DECISION

Dispute Codes MNSD
MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Tenants for the return of a security deposit plus compensation equivalent to the amount of the security deposit due to the Landlords' failure to return it within the time limits required under the Act. The Landlords applied for compensation for a loss of rental income, for repair expenses, to recover the filing fee for this proceeding and to keep the Tenants' security deposit in partial payment of those amounts.

Issues(s) to be Decided

1. Are the Tenants entitled to the return of their security deposit and if so, how much?
2. Are the Landlords entitled to compensation and if so, how much?

Background and Evidence

This one year fixed term tenancy started on February 1, 2009 and ended on January 31, 2010 when the Tenants moved out. Rent was $900.00 which included heat and hydro. However, the tenancy agreement also contained a term that the Tenants would be responsible for one-half of the excess hydro billing over and above the Landlords' equal instalment payments for the period February 2009 "until the anniversary date in September." The Tenants paid a security deposit of $450.00 at the beginning of the tenancy.

The Tenants' Claim:

The Tenants said they gave their forwarding address in writing to the Landlords on January 31, 2010 when they returned their keys. The Tenants said the Landlords later delivered a cheque to their forwarding address in the amount of $9.31 with a list of deductions from their security deposit for utilities from September 2009 to March 2010, expenses for replacing a door lock, damages to a blind and carpet cleaning. The Tenants said they did not give the Landlords written authorization to make any deductions from their security deposit. The Tenants also said the Landlords did not do a move in or a move out condition inspection report.

The Landlords said that the Tenants did not give them a proper forwarding address because it only contained the street name and number of their new residence and did not include the city or postal code. The Landlords said they did a walk-through of the rental unit with the Tenants at the beginning and at the end of the tenancy.

The Landlords' Claim:

The Landlords said the suite was newly renovated 5 – 6 months prior to the tenancy and was in good condition. In support of their position, the Landlords provided photographs they said they took the day before the tenancy started. At the end of the tenancy the Landlords said they discovered that there was a damaged lock on a sliding glass door and a broken slat from vertical blinds. In support, the Landlords provided photographs they said they took on February 11, 2010. The Tenants argued that these items were damaged at the beginning of the tenancy.

The Landlords said that under the terms of the tenancy agreement, the Tenants were responsible for the payment of one-half of the increased hydro billing not just for the period February 1, 2009 to September 2009 but for the whole tenancy. The Landlords also claimed that they approached one of the Tenants in the summer of 2009 to tell her that their equal payments had increased due to the increased use of hydro for the rental property and that they could not afford to pay it. The Landlords said the Tenants verbally agreed that they would compensate the Landlords for each additional month after September 2009.

The Tenants deny this and claim that utilities were supposed to be included in rent and that it was only after they received a copy of the tenancy agreement that they discovered that the Landlords wanted some contribution for hydro expenses. The Tenants claim that due to their own fixed income, they never would have agreed to pay utilities beyond September 2009.

The Landlords also claim that the Tenants did not give them written notice that they were ending the tenancy. The Landlords said they approached the Tenants in December 2009 and advised them that if they wanted to renew the lease, rent would be $1,200.00 per month. The Landlords said the Tenants told them they could not afford to pay that amount so on January 11, 2010, the Landlords told the Tenants they would rent the unit to them for $1,000.00 per month. The Landlords said that it was not until January 12, 2010 that the Tenants gave them verbal notice that they were moving out because the rental unit was too small. The Landlords said they tried to re-rent the rental unit to foreign students but were unsuccessful. The Landlords admitted that they had no intention of re-renting the rental unit to any other type of tenant. The Landlords said the rental unit is still vacant but that they have a foreign student lined up for September 2010.

The Tenants claim that the Landlords approached them approximately 3 months before the end of the tenancy about renewing the lease for $1,200.00 per month. The Tenants said they told the Landlords at that time that they could not afford that much and that they needed a larger residence in any event. The Tenants said the Landlords approached them a couple of more times with a reduced amount of rent but the Tenants told them the same thing. The Tenants said that in December 2009, the Landlords said that one of their sisters was moving in and wanted to know if the Tenants could move out early. The Tenants said the Landlords told them to just let them know when they

would be moving out and told them not to worry about giving written notice. The Landlords deny telling the Tenants that a family member was moving in or that they asked the Tenants to move out early.

Analysis

The Tenants' Claim:

Section 38(1) of the Act says that a Landlord has 15 days from either the end of the tenancy or the date they receive 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.

Section 36(2) of the Act says that if a Landlord does not complete a move out condition inspection report, the Landlord's right to make a claim against the security deposit for damages to the rental unit is extinguished. In other words, the Landlord may still bring an application for compensation for damages however they may not offset those damages from the security deposit.

I find that the Landlords received the Tenants' forwarding address in writing on January 31, 2010. Although the Landlords argued that the Tenants provided an incomplete address, I find that it was sufficient for the purposes of the Act because the Landlords admitted that with that address they were able to deliver a partial refund cheque to the Tenants. I also find that the Landlords did not return the Tenants' full security deposit and did not make an application for dispute resolution to make a claim against the deposit until May 26, 2010. I further find that the Landlords did not have the Tenants' written authorization to keep the security deposit and that their right to make a claim against it for compensation for alleged damages to the rental unit was extinguished under s. 24(2) and s. 36(2) of the Act because they did not complete a move in or a move out condition inspection report. As a result, I find that pursuant to s. 38(6) of the Act, the Landlords must return double the amount of the security deposit ($900.00) to the Tenants.

