

DECISION

Dispute Codes

CNR, RR, (MNDC), MNSD, FF
OPR, MNR, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Tenant for a rent reduction or alternatively for compensation, for the return of her security deposit and to recover the filing fee for this proceeding. The Landlord applied for a monetary order for unpaid rent, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts.

At the beginning of the hearing the parties confirmed the tenancy had ended and as a result, the Tenant's application to cancel a Notice to End Tenancy for Unpaid Rent and the Landlord's application for an Order of Possession are dismissed without leave to reapply.

Issues(s) to be Decided

1. Is the Tenant entitled to compensation and if so, how much?
2. Are there rent arrears and if so, how much?
3. Is the Landlord entitled to keep all or part of the Tenant's security deposit?

Background and Evidence

This fixed term tenancy started on November 29, 2009 and was to expire on May 31, 2010 however it ended on March 31, 2010 when the Tenant moved out. Rent was \$1,000.00 per month payable in advance on the 1st day of each month plus utilities. The Tenant paid a security deposit of \$400.00 at the beginning of the tenancy. The rental unit is a 700 square foot townhouse heated with baseboard heaters, one of which is located in the living room/dining room area. The living room also has a gas fireplace

The Tenant's Claim:

The Tenant said that at the beginning of the tenancy, the Landlord told her that she was reducing the rent by approximately \$300.00 per month due to the construction taking place on the rental property. The Tenant said the Landlord also told her that the gas to the rental unit would be turned off until the scaffolding on the rental property was taken down which she estimated would occur in February 2010.

The Tenant said the living room and dining room area of the rental unit were not a comfortable temperature because the baseboard heater in that area did not give off enough heat and she could not use the gas fireplace. The Tenant also said that she had a friend inspect the baseboard heater in the living room/dining room and he

believed there might be a short in the thermostat. The Tenant said she was unsure if the heater worked properly or not but she believed that if there was another source of heat in that room that it would have been more comfortable. Consequently, just prior to Christmas, the Tenant said the Landlord loaned her a space heater for approximately two weeks but did not offer to supply her with another source of heat thereafter. The Tenant argued that she paid higher electrical bills for these 2 weeks because the space heater consumer more energy than the baseboard heater would have.

The Tenant claimed that other, similar units in the rental property had a baseboard heater in the living room and another in the dining room area and therefore she argued that one baseboard heater was insufficient to heat the whole room. The Tenant also argued that the fireplace was intended to be a source of heat instead of the 2nd baseboard heater. The Tenant claimed that she asked the Landlord to inspect the baseboard heater in the living room/dining room but the Landlord failed to do so. The Tenant said she spoke to construction workers at the rental property in February 2010 and was told that it would be several more months before the gas would be turned back on. The Tenant said she that by the end of the tenancy the gas had still not been turned on.

The Tenant also claimed that there was an unreasonable amount of noise from the construction going on at the rental property. The Tenant said the noise was not disruptive until January 2010 when there was a constant banging on the walls which made it difficult for her to work from her home. As a result of the noise, the Tenant said she did not reside in the rental unit for several days in January and much of the month of February 2010. The Tenant said gave the Landlord a letter at the end of January 2010 advising her that due to the noise and lack of heat she would be moving out at the end of February 2010. The Tenant argued that due to the excessive noise, the suite was uninhabitable.

The Tenant further claimed that parking was included in her rent. The Tenant said that the Landlord gave her a parking pass for 2009 which allowed her to park on the road in front of the rental unit. The Tenant said this pass expired at the end of 2009 and the Landlord did not provide her with one for 2010 so he had to park in the garage of the rental property and walk a further distance to the rental unit.

The Landlord said that when the Tenant viewed the rental unit prior to entering into the tenancy agreement, she was aware of the ongoing construction. Consequently, the Landlord said she included an addendum to the tenancy agreement in which the Parties acknowledge that the Tenant was receiving a rent reduction due to the construction.

The Landlord also said that based on the information she was given by the Strata and the construction workers at that time, she advised the Tenant that the gas was supposed to be turned on in February 2010. The Landlord said that when she picked up the heater from the Tenant in early-January 2010, the Tenant never said anything about the baseboard heater in the dining room/living room area not working properly or that there was a problem with the heat. The Landlord said the first she heard about the

baseboard heater from the Tenant was in her letter dated January 25, 2010, which the Landlord said the Tenant had left for her with other mail on the fireplace mantle on March 11, 2010 when she was showing the rental unit to a prospective tenant.

The Landlord admitted that when she returned from holidays in January 2010, there was a voice mail message from the Tenant that said she had mail for the Landlord but the Landlord said that the Tenant dropped that mail off to her at her residence so she did not bother to return the Tenant's call. The Landlord claimed that the Tenant's letter dated January 25, 2010 was not included in the mail dropped off by the Tenant. The Landlord said that she checked the baseboard heater in the living room/dining room on March 11, 2010 and it was working properly. The Landlord also said that her current tenants moved in on April 1, 2010 and have reported no problems with the heat.

The Landlord said that the first she knew that the Tenant was planning on moving out was on March 4, 2010 when she contacted the Tenant because she discovered that the Tenant had put a stop payment on her rent cheque. The Landlord argued that had the Tenant simply called her in January 2010 about problems with the heat or about wanting to move, she could have investigated the baseboard heater or made arrangements to rent the rental unit for March 2010. Instead the Landlord said the Tenant said nothing. The Landlord said that she thought the Tenant knew that she had to renew the on-street parking pass and guest passes by taking her tenancy agreement to City Hall as proof of residency and paying \$26.00 for the year.

