

## **DECISION**

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

**Tenants:** MNSD and FF

### **Introduction**

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

By application of January 14, 2010, the landlords seek a Monetary Order for loss or damages under the legislation or rental agreement, unpaid utilities, recovery of the filing fee for this proceeding and authorization to retain the security deposit in set off against the balance owed.

By application of February 12, 2010, the tenant seeks return of her security deposit, loss or damage under the legislation or rental agreement and recovery of her filing fee.

### **Issues to be Decided**

This dispute arises from a disagreement between the parties as to whether the fixed term agreement in place when the landlords took possession of the rental unit applied or whether it had devolved to a month to month agreement. If that decision finds the fixed term agreement prevails, the dispute requires a decision on whether and to what degree the landlords are entitled to an order for loss of rent in addition to the question of utilities, filing fee and disposition of the security deposit.

The tenant's application also requires a decision on whether she is entitled to some recompense due to a claim of inadequate heating in the rental unit.

## **Background and Evidence**

This tenancy in the landlord's basement suite began on August 1, 2009 under a 12-month fixed term rental agreement. Rent was \$975 per month and the tenant paid a security deposit of \$500 at the beginning of the tenancy. The tenant gave her notice to end the tenancy on November 30, 2009 and vacated by the end of December 2009.

Unbeknownst to the tenant, the original landlord sold the rental building at or about the time her tenancy began and the new landlords took possession on September 1, 2009 and after doing some decorating, moved in on September 28, 2009.

The tenant makes claim that on her first meeting with the landlords, their realtor told her that the new landlords would be taking possession and that her rental agreement was void and would have to be renegotiated.

The landlords claim they heard no such comment and certainly had not instructed the realtor to convey that message. However, there seems to be some agreement that the landlords stated they would have preferred that the tenant had not had two dogs.

While the parties initially disagreed on who would be responsible for return of the tenant's security deposit, after the tenant had provided the landlord with references on the question, the landlord conceded in a letter of October 16, 2009 that he had been misinformed, apologized and promised to act accordingly.

In addition, the tenant stated that the original fixed term agreement was no longer valid as the new landlord had not continued the cable service provided by the first landlord, had raised her portion of the hydro from 30 per cent to 40 per cent, and had drafted a new rental agreement which would have required her to pay a pet damage deposit not included in the original agreement.

In an effort to stabilize the tenancy the landlord drafted and presented the new agreement to the tenant in the latter part of October, but she declined to sign it because it added the requirement for a pet damage deposit among other reasons. The landlords stated that they had been prepared to negotiate but received no proposals from the tenant.

By letter of October 13, 2009, the tenant appears to have acknowledged the validity of the first rental agreement in her statement, "I understand that my lease is not as clear as the revised lease, however it is a legal document none the less."

After receiving the tenant's notice to end the tenancy, the landlord cautioned the tenant by letter of December 8, 2009 that the first lease remained operative in his view and that, "I may attempt to recover any rental loss experienced due to your actions."

The landlords gave evidence that they were unable to find new tenants to take possession of the rental unit until May 1, 2010. They submitted into evidence receipts and copies of advertisement from both a local newspaper and Craigslist that show they they had begun to advertise on January 14, 2010.

They stated that they had not advertised in December as they had been advised by the Residential Tenancy Branch that, because the tenant had given notice to take effect before the end of the fixed term agreement, the notice end date automatically self-corrected to the end date of the agreement.

While I questioned the wisdom of that action, the landlords are correct as the tenant retained a right to the rental unit beyond the ineffective end date of December 31, 2009 stated in her notice, if the fixed term remained enforceable, and contracting with new tenants before the tenant vacated could have placed them in breach of contract.

I note also that in the newspaper ad submitted, the landlord's had lowered the rent requested by \$100 per month. which I take as evidence of an effort to minimize their losses as required under section 7(2) of the *Act*.

The tenant gave evidence that, as a result of the hole that had been put in the wall to accommodate the proposed gas fireplace, the rental unit was so cold that at times she and her daughter stayed elsewhere overnight.

## **Analysis**

On the question of the cable and internet connection, there is no expressed provision in the original rental agreement that these services would be provided, nor is there any breakdown on the sharing of utilities other than the general provision at clause 21 which states:

“The Tenant is responsible for the payment of the following utilities and other charges in relation to the Premises: electricity and telephone.”

There is also no reference in the agreement concerning the landlord's verbal promise to provide the tenant with a gas fireplace.

Taken together with the previously cited written references by both the landlord and the tenant on the continuing standing of the first rental agreement, I cannot find that the landlords repudiated that agreement.

As I find that the agreement remained in force, I must find that the tenant breached the fixed term agreement by terminating the tenancy on December 31, 2009.

Accordingly, I find that the tenant is responsible to some degree for the landlords' losses.

However, in determining the matter of degree, I must observe that the four months loss of rent for January to May inclusive claimed by the landlord is an uncharacteristically long time for a suite in the lower mainland to remain empty.

The landlords did not begin advertising the unit January 14, 2010 because they said they needed some time to assess and do repairs on the suite to which they said they had not had full access since they bought until it was vacated. I must find, therefore, that part of the delay in the landlords finding new tenants was a result of their meeting their own need to do maintenance work on their newly acquired suite and they have not fully met their obligation to do whatever is reasonable to minimize their loss under section 7(b) of the *Act*.

Also, the landlords gave no evidence on the number of viewings they had, how many applicants they may have declined or by what criteria, or when they lowered the rate leaving one to ponder why it took four months to find a new tenant.

Therefore, I will allow the landlords claim for two months loss rent due to the breach of the fixed term agreement by the tenant, but I am not persuaded by the evidence that the landlords are entitled to reimbursement for the full four months claimed.

I will further allow the landlord's claim for \$164.11 for unpaid utilities for which the tenant was provided with receipts and the formula used to make the calculations and which the tenant did not contest.

I further find that the landlords are entitled to recover the filing fee for this proceeding and authorization to retain the security deposit in set off against the balance owed.

The tenant's application for return of the security deposit is dismissed. However, I accept the tenant's assertion that the rental unit was unacceptably cold. While the hole in the wall may not be sufficient to prove breach of contract on the part of the landlord, I find that it is sufficient to indicate a loss of quiet enjoyment. I accept the landlords' view that the tenant was not fully cooperative in facilitating repair. Taking both positions into account, I find that the tenant is entitled to a credit of \$75 for each of the two months of November and December, a total of \$150.

On balance, I find that the tenant owes to the landlord's an amount calculated as follows:

Two month's loss of rent (\$975 x 2)	\$1,950.00
Unpaid utilities	164.11
Filing fee	<u>50.00</u>
Sub total.	\$2,164.11
Less retained security deposit (no interest due)	- 500.00
Less rent rebate for inadequate heating	<u>- 150.00</u>
<b>TOTAL</b>	<b>\$1,514.11</b>

## **Conclusion**

In addition to authorization to retain the security deposit in set off, the landlords' copy of this decision is accompanied by a Monetary Order for **\$1,514.11**, enforceable through the Provincial Court of British Columbia, for service on the tenant.

June 24, 2010