Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR OPB MND MNR MNSD MNDC

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order of Possession for unpaid rent and breach of an agreement and to obtain a Monetary Order for damage to the unit, site or property,

The parties appeared at the teleconference hearing, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

At the outset I explained how the hearing would be conducted and requested that the parties not interrupt each other when they were providing testimony. After explaining the hearing processes I asked each participant if they had any questions or preliminary issues they wished to raise at that time. All participants stated they understood how the process would be conducted and none of them had preliminary issues to bring forward.

The Tenants' legal advocate acknowledged that she did not have firsthand knowledge of what transpired as the Tenants had only approached her to assist them six days prior to the hearing. She met with the Tenants today and they appeared at her office with only a few documents they had received from the Landlord.

Issue(s) to be Decided

1. Have the Tenants breached the *Residential Tenancy Act*, regulation, and or tenancy agreement?
2. If so, has the Landlord met the burden of proof to obtain a Monetary Order pursuant to section 67 of the *Residential Tenancy Act*?

Background and Evidence

The Landlord affirmed that on July 14, 2011 Tenant (1) was personally served with the Landlord's application and the majority of their evidence which included the documents and photographs. Tenant (2) was not available so his hearing documents and evidence package was sent via registered mail on July 14, 2011. Tenant (2) refused to pick up his

registered mail so a second service was conducted in person on September 25, 2011 by the Landlord's husband.

At the outset of the hearing both Tenants confirmed receiving the hearing documents, "some papers" and "some photos". They were attending the teleconference hearing from their advocate's office and had only brought a few papers with them to review during the hearing.

Tenant (1) signed a written tenancy agreement with the Landlord on September 29, 2010 and Tenant (2) was added as a Tenant to the rental unit when the Landlord completed Tenant (2)'s intent to rent form to have Income Assistance pay Tenant (2)'s rent. I heard undisputed testimony that Tenant (1) managed the tenancy because Tenant (2) was visually impaired and both Tenants occupied the rental unit since October 1, 2010. Rent was payable on the first of each month in the amount of $800.00 and on October 16, 2010 the Tenants paid $400.00 as a security deposit and a deposit of $200.00 was paid for the natural gas costs.

The parties were in dispute as to which date the tenancy ended. The Landlord states the Tenants had not completely vacated the unit until July 7, 2011 which is also the date they conducted the move out inspection. The Tenants state they had vacated the property by July 6, 2011 and it was the Landlord who postponed the inspection until July 7, 2011. As the tenancy has ended the Landlord confirmed she was withdrawing her requests for Orders of Possession.

The Landlord affirmed that a move in inspection was conducted with Tenant (1) on September 30, 2010 and the move out inspection was completed July 7, 2011. The Landlord had completed a move in inspection form and move out inspection form however at the time she requested Tenant (1) to sign the form an altercation broke out whereby Tenant(1) stole the inspection document and taunted the Landlord by saying she could not prove the damages without the form. The Landlord provided a written statement in her evidence which fully explained the occurrences of July 7, 2011.

The Landlord served the Tenants a 2 Month Notice to End Tenancy on March 30, 2011 which the Tenants later claimed they did not receive. So the Landlord served the Tenants a 1 Month Notice dated May 31, 2011 and requested that they sign the Notice so the Landlord had proof they had received it. The Landlord stated that this is an indication of how the Tenants claim they did not receive documents or notices.

The Landlord stated there was a balance of $38.18 remaining in the Tenants natural gas deposit. She advised that the Tenants had always paid their natural gas bill when it

was presented to them. After she had issued the Tenants the Notices to end the tenancy she informed them that she would be applying the $200.00 natural gas deposit towards the final bills. It took them almost four months to get the Tenants to vacate the property during which the natural gas bills totalled $161.82 and were comprised of $41.67 for April 2011; $44.49 for May 2011; $43.39 for June 2011; and $32.27 up to July 15, 2011. This leaves a balance owed to the Tenants of **$38.18** ($200.00 – 161.82).

