Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNSD, MNDC , FF

Introduction

This Dispute Resolution hearing was convened to deal with an application by the tenant. The tenant was seeking a refund of $950.00 for a rent increase not properly implemented in accordance with the Act and that a subsequent Notice of Rent Increase be cancelled. The tenant was also requesting an order to force the landlord to make repairs.

Issues to be Decided

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

- Is the tenant entitled to a refund rent due to a noncompliant rent increase imposed by the landlord?
- Should the landlord be ordered to complete repairs?

Background and Evidence

The parties testified that this tenancy originally began in 2003. Rent was $800.00.

Submitted into evidence was written testimony, copies of communications, a copy of a Notice of Rent Increase purporting to be effective on September 1, 2012. No written tenancy agreement was submitted into evidence.

With respect to the disputed rent increase, the tenant testified that during the tenancy the landlord made a request for $50.00 additional rent , but never issued a valid notice of rent increase on the proper form. The tenant testified that, since January 2011, he paid an additional $50.00 per month and this extra rent was paid for 20 months totaling $1,000.00, for which the tenant is seeking a refund,.

The landlord acknowledged that no rent increase notice was issued on the approved RTB form and also acknowledged that the amount of additional rent collected did exceed the percentage permitted under the Act. However, the landlord pointed out that, although costs had risen substantially over time, no rent increase had ever been imposed on the tenancy since 2003. The landlord also objected to the tenant's claim for

a rent refund on the basis that the tenant had willingly agreed to pay additional rent, as confirmed in the tenant's written evidence. The landlord pointed out that the tenant paid this additional rent without complaint until recently. The landlord was disputing the tenant's entitlement to a rent refund of $1,000.00.

The tenant testified that, when he rented the unit, the yard was enclosed with a fence on all sides. The tenant testified that in 2007 the fence suddenly blew down and when the tenant requested repairs, the landlord did not respond. The tenant testified that the fenced yard was an important feature of the rental property and its loss caused him the inconvenience of finding other people and animal droppings in his yard, that would otherwise not be there, had the landlord repaired or provided a replacement fence. The tenant felt that the loss of a security perimeter had devalued the tenancy.

The landlord testified that, although the yard, by appearance, was fenced on three sides, only the back fence actually belonged to the property, and the landlord did replace that specific section. According to the landlord, the two side fences were not part of the property, but belonged to the adjacent neighbours. The landlord's position was that the removal, or destruction, of the two side fences was not a matter within the landlord's control and it was solely up to the neighbours, who owned the fences to fix or replace the two affected sections . The landlord stated that no representations were made to the tenant, when he agreed to rent the unit, that the yard included a full perimeter fence as part of the tenancy. The landlord further testified that the rear fence was an effective barrier at the back of the property and that the tenant was not particularly inconvenienced by the property being open on the sides, as this is a common state in the rest of the neighbourhood where yards are not divided by fences. The landlord stated that the loss of two sections of the neighbour's fence does not warrant any compensation.

The tenant stated that a wooden drain cover in the yard had deteriorated and he was seeking an order for repairs. With respect to this issue, the landlord agreed to look into the matter and take appropriate action if warranted.

The tenant gave testimony about maintenance work done by the tenant on behalf of the landlord during the tenancy as part of an informal agreement. The landlord denied that any agreement was ever reached to delegate extra maintenance tasks to the tenant.

Analysis

Claim for Overpaid Rent

With respect to the tenant's claim for over-paid rent, I find that the evidence confirmed that additional $50.00 per month in rent was collected for 20 months. Section 43(1) of

the Act states that a landlord may impose a rent increase only up to the amount (a) calculated in accordance with the regulations,(b) ordered by the director on an application under subsection (3), or (c) agreed to by the tenant in writing. I find that the tenant did not agree to the rent increase prior to it being implemented by the landlord.

Even if it was proven that the parties both agreed in writing to a rent increase that exceeded the percentage allowed under the Act and Regulation, I find that section 41 of the Act states that the landlord is still required to follow the process provided by the Act in implementing a rent increase. Section 42(2) and 42(3) of the Act states that a landlord must give a tenant a Notice of Rent Increase at least 3 months before the effective date of the increase and the Notice of the Rent Increase must be in the approved form.

