Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PPG Management Corporation and Platinum Properties Group Corporation and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with an application by the tenants for a monetary order. Although both respondents were properly served by registered mail a representative for only one company appeared.

The hearing was originally scheduled for January 10, 2014. The female tenant explained that as a result of a stroke she is paralyzed on the right side, has significant mobility issues, and can have trouble remembering organizing her thoughts. She has a live-in caregiver – her daughter - to help her with the daily activities of living. Her caregiver also works part-time in a nearby town. She has to rely on prepared notes to present her evidence.

She further explained that over the past three days there had been significant snow fall in their area. Her caregiver has been trapped in the town where she works and unable to return home leaving the tenant on her own. The tenant explained that on the previous night there had been a power outage and she lost all but two pages of her prepared notes that were on her computer. She was not sure she could proceed with the presentation of her case without notes prepared in advance and without her caregiver in attendance.

I decided that the hearing should be adjourned to accommodate her needs for advance preparation and assistance.

The hearing was adjourned to a date and time convenient to both parties, January 21 at 1:00 pm.

On January 21 the hearing commenced as scheduled. The parties did not finish their evidence is the time allocated for the hearing so it was adjourned to a date and time convenient to the parties, January 28 at 1:00 pm.

The hearing continued on January 28 as scheduled. Once again the parties did not complete their evidence within the time allocated so it was continued to February 17 at 1:00 pm. Once again this was a date and time convenient to the parties.

On February 17 the landlord's witness appeared as did the tenant's caretaker. As described in previous hearings the tenant is suffering from the residual effects of a stroke and is on palliative care. According to the daughter her mother's pain medication had been mismanaged and since Saturday, February 15, her mother had been much sicker. She said the tenant was in bed, with a severe headache and was unable to read her notes, concentrate or participate in a hearing. The daughter indicated that it would be at least two weeks before her mother would be well enough to participate in a hearing.

I agreed to the tenant's request for an adjournment. I asked the caregiver to obtain a doctor's certificate confirming that her mother was not well enough to participate in a hearing today and to send one copy of that certificate to the Residential Tenancy Branch and one copy to the landlord. The caregiver agreed to do so.

Both parties said any date in April would be acceptable. The hearing was subsequently scheduled for April 7 at 1:00 pm. The parties were notified in the usual manner. The tenant did file a doctor's letter with the Residential Tenancy Branch.

On April 7 only the tenant and her caregiver appeared. I heard the balance of her rebuttal evidence and closed the hearing.

Preliminary Issues

The landlord did not file any written evidence until January 15. Some of this material related to the landlord's claim for arrears of rent and repairs. As the hearing had already commenced I refused to hear and decide the landlord's claim and advised the landlord that it would have to file its' own application for dispute resolution. I did consider the evidence in the preparation of this decision.

Prior to the hearing the tenants had amended their claim to ask for an additional $10,000.00 damages for breaches of sections 95(2)(a)and (b).

As explained in *Residential Tenancy Branch Fact Sheet 142: Administrative Penalties*, the imposition of an administrative penalty pursuant to section 95 is done by a completely different process then dispute resolution. Dispute resolution proceedings

are between a landlord and a tenant. One party files for dispute resolution, a hearing is conducted before an arbitrator, and a decision is rendered. An administrative penalty proceeding is between the government and the accused party. The allegation goes to the Director of the Residential Tenancy Branch. An investigation is conducted. After the investigation the matter may proceed to a hearing. As an arbitrator I have no jurisdiction over complaints made pursuant to section 95 and sections 95 to 96.1 do not apply to dispute resolution proceedings.

Issue(s) to be Decided

Are the tenants entitled to a monetary order and, if so, in what amount?

Background and Evidence

The tenant testified that she and her adult son were shown the rental unit by the resident manager on April 2, 2010. They agreed that the unit would meet their requirements and at the request of the resident manager they completed an application for tenancy. As part of this process the resident manager asked them to complete a credit application and to provide various pieces of personal identification, which they did. At this time they discussed a move-in date of May 7.

The male tenant subsequently called the resident manager to see if their application had been accepted. When advised that it had the parties agreed to meet on April 28 to sign the documents. The tenants gave notice to end tenancy at their current residence, effective May 6 as the rent at the unit was due on the 7th day of the month.

The tenant says they paid the security deposit on April 2; the landlord's records say April 21.

On April 28 the tenants met with the resident manager. She had the tenancy agreement and the move-in condition inspection report completed, which they all signed. The tenants received the keys to the rental unit on this date.

The relevant terms of the written tenancy agreement are that:

- The tenancy commenced May 1 for a one year term and would continue thereafter as a month-to-month tenancy.
- The monthly rent was $1124.00.
- The rent was due on the first day of the month.

- "10. Late payment, returned, or non-sufficient (NSF) cheques are subject to an administrative fee of not more than $25.00 each, plus the amount of any service fee charged by a financial institution to the landlord."

The female tenant testified that they were never given a copy of the tenancy agreement or the move-in condition inspection report. The landlord's witness said that although they did not have any proof that the documents were given to the tenants, it is their policy to provide these documents to all tenants.