The Landlord's Claim:

The Parties agree that the Tenant did not pay rent for March 2010.

Analysis

The Tenant's Claim:

Section 28 of the Act says (in part) that a tenant is entitled to quiet enjoyment including but not limited to the right to freedom from unreasonable disturbance. The Tenant argued that although she was aware that there would be some ongoing construction in the rental property, the noise was unreasonable and not only made it difficult for her to work from home but made it uninhabitable for most of February 2010 and some days in January 2010.

The Landlord argued that the Tenant was aware that construction would be carried on in the rental property until approximately the end of May 2010 and her rent was reduced as a result. In particular, the Landlord claimed that the market rent for a newly renovated suite such as hers which was in a desirable location near the beach in White Rock would have been \$1,300.00. The Addendum to the Parties' tenancy agreement states that "as of June 1, 2010, an increase in rent may take effect to a maximum of \$1,300.00 per month."

In the circumstances, I find that the Tenant knew prior to signing the tenancy agreement that construction (including repairs to the outside of the building) would be going on for some time and possibly last as long as May 2010. I also find that the Parties agreed to a rent reduction to compensate the Tenant for any inconvenience that she might have to endure. Consequently, I find that the Tenant cannot now claim a further rent reduction because she could not tolerate the construction noise. Although the Tenant alleged that the noise level made the rental unit uninhabitable for most of February 2010, she provided no evidence in support of that assertion. For all of these reasons, I find that the Tenant is not entitled to a further rent reduction or compensation for a loss of quiet enjoyment and that part of her claim is dismissed without leave to reapply.

Section 32 of the Act says a landlord must provide and maintain residential property in a state of decoration and repair that complies with health, safety and housing standards required by law and that makes it suitable for occupation by a tenant.

Section 27(2) of the Act says that if a landlord terminates or restricts a service or facility, the landlord must reduce the rent by an amount that is equivalent to the loss of the service or facility.

The Tenant admitted that when she entered into the tenancy agreement, she was told that she would not be able to use the gas fireplace until the scaffolding had been removed from the outside of the rental property which the Landlord estimated would be in February 2010. The Landlord argued that the information she gave the Tenant was based on the only information available to her at that time from the Strata. I find that the Tenant knew that the Landlord could only provide her with approximate information about when the gas would be restored based on what she was told by the Strata or the construction crew. I also find that the Tenant knew that her rent reduction was in part due to the loss of the gas fireplace. Consequently, I find that the Tenant cannot claim compensation on the basis of the Landlord's failure to provide that amenity.

The Tenant also sought compensation on the basis that she lost the use and enjoyment of the rental unit because the living room and dining room area were not a comfortable temperature. The Tenant claimed that as early as mid-December 2009, there was inadequate heat due to the loss of the use of the fireplace and possibly also due to a problem with a baseboard heater in that area. The Tenant claimed that she told the Landlord (at some point) that the baseboard heater was not working properly which was denied by the Landlord. The Tenant also claimed that she told the Landlord in a letter dated January 25, 2010 about the lack of heat in the rental unit but the Landlord didn't investigate the problem.

The Landlord claimed that the Tenant never said anything to her about a baseboard heater not working properly although she had an opportunity to do so when she returned the space heater to the Landlord. The Landlord also claimed that the Tenant didn't give her the letter dated January 25, 2010 which referred to a problem with the baseboard heater until March 11, 2010 and that when she checked the baseboard heater that day it was working properly.

On this issue, the Tenant has the burden of proof and must show (on a balance of probabilities) that the Landlord knew there was a problem with the heat in the rental unit but failed to do anything about it. This means that if the Tenant's evidence is contradicted by the Landlord, the Tenant will need to provide additional, corroborating evidence to satisfy the burden of proof. Given the contradictory evidence of the Landlord (that the Tenant did not advise her of a problem with the baseboard heater or lack of heat until March 4, 2010 at the earliest) and in the absence of any corroborating evidence from the Tenant, I find that the Tenant has not provided sufficient evidence to show that she notified the Landlord about a problem with the heat and the Landlord failed to address it. Furthermore, the Tenant provided no evidence that the ambient temperature in the rental unit rendered it uninhabitable. Consequently, and for all of these reasons, this part of the Tenant's application for compensation is dismissed without leave to reapply.

With respect to the issue of parking, I note that the tenancy agreement says that a garage door opener and parking stall #24 are included in the rent. The Tenant admitted that she had the use of a parking stall in the garage. Consequently, I find that there is no basis for this part of the Tenant's claim and it is dismissed without leave to reapply. As the Tenant has been unsuccessful on her application, I find that she is not entitled to recover the \$50.00 filing fee for this proceeding from the Landlord and that part of her claim is dismissed without leave to reapply.

The Landlord's Claim:

Based on the evidence of both Parties, I find that there are rent arrears in the amount of \$1,000.00 for March 2010 and award the Landlord that amount. I also find that the Landlord is entitled to recover the \$50.00 filing fee she paid for this proceeding from the Tenant. I order the Landlord pursuant to s. 38(4) of the Act to keep the Tenant's security deposit in partial payment of the monetary award. The Landlord will receive a monetary order for the balance owing of \$650.00.

Conclusion

The Tenant's application is dismissed without leave to reapply. A monetary order in the amount of **\$650.00** has been issued to the Landlord and a copy of it must be served on the Tenant. If the amount is not paid by the Tenant, 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: June 15, 2010.

Dispute Resolution Officer