In this instance, I find that the landlord did not follow the proper process as described in section 42 by failing to serve the tenant with the formal Notice of Rent Increase on the approved form at least three months in advance of the effective date.

Section 43(5) states, "*If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase*". Based on the Act, I find that the tenant is therefore entitled to be compensated in the amount of $1,000.00 for additional rent collected by the landlord without authority.

Request for an Order for Repairs

Section 32 of the Act imposes responsibilities on both the landlord and the tenant for the care and cleanliness of a unit. A landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant. (My emphasis)

With respect to the tenant's request for an order to force the landlord to repair the fence, I find that the landlord did dutifully restore the portion of the fence at the back perimeter of the property, which the landlord believes is owned by the landlord, but failed to repair or re-build the two side sections of the fence that the landlord believes are owned by the neighbours.

I find that, under section 32 of the Act, the landlord would be required to repair damages to the premises owned by the landlord to ensure that the rental property complies with the health, safety and housing standards required by law. However, I find that the two fence sections in question were removed, not left in a damaged condition. I further find that there is no violation of the "health, safety and housing standards required by law" due to a lack of fencing. For this reason, I find that the landlord is not contravening the

Act and there is no basis to order that the landlord repair the fence. I also find that I lack authority under the Act to order that the landlord replace fencing that was owned by, and possibly legally removed by, others.

In regard to the tenant's testimony that being deprived of a fenced perimeter has devalued the tenancy, I find that this claim would have to be based on the contract, or tenancy agreement, because the Act does not require that a yard be fenced.

Section 6 of the Act states that all of the rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement and that a landlord or tenant may make an application for dispute resolution if the they cannot resolve a dispute.

Section 58 of the Act provides that, except as restricted under this Act, a person may make an application for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:

(a) rights, obligations and prohibitions under this Act;

(b) rights and obligations under the terms of a tenancy agreement that

(i) are required or prohibited under this Act, or

(ii) relate to the tenant's use, occupation or maintenance of the rental unit, or the use of common areas or services or facilities.

While I have the power under the Act to enforce a tenancy agreement , I find that there is no written tenancy agreement in evidence. I find that a detailed description of what facilities were to be provided as part of this tenancy have not been defined in written form. However, the tenant's position is that the standard was set by the fact that previously existing fenced yard featured when he rented the unit, was transformed into an unfenced yard, which reduced the quality of the tenancy.

Section 27 of the Act states that a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or if providing the service or facility is a material term of the tenancy agreement.

However a service or facility, other than an essential or material may be restricted or terminated provided that the landlord(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and (b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

In this instance, while I find that the removal of the side fencing may have affected the quality of the tenancy from the tenant's perspective, the fact is that the landlord was technically not responsible for terminating or restricting this facility, that is the fenced perimeter, because the fence was destroyed either by the weather or by other individuals, who may have had the legal right to remove the fence, presuming, of course, that these others owned the structure.

In this regard, I am unable to find that the landlord was in violation of the Act nor the tenancy agreement with respect to the fence removal. However, I find that the landlord should now take steps to find out for certain, if possible, who the fence legally belonged to. If it is established that the landlord owned either one, or both, of these side sections of the fence, then the landlord would be responsible for the fence's condition under the Act and the tenant would then be at liberty to make another application seeking repairs or replacement of the fence.

With respect to the deficient drain cover, I find that this matter was resolved by the landlord's intention to look into the matter and rectify it if warranted. If, however, the issue is not resolved to the tenant's satisfaction, the tenant is still at liberty to bring this issue to a dispute resolution hearing.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to monetary compensation totalling $1,050.00, comprised of $1,000.00 representing $50.00 per month for 20 months and the $50.00 cost of the application. The tenant is ordered to deduct $800.00 from rent owed for September 2012 and $250.00 from the rent owed for October 2012.

The remainder of the tenant's application is dismissed with leave.

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: August 22, 2012.

Residential Tenancy Branch