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 a monetary order for $900.00 loss of rent for May 2009 due to the tenant over-holding the rental unit for 3 days in May 2009 and refusing to grant the landlord access to show the unit in advance of the tenant's departure. The landlord was seeking an order to retain the security deposit in partial satisfaction of the claim.

A previous hearing had been held on November 23, 2010 on the tenant's application for return of double the security deposit and it was found that, although the tenant had provided a forwarding address, it was for his place of employment and thus the landlord was prevented from serving any application to keep the deposit for damages and loss, because this would need to be served according to section 89 of the Act, which requires an Application for dispute Resolution to be served by registered mail to the place the respondent *resides*. The tenant's application was dismissed with leave to reapply and an order was also issued that documents could be served to the tenant at his place of employment and that the landlord had 15 days to either return the deposit or make application to keep it.

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 loss of rent.

Background and Evidence

The landlord submitted into evidence a copy of the tenancy agreement, written testimony copies of correspondence, copies of dates when phone messages were sent to the tenant, bank records, and proof of service.

The landlord testified that the tenancy began in November, 2008 at which time the tenant paid a security deposit of $450.00.

The landlord testified that the tenant gave proper written notice to vacate effective May 1, 2009. The landlord testified that, during the entire month of April 2009, the tenant refused to allow the landlord to show the suite to potential renters. The landlord referred to photos of telephone records apparently showing that calls were made by the landlord to the tenant leaving messages that the tenant had never answered.

In addition, according to the landlord, the tenant did not leave on the date specified in the tenant's notice to vacate. The landlord testified that the tenant remained in the suite until May 3, 2009. The landlord stated that the tenant did not return the keys until May 3 and did not disconnect the hydro until May 5, 2009.

The landlord's witness supported this testimony and stated that she had personal knowledge that the tenant had remained in the unit past May 1, 2009 and was still there on May 3, 2009.

The landlord stated that, because of the tenant's actions, the unit was not re-rented until June 1, 2009. The landlord offered evidentiary proof that he did not receive any rent for the month of May 2009 and it is the landlord's position that the tenant should compensate him for the loss in the amount of $900.00, half of which would be satisfied by retaining the tenant's $450.00 security deposit.

The tenant denied ever prohibiting the landlord from showing the unit. The tenant stated that after giving his notice to vacate, he began moving out gradually during the month of April and was already completely moved into his new home by May 1, 2009. The tenant acknowledged that he did not return the keys to the landlord until May 3, 2009, but stated that this was because that was the day that the landlord had scheduled the walk-through inspection and he expected the return of his security deposit at that meeting. However, according to the tenant, the landlord took the keys but did not do a walk-through and did not refund his deposit.

Analysis

In regards 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 the tenancy agreement, the non-complying party 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.

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, in compliance with the Act, the tenant gave adequate notice to vacate effective May 1, 2009.

To satisfy element 4 of the test for damages and loss, the landlord would need to prove that reasonable steps were taken to minimize losses by trying to re-rent the unit.

Section 29 of the Act states that a landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

> (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 following information:
>
> > (i) the purpose for entering, which must be reasonable;
> >
> > (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

I accept the landlord's testimony that there were potential renters interested in viewing the unit and that the landlord attempted to contact the tenant by phone. However, even if it was true that the tenant did not answer the landlord's phone calls, during the month of April 2009, I find that this would not be sufficient evidence to prove that the tenant refused to give the landlord access to show the suite. In order to properly request access the suite in accordance with the Act, the landlord would have been required to provide written notification to the tenant. A request for access served by telephone would not be valid notice. No evidence was submitted to verify that a 24-hour written notification had ever been served on the tenant by the landlord.

Given the above, I find that the landlord's failure to find a new renter before May 1, 2009 was not proven to be caused by the tenant. It is not a violation of the Act for a tenant to ignore or decline verbal notice. Therefore there is no basis to award damages and the landlord is not entitled to be compensated for the one-month loss of rent.

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 other words, the applicant, in this case the landlord, has the onus of proving during these proceedings, that the compensation being claimed as damages is justified under the Act.

I find that, in any dispute when the evidence consists of conflicting and disputed verbal testimony, in the absence of independent documentary evidence, then the party who bears the burden of proof is not likely to prevail.

With regard to the verbal testimony given by the landlord and the witness alleging that the tenant had remained in the unit for 3 days past the move-out date given, I find insufficient evidence to prove that this was so in light of the tenant's denial. Moreover, the landlord failed to offer evidentiary verification that there was a new renter ready and waiting to move in on May 1, 2009, but who was prevented from doing so because the tenant was still in possession of the unit.

Being that the burden of proof was not sufficiently met to support the compensation being claimed, I find that the landlord's application must be dismissed. Given the above, I find that the landlord must return the security deposit to the tenant in the amount of $451.12 including interest.

Conclusion

I hereby grant the tenant a monetary order under section 38 for $451.12. 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.

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: April 2011.

Residential Tenancy Branch