The tenants started moving into the unit on May 3.

On May 7 the tenants paid a pet damage deposit of $562.00.

The female tenant argued that the verbal agreement reached with the resident manager was that the rent was due on the 7th day of the month. She also argued, based upon the wording of section 29(a) of the *Residential Tenancy Act*: "A landlord must not accept a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement"; that since the security deposit was paid on April 2 that is when the tenancy agreement was entered into and the terms discussed by the tenants and the resident manager on that date comprise the true terms of their contract.

Over the course of the tenancy there were some issues with the rent. There is evidence that the landlord did collect the rent on the first day of the month. There were some occasions when a rent cheque was returned NSF and the tenants were charged NSF fee and late fee by the landlord and NSF fees by their own financial institution.

The tenant argued that although the resident manager told them she would collect the rent on the first day of the month they did not understand this to mean the cheques would be deposited on the first day of the month. The tenant argues that since the rent was not due until the 7th day of the month they would have all cleared the bank if the landlord had deposited them on the correct day.

The tenant filed copies of some of the cheques, money orders and bank drafts given to the landlord for rent. All are signed by the male tenant. Some are dated for the first day of the month; others for other days of the month.

Some of the tenants' evidence included an e-mail from the male tenant to the property manager dated July 4, 2011: " . . as discussed I have mailed out two post dated cheques for July rent. The first cheque enclosed is for $562.00 one half of a months rent and a $25.00 for the late fee totally $587.00 date for July 15th, 2011. The second

cheque enclosed is for $562.00 for the second half of the months rent. My apologies and thank you kindly." These payments were required because the cheque given to the landlord for the July rent had been returned NSF.

In January, February and March of 2011 the male tenant was living in another community for work related reasons. Unbeknownst to the female tenant he had given the landlord's head office post-dated cheques for the January, February and March rents. Meanwhile the resident manager attended at the rental unit in January and March and received payment of the rent in cash for each of those months from the female tenant. She gave the female tenant receipts for both payments. The cheques provided for those months were cashed and deposited to the landlord's account.

The landlord's records reflect the payments made by cheque but not the payments made by cash. The landlord's witness says the company has no record of these payments.

The landlord's witness testified that the resident manager's last day of employment was March 15, 2011. He said he could not say anything about the circumstances regarding the end of her employment for privacy reasons.

After the resident manager's employment ended the landlord gave notice to all tenants that said:

> "**Effective Immediately . . .is no longer employed at . . .**
> We are currently searching for a new Resident Manager but in the interim period please ensure all rent cheques or money order are made out to . . .
> **CASH TO NOT TO BE GIVEN NOR WILL BE ACCEPTED UNDER ANY CIRCUMSTANCES. WE WILL NOT BE RESPONSIBLE FOR CASH. ALL CASH WILL BE DONATED TO CHARITY AND RENT WILL REMAIN OUTSTANDING.**"

The parties gave conflicting evidence as to whether they ever had any conversations about a possible double payment of rent by the tenants.

The female tenant testified that the male tenant sent the landlord written notice to end tenancy by a letter dated June 30 and mailed on July 2, 2011. The letter stated that they were ending the tenancy effective October 6, 2011. It also stated "Take notice that the rent is paid up to October 6, 2011."

The landlord's witness did not acknowledge receipt of this letter and stated that they would never have accepted a notice to end tenancy with an effective date of the 6th day of the month.

On August 18 the new resident manager gave the female tenant a document about the August rent. The female tenant said she gave the resident manager a copy of the June 30 letter and another letter with their forwarding address on the same date.

The landlord's witness did acknowledge receipt of the tenants' forwarding address.

The tenant testified that they moved out of the rental unit on August 22 but they kept the keys until October 6. They were of the view that since they had over paid the rent by two months they were entitled to possession for an additional two months.

The landlord's notes say the unit was vacated on August 22 and one key was left on the counter.

The landlord's witness admitted that they did not make an application for dispute resolution claiming against the security deposit or pet damage deposit. According to the witness, manpower is the issue for them.

Instead, in September the landlord sent an account for $1874.00 to a credit agency for collection. It appears from the landlord's evidence that they charged the tenants for the August and September rents, $600.00 for repainting the unit; $100.00 for general cleaning; late fees and NSF fees; deducted the security deposit and pet damage deposit, and sent the balance of what they said was due to collection.

The tenants found out about the registration with the collection agency on September 26, 2012.

They filed this application on September 30, 2013.

On their application the tenants named two respondents: one company hereinafter referred to as Company A for which the landlord's witness appeared; and a second company, hereinafter referred to as Company B. The landlord's witness made it clear he was not appearing for Company B saying that Company B had nothing to do with this building.

Analysis

The questions that need to be decided are the basics:

Who is the landlord?
When did this tenancy start?
What are the terms of the tenancy agreement?
When did this tenancy end?

Once those questions are decided then determinations of the following issues can be made:

Did the tenants file their application in time?
Were the tenants responsible for late fees and NSF fees?
What order should be made regarding the security deposit and pet damage deposit?

