



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Tenants for compensation for damage or loss under the Act or tenancy agreement, for the return of a security deposit and to recover the filing fee for this proceeding.

Issues(s) to be Decided

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

Background and Evidence

This fixed term tenancy started on May 1, 2009 and was to expire on April 30, 2010. The Tenants claimed, however that the rental unit was not reasonably clean at the beginning of the tenancy and therefore they argued that they were entitled to rescind the tenancy agreement on May 10, 2009. Rent was \$1,650.00 per month payable in advance on the 1st day of each month. The Tenants paid a security deposit of \$825.00.

One of the Tenants (S.V.) first viewed the rental unit on April 14, 2009 and he said it was not reasonably clean at that time and recalled that there were a number of dirty dishes. The Tenant said that the Landlord's agent (who was residing in the rental unit at the time) assured him that the suite would be professionally cleaned, however when the Tenant returned on April 17, 2009, the suite was still in the same condition. The Tenant said the Landlord's agent again assured him that the unit would be professionally cleaned (including the carpets) and as a result, he signed the tenancy agreement. The Tenants said they arrived late in the day on May 6, 2009 to take possession of the rental unit but found that it was unacceptably dirty and considered it uninhabitable. In particular, the Tenants said the walls were grimy, the floor was sticky, there was a yellow stain on the refrigerator, the ceiling had oil marks, the light switches were dirty, there were remnants of food in the sink, the toilet and bathtub had hairs in them, there appeared to be mould under the sink and there was dust downstairs. The Tenants provided photographs of what they said they saw that day.

The Tenants said they contacted the Landlord's agent immediately afterward to advise him that they could not stay in the rental unit because they felt it was unfit for occupation

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and in response the Landlord's agent suggested that "they part ways." The Tenants also said they felt it would be "impossible to live there because it was so filthy." In particular, the Tenants said they were concerned about the affect this might have on the health of one of their infant children who had a gastro-intestinal sensitivity so they immediately started to look for other accommodations. The Tenants admitted that they received a call from the Landlord's cleaner, E.W., on or about May 7, 2009 who asked them what further cleaning was required, however they advised her to speak to the Landlord's agent instead.

The Tenants said the Landlord's agent called them 2 days later and they told him that they wanted to take him up on his offer to get out of the lease but he advised them that he had fixed all of the problems the Tenants had identified to him. The Tenants said they returned to the rental unit on May 8, 2009 and found that while some further cleaning had been done and the carpets were in better condition, the cleanliness was still inadequate. The Tenants also provided photographs of the rental unit they said they took on May 8, 2009 which they claim show that the condition of the rental unit was not significantly different (or cleaner) than it was on May 6, 2009.

The Tenants said they stayed for approximately 5 days in an apartment of a co-worker until they could find new accommodations. The Tenants admitted that they did not contact the Landlord's agent again until the evening of May 9, 2009 to advise him that would not be taking the rental unit and they returned the keys to him on May 10, 2009. The Tenants said they entered into a new tenancy agreement on May 11, 2009 for accommodations that were \$330.00 more per month. The Tenants admitted that their new accommodations were larger, however they said their new residence lacked the desirable features of the rental unit such as underground parking, an additional bathroom, a private enclosed yard and closer proximity to their work places.

The Tenants said that one of them had planned to take the third week of May 2009 off of work to unpack their belongings which were expected to arrive from California on May 13, 2009. However due to the need to use the first week to look for other accommodations, S.V. said he was unavailable to help his spouse (A.L.) unpack. The Tenants claimed that because A.L. had to unpack on her own, she could not start work as anticipated on June 1, 2009 and lost 2 weeks of employment income. Consequently, the Tenants sought to recover compensation of \$2,155.00.

The Tenants said the Landlord returned one half of their rent payment for May 2009 in the amount of \$825.00 on May 21, 2009 and their security deposit on May 11, 2009. The Tenants did not cash the Landlord's cheques as they believed that in doing so, they were waiving their right to seek any other compensation. The Tenants argued that they only entered into the tenancy agreement because the Landlord's agent promised that the rental unit would be professionally cleaned, however, the Landlord breached the

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tenancy agreement in failing to have it professionally cleaned or to provide the rental unit in a reasonably clean condition which entitled the Tenants to end the tenancy and recover their whole rent payment for May 2009.

The Landlord's agent claimed that he hired a cleaner (E.W.) who spent most of the day on May 4, 2009 cleaning the rental unit. The Landlord's agent said that he walked around the house with E.W. after she had finished cleaning on May 4, 2009 and everything appeared fine to him. The Landlord's agent said he met the Tenants at the rental unit when they arrived in the early evening on May 6, 2009. The Landlord's agent said he showed one of the Tenants (S.V.) around the rental unit while the other Tenant (A.L.) stayed in the car with their children. The Landlord's agent said he offered to S.V. to do the formal move in condition inspection report at another time (which S.V. denied) because he knew the Tenants had been driving all day with their young children and were tired. The Landlord's agent said S.V. said nothing to him at that time about the cleanliness of the rental unit nor did he take any photographs in his presence. The Landlord's agent said he gave S.V. the keys and left.

