Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: OPR, MNR, MNDC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for an Order of Possession based on a Notice to End Tenancy for Unpaid Rent dated January 23, 2014, a monetary order for rent owed and an order to retain the security deposit in partial satisfaction of the claim.

Although served with the Application for Dispute Resolution and Notice of Hearing by registered mail sent on February 5, 2014 and amended copy sent on February 13, 2014, as evidenced by the Canada Post tracking numbers submitted into evidence, the tenant did not appear.

At the outset of the hearing, the landlord stated that the tenant vacated the unit on February 8, 2014. The landlord no longer requires an Order of Possession, but still seeks a monetary order for the rent owed and for cleaning and other damages.

Issue(s) to be Decided

Is the landlord entitled to compensation for rental arrears?

Is the landlord entitled to compensation for damages and loss?

Background and Evidence

The landlord testified that the tenancy began on November 3, 2013 with rent of $1,200.00 per month, at which time the tenant paid a security deposit of $600.00. The landlord testified that the tenant failed to pay $300.00 of the rent owed for December 2013, and failed to pay $1,200.00 rent for January 2014. The landlord testified that a 10-Day Notice to End Tenancy for Unpaid Rent was issued and served on the tenant in person on January 23, 2014.

The landlord testified that the tenant vacated without paying the $1,500.00 in rental arrears and the rental unit was left in a condition that prevented it from being re-rented in February 2014, although, according to the landlord, advertisements were posted as of

February 15, 2014. The landlord is claiming $1,200.00 loss of rent for the month of February 2014.

The landlord testified that the tenant is responsible for utilities and the 10-Day Notice to End Tenancy for Unpaid Rent shows that, as of January 23, 2014, the tenant was $500.00 in arrears for utilities. No date is shown on the form with respect to when the landlord had issued the written demand for the utility payments and when the written demand was served on the tenant.

A copy of an invoice for hydro services in the landlord's name, dated January 17, 2014, was in evidence indicating that $179.34 is owed on the hydro account. However, the landlord is claiming $500.00 "*unpaid utility rounded*".

In addition to the rent owed, loss of revenue and utility arrears, the landlord is claiming the following:

- $100.00 – "*bounced cheque fee*"
- $120.00 – carpet shampoo
- $200.00 appliances and bathroom cleaning
- $50.00 for curtain and rod
- $10.00 for missing/burnt out light bulbs
- $100.00 for garbage removal
- $150.00 for missing blinds
- $50.00 for plumber's services

No receipts or invoices for items, cleaning costs or other services were submitted into evidence by the landlord.

The landlord did submit bank statement s showing that two of the tenant's cheques had been returned and that a charge of $7.50 for each cheque would be imposed on the landlord .

The total claim by the landlord is for $3,980.00.

The landlord submitted a copy of the move-in and move-out condition inspection reports. Only the move-in condition inspection report was signed by the tenant. The landlord explained that the tenant left a telephone message to say that they were vacating the unit on February 8, 2014. The landlord testified that he attended the unit on that date, but the tenant did not show up.

Also in evidence was a copy of the tenancy agreement with a term in the addendum confirming that the parties agreed that returned cheques would result in a charge of $50.00 each.

Analysis

Rent and Utilities

With respect to rent owed, I find that section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement. In this instance, I find that the tenant did not pay the rent when it was due and the landlord is entitled to rent of $300.00 for December 2013, $1,200.00 rent for January 2014 and $300.00 partial rent for over-holding the rental unit during the month of February 2014.

I find that the section 46(6) of the Act provides that, if a tenancy agreement requires the tenant to pay utility charges to the landlord, and they remain unpaid more than 30 days after a written demand for payment has been issued, then the landlord may treat the unpaid utility charges as unpaid rent and may serve the tenant with a Ten Day Notice to End Tenancy for Unpaid Rent and Utilities.

Although the landlord indicated that $500.00 was owed for utilities on the Ten Day Notice, I find that the space where the landlord is required to indicate *when* the written demand for the utility payment was made, was left blank by the landlord. I find that, under the Act, utilities are not considered as rental arrears until 30 days ***after*** the written demand is served. No copy of a written demand was in evidence However, the landlord submitted an invoice for hydro in the amount of $179.34 and, based on this evidence, I find that the landlord is entitled to be compensated $179.34 for the cost of hydro.

Returned Cheque Charges

The landlord is claiming $100.00 for 2 incidents of returned cheques. According to the landlord, the $50.00 fee for an NSF cheque is based on a term in the tenancy agreement agreed to by both parties. The tenancy agreement in evidence confirms that this charge exists as a term in the agreement consented to by both parties.

I find that Section7(1)(d) of the Residential Tenancy Regulation only allows a landlord to charge an administration fee of not more than $25 for the return of a tenant's cheque by a financial institution or for late payment of rent.

