Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for compensation for a loss of rental income, to recover the filing fee for this proceeding and to keep the Tenants' security deposit in partial payment of those amounts. The Tenants applied for the return of their security deposit plus compensation for the Landlord's failure to return the deposit within the time limits under the Act as well as to recover the filing fee for this proceeding.

Issues(s) to be Decided

1. Is the Landlord entitled to a loss of rental income and if so, how much?
2. Are the Tenants entitled to the return of their security deposit and if so, how much?

Background and Evidence

On May 14, 2009, the Parties made a verbal agreement whereby the Tenants agreed to rent the rental unit (for an indeterminate fixed term) at a rate of $1,400.00 per month commencing June 1, 2009. The Tenants paid a security deposit of $700.00 and received a key and garage door opener. The Landlord said she also gave the Tenants a copy of the Strata By-Laws and Rules together with a Strata Form K and draft lease to review and sign. The Tenants denied that they received the Strata documents.

The Landlord said she agreed to re-paint one bedroom, one wall in the living room, to stain some wood and to clean the rental unit. On May 25, 2009, the Landlord said she had a telephone conversation with one of the Tenants who told her not to worry about painting because the Tenants were considering putting an offer on the rental property. On June 7, 2009, the Landlord said she got a verbal offer from the Tenants' realtor which she rejected. On June 9, 2009, the Landlord said she contacted the Tenants and asked them why the rent was not paid and one of them told her it was because the rental unit was not ready for occupation on June 1, 2009. The Landlord said the Tenants also stated during that conversation that they would be moving in the morning of June 15, 2009 and had booked a moving truck for that day. The Landlord claimed that as a result of this conversation, she cleaned the rental unit on June 9, 2009 and had the rental unit painted on June 11, 2009.

On June 11, 2009, the Tenants contacted the Landlord to advise her that they had purchased another property and would not be moving in. The Landlord said that as of June 11, 2009, the Tenants had moved in a microwave, curtains and a curtain rod and some bags of baby clothing or bedding. The Landlord also said that the Tenants never returned the keys or the garage door opener. The Landlord claimed that she received a letter from the Tenants dated August 3, 2009 on August 4, 2009 asking for the return of their security deposit.

The Tenants claimed that their agreement to rent the rental unit was conditional on it being re-painted, tile work being done around the fireplace and general cleaning being done by June 1, 2009. The Tenants claimed that the rental unit was not re-painted or cleaned by June 1, 2009 and therefore the tenancy agreement was frustrated. The Tenants admitted, however, that they told the Landlord on May 14, 2009 that they probably wouldn't move in until June 15, 2009. The Tenants also admitted that they told the Landlord on June 9, 2009 that they would be moving in on June 15, 2009

The Tenants agreed that they told the Landlord not to paint but claimed that that conversation took place on June 3, 2009. The Tenants said on June 7, 2009 they told the Landlord that they were still looking to purchase a property and the Landlord said she still intended to sell the rental property. In essence, the Tenants argued that their original agreement was frustrated when the rental unit was not cleaned and painted on June 1, 2009. Consequently, the Tenants argued that once the negotiations about purchasing the rental property fell through, a new tenancy agreement was created however they were not clear about what the terms of that alleged agreement were.

Analysis

Section 38(1) of the Act says that a Landlord has 15 days from either the end of the tenancy or the date she receives the Tenant's forwarding address in writing (whichever is later) to either return the Tenant's security deposit or to make an application for dispute resolution to make a claim against it. If the Landlord does not do either one of these things and does not have the Tenant's written authorization to keep the security deposit then pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit.

I find that the Landlord received the Tenants' forwarding address in writing on August 4, 2009 and filed an application for dispute resolution to make a claim against the security deposit on August 13, 2009. Consequently, I find that s. 38(6) of the Act does not apply.

I find that the term of the Parties' verbal agreement made on May 13, 2009 regarding the duration of the tenancy was not sufficiently clear to create a fixed term tenancy and as a result, I find that it was a month to month tenancy. Under section 45 of the Act, a Tenant of a month-to-month tenancy must give a Landlord one clear month's notice that they are ending a tenancy. In this case, the Tenants did not give the Landlord any written notice that they were ending the tenancy but argued that they were relieved of that obligation under the Act because the tenancy had been frustrated.

RTB Policy Guideline #34 states (in part) as follows:

> "A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible."

I find that the tenancy agreement was not frustrated because the Landlord failed to make repairs of a cosmetic nature and do general cleaning by June 1, 2009 because these things did not render the rental unit unfit for occupation. Furthermore, I am not convinced that there was an agreement that the painting and cleaning would be done by June 1, 2009. The Tenants admitted that as of June 9, 2009 they advised the Landlord that they still planned on moving into the rental unit notwithstanding that the painting and cleaning had not been done as of that date.

I further find that the Parties' agreement that the Landlord would paint and do cleaning was not a fundamental term of the tenancy agreement, the breach of which would entitled the Tenants to rescind the tenancy agreement. I find that the Tenants would have moved into the rental unit on June 15, 2009 as planned had they not, in the interim, purchased another property. Consequently, the Tenants were not relieved of their obligation to give the Landlord one month's written notice as required by s. 45 of the Act and are liable for rent for the month of June 2009.

The Landlord claimed that she was seeking only one-half of a month's rent or $700.00. Consequently, I order the Landlord pursuant to s. 38(4) and s. 72 of the Act to keep the Tenants' security deposit in full satisfaction of her loss of rental income claim. The Landlord is also entitled to recover her filing fee for her application and as a result, she will receive a monetary order in the amount of $50.00.

As a final matter, I order the Tenants to return to the Landlord at their expense the keys and garage opener to the rental property that are currently in their possession.

Conclusion

The Tenants' application is dismissed. A monetary order in the amount of $50.00 has been issued to the Landlord 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: December 09, 2009.

Dispute Resolution Officer