File #16231

IN THE MATTER between **PS**, Applicant, and **PDL**, Respondent.

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act");

AND IN THE MATTER of a hearing before **Adelle Guigon**, Rental Officer,

BETWEEN:

PS

Applicant/Tenant

-and-

PDL

Respondent/Landlord

REASONS FOR DECISION

Date of the Hearing: **November 20, 2018**

Place of the Hearing: **Yellowknife, Northwest Territories**

Appearances at Hearing: **PS, Applicant/Tenant**

Date of Decision: **November 20, 2018**

REASONS FOR DECISION

An application to a rental officer made by PS as the Applicant/Tenant against PDL as the Respondent/Landlord was filed by the Rental Office September 19, 2018. The application was made regarding a residential tenancy agreement for a rental premises located in Yellowknife, Northwest Territories. The filed application was served on the Respondent/Landlord by fax sent November 13, 2018, pursuant to subsection 71(1)(c) of the *Residential Tenancies Act* (the Act). It was also served by registered mail signed for November 19, 2018.

The Tenant alleged the Landlord had improperly terminated the tenancy agreement, had improperly evicted the Tenant from the rental premises, had improperly distrained and seized the Tenant's property, and had caused damage to the Tenant's vehicle. An order was sought for the return of monies paid to retrieve property, for costs of repairing the vehicle, and for compensation for pain and suffering.

A hearing was scheduled for November 20, 2018, in Yellowknife. PS appeared as Applicant/Tenant. PDL was served notice of the hearing by fax sent November 13, 2018, and by registered mail signed for November 19, 2018. No one appeared at the hearing on behalf of the Respondent/Landlord. The hearing proceeded in the Respondent/Landlord's absence pursuant to subsection 80(2) of the Act.

Tenancy agreement

The Tenant testified that he had entered into a fixed-term tenancy agreement with the Landlord commencing December 1, 2017, and ending November 30, 2018. I am satisfied a valid tenancy agreement was in place in accordance with the Act.

Distrain of chattels and seizure of personal property - December 2017

The Tenant entered into evidence a notice from the Landlord dated December 4, 2017, in which the Landlord stated the following:

> "Polar Developments will hold in trust your vehicle in a locked compound until you are able to provide the full security deposit for the above stated apartment, December 2018 rent and parking, post-dated cheques for January 2018 through to November 2018 for rent and parking, proof of tenants insurance, and proof of power in your name."

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A description of the Tenant's vehicle is included in the notice, and it is signed by an agent for the Landlord and by the Tenant. I take note that the reference to December 2018 should be for December 2017. The tenant testified that in effect his vehicle was held 'hostage' by the landlord until he provided the demanded items.

Security deposit

Section 14(2) of the Act provides for the tenant to pay 50 percent of the security deposit at the beginning of the tenancy and pay the remaining 50 percent within three months of the beginning of the tenancy. There is no requirement for the tenant to pay 100 percent of the security deposit at the beginning of the tenancy; the tenant may choose do so, but the tenant is not required to. The Landlord's requirement for payment of the security deposit in full at the beginning of the tenancy was in contradiction of the Act.

Rent payments

Section 41(1) of the Act requires the tenant to pay the rent as specified in the tenancy agreement and on the dates specified in the tenancy agreement. The tenant testified that the rent of $1,397 and the parking fee of $40, totalling $1,437, was due on the first of each month. As long as the rent was paid in full when due then the Tenant was not in breach of their obligation under either the Act or the tenancy agreement.

Additional obligations

Section 12(1) of the Act provides for landlords and tenants to include in a written tenancy agreement additional rights and obligations that are not inconsistent with the Act and the *Residential Tenancies Regulations* (the Regulations).

Section 45(1) of the Act requires tenants who have undertaken additional obligations in a written tenancy agreement to comply with those obligations.

If the written tenancy agreement between the parties included terms requiring that post-dated cheques be provided for rent, that the tenant must have tenants insurance, and that the tenant is responsible for power (electricity), then the tenant having agreed to those terms must comply with them. None of those terms are inconsistent with the Act.

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Distraint and seizure

Section 3(1) of the Act specifically prohibits a landlord from distraining for rent payable under a tenancy agreement on the goods and chattels of any person.

Black's Law Dictionary (Ninth Edition) defines 'distrain' as:

> "1. To force (a person, usu. a tenant), by the seizure and detention of personal property, to perform an obligation (such as paying overdue rent)."

