's claim of $80.92 for paint costs, without leave to reapply.

In relation to the Landlord's claim for advertising fees, I find that the Landlord has chosen to incur costs that cannot be assumed by the Tenant. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of the Act and not for costs incurred to conduct a Landlord's business. Therefore, I find that the Landlord may not claim advertising fees, as they are costs which are not denominated, or named, by the *Residential Tenancy Act.*

A significant factor in my determination of the Landlord's claim for loss of September 2010 rent is the credibility of the Landlord's testimony. I am required to consider the Landlord's evidence not on the basis of whether his testimony "carried the conviction of the truth", but rather to assess his evidence against its consistency with the probabilities that surround the preponderance of the conditions before me.

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround*

> *the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In the circumstances before me, I find the version of events provided by the Tenants to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the Tenants over the Landlord in relation to when the new tenant(s) began to occupy and paint the rental unit.

The Landlord initially testified the unit was not rented for September 2010 and later changed his testimony to confirm the new tenant(s) had agreed to assist him with repainting the unit and were allowed to "casually move their possessions into the unit". The new tenants were not required to pay rent for September 2010. He felt he was not able to re-rent the unit because of the painting scheme, a scheme that was present at the time he purchased the property. The Landlord could not provide an exact date of when this arrangement was entered into or when they began to move in; however he indicated they did not begin to move in until around the end of September when they began painting the unit. I note that the Landlord did not advertise the unit for rent past the end of August which suggests that on a balance of probabilities he had entered into the agreement with his new tenants long before the end of September. I also note that the receipts he submitted for paint were all dated September 7, 2010. Entering into an agreement with the new tenant(s) to occupy the unit without payment of rent is not a method of mitigating his loss of rent for September 2010. Based on the aforementioned, the Landlord has provided insufficient evidence to support he mitigated his loss, and therefore has not met item #4 in the test for damage or loss, as listed above. Therefore I dismiss the Landlord's claim of loss of rent of $850.00, without leave to reapply.

The Landlord has not been successful with his application, therefore he must bear the burden of the filing fee for his application.

It is evident that the Landlord is not familiar with his obligations as required by the Act. I have included with my decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the parties to familiarize themselves with their rights and responsibilities as set forth under the *Residential Tenancy Act*.

Tenants' application

The Tenants have sought the return of double the balance owed on their security deposit. The evidence supports the tenancy agreement ended August 31, 2010. The Landlord refunded $212.50 of their $425.00 security deposit on September 12, 2010.

The Landlord admitted that he did not apply for dispute resolution to keep the security deposit, (his application dated January 20, 2011 was not for a monetary order to keep the security deposit), he does not have an Order allowing him to keep the $212.50 that he withheld, and he does not have the Tenants' written consent to retain $212.50 of the security deposit.

The evidence supports that the Tenants provided the Landlord with their forwarding address, in writing, on September 27, 2010.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit. In this case the Landlord was required to return the Tenants' security deposit in full or file for dispute resolution no later than October 12, 2010. In this case the Landlord returned $212.50 prior to the deadline, however he did not return the balance owed of $212.50.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposit and the landlord must pay the tenant double the security deposit.

Based on the aforementioned, I hereby find that the Tenants have succeeded in proving the test for damage or loss as listed above and I approve their claim for the return of double the balance owed of their security deposit plus interest of **$425.00** (2 x $212.50 plus interest of $0.00).

The Tenants have succeeded with their application; therefore I award recovery of the **$50.00** filing fee.

Conclusion

The Tenants' copy of my decision will be accompanied by a Monetary Order for **$475.00** ($425.00 + 50.00). This Order must be served upon the Landlord and may be filed in Provincial Court and enforced as an Order of that Court.
The Landlord's application is HEREBY 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: March 04, 2011.

Residential Tenancy Branch