The Landlord's agent said it was not until the following day that the Tenants contacted him and advised him and said the rental unit was "disgusting" and "should be condemned." The Landlord's agent said he was shocked but offered to let the Tenants out of the lease and also told them he would send the cleaner back to the rental unit in an attempt "to make them happy." The Landlord's agent said he called the Tenants again on May 7, 2009 to find out exactly what needed further attention and the Tenants told him that the walls were dirty, something had spilled in the refrigerator and they were not happy with the cleanliness of the bathrooms. The Tenant's agent said he had E.W. return to the rental unit on May 8, 2009 to do further cleaning and in particular, to address the concerns of the Tenants. The Landlord's agent said he went through the rental unit again with E.W. once she had finished cleaning on May 8, 2009 and felt the "place looked great."

E.W. admitted that she is not a professional cleaner but a friend of the Landlord's agent and helped him and his spouse with cleaning once or twice a week when they resided in the rental unit. E.W. also gave evidence that on May 4, 2009 she cleaned out the kitchen cupboards and bathrooms and washed all the walls and floors of the rental unit. E.W. said that she felt the rental unit was clean after May 4, 2009 however, on May 8, 2009 she asked the Landlord's agent to point out the areas of concern identified by the Tenants so she could address them. E.W. said that much of the kitchen area had been thoroughly cleaned by her at an earlier date (immediately prior to the Passover holiday a month prior) and as a result, she claimed it only needed to be wiped down on May 4, 2009. E.W. also admitted that there were areas of the walls that she could not reach, however she claimed that this was not an issue because no one else could reach that height either and leave marks. E.W. claimed that on May 8, 2009 she spent most of her

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time washing walls and vacuuming the carpet. E.W. said that when she finished cleaning for the 2nd time on May 8, 2009, she felt that things were as clean as possible.

The Landlord's agent said once the Tenants advised him that they would not be moving into the rental unit on May 9, 2009, he took immediate steps to advertise the rental unit on Craig's List and found new tenants 2 days later who took occupancy on May 15, 2009. The Landlord's agent said that no further cleaning was done in the rental unit after May 8, 2009 and the new tenants did not complain about its cleanliness. One of the new tenants (D.W.) gave evidence that when he viewed the rental unit on or about May 11, 2009, he did not find it to be unclean or uninhabitable otherwise he would not have been interested in it. D.W. said the rental unit has some wear and tear which was to be expected for a rental property of its age. D.W. admitted that he did further cleaning after he moved in but claimed that was his usual practice wherever he lived because he wanted things cleaned to his standard.

The Landlord's agent also claimed that the rental unit was approximately 30 years of age, had always been used as a rental property and had never had renovations. Consequently, the Landlord's agent argued that aside from repainting the rental unit (which the Tenants had not requested), it was reasonably clean for a property of its age and habitable on May 8, 2009. The Landlord's counsel also argued that the Tenants had no intention from the outset to move into the rental unit and used cleanliness as an excuse. In particular, counsel noted that the Tenants claimed there were a number of features that made the rental unit highly desirable to them yet they immediately decided to find another place instead of taking steps to try to remedy the alleged cleaning deficiencies by for example, hiring their own cleaner. The Landlord's counsel also argued that the Tenants showed up to the rental unit on May 6, 2009 to take possession but brought no furnishings or other items with them and never stayed at the rental unit.

Analysis

The Tenants provided a copy of a written tenancy agreement signed by only S.V. which both Parties admit he signed on April 17, 2009. The Landlord provided a copy of a tenancy agreement signed by S.V. and the Landlord however there is no evidence of when the Landlord signed this document Tenants claim that they never received a copy of it prior to the hearing. In the absence of any evidence that the Landlord signed the tenancy agreement prior to the Tenants revoking their offer to rent on May 9, 2009, I find that there is insufficient evidence that the Parties entered into the written tenancy agreement. However, I find that the written tenancy agreement is evidence of the Parties' intention and as a result, I find that on April 17, 2009, the Parties entered into a *verbal agreement* to rent the rental unit for a one year fixed term tenancy at a rate of \$1,650.00 per month. For similar reasons, I find that it was the Parties' intention that

A.L. would be a Tenant and as a result, I find that A.L. is properly named as a Tenant in these proceedings.

In this matter, the Tenants argued that it was a condition of entering into the tenancy agreement that the rental unit would be professionally cleaned and that the Landlord failed to do so. The Tenants also argued that the Landlord failed to provide them with the rental unit in a reasonably clean condition at the beginning of the tenancy and that this rendered it unfit for occupation.

Section 32 of the Act says that “a Landlord must provide and maintain residential property in a state of decoration and repair that complies with health, safety and housing standards required by law and that having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.”