The Landlord referred to her documentary evidence which included, among other things, photo graphs of the ceiling, receipts for repairs and cleaning, proof that a smoke detector was purchased and installed September 29, 2010 on the ceiling, and a copy of the tenancy agreement and addendum, in support of her claim for damages to the unit as follows:

- $200.00 for occupying or over holding the rental unit from July 1st to July 7, 2011;
- $132.00 for the cleaning person. The rental unit smelled of smoke and the ceilings, walls, windows, and blinds had to be thoroughly washed. She referred to #18 in her tenancy agreement which stipulates “Absolutely no smoking indoors”. The Landlord stated that both her and her husband had witnessed Tenant (1) smoke indoors and warned him that he was breaching the tenancy agreement. The 1 Month Notice to End Tenancy was issued and included smoking indoors as one of the reasons for issuing the Notice.
- $76.85 for cleaning supplies which included carpet shampoo, floor and oven cleaner, and other general cleaning supplies.
- $132.56 for ceiling paint. The Landlords had painted the ceilings just six to eight months prior to this tenancy. They had also just installed a smoke detector which when removed from the ceiling you could clearly see in the photos the discoloration of the rest of the ceiling that was caused by the Tenant’s smoking in the unit.
- $77.15 to replace a throw mat or carpet. The Landlord alleged that she had provided the Tenants with a throw mat that was to be left in the unit at the end of the tenancy however the Landlord could not locate it at the end of the tenancy.
- $225.00 for the Landlord and her spouse’s labour to repaint the ceilings. It took them 15 hours and she was charging $15.00 per hour.
- $120.00 to cover the cost for the carpenter who attended the rental unit on two occasions to install new windows however he could not do the work because the Tenants were still occupying the unit. The Landlord advised she had scheduled the carpenter thinking the Tenants would have vacated the unit on June 30, 2011 because of the 1 Month Notice. She did not know at

the time of scheduling the carpenter that the Tenants would stay and not move out. She had hoped they would be out by the second time the carpenter appeared but they were still in the unit. She was charged by the carpenter for his travel time which is the cost she wishes to be reimbursed.

Tenant (1) testified that they finished moving on July 6, 2011 and requested the Landlord attend to complete the move out but it was postponed to July 7, 2011 at her request. He confirmed that he owed the Landlord rent for the six days of July 2011.

The Tenant denied stealing the move in / move out inspection form. He confirmed there was an altercation and the Landlord grabbed his pack however he stated the move in and move out form was his document and not the Landlords. He then stated that he had no idea what the Landlord was claiming money for because it is not clearly listed on the actual application form. He stated that because of this he did not know what to provide as evidence. In discussing this Tenant (1) changed his testimony about receiving evidence and alleged that he only received the application and hearing letter and no other evidence so he could not provide evidence for his defence.

Tenant (1) requested that the Landlord's application not be considered because she did not serve them with the hearing documents and application within three days of filing her application. He confirmed he was served the hearing documents July 14, 2011.

In response to the Landlord's claim for damages Tenant (1) stated that he had hired a cleaning person who cleaned the unit July 6, 2011 and that he paid her $12.00 an hour. He stated that he has a receipt but that it was at home. Tenant (1) stated that he could have submitted receipts, witness statements and his copy of the inspection form had he known what the Landlord was claiming. He stated that he had completed an inspection form himself and that he did not have the Landlord's form as she alleged. He could prove that there were stains on the carpets from the beginning of the tenancy and that he did not smoke in the rental unit. He attended the rental unit and opened up the windows and doors before the Landlord arrived. He had several witnesses there and when the altercation broke out the Landlord took his pack and stole his papers.

Tenant (1) confirms the Landlord offered them a throw mat to use but that they did not need it so they put is downstairs and did not use it. They did however purchase a couch from the Landlord for $25.00. He confirmed he paid a $200.00 deposit for natural gas because the gas company refused to put the bill in his name. He argued that they always paid their bills but the Landlord would never give them a receipt. He confirmed the bills would come around the 12th or 15th of each month and he would always pay so he does not know which bills she could have put the deposit towards.

Tenant (1) stated that he is not responsible for any of the damages as he did not smoke inside the rental unit. A discussion followed where I asked Tenant (1) if he had seen the ceiling photo where the smoke detector had been removed and he answered stating the first time he saw that photo was when the Landlord sent all the papers to him. He argued that the ceiling looked the same as when they first rented the place because the Landlords had decided to renovate the rental unit later before they were going to put it up for sale. He stated that the walls had been puttied and needed painting but the Landlord refused to paint them until they did their renovations.

The Tenants confirmed the carpenter showed up to replace the windows when they were still in the rental unit but that had nothing to do with them. They could not get their new rental place until June 30, 2011 so they told the Landlord it would take them a few days to move because they had a lot of stuff and only had one van to move their stuff in.

Tenant (2) affirmed that he had cleaned his room to the best of his ability. He also confirmed that he had been personally served with the Landlord's hearing documents which included papers and photographs.

In closing the Tenants and their advocate expressed their concerns that the application was not served in three days as required by the Act.

