



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNDC, MNSD, FF
 MNSD

Introduction

This matter dealt with an application by the Landlord for compensation for damage or loss under the Act or tenancy agreement, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts. The Tenant applied for the return of his security deposit.

Issues(s) to be Decided

1. Is the Landlord entitled to compensation and if so, how much?
2. Is the Tenant entitled to the return of his security deposit?

Background and Evidence

This one year fixed term tenancy was supposed to start on November 1, 2009 at a rental rate of \$1,200.00 per month. The rental property is located on a corner lot facing a busy road. The Tenant said that one of his children has a disability and it was of great concern to him to ensure that he would not be able to run into the road. The Parties agree that on October 15, 2009, the Landlord and Tenant viewed the rental property together.

The Landlord said he discussed options for fencing the property with the Tenant and eventually agreed that he and the Tenant would share the cost to fence the front and back of the property. The Landlord said the Tenant gave him a security deposit of \$500.00 that day and agreed to rent the property. The Landlord also said that on that day, he engaged the services of a fencing company to build the fence before the Tenant moved in and paid a \$500.00 deposit. However, on October 20, 2009, the Tenant gave the Landlord written notice that he would not be moving into the rental unit. The Landlord said he was able to re-rent the rental unit for November 16, 2009 at a rate of \$1,100.00 for the first 5 months. Consequently, the Landlord said he lost rental income of \$600.00 for ½ of November and \$450.00 for the following 4 and ½ months. The Landlord also said that he was unable to recover his \$500.00 deposit for the fence because some of the materials had already been cut.

The Tenant claimed that the Landlord agreed on October 15, 2009 to fence the front and back of the yard but later advised him that he could not fence the front yard because it would create a safety hazard for other tenants of the rental property who

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would have to back into the road from the blind corner lot. The Tenant claimed that the Landlord offered instead to put a lock on a screen door where his disabled child would not be able to reach it. The Tenant said he did not think that this option would be adequate to ensure his child's safety and as a result, he gave the Landlord written notice on October 20, 2009 that he would not be moving into the rental unit.

The Tenant said that the Landlord initially told him that he would not get the \$500.00 deposit back because the fencing company had already started making the fence. The Tenant said that he asked the Landlord for the contact information for the fencing company so he could arrange to obtain the materials for his new residence but the Landlord refused to provide those details and told him instead that he just wanted to keep the deposit to compensate him for his lost rental income.

Analysis

Landlord's Claim:

RTB Policy Guideline #8 (Unconscionable and Material Terms) states at p. 2 that a material term is one that the parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. In this case, the Tenant argued that the Landlord's decision not to fence the front of the rental property was a breach of a material term of the tenancy agreement that gave him the right to end the tenancy.

On this issue, the Tenant has the burden of proof and must show (on a balance of probabilities) that the fencing of the front of the property was a material term of the tenancy agreement and that the Landlord failed or refused to fence the front of the property. The Parties agreed that the Tenant only agreed to rent the property if a fence would be built. Consequently, I find that it was a material term of the tenancy agreement that a fence would be built along the front of the rental property. The Parties disagree, however as to whether the Landlord later refused to build a fence along the front of the rental property. The Landlord said he was prepared to have the fence built prior to the tenancy and provided an estimate dated November 17, 2009. The Tenant claimed that the Landlord changed his mind and in support provided a copy of his letter dated October 20, 2009.

I find however, that the Tenant's letter of October 20, 2009 says nothing about the Landlord refusing to fence the front of the property but instead only refers to the busy road being a safety concern. In the absence of any other corroborating evidence to support the Tenant's position, I find that the Tenant has not provided sufficient evidence to show that the Landlord refused to fence the front yard Landlord and thereby

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breached a material term of the tenancy agreement. Consequently, I find that the Tenant was not entitled to end the tenancy agreement.

Section 45(2) of the Act says that a tenant of a fixed term tenancy cannot end the tenancy earlier than the date set out in the tenancy agreement as the last day of the tenancy. If a tenant ends a tenancy earlier, they may have to compensate the landlord for a loss of rental income that he incurs as a result. 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.

I find that the Landlord took reasonable steps to re-rent the rental unit by November 16, 2009 and as a result, I find that he is entitled to recover one-half of the rent for November, 2009 as well as the difference in the rental rate for the following 4 and ½ months for a total of \$1,050.00.

The Landlord also sought to recover \$500.00 for a non-refundable deposit he said he paid to have the fence built for the Tenant. On this issue, the Landlord has the burden of proof and must show (on a balance of probabilities) that he paid the deposit and that it could not be refunded for the reasons he alleged. The Landlord provided a quote dated November 17, 2009 that shows the name of a company, a telephone number, the cost for labor and supplies and that a deposit had been paid. The Tenant argued that this quote was unreliable in that there was no name or address on it.

I find that there is insufficient evidence to conclude that the Landlord's deposit of \$500.00 was not refunded to him. The Landlord provided no evidence of that and I find that the quote he provided is deficient in a number of respects. In particular, the quote is dated almost a month after the Landlord said he placed his order, it is unsigned, has no name or address, no particulars about the size of the fence to be built and no GST registration number. Consequently, I find that the Landlord is not entitled to recover the \$500.00 deposit for the fence and that part of his claim is dismissed without leave to reapply. In summary then, I find that the Landlord has made out a monetary claim for \$1,050.00.

Tenant's Claim:

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

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then pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit.

I find that the Landlord received the Tenant's forwarding address in writing on October 20, 2009 together with his written Notice that he was ending the tenancy. I also find that the Landlord did not return the Tenant's security deposit and did not make an application for dispute resolution to make a claim against the deposit until March 25, 2010. I further find that the Landlord did not have the Tenant's written authorization to keep the security deposit. As a result, I find pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit (\$1,000.00) to the Tenant.

RTB Policy Guideline #17 at p. 2 states that "unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit." Although the Tenant applied to recover only the original amount of the security deposit, I find that he did not specifically waive reliance on s. 38(6) of the Act and accordingly, I find that he has made out a monetary claim for \$1,000.00.

As each of the Parties is entitled to recover their respective \$50.00 filing fees from each other pursuant to s. 72 of the Act, I make no order regarding them. I order pursuant to s. 72 of the Act that the Parties' respective monetary awards be offset and accordingly the Landlord will receive a Monetary Order for the balance owing of \$50.00.

Conclusion

A Monetary Order in the amount of \$50.00 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: July 14, 2010.

Dispute Resolution Officer