Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the landlord-MNR, MNSD, MNDC FF
For the tenant-MNDC, MNSD, FF

Introduction

This hearing dealt with the cross applications of the parties.

The landlord applied for a monetary order for unpaid rent and money owed or compensation for damage or loss, for authority to retain the tenant's security deposit and to recover the filing fee.

The tenant applied for a monetary order for money owed or compensation for damage or loss and return of her security deposit, and for recovery of the filing fee.

The hearing process was explained to the parties. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

Is the landlord entitled to a monetary order and recovery of the filing fee?

Is the tenant entitled to a monetary order, a return of her security deposit and recovery of the filing fee?

Background and Evidence

I heard testimony that this one year, fixed term tenancy started on November 1, 2011, was to end on October 31, 2012, and actually ended before the end of November 2011, when the tenant vacated the rental unit. Monthly rent was $2,300.00 and the tenant paid a security deposit of $1,150.00 on or about October 13, 2011. The landlord has not returned the tenant's security deposit.

The rental unit is a condo on the top floor of a multi-level building.

Landlord's Application:

The landlord amended his monetary claim at the start of his testimony, reducing the amount claimed, $4,876.00, by the amount of $2,300.00, as the rental unit was rented for the month of January, 2012. The landlord's monetary claim included $2,300.00 for loss of rent revenue for December 2011, advertising for $176.00, and $100.00 for a strata fee.

The landlord's relevant evidence included a copy of the tenancy agreement, a home repair invoice, a letter from the strata management company to a heating repair company, copies of a train of dated and undated email communication between the parties, and a copy of advertising attempts made by the landlord.

The landlord submitted that he is entitled to loss of rent revenue for the month of December 2011, due to the tenant breaking the fixed term tenancy agreement less than one month into the tenancy.

The landlord acknowledged that the tenant did not move into the rental unit on November 1, 2011, but rather on or about November 8, 2011.

The landlord submitted that on November 9, 2011, he received an email from the tenant stating that there was no heating in the rental unit, to which the landlord responded that he had no idea why the baseboard heaters were not warming the condo, but that he would call the building manager the next day. In that email, the landlord mentioned that the baseboard heaters were electric.

The tenant responded that night, stating that she wanted to know what was going to be done about the heating.

The landlord then responded by stating that he would like to come by at noon, the next day, to test the heating units in the condo. The tenant responded by saying that that time was "no good" and informed the landlord she would have the repairs made.

The landlord contended that this response by the tenant denied him access to the rental unit.

The landlord informed the tenant via email on November 10, 2011, that his guess was that the baseboard heaters were working to specification, but that if they became too hot, a danger would develop. As well, the landlord informed the tenant that the gas fireplace should be used in conjunction with the baseboard heating in the living area.

On November 13, 2011, the landlord received an email from the tenant stating that she has had no heat since November 8, and informed the landlord that the heating company was returning the next day.

On November 14, 2011, the landlord received an email from the tenant stating that heating company had attended the rental unit and that the heating system could not be rectified, with another request that the landlord “do something about this ASAP.”

The landlord responded in an email that he would call the building manager the next day for an update.

The landlord sent the tenant an email the next day stating that he left a message the next day and reiterated that the tenant could use the gas fireplace for a heating source.

The tenant’s email response informed the landlord that there was no heat in the baseboard heating in the bedrooms.

The landlord received the tenant’s email on November 18, 2011, requesting a mutual end to the tenancy, to which the landlord issued a counter proposal of ending the tenancy. The tenant issued the landlord her notice to vacate by November 30, 2011, via email on November 23, 2011.

The landlord contended that although the tenant complained of lack of heating, the heating system, according to reports he received was functioning properly and that the tenant ought to have used the gas fireplace in conjunction with the baseboard heating. .

The landlord also contended that directly upon receiving the tenant’s notice, he began advertising the rental unit for rent; however the rental unit sat empty during December 2011.