Section 7(2) of the Act states a landlord must not charge the fee described in paragraph 7(1) (d) unless the tenancy agreement provides for that fee.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if a) the term is not consistent with the Act or Regulations, b) the

term is unconscionable, or c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 5 of the Act states that landlords or tenants may not avoid or contract out of the Act or Regulation and that any attempt to avoid or contract out of the Act or Regulations is of no force or effect.

I find that I am unable to enforce the term in the tenancy agreement requiring a payment of $50.00 for the return of a cheque by the bank because the amount contravenes the limit under the legislation.

In the interest of maintaining my neutrality as an Arbitrator, I am also not prepared to adjust or reinterpret the flawed term in the agreement to read, "$25.00", in order to comply with the Act. I find that intervening in this manner would compromise administrative fairness and natural justice.

Therefore the portion of the landlord's application seeking $100.00 for the two returned cheques is not enforceable under the Act and must be dismissed.

Damages

An Applicant's right to claim damages from another party is dealt with under section 7 of the Act which 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 an Arbitrator the authority to determine the amount and to order payment under these circumstances.

In a claim for damage or loss under the Act, the party making the claim 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, and
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, I find that the landlord is required to prove the existence and value of the damage or loss stemming directly from a violation of the agreement or a contravention of the Act by the respondent and to verify that a reasonable attempt was made to mitigate the damage or losses incurred.

In regard to the landlord's claim for compensation for loss of revenue for the remainder of the month of February 2014, in the amount of an additional $1,200.00, I find that the landlord is required to prove that reasonable steps were taken to mitigate the loss, by providing proof that the unit was advertised and that efforts were made to market it.

Although the landlord gave verbal testimony with respect to this matter, I find that no evidentiary material was submitted to verify that the landlord met element 4 of the test for damages.

With respect to the cleaning, repairs and disposal costs, I find that section 37(2) of the Act states, upon vacating a rental unit, the tenant must leave it reasonably clean and undamaged, except for reasonable wear and tear.

I find that the landlord is relying on the move-in and move out condition inspection reports to support the landlord's allegation that the rental unit was not left in good repair and was not returned in a reasonably clean condition.

However, I find that the landlord's move-out condition inspection report was not signed by the tenant. The landlord testified that this was due to the tenant's failure to cooperate.

Section 35 of the Act states that, in arranging the move-out inspection, the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. Part 3 of the Regulation goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

Section 17 of the Regulation also states that a landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

If the tenant is not available at a time offered the tenant may propose an alternative time to the landlord, who must consider this time before proposing a second opportunity, different from the other opportunity by providing the tenant with a notice in the approved form.

The Residential Tenancy Regulations state that,when providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

The Act states that the landlord must make the inspection and complete and sign the report without the tenant only if:

> (a) the landlord has complied with the Act by offering 2 opportunities to inspect on the approved form**,** and
>
> (b) the tenant does not participate on either occasion.

I find that the landlord apparently presumed that the move out condition inspection would be done on the final day of the tenant's occupancy and this did not occur. In any case, I find that the landlord did not offer the tenant two different inspection dates, nor did the landlord issue a "Notice of Final Opportunity to Schedule a Condition Inspection" on the approved form as required under the Act, before completing the move out condition inspection report in the tenant's absence.

I find that the landlord's failure to comply with the requirements of the Act and Regulation with respect to conducting the move out condition inspection report, adversely affects the weight of this evidence pursuant to section 21 of the Residential Tenancy Regulations

In addition to the above, I find that the landlord has not sufficiently supported the monetary amounts being claimed for cleaning and damages with details and receipts. I find that the landlord has not satisfied element 3 of the test for damages.

Even if I find that the landlord's right to claim against the security deposit was *not* extinguished under section 36(2) of the Act, I still find that, the value of the move-out condition inspection report was affected by serious procedural deficiencies that function to negatively impact the evidentiary weight of this report.

Based on the evidence before me, I find that the $120.00 claimed for carpet cleaning, $200.00 claimed for general cleaning, $50.00 claimed for the missing curtains and rod, $10.00 claimed for light bulbs, $100.00 claimed for garbage removal, $150.00 claimed for missing blinds and $50.00 claimed for plumber's services, must all be dismissed because they fail to satisfy all elements of the the test for damages.

I find that the landlord has established total monetary entitlement of $2,329.34 comprised of $2,100.00 rental arrears for December 2013, January 2014 and part of February 2014, $179.34 in unpaid utilities and the $50.00 cost of the application. I order the landlord to retain the security deposit of $600.00 in partial satisfaction of the claim leaving a balance to the landlord of $1,729.34.

I hereby grant the Landlord an order, under section 67 of the Act, for $1,729.34. This order must be served on the Respondent and is final and binding. If necessary it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The remainder of the landlord's application is dismissed without leave.

Conclusion

The landlord is partly successful in the application and is granted a monetary order for rental arrears and utilities. The request for the order of possession is found to be moot as the tenant vacated prior to the hearing

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 27, 2014

Residential Tenancy Branch