

DECISION

Dispute Codes MNSD, MNDC, FF, DRI

Introduction

This hearing dealt with applications from both the landlord and the tenants pursuant to the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for her application from the tenants pursuant to section 72.

The tenants applied for:

- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties appeared at the hearing and were given a full opportunity to be heard, to present evidence, to call witnesses and to make submissions. Both parties testified that they sent one another copies of their applications for dispute resolution by registered mail and provided their confirming Canada Post Tracking Numbers. Both parties confirmed receiving these documents from the other party. I am satisfied that the parties have served one another with their applications for dispute resolution in accordance with the *Act*.

The parties also confirmed that they have received evidence packages from one another, including a video/audio DVD provided by the tenants of a meeting between the landlord's representative DW and the tenants. I said that I had checked the copy

forwarded to the Residential Tenancy Branch on the DVD player supplied in accordance with the Residential Tenancy Branch's Rules of Procedure and confirmed that I could view it and hear the DVD. The landlord testified that she was unable to hear the audio of this DVD on either of the copies provided by the tenants. The male tenant testified that he had checked all copies of this DVD before he sent it to ensure that they were viewable and audible. Since the landlord had not had an opportunity to listen to the audio of this DVD, I advised the parties that I would be disregarding that evidence.

Issues(s) to be Decided

Is the landlord entitled to:

- a monetary Order for damage created during the tenancy?
- a monetary Order for loss of rent when the tenants vacated the rental premises?
- retain all or a portion of the tenants' security deposit?
- recover the filing fee for this application from the tenants?

Are the tenants entitled to:

- a reduction in rent during their tenancy?
- a monetary Order for losses they experienced during the course of their tenancy?
- a monetary Order for double the monthly rent because the landlord did not use the property for the purpose stated on the landlord's 2 Month Notice to End Tenancy for Landlord Use of the property?
- obtain the return of their security deposit?
- recover their filing fee for this application from the landlord?

Background and Evidence

The parties testified that this tenancy commenced as a one-year fixed term tenancy on December 1, 2007. On April 1, 2009, the tenancy was continued as a one-year fixed term tenancy to expire on March 31, 2010. Rent was set at \$ 1,680.00 per month. During early 2010, the tenants approached the landlord's representative to let him know that they did not wish to sign another fixed term lease but were looking into finding alternate accommodations. The landlord's representative prepared a hand-written set

of “Tenant Agreement Changes” that were to take effect on May 1, 2010. The parties entered into evidence a written copy of this agreement, signed by both parties on April 7, 2010. This agreement was comprised of the following four terms:

- *Tenant wants to change to month to month rental.*
- *They agree to give one month notice before they move.*
- *Tenant also agrees to not claim one month free rent from landlord when they move out.*
- *The rental will continue at \$1680 per month.*

The tenants testified that they did not receive a proper explanation from the landlord’s representative as to why he wanted them to sign an agreement requiring them to not claim one month’s free rent when they moved out. At that time, they said that they had no reason to request one free month of rental from the landlord.

The landlord testified that the tenants found a new rental unit on May 11, 2010, with a projected move-in date of July 1, 2010. The landlord said that the tenants asked the landlord’s representative to attend their unit on May 12, 2010, where they asked him to sign a 2 Month Notice to End Tenancy for Landlord Use of Property. The landlord said that her representative, her father, does not have a full command of the English language. She said that her father signed the documents prepared by the tenants without fully understanding what he was signing and without her authorization. She said that the notice was not fully completed or dated, appeared to have been altered by the tenants, and maintained that the notice was legally invalid. During the hearing, both she and her sister, who provided evidence on their father’s behalf at the hearing, confirmed that they never had any intention of moving into the rental premises. They said that the tenants were incorrect in claiming that their father issued the tenants an eviction notice for landlord use of the property so that one of his daughters could live there.

The landlord’s application for a monetary Order included the following items:

Item	Amount
Loss of Rent for June 2010	\$1,680.00
Carpet Cleaning and Replacement of Missing Light Fixture	60.00
Recovery of Filing Fee for this application	50.00
Total Monetary Award Requested	\$1,790.00

The tenants testified that the landlord's representative called them on May 8, 2010 to tell them that they would need to vacate the rental unit by July 1, 2010 because the landlord's daughter was planning to move into this unit. The tenants said that they told him that this was not sufficient notice for this type of eviction and that he would need to review the *Act*. After consulting with the Residential Tenancy Branch on May 10, 2010, the tenants said that they learned that they were entitled to two month's notice if the landlord needed the premises for a close family member and that they would be entitled to live there rent-free for the last month of their tenancy.

The tenants testified that they contacted the landlord's representative on May 12, 2010, requesting that he prepare the proper form if he was intending to seek their eviction for landlord's use of the property. Since he was unwilling or unable to do so, the tenants printed out two copies of the relevant form, Form #RTB – 32, and asked him to sign this. They also entered evidence that they had found a new place to live by July 1, 2010, the date the landlord's representative requested them to vacate the property.

