DECISION

Dispute Codes OPC MND MNSD MNDC FF
CNC MNDC MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenants.

The Landlord filed seeking an Order of Possession for Cause, a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, to keep all or part of the security deposit, for damage to the unit site or property, and to recover the cost of the filing fee from the Tenants for this application.

The Tenants filed seeking an Order to cancel the notice to end tenancy for cause, and to obtain a Monetary Order for the return of all or part of the security deposit, for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, and to recover of the cost of the filing fee from the Landlord for this application.

Service of the hearing documents by the Tenants to the Landlord was done in accordance with section 89 of the *Act*, served personally to the Landlord. The Landlord confirmed receipt of the Tenants' hearing documents within the required time frame.

Preliminary Issues

The Landlord filed her application on August 10, 2010 seeking a Monetary Order in the amount of $50.04 then on September 8, 2010 she submitted evidence for a claim in the amount of $4,080.04. The Landlord confirmed that the she did not amend or change her application for dispute resolution at the *Residential Tenancy Branch* and therefore did not serve a copy of the amended application form to each of the Tenants.

The Tenants testified that they did not receive a copy of the Landlord's evidence which was filed in support of this higher amount being claimed by the Landlord.

After further clarification of the application process the Landlord confirmed she has regained possession of the unit and therefore requested to withdraw her application in full and she would make a new application for dispute resolution to seek a Monetary Order for the full amount of her claim.

I informed the Landlord that all evidence received for this file would remain on this file and she would have to serve each Tenant and the *Residential Tenancy Branch* again with all of the evidence she wished to rely on for any future application.

The hearing proceeded in relation to the Tenants' application.

Issues(s) to be Decided

Are the Tenants entitled to an Order to cancel the notice to end tenancy pursuant to section 47 of the *Residential Tenancy Act?*

Are the Tenants entitled to a Monetary Order pursuant to sections 38, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony was the month to month tenancy agreement was effective June 1, 2010. Rent was payable prior to the first day of each month in the amount of $1,200.00 and the Tenants paid a security deposit of $600.00. The written tenancy agreement did not stipulate access or usage of either the front or back yard areas. The rental unit was a duplex with four separate living areas, two upper units and two lower units. The Tenants occupied the unit directly above where the Landlord's adult daughter resides while the Landlord occupied the other lower unit. The tenancy ended on August 31, 2010 when the Landlord hired a bailiff to remove the Tenants and their possessions after she had obtained an Order of Possession and a Writ of Possession.

The Tenants testified that they are seeking the return of their rent for July and August 2010 at $1,200.00 per month plus the return of their security deposit as compensation for having to deal with all the problems while they lived in the rental unit for those two months. They confirmed that they occupied the unit for three months and that they did not start to experience problems until July 2010. The Landlord began to argue and yell at the Tenants and their children. She then began to restrict their access to the back yard area, restricted and then stopped their access to laundry facilities, and on more than one occasion the Landlord drained the water out of their children's pool. Someone also cut a hole in the blow up pool to prevent it from being used again. They then had to deal with no hot water either the hot water tank was shut off or the Landlord's daughter ran the hot water until the tank was empty so they would not have any. Then for about six or seven days they began to experience no water at all. It was not until the police attended that the Landlord would turn the water on again.

The Landlord confirmed that there was nothing specifically written in the tenancy agreement about the use of the front or back yard or use of the laundry facilities. The Landlord confirmed the Tenants were allowed to use the laundry machines initially for two hours once per week and then later she changed it to two days per week. The Landlord argued that when the Tenants failed to remove their laundry within the required timeframes she restricted their use of the machines completely. She confirmed that the water was shut off the laundry machines and that she told the Tenants that they were not allowed in the back yard as their children were damaging her plants. The Landlord stated that she informed the Tenants of these changes verbally and no written notices or warnings were issued to the Tenants for these changes. There was however one written letter issued to the Tenants about smoking. The Landlord claims the hot water tank was never shut off nor was the main water supply.

The Landlord attempted to argue that she did not receive copies of the Tenants' evidence specific to their application. She confirmed receiving the same documents that were received at the *Residential Tenancy Branch*. The Landlord confirmed the contents of the photos that it was herself sitting in the Tenants' children's pool and sweeping off the chalk on the sidewalk; however she argued she was sweeping at 8:00 a.m. in the morning to locate a garden hose connector that had fallen on the patio.

The Tenants stated that the Landlord knew they were vacating the rental unit on August 30, 2010, as she watched them move out some of their possessions yet she still hired the bailiffs to come and remove them and their remaining possessions.

Analysis

All of the evidence and testimony was carefully considered in my following decision.

Section 7(1) of the Act provides that if a landlord or tenant does not comply with this Act, the Regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for the damage or loss which results. That being said, section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In the circumstances before me, I find the version of events provided by the Tenants to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the Tenants over the Landlord in regards to issues surrounding water being turned off at the rental unit.

The evidence supports the Landlord changed or restricted services regarding the Tenants' access to facilities during the tenancy. Section 27 (1) of the Act provides that a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation or if the service or facility is a material term of the tenancy agreement. Section 27(2) states that a landlord may terminate or restrict a service or facility, other than one referred to in subsection 27(1) if the landlord gives 30 days written notice, in the approved form, of the termination or restriction, and the landlord reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

The undisputed testimony confirms the Landlord restricted and later denied the Tenants access to laundry facilities and use of the backyard area without providing proper written notice and without providing a reduction in rent as required under Section 27 of the Act. Therefore I find the Tenants have proven the test for damage or loss as listed above and I approve their claim in the amount of $1200.00. The amount of the claim is calculated in accordance with section 67 of the Act while taking into consideration that

during warm summer month's children tend to spend more time outside than inside so by restricting their access to a fenced yard the landlord reduced the value of their tenancy up to 40%. The remaining 10% takes into consideration the loss of laundry facilities.

I accept that the water was shut off in the rental unit up to as many as seven days which is a breach of section 27 (1) of the Act. Therefore I approve the Tenants' claim for compensation in the amount of $276.15 (7 x $39.45).

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit. In this case the tenancy ended August 31, 2010 however the Tenants have not provided their forwarding address to the Landlord in writing. Therefore the Tenants' application for the return of their security is premature and is dismissed with leave to reapply.

The Tenants have been partially successful with their application; therefore I award recovery of the $50.00 filing fee.

Monetary Order – I find that the Tenants are entitled to a monetary claim as follows:

Compensation for reduced services and facilities	$1,200.00
Compensation for seven days without water	276.15
Filing fee	50.00
TOTAL AMOUNT DUE TO THE TENANTS	**$1,526.15**

Conclusion

A copy of the Tenants' decision will be accompanied by a Monetary Order for **$1,526.15**. The order must be served on the respondent and is enforceable through the Provincial Court 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: September 28, 2010.

Dispute Resolution Officer