Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CAPREIT
and [tenant name suppressed to protect privacy]

Decision

Dispute Codes:

OPR, MNR, MNSD, FF

Introduction

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

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Preliminary Matters

Landlord's Application MNR and OPR

The landlord's application indicated that they were seeking an Order of Possession and monetary order for rental arrears owed, which would be based on a Ten Day Notice to End Tenancy for Unpaid Rent. In addition the landlord was seeking compensation for damages.

At the outset of the hearing, the landlord clarified that they had never served the tenant with a Ten Day Notice to End Tenancy for Unpaid Rent.

Both parties stated that, in fact, the tenancy had been ended by the tenant effective January 25, 2014, at which time the tenant permanently vacated.

Therefore I find that the landlord's application was not for rental arrears owed for February and March 2014 pursuant to section 26 of the Act, but was actually a

claim for damages for loss of revenue based on the tenant's alleged short Notice to end the tenancy.

In addition, the landlord's request for an Order of Possession was also apparently made in error, as the tenant had already vacated the unit in January 2014. It was established that the landlord was aware that the tenant was gone as of February 5, 2014, based on the landlord's own evidence.

Therefore I find that the application before me is strictly to deal with the landlord's request for compensation for loss of revenue, cleaning and repairs.

Service of the Hearing Package

The landlord testified that, on April 11, 2014, they served the tenant with the hearing package and with the landlord's evidence. The tenant confirmed that they received the package on that date.

However, I find that the landlord's Application for Dispute Resolution was filed on February 21, 2014.

Section 89 of the Act states that an application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, must be given to one party by another, in one of the following ways:

(a) by leaving a copy with the person;

(b) if the person is a landlord, by leaving a copy with an agent of the landlord;

(c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

Section 59 states that an application for dispute resolution must be in the approved form, include full particulars of the dispute that is to be the subject of the dispute resolution proceedings, and be accompanied by the fee prescribed in the regulations. A person who makes an application for dispute resolution must give a copy of the application to the other party **within 3 days of making it,** or within a different period specified by the director. (my emphasis)

Although the tenant did attend, they testified that, they only received the Notice of Hearing, a copy of the Application and all of the landlord's evidence on April 10, 2014, five days before the hearing date.

The tenant pointed out that they could not comply with the rules of Procedure by getting their responding evidence into RTB nor served on the landlord within the required time deadlines before the hearing. The tenant pointed out that they had to rush to gather and submit their own evidence in time for the hearing on April 15, 2014.

Records show that the tenants hastily faxed their documentary evidence to Residential Tenancy Branch on April 14, 2014 including a copy of their written Notice to End Tenancy dated November 25, 2013 notifying the landlord that they would be moving out effective January 31, 2014. The tenant also provided proof of service in the form of a Canada Post Priority Mail Receipt confirming that they served their evidence package on the landlord by registered mail sent on April 10, 2014.

I find that the landlord served the tenant with the Notice of Hearing documents and evidence 49 days after making the application. I find that this was in violation of the 3-Day deadline given under the Act. I find that this delay gravely prejudiced the respondent who was not able to serve and submit their evidence in time to arrive before the hearing.

In some circumstances proceedings can be adjourned after the hearing has commenced. However, the Rules of Procedure contain a mandatory requirement that the Dispute Resolution Officer must look at the oral or written submissions of the parties; consider whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose]; consider whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding; and weigh the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and assess the possible prejudice to each party.

In the case before me, the landlord did not request an adjournment. However, given that I found the respondent was prejudiced by the landlord's 49-day delay in notifying the tenant of the hearing date, I felt it appropriate to asked both parties if they would agree that this dispute resolution hearing should be adjourned and reconvened at a later date. This was to enable the respondent tenant sufficient time to submit and serve their evidence. I explained that this would allow the tenant to properly respond to the landlord's amended claims and the 40-page package of evidence served by the landlord only 4 days prior to the

hearing. It would also permit the landlord time to review the tenant's late evidence and prepare a rebuttal if they desired to do so.

However, the landlord refused to consent to an adjournment and insisted that the matter be heard on schedule.

The tenant stated that they would willingly consent to an adjournment. The tenant testified that they were disadvantaged due to the short notice of the hearing because the landlord waited 49 days to serve them with the Notice of Hearing and they received it just prior to the scheduled date, instead of within 3 days, or February 24, 2014, as required by the Act.

However, the tenant testified that, despite the above concerns, they were still willing to proceed with the hearing if the landlord wanted to.