Black's Law Dictionary (Ninth Edition) defines 'goods' as:

> "1. Tangible or movable personal property other than money; esp., articles of trade or items of merchandise <goods and services>."

Black's Law Dictionary (Ninth Edition) defines 'chattel' as:

> "Movable or transferable property; personal property; esp., a physical object capable of manual delivery and not the subject matter of real property."

Section 35(1) of the Act specifically prohibits a landlord from seizing the personal property of a tenant for any breach by the tenant of the tenancy agreement or under the Act, including the obligation to pay rent.

Black's Law Dictionary (Ninth Edition) defines 'seize' as:

> "1. To forcibly take possession (of a person or property). 2. To place (someone) in possession. 3. To be in possession (of property). 4. To be informed of or aware of (something)."

By taking possession of the Tenant's vehicle until and unless the tenant complied with the listed demands, the Landlord seized and distrained the Tenant's personal property in direct contravention of subsections 3(1) and 35(1) of the Act. Unfortunately, there are no remedies available in the Act for either of these breaches at this time. If there were I would order them.

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Rental arrears

The Tenant testified that until June and July 2018 he had successfully paid all rents (including parking fees) in full and on time. The Tenant admitted that the rent for June was late, but it was paid in full, and that the rent for July was late and had not been paid before he was improperly evicted from the rental premises.

Termination and eviction

The Tenant testified that he was away from the community for several weeks, at least during July and August. He testified that he had notified the Landlord that he would be travelling, and kept in regular and consistent contact with the Landlord while he was away. Much of the communications between the Tenant and the Landlord during the month of July were regarding resolving the July rental arrears. At no time did the Tenant make any indication to the Landlord that he did not intend to return to live in the rental premises. The Tenant testified that his intention was to fulfill the fixed-term tenancy agreement by remaining there until November 30, 2018.

The Tenant entered into evidence two notices sent by the Landlord to him by email. The notices are dated July 24, 2018, and July 27, 2018, and are entitled as notices to vacate. The notices basically claim that because the Tenant had failed to pay the rent for July the Tenant was required to vacate the rental premises by Noon on July 27, 2018.

The July 27, 2018, notice elaborated on the reasons for terminating the tenancy by suggesting that the tenant had repeatedly failed to pay rent, had been given numerous opportunities to remedy the rental arrears, and that the Landlord had "attempted to be accommodating with" the Tenant's situation from the outset of his tenancy. The Landlord indicated that for those reasons the Landlord would "no longer entertain" the tenancy beyond July 27, 2018, because doing so would likely accrue rental arrears beyond the value of the security deposit. Arrangements had already been made by the Landlord for a third party to pack and store the Tenant's items from the rental premises because the rental premises had "been rented to another party for August 1st."

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The Landlord did as they said they were going to in the July 27, 2018, notice. The Tenant was still in Quebec at the time. The Landlord re-possessed the rental premises, and packed and removed the Tenant's personal property and stored it. The Tenant's vehicle remained parked in the parking lot of the residential complex, and the Landlord placed what appears to be a loader bucket behind the vehicle preventing its removal.

Section 48 of the Act says:

> "(1) No person shall terminate a tenancy agreement except in accordance with this Act.
>
> (2) No landlord shall regain possession of a rental premises unless
>
> (a) the tenant has vacated or abandoned the rental premises; or
>
> (b) an eviction order has authorized the regaining of possession."

The Landlord may not terminate a residential tenancy agreement without either the Tenant's agreement in writing or obtaining an order from the Rental Officer.

Section 50 of the Act provides for a written agreement between a landlord and tenant to terminate a tenancy agreement on a specific date as binding on both parties. At no time did the Landlord and Tenant agree in writing to terminate the tenancy. I am not satisfied that the tenancy agreement was terminated in accordance with section 50 of the Act.

Subsection 54(1)(g) of the Act provides for a landlord to give a tenant at least 10 days written notice to terminate the tenancy agreement where the tenant has repeatedly failed to pay the full amount of the rent or to pay the rent on the dates specified in the tenancy agreement. Subsection 54(4) of the Act specifies that where a notice is given under subsection 54(1) the landlord must make an application to a rental officer for an order to terminate the tenancy agreement. The termination of the tenancy under section 54 is not enforceable or binding without an order by a rental officer.

