

## **DECISION**

**Dispute Codes:** MNDC, MNSD and FF

### **Introduction**

These applications were brought by both the landlord and the tenants.

By application of May 19, 2010, the landlords seek a Monetary Order for loss of rent on the grounds that the tenants failed to move in to the rental unit on January 1, 2010 under a fixed term rental agreement signed on October 21, 2009 . The landlords also seek to recover the filing fee for this proceeding and authorization to retain the security deposit.

By prior application of December 13, 2009, the tenants seek return of the security deposit and recovery of their filing fee.

### **Issues to be Decided**

The landlords' application requires a decision on whether the landlord is entitled to a Monetary Order for the loss of rent and filing fee and authorization to retain the security deposit.

The tenants' application requires a decision on whether they are entitled to a Monetary Order for return of the deposit and recover of their filing fee.

### **Background and Evidence**

The landlord and tenants signed a fixed term rental agreement on October 21, 2009 under which the tenants take possession of the rental unit on January 1, 2010 for one year. Under the agreement, rent was to be \$3,000 per month and the tenants paid a security deposit of \$1,500.

During the hearing, the landlords stated that the tenants had breached the binding rental agreement signed by the tenants on October 21, 2009 and in consequence, they lost \$3,000 for one month's rental.

The tenant stated that the contract of October 21, 2009 was no longer binding as the landlords had amended a material term of the agreement, with the tenants tentative approval, and had continued to advertise the rental unit at least to November 13, 2009 as substantiated by a Craigslist listing submitted into evidence.

In addition, the tenants submitted a copy of an email sent to them by the landlords on November 13, 2009 after they had heard from the tenants' landlord at the time and had visited their residence and had become apprehensive about its condition.

That email stated, in part, "...We are open to suggestions and would like to try to resolve this as quickly as possible **otherwise we will have to decline your application.** " (emphasis added).

According to the landlords, the tenants' response was to suggest the security deposit be increased to \$3,000. The landlords amended the application accordingly and sent it to the tenants to be initialled. However, on or about November 21, 2009, the tenants advised the landlords that they did not wish to proceed with the tenancy and requested return of their security deposit.

## **Analysis**

Black's law dictionary defines "anticipatory breach of contract" as occurring when "a party to a contract asserts that he or she will not perform a future obligation as required by the contract.....and in such a case the other party may treat the contract as ended.

By stating in the email of November 13, 2009 that, "...otherwise we will have to decline your application," I find that the landlord created an anticipatory breach of the contract and the tenants gained the right to repudiate the agreement of October 21, 2010. The landlords' words were clearly not those of persons who believed they were party to a binding agreement as claimed by the landlords during the hearing.

I further find that by continuing to advertise after the agreement had been signed, the landlords gave the tenants further cause to question their good faith.

In addition, I find that the contract is tainted by the landlords having amended the previously signed copy by changing the \$1,500 deposit to \$3,000, a clear breach of Section 19(1) of the *Act* which limits the amount of security deposits to one-half a month's rent.

Finally, section 38 of the *Act* provides that, within 15 days of the end of the tenancy or receipt of the tenants' forwarding address, the landlord must either return the deposit or make application for dispute resolution to claim upon it on penalty under section 38(6) of having to return it in double, a right the tenants have waived.

I find that the landlords are in breach of section 38(1) of the *Act* by waiting for over five months before making application to make claim on the deposit.

For these reasons, I find that the tenants are entitled to a Monetary Order for return of their \$1,500 security deposit, and having succeeded in their application, they are entitled to recover their \$50 filing fee for this proceeding from the landlords.

For the same reasons, I find that the agreement of October 21, 2009 was rendered unenforceable and the landlords' application is dismissed without leave to reapply.

### **Conclusion**

The tenants' copy of this decision is accompanied by a Monetary Order for \$1,550, enforceable through the Provincial Court of British Columbia, for service on the landlords.

June 1, 2010