The Landlord confirmed service was conducted on July 14, 2011, in person to Tenant (1) and via registered mail to Tenant (2). She stated that the inspection document the Tenant was referring to was not his and was in fact the one he had stolen during the altercation she mentioned earlier. The Landlord's spouse provided affirmed testimony that he served the papers in person to Tenant (1) and that they included copies of all of their evidence and photos except for the typed statement and the September 29, 2010 receipt for the smoke detector which were served to the Tenants on September 25, 2011.

Analysis

After careful consideration of the testimony and evidence before me I favor the evidence of the Landlord, who affirmed each Tenant was served with the hearing documents and their evidence on July 14, 2011, which was the same day they served the evidence to the *Residential Tenancy Branch*, over the testimony of Tenant (1) who initially stated that they received documents and photos and later changed his testimony to say he only received a copy of the Landlord's application and the hearing document, and later testified that he had never seen the ceiling without the smoke detector until he saw the photos sent to him by the Landlord. I favored the evidence of the Landlord over the

Tenants, in part, because the Landlord's evidence was forthright, consistent and credible which lends credibility to all of their evidence.

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 is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find Tenant (1)'s allegation that he was not able to provide evidence in his defense because he did not know what the Landlord was claiming in damages to be improbable because of his contradiction in stating at first that he received the photos and evidence to then explaining that he did not receive the evidence and did not have knowledge of what the Landlord was claiming in damages then later confirming that he had seen photos submitted by the Landlord of when the smoke detector was removed from the ceiling. Rather, I find the Landlord's explanation that each Tenant was served the hearing documents and evidence in accordance with the Act to be plausible given the circumstances presented to me during the hearing.

For all the aforementioned reasons and pursuant to section 62 of the Act, I find that each Tenant was served notice of the dispute resolution hearing, the application, and copies of the Landlord's evidence, including photographs, on July 14, 2011 in accordance with Section 89 of the Act. Furthermore I find the evidence provided sufficient details of what the Landlord's claim entailed and therefore I do not accept that the Tenants did not know what was being claimed.

The Tenants argued that the Landlord's application not be considered as she did not serve the hearing documents within the 3 days. Section 59 (3) of the Act provides that a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director.

The application was filed in at a remote service location on July 8, 2011 however the hearing documents and Notice of Hearing letter were not created and provided to the Landlord until July 12, 2011. For the purpose of Section 59 (3) an application is not made until the date the hearing documents are created. The evidence supports the Landlord served the hearing documents two days later on July 14, 2011 and therefore

the Landlord has complied with section 59 (3) of the Act. I further find the Tenants had amble notice to submit evidence prior to the hearing.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on a balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

The *Residential Tenancy Regulation* Part 3 Section 21 provides that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

In the absence of a move in or move out inspection report form I accept the Landlord's photographic evidence and receipts to support the condition of the rental unit prior to the tenancy and at the end of the tenancy. I find that on a balance of probabilities the Tenants did not clean the walls, ceilings, carpets, windows, and appliances and that they were smoking inside the rental unit in breach of their tenancy agreement.

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 37 (3)(a) of the Act provides that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

As per the aforementioned I find the Landlord has met the burden of proof to establish damages in the amount of **$750.41** which is comprised of the following:

- $184.00 occupation or overholding of the rental unit ($800.00 x 12 mo divide by 365 days x 7 days)

- $132.00 for cleaning of the rental unit
- $76.85 cleaning supplies
- $132.56 ceiling paint
- $225.00 labour to paint and clean

The Landlord has also claimed $77.15 for a mat and $120.00 for the cost of a contractor she had scheduled without confirming the rental unit had been vacated. After consideration of these matters I find there to be insufficient evidence to meet the burden of proof. Accordingly the $77.15 and $120.00 claims are hereby dismissed.

I accept the Landlord's accounting of the $200.00 natural gas deposit and that she still holds in trust $38.18 of the natural gas deposit and the $400.00 security deposit.

The Landlord has been primarily successful with her application; therefore I award recovery of the **$50.00** filing fee.

I find that the Landlord is entitled to a monetary claim as noted above and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' deposits plus interest as follows:

Damages / Losses	$ 750.41
Filing Fee	50.00
SUBTOTAL	$ 800.41
LESS: Natural gas deposit + Interest 0.00	-38.18
Security Deposit $400.00 + Interest 0.00	-400.00
Offset amount due to the Landlord	**$362.23**

Conclusion

The Landlord's decision will be accompanied by a Monetary Order of **$362.23.** This Order is legally binding and must be served upon the Tenants.

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: October 07, 2011.

Residential Tenancy Branch