Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MND, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for compensation for repair expenses, for a "lease break fee," to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts.

At the beginning of the hearing, the Landlord's agent claimed that he had not received the Tenant's evidence package. The Tenant provided documentary proof (ie. a fax transmission confirmation) that his evidence package had been received by the Landlord's agent by fax on October 19, 2010. The Landlord's agent was advised of the documents (and the contents thereof) in the Tenant's evidence package and was also given an opportunity to adjourn this hearing so that he could be re-served with that package. The Landlord's agent chose to proceed with the hearing as scheduled.

Issues(s) to be Decided

1. Is the Landlord entitled to compensation and if so, how much?
2. Is the Landlord entitled to keep the Tenant's security deposit?

Background and Evidence

This fixed term tenancy started on July 1, 2009 and was to expire on June 30, 2010, however it ended on May 31, 2010 when the Tenant moved out. The Landlord was granted an Order of Possession on March 23, 2010 to take effect 2 days after service of it on the Tenant. The Landlord agreed to let the Tenant continue to occupy the rental unit for a further 2 months and on April 30, 2010 the Parties signed a Mutual Agreement to End the Tenancy on May 31, 2010. Rent was $1,600.00 per month. The Tenant paid a security deposit of $800.00 at the beginning of the tenancy.

The Landlord sought to recover a "lease break fee" of $800.00 pursuant to a term of the tenancy agreement that states as follows:

> "(2a) If the terms of this lease [are] broken, such as if, you fail to pay rent on time and we are force[d] to terminate the tenancy, the tenants will pay the fees for re-renting the premises which is ½ of one month['s] [rent] plus GST TAX."

The Landlord's agent did not provide any specifics as to what his actual expenses were to re-rent the rental unit but argued that because he charged the Landlord this fee, it was a fee that could be recovered from the Tenant.

The Tenant argued that he should not be responsible for this fee because he offered to pre-pay rent for June 2010 but the Landlord's agent would not permit him to. The Tenant claimed that the only reason the Landlord's agent would not allow him to stay for the full term of the tenancy was because he wanted the $800.00 lease break fee.

The Landlord also claimed $232.93 for the cost to replace a refrigerator and freezer door handle and to repair a bi-fold door. The Landlord's agent said he completed a move in condition inspection report with the Tenant on July 3, 2009 and these damages were not noted. The Landlord said that at the end of the tenancy, he completed a move out condition inspection report with the Tenant and the Tenant agreed with the damages noted on it (ie. that the refrigerator door handle was missing and that the bi-fold closet was off).

The Tenant argued that he should not be responsible for the cost of repairs as he claimed that the refrigerator door handle was loose and the freezer door handle held on with tape at the beginning of the tenancy. The Tenant also claimed that the bi-fold door was off of its hinges at the beginning of the tenancy. The Tenant said the Landlord's agent told him that it was not necessary to document these things on the condition inspection report because they would be repaired very shortly (which the Landlord's agent denied). The Tenant said the repairs were not made despite a number of requests to the Landlord's agent to make them.

The Landlord further claimed $150.00 to cut the grass on the rental property 3 days after the tenancy ended. The Landlord's agent said that the grass on the rental property was overgrown at the end of the tenancy and that it took him a total of 4 hours to cut and rake it. The Tenant argued that he should not be responsible for this cost because the Landlord's agent showed up without notice only a few days before the tenancy ended and cut the grass. The Tenant said he was told this was done so that Landscapers could fill holes in the back yard. The Tenant also said that the front yard was ripped up so that a new drive way could be installed.

The Tenant said that during the move out inspection, the Landlord's agent assured him that he would not have any amounts deducted from his security deposit. The Tenant also claimed that he only noticed a few days after the tenancy ended that the Landlord had marked "grass not cut" on the condition inspection report. Consequently, the Tenant said he contacted the Landlord's agent who assured him again that none of the items marked on the condition inspection report would affect the return of his security deposit.

The Tenant argued that the Landlord's agent misled him that the repairs were not in issue and thereby prevented the Tenant from addressing them.

Analysis

RTB Policy Guideline #4 (Liquidated Damages) says at page 1 that "a clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss."

