Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Wheeler Cheam Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNR, MNSD, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has requested compensation for unpaid rent, to retain the security deposit and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The tenant applied requesting return of the security deposit and to recover the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Issue(s) to be Decided

Is the landlord entitled to compensation for unpaid October 2013 rent?

May the landlord retain the $325.00 security deposit or should it be returned to the tenant?

Is either party entitled to filing fee costs?

Background and Evidence

The tenancy commenced in May 2012; it was a fixed-term that converted to a month-to-month tenancy at the end of October 2012. Rent was $650.00 due on the 1st day of each month. A security deposit in the sum of $325.00 was paid.

A copy of the tenancy agreement was supplied as evidence. Clause 14 of the standard Residential Tenancy Branch tenancy agreement form set out the method required for ending the tenancy; in compliance with the Act.

A move-in condition inspection report was completed.

The parties agreed that on September 7, 2013 the tenant sent the landlord an email indicating she would vacate at the end of the month. The landlord responded via a September 8, 2013 email, which stated "we confirm receipt of your notice to vacate," the landlord did not tell the tenant she could be held responsible for any loss of rent revenue or that her notice was not acceptable.

The landlord said they did not receive a written, signed notice to end tenancy and while they confirmed receipt of the tenant's email the day after it was received, they could not be sure she would in fact vacate. The landlord said that in the absence of a signed notice, the tenant would be free to change her mind and might remain in the unit. The landlord did not request a signed notice from the tenant; he said that it was her responsibility to provide proper notice ending the tenancy.

On September 23, 2013 the landlord emailed the tenant to confirm a condition inspection for September 30, 2013, indicating his assistant would be contacting the tenant. A move-out inspection was completed on September 30, 2013 and the landlord commenced advertising the unit on several popular web sites and in the newspaper. A copy of the newspaper ad and 1 web site ad were supplied as evidence. The unit was rented effective November 1, 2013.

During the hearing the landlord was asked the dates of other advertising he said had occurred; those ads could not be located.

The landlord said that he had another hearing yesterday where the same set of circumstances occurred and the notice given by a tenant was determined to be contrary to the legislation as the tenant had not signed the notice.

The tenant said she gave notice as she suspected the landlord had entered the unit without her permission and there had been an ant problem the landlord never addressed.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Section 52 of the Act provides:

Form and content of a notice to end tenancy

52 *In order to be effective, a notice to end a tenancy must be in writing and must*

(a) be signed and dated by the landlord or tenant giving the notice,
(b) give the address of the rental unit,
(c) state the effective date of the notice,

(d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy, and
(e) when given by a landlord, be in the approved form.

Even though the parties communicated via email, the tenant was required to give a written, signed notice ending the tenancy, in accordance with section 52 of the Act.

Section 45 of the Act requires a tenant to end a periodic tenancy at least the day before the day in the month rent is owed. Therefore, if proper notice had been given on September 7, 2013 I find that notice would have been effective on October 31, 2013. However, the tenant did vacate on September 30, 2013; after the landlord had confirmed her September 7, 2013 email notice and arranged the condition inspection for September 30, 2013.

I have considered section 7 of the Act, which requires a party to mitigate a loss they are claiming. Residential Tenancy Branch policy suggests that when a tenant breaches a term of the tenancy agreement, the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. In this case the landlord became aware on September 8, 2013. Efforts to minimize the loss must be "reasonable" in the circumstances. The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed and if the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved.

A breach, by either party, of a tenancy agreement or the Act does not bestow an automatic right to compensation; mitigation is required. I find, that when the landlord responded to the tenant on September 8, 2013, confirming receipt of the notice ending tenancy the landlord understood that if the tenant did vacate on September 30, 2013 a possible loss of rent revenue could result. It would have been reasonable for the landord to request proper notice, rather than confirming the notice and then later claiming the notice was insufficient. The landlord took no steps to address the possible loss of rent by either warning the tenant she could be held responsible for a loss of rent revenue and by requesting a written signed notice; which the landlord knew was required.

I find it would have been reasonable for the landlord to inform the tenant that, in fact, he was not “confirming” her notice, but rejecting that notice, as it was insufficient. The landlord was well aware that the tenant needed to give a signed, written notice and the “confirmation” of her notice did nothing to disabuse the tenant of this responsibility. Rather, the landlord confirmed the notice and went on to arrange a move-out inspection; actions I find indicate that he had in fact accepted the notice.

If the landlord had told the tenant he needed a signed, written notice the tenant may well have given a signed written notice. The landlord could have then taken steps to locate new occupants for the earliest possible date, which would have demonstrated a sincere attempt to mitigate the claim. It is not the landlord’s responsibility to ensure a

tenant understands their rights and obligations, but the landlord has a responsibility to mitigate claims made.

I understand the landlord said he rejected the notice as it was not signed by the tenant and failed to comply with section 52 and 45 of the Act; however, the requirement to mitigate the claim by the landlord has resulted in dismissal. In the absence of steps taken by the landlord, that could have mitigated the loss claimed, I find that the claim for the loss of rent is dismissed.

During the hearing the landlord was given an opportunity to locate ads that were not supplied as evidence. Additional ads could not be located.

Therefore, I find that the tenant is entitled to return of the $325.00 security deposit and I grant the tenant a monetary Order in that amount. In the event that the landlord does not comply with this Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

I decline filing fees as the tenant's application was not required. When a landlord claims against a deposit, any balance is ordered returned to a tenant. The landlord submitted their claim prior to the tenant's.

Conclusion

The tenant is entitled to return of the security deposit.

The landlord's claim is dismissed.

Filing fee costs are declined.

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: January 27, 2014

Residential Tenancy Branch