The tenants entered written evidence that they met with the landlord's representative on May 13, after he tried to rescind the written 2 Month Notice to End Tenancy he had signed the previous day. This evidence alleged that the landlord's representative confirmed that he wanted them to leave so that his daughter could move into the rental premises on July 1, 2010. At the hearing, they said that the DVD evidence included a video and audio proof of their assertion. They said that they told him that they had learned that the April 7, 2010 Tenant Agreement Change was not a valid document and that they were still entitled to one month's free rent at the end of this tenancy on the basis of the landlord's notice to end tenancy for landlord use of the property.

Since they no longer trusted the landlord's representative, the tenants said that they issued a 10 day notice to end tenancy on May 13, 2010, pursuant to section 49 of the *Act* in response to the landlord's 2 Month Notice to End Tenancy for Landlord Use of the Property. They vacated the rental premises on May 23, 2010.

The tenants' application for a monetary Order included the following items:

Item	Amount
Last Month's Rent	\$1,680.00
Equivalent of 2 Month's Rent for Landlord's Failure to Use Property for the Purpose Stated in his Notice to End Tenancy	3,360.00
Return of Security Deposit	825.00
Return of Key/Fob Deposit	150.00
Wrongful Withholding of Security and Key/Fob Deposit	975.00
Rental Rebate from May 23 to May 31	433.55
Interest from Security Deposit	15.89
Wrongful Increase of Rent from April 1, 2009 – May 31, 2010	390.00
Filing Fee for this Application	50.00
Total Monetary Award Requested	\$7,879.44

Analysis

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

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 currently 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...

The parties presented very conflicting accounts of the circumstances surrounding the end to this tenancy. In addition to the manner and tone (demeanour) of the witness' evidence, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

The landlord provided conflicting evidence regarding the extent to which her father was able to act on her behalf. Although the landlord's father has clearly been acting as her representative with the tenants throughout the course of this 2 ½ year tenancy, she maintained that his capacity in the English language limited his ability to act on her behalf. As he was identified throughout this tenancy as the tenants' sole contact, I find that the landlord's representative was authorized to interact with the tenants. Evidence was entered that his authority to act on her behalf extended to his signing his daughter's name on documents. I am satisfied that that the landlord's father was acting on her behalf over a wide range of landlord/tenant issues.

Although the landlord's representative was in attendance at the hearing, the landlord presented very little direct testimony from him during this tenancy. Virtually all of the testimony attributed to him was provided by his daughter, TW, who was in the same room as him, but seldom asked for any input from him in offering oral testimony. Other testimony describing the nature of the conversations between the tenants and the landlord's representative was provided by the landlord, PA. This oral evidence varies from the tenants' direct testimony regarding their conversations with the landlord's representative who they maintain told them a number of times that he was seeking their eviction for the use of the property by one of his daughters. Under these circumstances, I find the tenants' evidence more credible and direct than that of the landlord.

Landlord's Application for a Monetary Order for Damage

The landlord testified that no move-in or move-out condition inspection was conducted, nor was a report prepared and sent to the tenants. In the absence of this information

and evidence as to the condition of the premises when this tenancy began, I dismiss the landlord's application for a monetary Order for damage created during this tenancy.

Tenants' Application for a Reduction in Rent from April 1, 2009 until May 31, 2010

Although the tenants submitted that the landlord did not follow the required procedures to increase their rent as of April 1, 2009, they testified that they did not raise concerns about this issue until they received the landlord's application for dispute resolution. As they clearly accepted and paid the rent from April 1, 2009 until the end of their tenancy, I dismiss the tenants' application for a reduction in their rent during that period.

Landlord's Application for a Monetary Order for Losses Experienced During this Tenancy

I find that the tenants issued their May 13, 2010 notice to end tenancy in accordance with section 50(1) of the *Act*. This allowed them to give the landlord at least 10 days' written notice that they were ending their tenancy before the June 30, 2010 date requested by the landlord. Although the tenants signed the April 7, 2010 agreement, no such agreement can supersede the provisions of the *Act*. Since the tenants' notice to end tenancy was in accordance with the *Act*, I dismiss the landlord's application for a monetary Order for her loss of one month's rent.

Tenant's Application for a Monetary Order

The *Act* allows a landlord to end a tenancy when:

the landlord or a close family member of the landlord intends in good faith to occupy the rental unit;

The "good faith" requirement imposes a two part test. First, the landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy. Second, the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.

If the “good faith” intent of the landlord is called into question, the burden is on the landlord to establish that she truly intends to do what she has indicated on the Notice to End, and that she is not acting dishonestly or with an ulterior motive.

The tenants alleged that the landlord’s representative placed the clause requiring them to forego their claim for the last month’s rent in the April 7, 2010 agreement because he planned to issue them a 2 Month Notice to End Tenancy for Landlord Use of Property in the coming weeks. One month after jointly signing this agreement, the tenants testified that the landlord’s representative notified them that they would have to end their tenancy by July 1, 2010. The landlord did not satisfactorily address why this clause was placed in the April 7, 2010 agreement when the tenants would not have been entitled to forego paying rent during their last month of the existing tenancy.