Tenant’s Application:

The tenants’ monetary claim is in the amount of $5,803.50, which includes $123.26 for a heater/pest control materials, $17.90 for a window seal, $1,008.00 for painting/repairs of the rental unit, $335.99 for a carpet to cover stains, $47.04 for a change of address, $1,727.19 for moving costs, $16.68 for a window/child’s room, $1,047.00 for child support rent portion, $330.40 for window covering in the master bedroom, and “damage” deposit in the amount of $1,150.00.

The tenant’s relevant evidence included a written summary of her claim and response to the landlord’s application, receipts for the items claimed, a witness statement, repair requests for other units in the residential property, photographs of the rental unit, photographs of the rental unit, including the glass panel to the fireplace lying on the floor, an email train between the parties and statements from a vet’s office.

In response to the landlord’s application and in support of her own application, the tenant submitted that she was unable to move into the rental unit on November 1, 2011, due to the lack of cleanliness in the rental unit, to which she had to address with the landlord. The tenant confirmed that the landlord paid a professional cleaning company to clean the rental unit after her complaints.

The tenant submitted that she immediately noticed the lack of heating in the rental unit upon moving in, on November 8, 2011, and contacted the landlord.

The tenant submitted that she learned, contrary to the landlord's assertion, that the baseboard heating was water powered, not electric, and that the heating would not be sufficient to provide adequate heating.

The tenant submitted that the landlord's response to her complaints about the lack of heating was to inform her that she should use the gas fireplace in the living room and also to offer her portable heaters.

The tenant submitted that she continually informed the landlord she would not use the gas fireplace due to concerns for the safety of her toddler, as the gas panel exploded on one occasion, which was not adequately repaired, and also due the fear of her small child burning her hands on the glass panel.

The tenant also submitted that the baseboard heating in the bedrooms never worked and landlord failed to attend to ever correct the problem despite numerous requests, which compelled the tenant to issue her notice to vacate.

The tenant claimed that she was entitled to be reimbursed for having the rental unit painted, for repairs, and carpet due to the state of uncleanliness and dirty carpets which were not evident when she first viewed the rental unit. The tenant submitted that it was not until she moved in that significant stains became visible, which proved that there were pets in the rental unit prior to her moving in, in contradiction to the statements of the landlord. As support, the tenant produced statements from a vet's office, showing a pet resided at the same address of the rental unit, prior to her tenancy.

The tenant also claimed she is entitled to reimbursement for window coverings, heaters, change of address and moving costs as the landlord's insufficient response to address the heating situation forced her to move earlier than anticipated.

Analysis

Based on the testimony, evidence and a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim as follows:

First proof that the damage or loss exists, **secondly**, that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement, **thirdly**, to establish the actual amount required to compensate for the claimed loss or to repair the damage, and **lastly** proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met all four elements, the burden of proof has not been met and the claim fails.

Landlord's Application

I accept that the tenant ended her tenancy early by vacating the rental unit as of the end of November, 2011, in violation of Section 45 of the Residential Tenancy Act. The tenant was required to end this tenancy by providing the landlord with 30 days written notice unless the tenant could show that the landlord had breached a material term of the tenancy agreement and had not corrected the problem within a reasonable timeframe pursuant to section 45(3) of the *Act*.

Section 32 of the Act requires a landlord to provide and maintain a residential property in a state that complies with the health, safety and housing standards required by law and having regard for the age, character and location of the rental unit, make it suitable for occupation by a tenant.

Section 33 requires the landlord to make emergency repairs where they are urgent, necessary for the health or safety of anyone or for the preservation or use of the residential property; and are required for the primary heating system.

The tenant argued that she was entitled to end this tenancy early due to the landlord's failure to address the lack of heating in the rental unit.

I accept the tenant's argument. The tenant, as well as the landlord, submitted written documentation of her requests and proved to my satisfaction that the landlord failed to respond to her reasonable requests. I also find that the lack of heating was an emergency repair.

