Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

DECISION AND REASONS

Introduction

This was an application by the tenant for a Monetary Order and an Order for the return of his security deposit. The landlord applied for a monetary order and an order authorizing it to retain the security deposit. The hearing was conducted by conference call. The tenant participated and the named parties appeared for the landlords.

Background and Evidence

The tenancy began on December 1, 2008 for a fixed term ending May 31, 2009 with rent in the amount of $2,200.00 due in advance on the first day of each month. The tenant paid a security deposit of $2,200.00 on November 20, 2008.

A term of the tenancy agreement, as amended provided that:

> The lease shall terminate at the end of the rental period on May 31, 2009 (as stated in paragraph 4) or the Landlord can terminate the lease earlier with two month's written notice. The Tenant acknowledges that the tenancy will not continue on a month-to-month basis after the Termination Date.

On January 26, 2009 by e-mail the landlord gave the tenant a purported two month notice. The tenant said the notice was given because the landlord had sold the rental unit and the new owner intended to occupy the unit. The Notice required the tenant to move out by March 26, 2009. The landlord did not provide the tenant with a two month Notice in the form required by the *Residential Tenancy Act*. The tenant testified that he spoke to the landlord and said that the tenancy should not end on the 26th of the month but should end on March 31st. He testified that the landlord then proposed that he move out on February 28, 2009. The tenant said that he agreed to the February 28, 2009 move-out date. Later, according to the tenant's e-mail to the landlord, she thanked him for being understanding and said she would return his rent cheque for the month of March. The tenant said that the landlord also asked him if he was interested in moving to one of her other apartments beginning March 1, 2009. The tenant said that despite the agreement the landlord sent a February 20, 2009 e-mail to the tenant wherein she

said: “Per our email notice of January 28, 2009, the termination date of this lease agreement is March 26, 2009.”

The landlord’s representatives testified that the February 28, 2009 move-out date was discussed but it was not agreed to.

According to an e-mail from the tenant to the landlord he moved out on March 1, 2009. The landlord testified that the tenant returned the keys on March 3, 2009. The tenant agreed that the keys were returned on March 3, 2009; he said this was because the landlord did not provide him with any means of contacting her and it was not until March 3, 2009 that he received instructions to leave the keys with the concierge at the rental property.

On March 17, 2009 the tenant wrote to the landlord. The letter was sent by registered mail. He referred to the landlord’s January 26th e-mail telling him to vacate by March 26th. He said that: “... even though you didn’t serve me proper notice I still expect my last month rent free which would have been the month of March. I moved out on March 1st so I should have been compensated for the rest of the month. I still haven’t received my compensation for the month of March nor have I received my damage deposit.” The tenant provided his forwarding address and requested that his damage deposit and last months rent be sent to that address.

By letter dated March 10, 2009 the landlord provided the tenant with a “refund calculation”. From the tenant’s $2,200.00 security deposit the landlord withheld rent for the period from March 1, 2009 to March 26, 2009 in the amount of $1,845.22 and made a further deduction of $200.00 said to be for a returned rent cheque for March 2009. The landlord enclosed a refund cheque in the amount of $225.95. That amount included a $71.17 reimbursement for keys and fob. The tenant did not negotiate the cheque.

The landlord submitted that the *Residential tenancy Act* does not apply to this tenancy. The landlord referred to section 4 (e) of the *Residential Tenancy Act* which provides that the *Act* does not apply to living accommodation occupied as vacation or travel accommodation. The landlord alleged that the tenant maintained a permanent residence in Whistler at came to Vancouver for work related reasons. The landlord’s position that the tenant said he was renting the apartment while he was temporarily traveling to Vancouver for work related reasons. Although the landlord submitted that

the *Residential tenancy Act* does not apply to the tenancy it took the position that it was entitled to retain the tenant's security deposit because he ended the tenancy before the March 26, 2009 termination date without giving 30 days notice as required by the *Residential Tenancy Act*.

Analysis and conclusion

The tenant named the corporate entity as landlord together with the named individual. The personal respondent, by her dealings and conduct with respect to this tenancy falls within the definition of "landlord" in section 1 of the Residential Tenancy Act and I find that she is a proper party to this proceeding.