It is unusual that the tenants would print a Landlord’s Notice to End Tenancy document themselves for the landlord’s signature, one day before they issued their own notice to end tenancy. However, I am satisfied that the landlord’s representative was attempting to obtain the end to their tenancy for landlord use and that he did sign the landlord’s name to the printed 2 Month Notice to End Tenancy for Landlord Use of Property on May 12, 2010. On May 12, 2010, the landlord prepared a letter to the tenants advising them that her father signed the 2 Month Notice without her knowledge or consent. In her letter, the landlord stated that her father did not represent her and that the signed form was invalid. This letter was delivered to the tenants by her father on May 13, 2010. At that time, they testified that he confirmed that he needed them to vacate the premises so that one of his daughters could live there. They also testified that they discussed the details of the pending end to the tenancy and he tried to settle their concerns with a cash settlement. The landlord did not present any direct evidence from her father regarding this sequence of events and the tenants’ claim that he continued to represent her interests as the landlord.

Based on the evidence before me, I find that that it more likely than not that the landlord’s representative acting on the landlord’s behalf attempted to obtain an end to

this tenancy for landlord's use of the property for use by one of his daughters. I find that there is undisputed evidence that the landlord did not intend to use the property for a close family member. I find that the evidence presented is consistent with the tenants' assertion that the landlord's representative included the clause in the April 7, 2010 agreement to avoid the provisions of section 49 of the *Act* which would allow them to stay in the rental premises rent-free during the last month of their tenancy. I find that the landlord has not met the burden of proving that her representative had no intention of providing notice to end tenancy for landlord use of the property.

Section 51 of the *Act* allows a tenant who receives a notice to end tenancy under section 49 to receive an amount that is equivalent of one month's rent payable under the tenancy agreement. I find that the April 7, 2010 agreement between the parties has no bearing on the provisions of section 51 of the *Act*, as parties cannot contract out of provisions of the legislation. In accordance with section 51(1) of the *Act*, I grant the tenants a monetary Order in the amount of \$1,680.00 for one month's rent.

Section 51(2) of the *Act* requires that in addition to payments under section 51(1) a landlord must pay a tenant an amount equivalent to double the monthly rent payable under the tenancy agreement if a landlord has not taken steps to use the property for the purposes stated in the notice under section 49 of the *Act*. Both the landlord and her sister testified that no one in their family intended to relocate to the rental premises. The landlord advertised the premises for rent on Craigslist on May 24, 2010. Since I accept that the landlord's representative did attempt to end this tenancy for landlord use of the property, I grant the tenants a monetary Order in the amount of \$3,360.00 in accordance with section 51(2) of the *Act*.

Section 50(2) of the *Act* requires the landlord to return that proportion of the rent that the tenants had already paid for the period from May 24 to May 31, 2010. I find that the tenants are entitled to a monetary Order in the amount of \$433.35 (i.e., \$1,680.00 x 8 days/31 days = \$433.55). Section 50(3) of the *Act* specifies that this notice does not affect the tenant's right to compensation under section 51.

Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit.

If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the deposit (section 38(6)). With respect to the return of the security deposit, the triggering event is the latter of the provision by the tenant of the forwarding address in writing or the end of the tenancy.

The tenants provide their forwarding address in writing prior to ending their tenancy on May 23, 2010. The landlord applied for dispute resolution on June 3, 2010, within 15 days of the end of this tenancy. I dismiss the tenant's application to obtain double the security deposit from the landlord. I allow the tenants' application to obtain the security deposit plus interest owing from December 1, 2007 until the date of this decision.

Tenants' Application for Return of Key/Fob Deposit

Based on the tenants' undisputed testimony regarding the landlord's failure to return to them the \$150.00 key/fob deposit for this tenancy, I issue a monetary Order allowing the tenants to recover the \$150.00 they paid for this item. I do not grant the tenants their request for double this amount, as there is no provision for doing so under the *Act*.

Filing Fees

As the tenants have been successful in their application, I allow them to recover their filing fees from the landlord. The landlord will bear her costs of filing her application.

Conclusion

I dismiss the landlord's application for a monetary Order for damage caused by the tenants. I dismiss the tenants' application for a reduction in rent from April 1, 2009 until

the end of this tenancy. I grant a monetary Order in the tenants' favour in the following terms:

Item	Amount
One Month's Rent -s. 51(1)	\$1,680.00
Equivalent of 2 Month's Rent for Landlord's Failure to Use Property for the Purpose Stated in his Notice to End Tenancy – s. 51(2)	3,360.00
Rental Rebate from May 24 – May 31/10 s. 50(3)	433.55
Return of Security Deposit (\$825.00 + \$13.44 = \$838.44)	838.44
Return of Key/Fob Deposit	150.00
Recovery of Filing Fee for this application	100.00
Total Monetary Award	\$6,561.99

The tenants are provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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*.