In support of his claim for $800.00 pursuant to the "lease break fee" in the Parties' tenancy agreement, the Landlord's agent provided an invoice that describes the amount claimed as "fees to re-rent out house for breaking the 12 month lease as per rental agreement." The Landlord's agent provided no evidence of the actual steps or costs involved in re-renting the rental unit but instead argued that this was a fee he charged the owner of the property. While an owner may agree in a separate agency agreement to pay his agent a flat fee for re-renting a unit on his behalf (and no evidence of this was adduced), this amount cannot automatically be transferred to the Tenant.

The Landlord has a duty under s. 7(2) to take reasonable steps to minimize his losses. In the circumstances, I find that there is no evidence of what the Landlord's agent actually did or expenses he incurred to re-rent the rental unit and therefore there is no evidence that $800.00 was a reasonable amount to re-rent the rental unit. Consequently, the effect of this clause is to provide for the automatic forfeiture of the security deposit and accordingly, I find it is a penalty clause and unenforceable pursuant to s. 6(3)(b) of the Act. Furthermore, the Landlord signed a Mutual Agreement to End the Tenancy on April 30, 2010 and by doing so, he cannot now claim that the tenancy ended as a result of the Tenant breaching the tenancy agreement (or having to enforce the Order of Possession). As a result, this part of the Landlord's claim is dismissed without leave to reapply.

Section 32 of the Act says that a Tenant is responsible for damages caused by his act or neglect but is not responsible for reasonable wear and tear. RTB Policy Guideline #1 defines "reasonable wear and tear" as natural deterioration that occurs due to aging and other natural forces, where the Tenant has used the premises in a reasonable fashion." The Landlord's agent relied on the condition inspection reports as evidence that the Tenant was responsible for the damaged refrigerator handles and a closet door. The Tenant argued that these damages existed at the beginning of the tenancy and he relied on witness statements in support of this assertion.

Section 20 of the Regulations to the Act states "in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary." The Tenant admitted that he signed the move in and the move out condition inspection reports. The Tenant argued, however, that the Landlord's agent said he was not going to include this information on the move in condition inspection report because the items in question would be repaired. However, the Landlord's agent denied this. There is a section on the Move in Report where the Parties can list any "repairs to be completed at the start of the tenancy." This section, however, was not completed and in the circumstances, I find that there is insufficient evidence to contradict *these particular items* on the move in condition inspection report.

The Landlord's agent argued that the damages in question were caused by the Tenant's act or neglect because they would not have broken without the Tenant exerting unreasonable force on them. The Tenant and his witnesses claimed that the refrigerator door handle was loose and the freezer door handle held on with tape only days prior to the start of the tenancy. The Tenant and his witnesses also claimed that there were pre-existing issues with a bi-fold bedroom closet door which the Landlord's agent estimated was approximately 10 years old. Given the contradictory evidence of the parties and in the absence of any further evidence to resolve the contradiction, I find that there is insufficient evidence to conclude that the damages in question were caused by an act or the neglect of the Tenant as opposed to reasonable wear and tear and as a result, this part of the Landlord's claim is dismissed without leave to reapply.

A term of the Parties' tenancy agreement is that the Tenant is responsible for cutting the grass. The Parties agree that the Landlord's agent attended the rental property 3 days before the end of the tenancy to cut the grass. The Tenant and his witness also claimed that the Tenant had cut the grass 3 days prior to the Landlord doing so. Nevertheless the Landlord's agent said he had to return on June 3, 2010 to cut the grass again because it was overgrown. The invoice dated June 9, 2010 provided by the Landlord's agent in support of this claim does not indicate the day on which the services (for lawn mowing) were rendered.

I find that the Landlord's claim for $150.00 for mowing the grass is unreasonable. In particular, I find that there is a preponderance of evidence that suggests instead that the grass was not overgrown on May 31, 2010 as the Landlord's agent alleged and as he also noted on the move out condition inspection report. Consequently, I find that there is insufficient evidence to support this part of the Landlord's claim and it is also dismissed without leave to reapply.

As the Landlord's claim has been dismissed in its entirety, I order pursuant to s. 38 of the Act that the Landlord return the Tenant's security deposit of $800.00 to him forthwith.

Conclusion

The Landlord's application is dismissed without leave to reapply. A Monetary Order in the amount of **$800.00** has been issued to the Tenant and a copy of it must be served on the Landlord. If the amount is not paid by the Landlord, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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: October 27, 2010.

Dispute Resolution Officer