The tenant stated that this was because they have already received harassing letters from a collection agency engaged by the landlord to collect the alleged "*debt*" threatening them with consequences should they fail to pay. The tenant wants the matter resolved.

The tenant submitted a copy of a letter from the collection agency dated April 9, 2014, which stated the following:

> *"Cap REIT has retained Suite Collections Canada Inc. to collect outstanding arrears resulting from your tenancy at the address referenced above.*
>
> *Our record shows that your account is in arrears in the amount of $2,390.82. Please note that this debt may be registered on your consumer's report with Equifax and TransUnion. Payment of this amount is due immediately….."*
>
> (Reproduced as written)

The tenant took exception to the fact that the landlord has already sent this matter, still under dispute and awaiting a Dispute Resolution hearing under the Residential Tenancy Act, to a collection agency. The tenant disagreed that the landlord's monetary claim for damages, not yet been proven through the dispute resolution process, should be categorized as "*outstanding arrears*" or as a "*debt*" that is "*due immediately*".

The tenant feels that by putting this claim into the hands of a professional collection agency before it has even been heard and validated under the

Residential Tenancy Act, the landlord has attempted to circumvent the RTB legislation. The tenant considers this to be harassment.

The tenant pointed out that an adjournment will merely give the landlord additional time to bully them by lodging fraudulent claims of arrears with collection agencies and threats to place bad reports on their credit standing. The tenant stated that, for this reason, they want the matter heard and they also hope to be refunded their security deposit wrongfully withheld by the landlord.

Accordingly, notwithstanding the improper service of the hearing documents, a determination was made that the hearing will proceed as scheduled and the landlord's claim will be heard on its merits.

Issue(s) to be Decided

- Is the landlord entitled to monetary compensation for damage and loss?

Background and Evidence

The tenancy began on February 1, 2013 and the tenant moved out on January 25, 2014. The monthly rent was $1,155.00. A security deposit of $577.50 and pet damage deposit of $577.50 is being held in trust for the tenant. The landlord has also retained the $60.00 paid as a deposit for the entry key.

According to the landlord, the tenant vacated the rental unit without any advance written notice and did not notify the landlord in writing until February 9, 2014.

The tenant disputed this allegation and testified that on November 25, 2013, after receiving a Notice of Rent Increase, they had provided the landlord with written notice terminating their tenancy at the end of their fixed term effective January 31, 2014. The tenant submitted a copy of the Notice.

The landlord's position is that the tenancy ended on February 28, 2014 and the tenant owes rent for February in the amount of $1,180.41.

A letter from the landlord dated February 11, 2014 addressed to the tenant at the rental unit, is in evidence stating that "*due to late submission*", the landlord refused to accept the tenant's notice that they had vacated.

The landlord submitted into evidence a copy of a tenancy agreement, copies of communications, a copy of the move-in condition inspection report signed by both parties on February 1, 2013, a copy of the move-out condition inspection report signed only by the landlord on February 28, 2014 and a document titled "Statement of Account" that purports to show the tenant owes the landlord $2,390.82 and shows a "*Move Out*

Date" of February 28, 2014. This move out date is apparently based on the landlord's own determination.

The landlord testified that the tenant had not fulfilled the tenant's responsibilities under the Act because, in addition to failing to provide adequate Notice to end the tenancy, the tenant left the unit in a dirty condition in need of repairs. The landlord is claiming costs for cleaning, carpet cleaning, garbage removal and repairs totaling $1,220.00

The landlord is also claiming loss of rent for the month of March 2014 in the amount of $1,180.41 because, according to the landlord, they were not able to show or re-rent the unit during February 2014 due to the condition it was left in by the tenant.

The tenant denies leaving the unit in need of repairs that did not already pre-exist. The tenant testified that the unit was left reasonably clean and that the carpet was shampooed more than once during their one-year tenancy. The tenant made reference to the notations on the move-in condition inspection report they filled out at the start of the tenancy and pointed out that the unit was not in pristine condition when they moved in and had pre-existing areas of damage throughout.

The tenant also pointed out that they were never given any notification by the landlord of the date for the move-out condition inspection, which was conducted in the tenant's absence on February 28, 2014.

The landlord explained that the tenants were living out of province after ending the tenancy, so there would be no opportunity for them to participate in the inspection in any case. For this reason, the landlord did not offer the tenants a final opportunity to schedule the move-out condition inspection.