Although the landlord's witness said Company B had nothing to do with this building that is not exactly what the record shows:

- The male tenant gave several cheques and money orders for rent which were make payable to Company B. Someone must have instructed him to name this particular payee as it is not a name that appears on any correspondence to the tenants.
- Not only were those payments accepted they are all shown as credits on Company A's Tenant Ledger for the tenants.
- The notice about the change in residential manager provided a telephone number where inquiries could be directed. The tenant testified that the telephone number was Company B's number; a statement that was not contradicted by the landlord's witness.
- Although the account placed for collection was for arrears of rent, clean and repairs, the creditor named on the collection agency documents is Company B.

I find that both companies fall within the definition of "landlord" contained in the *Residential Tenancy Act:*

- "the owner, the owner's agent or another person who, on behalf of the landlord permits occupation of the rental unit under a tenancy agreement, or
- exercises powers and performs duties under this Act, the tenancy agreement or a service agreement."

I find that the written tenancy agreement is binding upon the parties. Even if the tenant's interpretation of section 20(a) was correct, (a point on which I make no

determination), section 14(2) states that a tenancy agreement may be amended to change a term if both the landlord and tenant agree to the amendment. Both tenants signed the written tenancy agreement thereby amending any previous oral agreement they may have had.

There is conflicting evidence as to whether the landlord gave the tenants a copy of the tenancy agreement. While I am not suggesting that the female tenant lied in the hearing she frequently mentioned the difficulties she could have with memory and thinking as a result of her health condition. Her son – who may have been able to corroborate her testimony on so many points - did not testify or submit any written statement on this issue or any other. As a result, there is nothing to tip the balance of probabilities in the tenants' favour.

Even if the landlord had not provided the tenants with a copy of the tenancy agreement the legislation does not provide any consequences for its' failure to so as it does for a landlord's failure to provide a copy of a condition inspection report to a tenant. In particular, the legislation does not say that failure to provide a copy of a written tenancy agreement makes the agreement invalid.

The tenancy agreement stated that the rent was due on the first day of the month. It also complied with section 7(1) of the *Residential Tenancy Regulation* which requires that an administration fee of not more than $25.00 for the return of a tenant's cheque by a financial institution or for late payment of rent may be charged if the tenancy agreement provides for that fee.

I find that the tenant paid the rent twice in January and March of 2011. The sequence of events that spring leads to no other rational conclusion.

While some tenants might have applied to the Residential Tenancy Branch for a monetary order for the overpayment these tenants decided they would keep possession of this unit for an additional two months, even while paying rent for another unit. They gave written notice to end tenancy by mid-August, by personal service, if not earlier by mail. Where rent is due on the first day of the month, the effective date of a notice to end tenancy given by a tenant partway through a month is the last day of the following month. (Section 53). Although the notice given by the tenants stated that the effective date of the notice was October 6, that was incorrect. The actual effective date of the notice was September 30, 2011. Pursuant to section 53 the date of the notice is automatically corrected. The rent was paid to September 30. I find that this tenancy ended September 30, 2011.

Section 60(1) provides that an application for dispute resolution must be filed within two years of the date that the tenancy ends. I find that the tenants' application for dispute resolution was filed within two years of the end of the tenancy.

The tenants gave their forwarding address in writing on August 18, 2011.

Section 38(1) of the *Residential Tenancy Act* provides that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant or file an application for dispute resolution claiming against the deposit. In the present case, the landlord has done neither.

Section 38(6) provides that if a landlord does not comply with section 38(1), the landlord must pay the tenant double the amount of the security deposit. The legislation does not allow any flexibility on this issue.

I find that the tenants are entitled to an order that the landlords pay them the sum of 2248.00 $, representing double the security deposit and double the pet damage deposit.

I dismiss the tenants' claims for repayment of all NSF fees and late payment fees, except as detailed below. As stated earlier, the rent was due on the first day of the month and the tenancy agreement did properly provide for the charging of these fees. However, it appears from the landlord's ledger that the tenants were charged a $50.00 fee on June 5, 2010 and on September 9, 2010. This is in excess of the amount permitted by the legislation and I find that the tenants are entitled to reimbursement of $50.00 for the overpayment of NSF fees.

I dismiss the tenants' claim for NSF fees charged to them by their own financial institution. When a cheque is written for a particular date the payor is promising that the money is or will be in the account on the date of the cheque. Any fees that are charged to the tenant by their own financial institution follows from the fact that the funds were not there as promised by the person writing the cheque.

The tenants paid a filing fee of $50.00 for their initial claim of $2680.50. They paid an additional fee of $50.00 when they amended their claim to include damages for breaches of section 95. As the tenants were only successful on that portion of their application which did not relate to section 95 I find they are entitled to reimbursement from the landlords of the $50.00 they paid to file their initial application.

Conclusion

I find that the tenant's have established a total monetary claim of $2348.00 comprised of double the security deposit in the amount of $1124.44, double the pet damage deposit in the amount of $1124.00, over payment of NSF fees in the amount of $50.00, and $50.00 of the fees paid by the tenants for this application, and I grant the tenants a monetary order in this amount. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that court.

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: May 06, 2014

Residential Tenancy Branch