In reaching this conclusion I find the written evidence shows that the tenant was clear and consistent in her many requests to the landlord that the heating system in the bedrooms did not provide adequate heat to warm the rooms and that the landlord's main response was to inform the tenant to use the gas fireplace. I do not accept the landlord's position that the gas fireplace in the living room was sufficient to provide heat to the bedrooms. I also find that the landlord failed to provide sufficient evidence that he timely attended to the tenant's reasonable requests, as the evidence shows that he relied on one response from the tenant that he would not be permitted into the rental unit or any documentation that he hired someone to attend to the tenant's requests. I therefore am not satisfied that the landlord's response was sufficient to meet his requirement to make emergency repairs.

I further relied on the testimony and evidence that the primary response by the landlord to the tenant's request was to call the building manager, rather than take affirmative action himself. I find that the landlord failed to provide any documentation that the heating system in the bedrooms was heating properly.

Due to the above, I find the landlord fundamentally breached the tenancy agreement and the Act. I find the only remedy was to end the tenancy.

Under sections 62 and 44(1)(f) of the Act, I order the tenancy ended effective November 30, 2011, the date given on the tenant's written notice to the landlord of her intent to vacate.

As I have found that the tenancy ended on November 30, 2011, due to the landlord's own actions, I find the landlord is not entitled to loss of rent revenue for December, 2011 and I therefore **dismiss** his monetary claim for $2,300.00.

As to the landlord's claim for $100.00 for a strata move out fee, the landlord has submitted insufficient evidence that the tenant was responsible for this amount due to a violation of the tenancy agreement or Act or that the landlord incurred a cost in this amount. I therefore **dismiss** his monetary claim for $100.00.

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 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 named by the *Residential Tenancy Act* and I therefore **dismiss** his monetary claim for $176.00.

Due to the above, I dismiss the landlord's application in its entirety, without leave to reapply.

As I have dismissed the landlord's application, I decline to award him recovery of the filing fee.

Tenant's Application:

As to the tenant's monetary claim for painting, carpet, window coverings and seal, I find these are choices made by the tenant for which a landlord cannot be held responsible under the tenancy agreement or the Act. I therefore dismiss the tenant's monetary claim for painting of $1,008.88, carpet for $335.99, master window coverings of $330.40, child's window of $16.68 and window seal for $17.90.

As to the tenant's claim for a moving fee of $1,727.19 and change of address fee of $47.04, these are choices made by the tenant on how to facilitate her moving and I find the tenant has failed to provide sufficient evidence to hold the landlord responsible for choices made by the tenant. I therefore **dismiss** the tenant's claim for these amounts**.**

As to the tenant's claim for pest infestation, while I accept that there were spiders and sacs present, I find that the landlord attempted to eradicate the pests, to which the tenant declined to allow him that preferred choice. I therefore find that the tenant cannot hold the landlord responsible for this cost and I **dismiss** her claim for $123.26.

As to the tenant's claim for child support rent portion, upon query, the tenant responded that this supplement to her child's upkeep will not be repaid by the tenant. As the tenant did not establish that she suffered a loss in this amount, I **dismiss** her claim for $1,047.00.

As I have dismissed the landlord's application, I find that the tenant is entitled to a return of her security deposit, in the amount of $1,150.00.

As I have found merit with the tenant's application, I award her recovery of the filing fee of $100.00.

Due to the above I find the tenant has established a total **monetary claim** in the amount of **$1,250.00**, comprised of her security deposit in the amount of $1,150.00, and for recovery of the filing fee of $100.00.

I am enclosing a monetary order for **$1,250.00** with the tenant's Decision. This order is a **legally binding, final order**, and it may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement should the landlord fail to comply with this monetary order.

Conclusion

The landlord's application is dismissed, without leave to reapply.

The tenant is granted a monetary order in the amount of $1,250.00.

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 24, 2012.

Residential Tenancy Branch