Although the Landlord's July 27th notice to the Tenant referred to rental arrears that had been "in default for some time," the Landlord's July 24th notice and the closing statement of account both indicate that the only rental arrears the tenant carried were for July. The Tenant testified that the only rent that was late during the tenancy was for June and July. There was no evidence provided to contradict the Tenant's testimony.

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The Canadian Oxford Dictionary (Second Edition) defines ‘repeated’ as:

> “Frequent; done or said again and again.”

I interpret the definition as meaning that for something to be done repeatedly it must have been done more than twice, although not necessarily consecutively. While I am satisfied that the Tenant had been late paying rent twice, I am not satisfied the Tenant was *repeatedly* late paying rent. As a result, the Landlord did not benefit from the option to give notice to terminate the tenancy agreement under section 54 of the Act.

Even if the Tenant had been repeatedly late paying rent, the notices to vacate that the Landlord gave the Tenant were non-compliant with section 54 because they only gave the Tenant three days’ notice to terminate the tenancy agreement, not 10 days as is required. Additionally, the Landlord did not follow through with making an application to a rental officer as required under subsection 54(4) of the Act. I am not satisfied that the tenancy agreement was terminated in accordance with section 54 of the Act.

Subsection 63(1) of the Act provides for a landlord to make an application to a rental officer for an eviction order, which may only be granted by a rental officer who has either ordered the termination of the tenancy agreement or has determined that the tenancy has been terminated in accordance with the Act. In other words, a landlord may not evict a tenant from a rental premises without an order from a rental officer. The Landlord in this case did not file an application to a rental officer for any remedies, including for an order to terminate the tenancy agreement. An eviction order has not been issued by a rental officer.

Subsection 86.2(1) of the Act specifies that only a Sheriff may enforce an eviction order upon receipt of a writ of possession, and that the Sheriff must put the landlord in possession of the rental premises. In other words, a landlord may not personally re-claim possession of a rental premises under an eviction order. I am satisfied that the Landlord was not entitled to re-possess the rental premises.

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Subsection 1(2) of the Act defines when a tenant has vacated a rental premises as being when the tenancy has been terminated in accordance with the Act and: the tenant has left the rental premises and informed the landlord that the tenant does not intend to return, or the tenant does not ordinarily live in the rental premises and the rent the tenant has paid is no longer sufficient to meet the tenant's obligation to pay rent.

Subsection 1(3) of the Act defines when a tenant has abandoned the rental premises as being when the tenancy has not been terminated in accordance with the Act and: the landlord has reasonable grounds to believe that the tenant has left the rental premises, or the tenant does not ordinarily live in the rental premises, has not expressed an intention to resume living in the rental premises, and the rent the tenant has paid is no longer sufficient to meet the tenant's obligation to pay rent.

The Tenant testified that he had told the Landlord that he would be travelling for a lengthy period of time, that he was intending to resolve the July rental arrears and pay rent in full and on time going forward, and that he would be returning to Yellowknife to continue residing in the rental premises. I am not satisfied the tenant either vacated or abandoned the rental premises under subsections 1(2) or 1(3) of the Act.

Subsection 34(1) of the Act prohibits a landlord from disturbing a tenant's possession or enjoyment of the rental premises or residential complex. By improperly re-possessing the rental premises, the Landlord disturbed the Tenant's possession of the rental premises. Consequently, the Tenant is entitled to compensation from the Landlord for loss suffered as a direct result of the breach. Such compensation must be for demonstrable monetary losses and cannot be an arbitrary amount for pain and suffering. The Tenant is not seeking to return to the rental premises given that he has made alternate arrangements for accommodations. The Tenant has not suffered any monetary losses with respect to renting another place since the tenancy with the Landlord ended.

Security deposit

Subsection 18(4) of the Act specifies that the security deposit may only be retained by the Landlord against rental arrears and/or against costs of repairing damages to the rental premises. Subsection 18(3) of the Act requires that the security deposit and/or an itemized statement of account detailing why the security deposit is being retained must be provided to the tenant within 10 days of the day the tenant vacates or abandons the rental premises.

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Despite my finding that the tenant neither vacated nor abandoned the rental premises and that the Tenant was improperly removed from the rental premises, I am satisfied that the tenancy effectively ended when the Landlord regained possession on July 27, 2018. The security deposit itemized statement of account was then due August 6, 2018. The statement was not prepared, and the Tenant did not receive it, until September 12, 2018.

