



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This matter dealt with an application by the Landlords for a monetary order for loss of rental income as well as to recover the filing fee for the proceeding. The Landlords also applied to keep the Tenants' security deposit. The Tenants applied for the return of their security deposit as well as to recover the filing fee for this proceeding?

Issues(s) to be Decided

1. Are the Landlords entitled to compensation for a loss of rental income?
2. Are the Landlords entitled to keep all or part of the Tenants' security deposit?
3. Are the Tenants entitled to the return of their security deposit and if so, how much?

Background and Evidence

This fixed term tenancy started on October 15, 2008 and was to expire on October 31, 2009 but ended on February 28, 2009 when the Tenants moved out. Rent was \$2,000.00 per month which included the use of furnishings. The Tenants paid a security deposit of \$1,000.00 at the beginning of the tenancy.

The Landlords said that in early January, 2009, they were contacted by the Tenants who said that they needed to end the tenancy early. The Tenants gave written notice on January 2, 2009 that they were ending the tenancy effective March 31, 2009. In an e-mail dated January 7, 2009 the Tenants asked if they could pay March rent by using the security deposit and providing a further payment of \$1,000.00. In a responding e-mail dated January 7, 2009 and letter dated January 21, 2009, the Landlords agreed end the tenancy early and agreed that the Tenants could pay their March rent by applying the security deposit and providing a cheque \$1,000.00 for the balance. On January 12, 2009, one of the Tenants e-mailed the Landlords again and asked them if they could end the tenancy on February 28, 2009 (as they were separating and it was difficult living under one roof) however the Landlords would not agree.

The Landlords said they discovered in January, 2009 that the Tenants had placed an advertisement on Craig's List to re-rent the rental unit (at the same rate of rent) and they asked the Tenants to remove it. The Landlords said they initially advertised the rental unit for \$2,300.00 on Craig's list but after a week did not get any hits so they re-posted it

briefly for \$2,000.00 but got only one hit. The Landlords (who live in England) said they contacted a property manager for information and discovered that the market rate of rent had fallen. The Landlords said they were unwilling to reduce the rent further so they stopped advertising on January 24, 2009 and on February 4, 2009 they listed the property for sale.

The Tenants claim that in January, 2009 the Landlords demanded that they remove their advertisement from Craig's List and refused to allow them to sublet. The Tenants admit that they initially agreed to end the tenancy on March 31, 2009. However, the Tenants claim that on February 15, 2009, a friend of the Landlords came to the rental unit and removed a sofa bed from a play area where one of them was sleeping (because the Landlords had sold it). Consequently, on February 17, 2009 the Tenants sent the Landlords a letter advising them that there was a material breach of the tenancy agreement and that the Tenants would be moving out effective February 28, 2009, cancelling their cheque for \$1,000.00 in partial payment of March, 2009 rent and demanded the return of their security deposit. The Tenants moved out on February 28, 2009. The Landlords sold the rental property on March 7, 2009 and the property was transferred to the new owners on March 24, 2009.

The Tenants also claimed that they gave the Landlords their forwarding address in writing on February 28, 2009 when they signed a move out condition inspection report but that the Landlords refused to return their security deposit and did not apply to make a claim against it within 15 days as required by the Act.

Analysis

Section 38(1) of the Act says that a Landlord has 15 days from the later of the end of the tenancy or the date they receive the Tenants' forwarding address in writing to either return the security deposit or to make a claim against it by filing an application for dispute resolution. If a Landlord does not do either of these things and does not have the Tenants' written authorization to keep the security deposit then under s. 38(6) of the Act the Landlord must re-pay double the amount of the security deposit. I find, however, that the Tenants gave the Landlords written authorization to keep the security deposit in their e-mail of January 7, 2009 and therefore are not entitled to payment of double the security deposit.

Section 45(2) of the Act says that a Tenant of a fixed term tenancy may not end the tenancy any earlier than the day set out in the tenancy agreement as the last day of the tenancy. If a Tenant ends a fixed term tenancy earlier, they can be liable for a loss of rental income that the Landlord incurs as a result. Section 7(2) of the Act, however, states that a party who suffers damages must do whatever is reasonable to minimize

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their losses. Based on the Tenant's written notice dated January 2, 2009 and the Landlords' letter of January 7, 2009, I find that the Parties agreed to end the fixed term tenancy earlier, on March 31, 2009 rather than on October 31, 2009. It was not until February 17, 2009 that the Tenants sought to end the tenancy effective February 28, 2009 for an alleged material breach of the tenancy agreement.

Section 45(3) of the Act says that if a Tenant gives a Landlord written notice that they are in breach of a material term of the tenancy agreement and the Landlord fails to rectify the situation within a reasonable period of time, the Tenant may end the tenancy without further notice. A material term (as defined in RTB Policy Guideline #8) is one "that the parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement." In this case, I find that the removal of one piece of furniture, namely a sofa bed, from the rental unit does not constitute a material breach of the tenancy agreement entitling the Tenants to end the tenancy. This would more reasonably be characterized as the loss of a service of facility (under s. 27) of the Act which would entitle the Tenants to compensation. Consequently, I find that the Tenants were not entitled to end the tenancy earlier than March 31, 2009.

The Tenants argued that the Landlords were in breach of s. 34(2) of the Act by not allowing them to sub-let the rental unit when there was more than 6 months left under the tenancy agreement. I find, however, that by January 7, 2009, the parties agreed to amend the tenancy agreement so that it ended on March 31, 2009 rather than October 31, 2009 and therefore this section of the Act does not apply.

The Tenants also argued that the Landlords failed to mitigate their damages. In particular, the Tenants argued that the Landlords only advertised the rental unit for approximately one week at a \$300.00 increase in rent and then listed it for sale on February 4, 2009. In the normal course, this would be a significant argument that would likely have disentitled the Landlords to a loss of rental income, however, as of February 1, 2009, the earliest the Tenants could have ended the tenancy under s. 45(1) was March 31, 2009. This date also happened to be the last date the Landlords intended to use the unit as a rental property and therefore, there I find that there was no point in them continuing to advertise the rental unit.

As a result of the foregoing, I find that the Landlords are entitled to a loss of rental income for March, 2009. However, the Landlords ceased to own the property as of March 24, 2009 and in the absence of any evidence that an adjustment of March rent was made in favour of the purchaser of the rental property, I find that the Tenants' liability is only for the period March 1 - 23, 2009. Consequently, I find that the Landlords are entitled to recover \$1,483.87 as pro rated rent for March, 2009. I also find that the Landlords are entitled to recover their \$50.00 filing fee for this proceeding.



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I order the Landlords under s. 38(4) of the Act to keep the Tenants' security deposit in partial payment of the damage award. The Landlords will receive a monetary order for the balance owing as follows:

March 2009 rent:	\$1,483.87
Filing fee:	<u>\$50.00</u>
Subtotal:	\$1,533.87
Less: Security deposit:	(\$1,000.00)
Accrued interest:	<u>(\$3.20)</u>
Balance owing:	\$480.67

Conclusion

The Tenants' application is dismissed. A monetary order in the amount of **\$480.67** has been issued to the Landlords and a copy of it must be served on the Tenants. If the amount is not paid by the Tenants, 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: May 28, 2009.

Dispute Resolution Officer