

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes: MND, MNDC, MNSD, FF

Introduction

I have been delegated the authority under Section 9.1 of the *Residential Tenancy Act* (the “Act”) to hear this matter and decide the issues.

I reviewed the evidence on the case file prior to the Hearing. All parties gave affirmed evidence and this matter proceeded on its merits.

Issue(s) to be Decided

This is the Landlord’s application for a Monetary Order for damages to the unit, and loss of rent, to keep the security deposit, and to recover the filing fee from the Tenant for the cost of this application.

Background and Evidence

Service

The Landlord testified that he mailed the Tenant a copy of the Application for Dispute Resolution and hearing package on February 18, 2009, by double registered mail to the Tenant’s new residential address. The Tenant admitted service of the hearing package.

Landlord’s testimony

- The tenancy started on July 1, 2008. The monthly rent was \$3,700.00, due on the first day of each month. This was a fixed term lease, due to expire on June 30, 2009. The rental unit was furnished.

- On June 18, 2009, the Tenant paid the Landlord a security deposit in the amount of \$1,850.00 and a furniture deposit in the amount of \$1,850.00, for a total security deposit of \$3,700.00.
- There was no move-in inspection done on the rental unit.
- The Tenant gave notice on December 28, 2008, to vacate the rental unit on January 31, 2009.
- After the Tenant vacated the rental unit, the Landlord spent \$1,000.00 cleaning and making repairs to the rental unit.
- There was no move-out inspection done on the rental unit.
- The Landlord attempted to re-rent the rental unit by placing ads on Craig's List. The Landlord reduced the rent from \$3,700.00 to \$3,000.00 per month, but has not been able to find a suitable Tenant.
- The Landlord is currently living in the rental unit and is trying to sell it. The Landlord will rent it or sell it, whichever occurs first.
- The rental unit has dropped in value \$150,000.00 since the Landlord purchased it.

Tenant's testimony

- The Tenant advised the Landlord several times that his family was unhappy with the rental unit due to ongoing construction taking place at the rental property. The Tenant stated that the construction was very loud and was stopping him and his family from enjoying his home.
- The Tenant advised that the swimming pool at the rental property was out of order and that he could not open his windows in order to get fresh air into the rental unit.
- The Tenant wrote a letter to the Landlord on December 28, 2008, giving his one month notice to vacate the rental unit, as his family found the ongoing construction to be unbearable.
- The Tenant spoke to the Landlord BP on the telephone and gave him their forwarding address. The Tenant requested return of the security deposit.

Landlord's reply to Tenant's testimony

- The Tenant complained about construction noise, but the Tenant's representatives saw the construction when they viewed the rental suite and the Tenant chose to rent the rental unit anyway. The Landlord initially thought the construction would only take 2 or 3 weeks, but it has taken longer. The construction is still ongoing at the rental unit.
- The Landlord does not have any control over when the construction will be completed and should not be made responsible for fixing the situation because it is out of his hands. The strata is responsible for addressing the problem, not the Landlord.
- The Landlord did not receive the Tenant's forwarding address until the Landlord phoned the Tenant on February 17 and asked for it.

Analysis

The Landlord did not perform a move-in inspection or a move-out inspection on the rental unit. The Landlord did not provide any photographs to prove his claim for damages to the rental unit. The Landlord has failed to prove his claim for damages to the rental unit and this portion of the Landlord's application is dismissed without leave to reapply.

The Tenant was living in the rental unit from July 1, 2008 until the end of January, 2008. I accept the Tenant's oral evidence that he complained to the Landlord about the noise and disturbance of the construction on several occasions. The Tenant provided a copy of a letter written to the Landlord in December, 2008, stating that his family could no longer live in the rental unit because of the noise and disruption around the construction taking place.

A tenant is entitled to quiet enjoyment of a rental unit including, but not limited to, freedom from unreasonable disturbance. The Landlord did not offer to release the Tenant from the lease. The Landlord did not offer to lower the rent in consideration of the continuing construction.

Section 45(3) of the Act states:

Tenant's notice

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(3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

I find that the protection of the Tenant's right to quiet enjoyment was a material term of the tenancy. I find that the Landlord failed to comply with a material term of the tenancy agreement and failed to mitigate. Therefore, pursuant to Section 45(2(3) of the Act, the Tenant was at liberty to end the tenancy. The Landlord is currently living in the rental unit. The Landlord's claim for loss of revenue for the remainder of the lease is dismissed without leave to re-apply.

Section 19 of the Act states:

Limits on amount of deposits

19 (1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.

The Landlord was not permitted under the Act to retain more than \$1,850.00 as a security deposit.

The Landlord has not been successful in his application and is not entitled to recover the cost of the filing fee from the Tenant.

The Tenant is entitled to a full return of the security deposit, together with accrued interest. Interest has accrued in the amount of \$29.87. I therefore make a monetary order in favour of the Tenant in the amount of \$3,729.87. The Landlord is ordered to pay the Tenant forthwith.

Conclusion

I grant the Tenant a monetary order for \$3,729.87 against the Landlord. This order must be served on the Landlord and may be filed in the Provincial Court of British Columbia (Small Claims) and enforced as an order of that Court.

May 11, 2009