The Landlords' Claim:

The Tenants argued that they were not required to give written notice because their lease was expiring on January 31, 2010. However, unless a tenancy agreement specifically states that a tenant must move out of a rental unit at the end of a fixed term, the tenancy is deemed to continue on a month to month basis. This means that a tenant of a fixed term tenancy may still have to give written notice ending the tenancy at the end of the fixed term. Section 45(1) of the Act states that a Tenant of a month-to-

month tenancy must give one clear month's notice in writing that they are ending a tenancy.

I find that the tenancy agreement in this matter did not specify that the Tenants had to move out at the end of the fixed term and therefore I conclude that in order to end the tenancy, the Tenants were required to give one month's written notice to the Landlords unless the Landlords waived that requirement.

The Tenants also argued that the Landlords told them that they did not need to give written notice because someone else was moving in. The Landlords denied this. On this issue, the Tenants have the burden of proof and must show (on a balance of probabilities) that the Landlords waived the requirement of written notice ending the tenancy. This means that if the Tenants' evidence is contradicted by the Landlords, the Tenants will need to provide additional, corroborating evidence to satisfy the burden of proof. Given the contradictory evidence of the Landlords and in the absence of any corroborating evidence from the Tenants, I find that the Tenants have not provided sufficient evidence to show that the Landlords waived the requirement that the Tenants give them written notice.

However, section 7(2) of the Act states that a party who suffers damages must do whatever is reasonable to minimize their losses. This means that a landlord must try to re-rent a rental unit as soon as possible to minimize a loss of rental income. The Landlords admitted that after the tenancy, they were not interesting in renting to other than students who would live with them. By limiting the type of renter the Landlords were willing to accept, I find that the Landlords were partially responsible for their loss of rental income and must bear part of that loss. Consequently, I find that the Tenants are responsible for one-half of the loss of rental income for February 2010 of $450.00.

I find that there is insufficient evidence to support the Landlords' claim for utilities for September 2009 to the end of the tenancy. In particular, I find that the term of the tenancy agreement that requires the Tenants to pay one-half of the hydro billings in excess of the payment plan amount after September 2009 is unclear. Although that clause states that the increased amount is due in September when the amount is billed to the Landlord, the agreement is silent as to the Tenant's responsibility for those payments for the balance of the tenancy. Section 6(3) of the Act says that "a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it." I find that the term of the tenancy agreement that the Landlords claim obligates the Tenants to pay utilities for September 2009 to the end of the tenancy is not sufficient clear and I also find that it is unenforceable. Consequently, the Landlords' application to recover utility expenses from September 2009 to the end of the tenancy is dismissed without leave to reapply.

RTB Policy Guideline #1 (Landlord & Tenant – Responsibility for Residential Premises) states at p. 2 that a tenant is generally responsible for cleaning the carpets after a tenancy of about a year. The Tenants admitted that they did not clean the carpets because they were under the mistaken belief that it was the Landlords' obligation.

Consequently, I find that the Landlords are entitled to their reasonable carpet cleaning expenses of $30.00.

Sections 23 and 35 of the Act say that a Landlord must complete a condition inspection report at the beginning of a tenancy and at the end of a tenancy in accordance with the Regulations and provide a copy of it to the Tenant (within 7 to 15 days). A condition inspection report is intended to serve as some objective evidence of whether the Tenant is responsible for damages to the rental unit during the tenancy or if they have left a rental unit unclean at the end of the tenancy. In the absence of a condition inspection report, other evidence may be adduced but is not likely to carry the same evidentiary weight especially if it is disputed.

A move in and a move out condition inspection report were not completed by the Landlords. However, the Landlords rely on photographs they said they took of the rental unit immediately prior to the Tenants moving in and shortly after they moved out. I do not find the Landlords' photographs helpful in this matter because they do not show the condition of the sliding door's lock at the beginning of the tenancy. The Tenants claimed that the lock was already in poor condition at the beginning of the tenancy and worsened with reasonable wear and tear. Furthermore, while the photograph of the blind at the beginning of the tenancy is cut off and does not show the alleged area of damage. Consequently, I find that there is insufficient evidence to support the Landlords' claim for expenses to repair the door lock and the vertical blind and they are dismissed without leave to reapply.

As the Landlords have been partially successful on their claim, I find that they are entitled to recover one-half of the filing fee for this proceeding ($25.00) from the Tenants.

In summary, I find that the Tenants have made out a claim for $900.00 and the Landlords have made out a claim for $505.00. Although s. 24(2) and s. 36(2) of the Act say that the Landlord's right to claim against the security deposit for damages is extinguished if they do not complete a move in and a move out condition inspection report, sections 38(4), 62 and 72 of the Act when taken together give the director the ability to make an order offsetting damages from a security deposit where it is necessary to give effect to the rights and obligations of the parties.

Consequently, I order the Landlords to keep **$505.00** from the Tenants' security deposit. As the Landlords have already returned the amount of $9.31 to the Tenants, I order the Landlords to return the balance owing of **$385.69** to the Tenants.

Conclusion

A monetary order in the amount of **$385.69** has been issued to the Tenants and a copy of it must be served on the Landlords. If the amount is not paid by the Landlords, 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 08, 2010.

Dispute Resolution Officer