DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing was convened by way of conference call this date to deal with cross applications by the landlords and the tenants.

The landlords have applied for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, and for an order to keep all or part of the pet damage deposit or security deposit.

The tenants have applied for return of the security deposit and pet damage deposit, and to recover the filing fee from the landlords for the cost of this application.

Both parties gave affirmed evidence and were given the opportunity to cross examine each other on their evidence.

Issues(s) to be Decided

- Is the landlord entitled to a monetary order for compensation for damage or loss under the *Act,* regulation or tenancy agreement?
- Is the landlord entitled to retain the security deposit and pet damage deposit?
- Is the tenant entitled to return of the security deposit and pet damage deposit?

Background and Evidence

The parties agree that the tenant viewed the rental unit on March 23, 2010. The tenant was given an application form to fill out, and she did fill out part of it, but not fully.

The landlord testified that she required the security deposit to hold the unit for these tenants. The tenant testified that she felt she had to act on it because she received an email from the landlord on the day she viewed the suite stating that she had lots of

people wanting to view it, so she needed to know whether or not the tenant was going to take the unit.

On March 24, 2010, the tenant paid $500.00 for a security deposit and $500.00 for a pet damage deposit. The landlord testified that it was to be a fixed term tenancy for 3 months, and then it would be re-evaluated and a new term negotiated. The parties also agree that rent was to be $1,000.00 per month. The rent did not include storage space; if storage was required, it would cost an additional $200.00 per month.

On March 26, the tenant phoned the landlord stating that an issue had arisen with her granddaughter who was moving, and told the landlord that she had sent her an email the previous day, stating that she could not take the unit. During the conversation, the landlord stated that she had not checked her email the previous day, but offered an extra 1 bedroom suite in the lower level of the building that may be suitable for the granddaughter, but the tenant declined. The tenant testified that another $600.00 per month would be required for that unit, and she simply did not have the means to pay $1,000.00 for one unit, $600.00 for another unit and $200.00 for storage.

The landlord testified that the unit had been posted on Craig's List, KIJIJI and Used Nanaimo, and interested perspective tenants would communicate with her by email. She also testified that once she had received the security deposit, she told all interested tenants that the unit had been rented. As soon as she spoke with the tenant on March 26, 2010 when the tenant stated that she could not take the unit, the landlord reposted the advertisement on Craig's List, KIJIJI and Used Nanaimo and emailed tenants who had inquired to let them know that the unit was again available. She further testified that on March 26 she sent 4 emails to perspective tenants, however none responded. On March 27, 2010 she received 8 emails from interested tenants, but all wanted to rent the unit for May 1, 2010, not for April 1, 2010. She also testified that she had 50 – 75 people email her and she responded to each but most did not reply back. She told the tenant on March 26, 2010 that if she did find a renter for April 1, she would return both deposits. She took the advertisements off the websites because she had chosen a renter for May 1. That renter was accepted on March 31, 2010 who had to give a

month's notice to vacate their present rental unit. Due to the short time-frame, the landlord did not feel that placing an advertisement in the local newspaper would give sufficient time to have it rented for April 1, 2010.

The tenant testified that she had given the landlord her forwarding address in writing on March 23, 2010 on the application form. She further testified that the parties communicated by email, and had originally agreed to a 3 month fixed term, to be renegotiated.

When the tenant sent the landlord an email on March 25, 2010, she suggested in that communication that the landlord should keep a small portion of the security deposit, and suggested $250.00. She did not get a response to the email, so she called the landlord the following day.

Analysis

Having reviewed the evidence, including the emails exchanged by the parties, I find that a fixed term tenancy agreement did not exist. The parties both testified that the tenancy would be a fixed term for 3 months and then it's unclear whether the tenancy would revert to a month-to-month, or if the tenancy would continue for another fixed term after that date, or if the tenant would be required to move. I refer to section 13 (2) (f) (iii) of the *Residential Tenancy Act* which states:

> **13** (2) A tenancy agreement must comply with any requirements prescribed in the regulations and must set out all of the following:
>
> (f) the agreed terms in respect of the following:
>
> (iii) if the tenancy is a fixed term tenancy,
>
> (A) The date the tenancy ends, and
>
> (B) Whether the tenancy may continue as a periodic tenancy or for another fixed term after that date or whether the tenant must vacate the rental unit on that date;

Therefore, because a written tenancy agreement had not yet been signed, and the terms of which are unclear I must find that no fixed term tenancy agreement was entered into. Paying a security deposit is not the only factor that satisfies the elements to secure a fixed term tenancy.

However, Section 20 of the *Act* states that a landlord cannot require a security or pet damage deposit at any time other than when the landlord and tenant enter into the tenancy agreement. If no tenancy agreement existed, I would not have jurisdiction.

I do find, in the circumstances, that a month-to-month tenancy existed by virtue of the tenant paying and the landlord accepting the security deposit and pet damage deposit.

Further, the landlord testified, and I accept the testimony, that she did what she could to mitigate the loss of revenue for the month of April, 2010, and I therefore find that the landlord is entitled to rent for that month.

The *Act* also states that if a landlord is entitled to retain a pet damage deposit, it may be used only for damage caused by a pet to the residential property. Therefore, I cannot order that the pet damage deposit be retained by the landlord. However, Residential Tenancy Policy Guideline 17 states that:

> "Where a landlord applies for a monetary order and a tenant applies for a monetary order and both matters are heard together, and where the parties are the same in both applications, the arbitrator will set-off the awards and make a single Order for the balance owing to one of the parties. The arbitrator will issue one written decision indicating the amount(s) awarded separately to each party on each claim, and then will indicate the amount of set-off which will appear in the Order."

Conclusion

I find that the landlord is owed rent by the tenant in the amount of $1,000.00 and that the tenant is entitled to the security deposit and pet damage deposit in the amount of $1,000.00, and I order that the amounts be set-off from one another.

Since both parties have been successful with their claim, I order that each party bear their own costs and neither party will recover the filing fee from the other party for the cost of this application.

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 19, 2010.

Dispute Resolution Officer