The closing statement of account detailed the following:

Payment received from Tenant July 17th	($200.00)
Security deposit and interest	($1,397.45)
July rent and parking	$1,437.00
"July NSF Outstanding" charge	$50.00
Packing and removal of personal property	$327.08
Carpet cleaning	$194.25
Re-keyed locks and cut new keys	$129.00
Fridge cleaning and disposal of foodstuffs	$120.00
Parking for August 1st to September 12th	$56.00
Balance owing from Tenant	$716.33

It is noted that the Landlord failed to account for the $0.45 security deposit interest credit in their calculations, which should have resulted in a balance owing from the Tenant of $715.88. However, the Tenant did pay the incorrect balance of $716.33 in order to secure the return of the personal property the Landlord had in storage, including getting access to his vehicle.

Because the Landlord failed to comply with subsection 18(3) of the Act, I could simply order the return of the security deposit in full. However, there is no dispute that the rent and parking fees for July had not been paid in full and an amount of $1,237 remained outstanding. Therefore, it is not inappropriate to apply the security deposit of $1,397.45 against the rental arrears. Doing so results in a remaining security deposit credit to the Tenant of $160.45.

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NSF outstanding charges

The Landlord claimed in the statement a $50 charge for "NSF Outstanding" charges for July. Section 13 of the Act specifically prohibits penalties for breaches under the Act or a written tenancy agreement, and subsection 41(4) of the Act does not provide for landlords to be compensated for losses suffered as a direct result of a Tenant's failure to pay the rent in full and when due. Subsection 41(2) of the Act and section 3 of the Regulations do provide for a tenant to be liable to a penalty for paying rent late, which calculated in accordance with the Regulations amounts to $35 for the July rent. I am not holding the Tenant liable for the $50 NSF charge, but I am holding the Tenant liable for the late payment penalties for the July rent of $35.

Cleaning, damages, and personal property

Having established that the tenancy was not terminated in accordance with the Act and that the Tenant was improperly evicted from the rental premises, I am satisfied that the Tenant was also not given fair opportunity to repair any damages, effect any cleaning, remove any of his personal property, or return the keys to the rental premises himself. I am not holding the Tenant liable for the costs of packing and removal of personal property, carpet cleaning, fridge cleaning, disposal of foodstuffs, re-keying the locks, cutting new keys, or parking fees incurred after July 31, 2018.

The Tenant testified that there were expensive perishable exotic spices and foodstuffs which were missing from the property that was returned to him, but he acknowledged he was unable to prove their value and accepted that compensation for the loss could not be considered.

Damages to vehicle

The Tenant testified that when he returned to Yellowknife and discovered his vehicle had been blocked into the parking stall with a loader bucket, he also discovered damages to the rear bumper of the vehicle. Two photographs of the vehicle taken September 11, 2018, were entered into evidence, however, the claimed damage is not visible in either photograph. The Tenant could not prove the condition of the vehicle before it was blocked by the loader bucket, nor could he prove how the claimed damage was caused or who caused it. The Tenant had claimed an estimated cost of repairs in the amount of $500, but could not provide evidence substantiating the claimed costs.

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The Tenant conceded he did not have sufficient evidence to establish that the damages to the vehicle were caused by the Landlord. The Tenant's claim of $500 for costs of repairing the rear bumper of his vehicle is denied.

Order

At the hearing I had determined to only order the return of the monies the Tenant paid to the Landlord in September 2018 of $716.33 to secure the return of his property. In the course of writing these reasons for decision and reviewing the evidence accordingly, I am of the opinion that the Tenant is in fact entitled to a little more than what he paid in September. Given my findings that the Tenant is liable for the rent, parking fees and late payment penalties for July 2018 and is not liable for the Landlord's claims of costs for NSF charges, cleaning, repairs, and removal of personal property, I find the Tenant is entitled to a return of monies from the Landlord calculated as follows:

July rent and parking	$1,437.00
Plus late payment penalties for July rent	$35.00
Less payment received July 17, 2018	$200.00
Less payment received September 12, 2018	$716.33
Less security deposit and interest	$1,397.45
Total owed to Tenant	$841.78

An order will issue requiring the Landlord to pay to the Tenant monetary losses suffered as a direct result of the Landlord's breaches in the amount of $841.78.

Adelle Guigon
Rental Officer