In this matter, the Tenants have the burden of proof and must show (on a balance of probabilities) that either (a) it was a material term of the tenancy agreement that the rental unit would be professionally cleaned prior to the tenancy; or (b) that the rental unit was uninhabitable at the beginning of the tenancy. This means that if the Tenants’ evidence is contradicted by the Landlord, the Tenants will generally need to provide additional, corroborating evidence to satisfy the burden of proof.

The Tenants argued that they would not have rented the rental unit if the Landlord had not agreed to have it professionally cleaned. The Tenants said the Landlord’s agent hired a cleaner who was not a professional cleaner and argued that the Landlord provided no corroborating evidence that he had had the carpets professionally cleaned. The Landlord’s agent said he believed E.W. was a professional cleaner although E.W. claimed that she was not. The Landlord’s agent also said that he did hire professional carpet cleaners. While I find that the Landlord’s agent probably did advise the Tenants that the rental unit would be professionally cleaned, I find that there is insufficient evidence to conclude that this was a material term of the tenancy agreement.

RTB Policy Guideline #8 (Unconscionable and Material Terms) states at p. 2 that “a material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.” I find that the Tenant, S.V., and the Landlord’s agent discussed the issue of cleaning the rental unit on April 17, 2009. However, I find that there is no evidence that the Tenant advised the Landlord’s agent (or that the Parties agreed) that if the rental unit was not *professionally* cleaned that the Tenant would be released from his obligations under the tenancy agreement. Consequently, I cannot conclude that the Landlord’s offer to have the rental unit *professionally* cleaned was a material term of the tenancy agreement the breach of which would have entitled the Tenants to rescind the tenancy agreement.

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The Tenants also argued that the Landlord breached his duty under s. 32 of the Act to provide them with a rental property that was suitable for occupation. In particular, the Tenants claim that the rental unit was filthy on May 6, 2009 and that the Landlord failed to correct this situation. In support of their position, the Tenants rely on photographs they said they took of the rental unit on May 6, 2009 and May 8, 2009. The Tenants' photographs taken on May 6, 2009 show a few spots on a stove handle and bottom of the refrigerator, a small amount of debris in a cupboard, sink and washing machine, an unclean oven, handprints on some walls, some dirt under the kitchen sink, and some dust on stair railings. The photographs taken by the Tenants on May 8, 2010 include the same pictures of dust and debris, the unclean oven and a few hairs on a toilet seat and bathtub.

I find that the rental unit was not reasonably clean on May 6, 2009 and that not all of the cleaning issues had been remedied on May 8, 2009, however I do *not* find that this rendered the rental unit uninhabitable. In other words, I find that the cleaning that still needed to be done could **very easily** have been remedied with a further 4 hours of cleaning. Consequently, I find that it was unreasonable for the Tenants to suggest that these few deficiencies rendered the rental unit uninhabitable. Although the Tenants claimed that they had concerns for the health of their infant daughter who had a gastro-intestinal sensitivity, this is not something that the Tenants advised the Landlord of at any time prior to the hearing and was therefore not foreseeable. Furthermore, there is no evidence that the condition of the rental unit on May 8, 2010 would have been detrimental to the Tenants' child.

The Tenants also argued that it was not up to them to clean or to hire a cleaner to make sure the rental unit was reasonably clean and therefore they were entitled to end the tenancy agreement. I find that the Landlord breached his duty under s. 32 of the Act to provide the rental unit in a reasonably clean condition at the beginning of the tenancy however I also find that this breach was minor and did not entitle the Tenants to rescind the tenancy agreement but rather entitled them only to compensation for damages (such as for cleaning expenses, for example). As a result, I find that the Tenants were not entitled to rescind the tenancy agreement for this reason.

In summary, I find that the Tenants were not entitled to end the tenancy agreement earlier than the last day of the fixed term. However, as the Landlord was able to re-rent the rental unit effective May 15, 2009, the Tenants were only responsible for one-half of the rent for May 2009. The Landlord returned one-half of the Tenants' rent payment for May 2009 and their security deposit in May of 2009 but the Tenants did not cash them and I find that they would now be non-negotiable. As a result, I order the Landlord to re-issue payments for the Tenants' security deposit of \$825.00 and for the one-half month's rent for May 2009 in the amount of \$825.00. As the Tenants' have been



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unsuccessful in this matter, their application to recover the filing fee for this proceeding is dismissed without leave to reapply.

Conclusion

The Tenants' application to recover their security deposit and one-half of the rent paid for May 2009 is granted. A Monetary Order in the amount of \$1,650.00 has been issued to the Tenants and a copy of it must be served on the Landlord. If the amount is not paid by the Landlord, the Order may be filed in the Provincial (Small Claims) Court of British Columbia and enforced as an Order of that Court.

The balance of the Tenants' application is dismissed without leave to reapply. 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: November 25, 2010.

Dispute Resolution Officer