Analysis

The landlord is claiming damages including $1,500.00 loss of rent and $1,920 for cleaning and damages.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss 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.

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, the burden of proof is on the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred

Loss of Rent

With respect to the date that the tenancy ended, section 45 of the Act permits a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Based on the evidence submitted by the tenant, showing that the landlord was sent a letter in November 2013 terminating the tenancy effective January 31, 2014, I find that the tenant did provide adequate written notice in accordance with the Act.

In regard to the date that the tenancy is considered as ended, section 44(1) of the Act provides that a tenancy ends only if one or more of the following applies:

> (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
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> (i) section 45 *[tenant's notice]*;
> (ii) section 46 *[landlord's notice: non-payment of rent]*;
> (iii) section 47 *[landlord's notice: cause]*;
> (iv) section 48 *[landlord's notice: end of employment]*;
> (v) section 49 *[landlord's notice: landlord's use of property]*;
> (vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;
> (vii) section 50 *[tenant may end tenancy early]*;
>
> (b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
>
> (c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended.

(My emphasis)

Given the above, I reject the landlord's position setting an arbitrary date of February 28, 2014 as the end date of the tenancy. I find as a fact that the tenant gave written Notice that the tenancy would be ending effective January 31, 2014ansd it was established that the tenant physically vacated the unit on January 25, 2014.

Therefore, in accordance with section 44(1)(d) of the Act, I find that this tenancy was terminated January 25, 2014, the date the tenant physically vacated. I find that despite leaving prior to the end of the month, the tenant paid rent to the end of January 2014. I find that the landlord is not at liberty under the legislation to set their own end date for the tenancy as February 28, 2014, regardless of their stated position on the matter.

Given the above, I find that the landlord's claim for rent or loss of revenue for the months of February 2014 and March 2014, cannot be justified based on the tenant's alleged inadequate Notice to end tenancy.

With respect to the landlord's allegation that re-rental was delayed by the fact that the tenant left the unit in a dirty and damaged condition, I find that section 37 (2) of the Act states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

With respect to compliance with section 37 of the Act, I find that the tenant's role in causing damage can be established by comparing the condition before the tenancy began with the condition of the unit after the tenancy ended, through the submission of properly completed copies of the move-in and move-out condition inspection reports conducted jointly by both parties.

In this instance I find that section 23(1) of the Act was followed because both the landlord and tenant participated in, and signed, the move-in inspection report. I find that the tenant did not indicate in the spaces available whether she agreed or disagreed with the notations on the move-in inspection report.
With respect to the move out inspection, I accept that the tenant failed to participate in this process. However, I find that 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 and section 17 of the Regulation states that:

(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

(3) 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.

While a landlord can conduct the inspection without the tenant, the Act states that this can only occur if:

(a) the landlord has complied with subsection (3), and

(b) the tenant does not participate on either occasion.

Section 36 (2) of the Act states that the right of the landlord to claim against a security deposit, for damage to residential property is extinguished if the landlord does not comply with section 35 (2) *[2 opportunities for inspection]*,

I find that no evidence was presented by the landlord to prove that, during the final month of the tenancy and during the month of February 2014, the landlord had ever notified the tenant of the inspection scheduled for February 28, 2014. I find that the landlord had never offered the tenant two separate opportunities to participate.

I also find that the landlord did not submit verification that the landlord had ever offered the tenant a final opportunity to participate in the move out condition Inspection on the approved form. Finally, I find that the landlord's inspection occurred a full month *after* the tenancy ended.

Given the above, I find that the landlord's move out condition inspection report does not carry sufficient evidentiary weight to prove the landlord's claim for damages. I find I cannot rely on the contents of the move out condition inspection report given the deficiencies in administering it.

Based on the testimony and evidence presented during these proceedings, I find that the landlord's monetary claims haveo merit because they were not sufficiently proven to meet all elements of the test for damages and must therefore be dismissed.

I hereby dismiss the landlord's application in its entirety without leave to reapply.

I find that the landlord is not entitled to retain the tenant's $577.50 security deposit, $577.50 pet damage deposit, and $60.00 key deposit and these funds must be returned to the tenant forthwith.

Accordingly, I hereby grant the tenant a monetary order for $1,215.00. This order must be served on the landlord and may be enforced through BC Small Claims Court if necessary.

Conclusion

The landlord is not successful in the application and the landlord's monetary claims are dismissed without leave to reapply.

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: April 15, 2014

Residential Tenancy Branch