I do not accept the landlord's submission that the Residential Tenancy Act does not apply to this tenancy. Section 4 (e) of the Act is intended to exclude short-term stays in vacation accommodation or in hotel, motel or bed and breakfast accommodations. It was not directed at month to month or fixed term apartment rentals. There is no indication that the tenant used the rental unit as vacation or travel accommodation. The evidence is that he lived and worked in Vancouver. After the tenancy ended he continued to live and work in Vancouver.

The landlord has breached or failed to apply the provisions of the *Residential Tenancy Act* in a number of respects. Section 19 of the Act prohibits the landlord from requiring or accepting a security deposit greater than a half month's rent, yet the landlord demanded and was paid a full month's rent as a security deposit. A landlord is not permitted to end a fixed term tenancy before the end of the fixed term in the absence of cause, but the landlord made it a condition of the tenancy, contrary to the Act that it could do so. The Act also requires that a Notice to End Tenancy, if given by a landlord must be in the approved form; the landlord did not use an approved form. The *Residential Tenancy Act* requires that a two month notice must end the tenancy on the last day of the month before the day that rent is due to be paid. The landlord's notice should not have ended the tenancy on March 26, 2009; it should have been effective on March 31, 2009. Further, Section 51 of the Act provides that a tenant who receives a two month Notice under section 49 of the Act is entitled to receive from the landlord the equivalent of one month's rent as compensation or he may withhold payment of the last month's rent. Section 50 of the Act also permits a tenant who has received a two month Notice for landlord's use to end the tenancy early by giving the landlord at least 10 days'

written notice ending the tenancy earlier than the effective date of the landlord's Notice to End Tenancy.

Although the agreement permitting the landlord to end the fixed term tenancy on two month's notice was improper, as was the notice itself, the tenant accepted the Notice when he could have disputed in and taken the position that the tenancy should run its course. The tenant submitted that he should be compensated under the Act as though the landlord had given a two month Notice in the approved form. While I am sympathetic to the tenant's position on this point because I do not think that a landlord who breaches the requirements of the Residential Tenancy Act should find himself in a better position than one who adheres to the requirements of the Act, I do not allow the tenant's claim for a monetary award for the equivalent of one month's rent as compensation. According to the tenant the landlord proposed and the tenant agreed to end the tenancy on February 28, 2009. The landlord said that this was discussed but not agreed to. Assuming that the landlord's Notice should be treated as though it were given pursuant to section 49 of the *Act*, the tenant could have ended the tenancy early by giving 10 days notice in writing, but the tenant did not give written Notice of his intention to move out early and I am unable to find on the evidence before me that the parties agreed to a February 28th move out date. In any event the tenant overheld; he did not move out until March 1, 2009 and did not return the keys until March 3, 2009. The tenant stopped payment on his March rent cheque and I find that by withholding payment of March rent he did in fact receive the equivalent of one month's rent as compensation for the Notice; I find that the tenant was entitled to withhold March rent as compensation for the two month Notice ending the tenancy but that I find that he is not entitled to a monetary order for a further month's rent as compensation.
I follows from this finding that I deny the landlord's claim for a monetary order for unpaid rent for the month of March.

Section 38 of the *Residential Tenancy Act* provides that when a tenancy ends, the landlord may only keep a security deposit if the tenant has consented in writing, or the landlord has an Order for payment which has not been paid. Otherwise, the landlord must return the deposit, with interest if payable, or make a claim in the form of an Application for Arbitration. Those steps must be taken within fifteen days of the end of the tenancy, or the date the tenant provides a forwarding address in writing, whichever is later. If the landlord does not comply with these provisions he may not make a claim against the deposit and he must pay the tenant double the amount of the security deposit.

The tenant provided his forwarding address in writing in his March 17th letter to the landlord. He filed his application for dispute resolution on May 12, 2009. The landlord did not apply to claim a monetary order and an order permitting it to retain the deposit until August 11, 2009. Because the landlord did not apply to keep the deposit or refund it within 15 days as required by the legislation the doubling provision of section 38(6) therefore applies. I grant the tenant's application and award him the sum of $4,403.79. This includes interest on the original deposit amount. The tenant has been awarded less that $5,000.00 and he is entitled to recover $50.00 of the $100.00 filing fee for this application for a total claim of $4,453.79 and I grant the tenant a monetary order in the said amount. This order may be registered in the Small Claims Court and enforced as an order of that Court.

Dated August 21, 2009.