Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNSD, MNDC, FF

Introduction

This hearing was scheduled to deal with the tenant's application for a monetary Order for return of double the deposit paid, loss or damages and compensation as provided under the Act.

The tenants provided affirmed testimony that on November 1, 2009 copies of the amended Application for Dispute Resolution and Notice of Hearing were sent to the landlord via registered mail at the address noted on the Application.

The tenants testified that the landlord had provided them with a service address which was included on a Two Month Notice to End Tenancy form which was issued by the landlord on May 19, 2009. The tenants testified that until August 2009 they had on-going email contact with the landlord in relation to the tenancy which ended on July 14, 2009.

A copy of a Canada Post receipt was provided as evidence of service of the amended Application for Dispute Resolution and the Notice of Hearing to the landlord in Ireland. The tenants testified that the Canada Post web sited indicated the following:

- November 2, 2009 – item admitted at North Vancouver
- November 4 – international item left Canada
- November 5 – arrived in receiving country
- November 7 – item released to customs
- November 9 – item received at the delivery office and delivery attempted
- November 13 – item successfully delivered

The tenants testified that their initial Application for Dispute Resolution mailed to the landlord on July 31, 2009 showed as having been delivered on August 17, 2009, but that the mail was returned to them, unopened, by registered mail.

The tenants provided a copy of the Canada Post receipt and tracking number information as evidence of service.

I find that the landlord has been sufficiently served in accordance with section 89 of the Act*;* however the landlord did not appear at the hearing.

Background and Evidence

This tenancy commenced on February 1, 2006 and ended on July 14, 2009 as the result of a Two Month Notice to End Tenancy for landlord's use as the landlord was having her daughters move into the house. The landlord also issued the tenants a letter dated May 19, 2009 indicating her daughters were moving into the rental unit. The tenants paid a security deposit of $1,025.00 on December 5, 2005. Rent was $2,200.00 per month, due on the first day of the month.

The tenants testified that they made several written requests to the landlord that the deposit be returned. The tenants stated that during the tenancy they had an emergency contact person in Vancouver but that all other matters were communicated to the landlord via email, as the landlord resides in Ireland. The tenants provided copies of a July 11, 2009 email to the landlord providing their forwarding address and a second message sent on July 17, 2009.

The tenants testified that the landlord responded that she would be in Vancouver on July 31, 2009 and would like to wait until then to settle the end of the tenancy but the landlord did not provide them with a time, date or place where they could meet and that the deposit has not been returned to them. The tenants stated that at the end of the tenancy they did meet with a friend of the landlord to complete an inspection and provide the keys, but that the landlord's friend told them she was not responsible for any financial aspects of the tenancy.

The tenants provided a witness statement from a neighbor who lives across the street from the rental house. This statement indicates that the witness was present on August 28, 2009 when the tenants went to the home in an attempt to deliver papers to the landlord's daughters, who were to be living at the house. The statement indicates that there was a man at the house who told them that he was not expecting the landlord's daughter as she did not live there.

The tenants testified that when their registered mail containing the initial Application for Dispute Resolution was returned they decided to attempt to serve the landlord through her daughters who were to be residing at the rental house. The tenants stated that when they arrived at the house there was a moving van present in the driveway and that items such as a crib, could be seen. The tenants stated they approached a man who was present and asked if the landlord's daughter was home. The tenants stated that this man responded that she would not be back and that she did not live at the house. The tenants responded saying they thought the daughter was living there and, in reply the male said "they might be moving in here, in the basement in the future, I don't know…"

The tenants are claiming compensation as provided under section 51(2) of the Act as the Notice to End Tenancy issued on May 19, 2009 indicated that the lanldord's daughters would live in the rental unit. The tenants testified that they have remained in the neighbourhood and that their previous neighbours have reported that no one has moved out of the house and that the daughters did not move in after August 28, 2009. The tenants stated that the house does not have a basement suite.

The tenants are claiming compensation for return of excess rent paid as the result of having provided the landlord with written notice on July 4, 2009 that they would vacate the rental unit on July 14, 2009, rather than the effective date of the notice, August 1, 2009. The tenants calculated that they have overpaid July rent in the sum of $6.42 as they were in the house for 14 days in July.

The tenants provided a copy of a chimney cleaning receipt dated November 24, 2007 in the sum of $127.20. The tenants testified that the landlord had agreed the chimney was dangerous and that the tenants could have it cleaned and they would be reimbursed. The tenants testified that the landlord did not reimburse them.

Analysis

Section 38 of the Act determines the steps that must be taken in relation to return of deposits to tenants. In this case the parties completed a move-out condition inspection. There is no evidence of a signed inspection report before me as evidence. However, the tenants did not agree that the landlord could retain any portion of the deposits held in trust by the landlord.

The landlord did not return the deposit within 15 days of receiving the tenants July 17, 2009 request for return of the deposit and there is no evidence before me that the landlord made an application for dispute resolution. In the absence of payment to the tenants or an application for dispute resolution within 15 days, section 38(6) of the Act determines that the landlord must pay the tenants double the deposit. Therefore, I find that the tenants are entitled to double the deposit paid of $2,050.00 plus interest in the sum of $36.27 and are owed compensation in the sum of $2,086.27.

I have appended a copy of section 38 of the Act at the conclusion of this decision.

I have considered the tenants claim for compensation under section 52 of the Act which provides:

Tenant's compensation: section 49 notice

51 (1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2) If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

(2) In addition to the amount payable under subsection (1), if

(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or

(b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,

the landlord, or the purchaser, as applicable under section 49, **must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.**

(Emphasis added)

I find, in the absence of the landlord, that the encounter the tenants had on August 28, 2009 establishes that, on the balance of probabilities, the landlord's daughters did not move into the rental unit within a reasonable period of time and that the tenants are entitled to compensation as provided by section 51(2) of the Act, in the sum of $4,400.00. I also base this decision on the written statement provided by the tenant's witness who was present on August 28, 2009; six weeks after the tenants moved out, corroborating the tenant's testimony that the daughters were not residing at the rental unit. The landlord evicted the tenants so that her daughters could move into the rental unit; a legitimate reason under the Act; however, the landlord has breached the Act by failing to meet the stated reason indicated on the Notice to end tenancy within a reasonable period of time. I also base my decision on the presence of an occupant in the rental unit.

In relation to the claim for overpaid rent I find that the daily rent owed was $72.33 per day and that the tenants paid $1,000.00 for 14 days. I find that the tenants have not over paid rent owed.

In relation to the chimney cleaning costs, I find, in the absence of the landlord, that the tenants had the chimney cleaned with the permission of the landlord and that they are entitled to costs in the sum of $127.20.

As the tenant's application has merit I find that the tenants are entitled to filing fee costs. I dismiss without leave to reapply the tenant's claim for mail costs.

The tenants are entitled to the following compensation:

Double the deposit paid	2,050.00
Compensation – double the monthly rent	4,400.00
Chimney cleaning	127.20
Filing fee costs	50.00
	6,663.47

Conclusion

I find that the tenants have established a total monetary claim of $6,663.47 comprised of compensation, double the deposit paid and filing fee, and grant the tenants an order under section 67 in that amount. This order may be filed in the Provincial Court (Small Claims) 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: November 20, 2009.

Dispute Resolution Officer

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must use a service method described in section 88 (c), (d) or (f) *[service of documents]* or give the deposit personally to the tenant.