



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 Landlords for a loss of rental income, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts.

The Landlords' application named two parties as co-Tenants, however, the Landlord (M.V.) claimed that she did not serve one of the Tenants with the Application and Notice of Hearing in this matter (the "hearing package") because that tenant paid one half of the amount sought by the Landlords in this matter. The Parties were advised at the outset of the hearing that the Tenant's co-tenant may nevertheless have an interest in these proceedings because co-tenants were jointly and severally liable for any debts. In other words, a Landlord may pursue all or any one tenant for the *full amount of rent* that may be owed. As the Tenant agreed to be solely responsible for satisfying any order granted to the Landlord for a loss of rental income, I amended the style of cause to remove the other tenant named on the Landlords' application.

At the beginning of the hearing, the Landlords sought to amend their application to include an amount of \$450.00 representing the Tenant's share of the difference between the rent under the tenancy agreement and the reduced rent they were able to negotiate with a new tenant for the balance of the fixed term. Given that the Tenant has had no notice of the increased claim, I denied the Landlords' application to amend their application.

Issues(s) to be Decided

1. Are the Landlords entitled to compensation for a loss of rental income and if so, how much?
2. Are the Landlords entitled to keep the Tenant's security deposit?

Background and Evidence

This fixed term tenancy started on January 1, 2010 and was to expire on December 31, 2010 however it ended on May 31, 2010 when the Tenant and her co-tenant moved out.



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Rent was \$2,100.00 per month. The Tenant(s) paid a security deposit of \$1,050.00 at the beginning of the tenancy.

The Tenant and her co-tenant gave the Landlord written notice on April 29, 2010 that they were ending the tenancy on May 31, 2010. The Landlord (M.V.) said that the Tenant initially told her not to bother advertising the rental unit because she had a prospective tenant. The Landlord said that she could not approve the prospective tenant because they did not have a credit history and advised the Tenant of this on May 4, 2010. The Landlord said the Tenant then advised her that she would take responsibility for advertising for a new tenant on Craig's List and told the Landlord not to do so (to avoid duplicating ads). The Landlord said the Tenant sent her a total of 3 applications for prospective tenants, only one of whom was acceptable but he withdrew his application. The Landlord (M.V.) said she also sent the tenant "referrals" of her clients who were interested in viewing the rental unit. The Landlord said that by the end of May, however, a new tenant had not been found. Consequently, the Landlord said she started advertising some time thereafter for a new tenant and one was found for July 1, 2010 at a reduced rent of \$1,950.00.

The Landlord (M.V.) said that there is a term of the tenancy agreement that the Tenant is responsible for liquidated damages which includes loss of rental income, advertising expenses and a leasing commission fee of \$300.00. The Landlord said she explained this to the Tenant and her co-tenant when they signed the tenancy agreement and then again when the Tenant advised her that she wished to end the tenancy early.

The Tenant denied this and said that this term of the tenancy agreement was not clear to her so she contacted the Landlord (M.V.) about it and was told that to end the tenancy early she needed to give the Landlord one month notice to try to find a new tenant and would have to pay \$300.00 as a "lease break fee." The Tenant also claimed that she gave her written authorization on the move out condition inspection report to deduct this amount from the security deposit on the understanding that this was the extent of her liability. The Landlord claimed that the condition inspection report states, "Tenants breaking lease, deduct \$300.00 from security deposit."

The Tenant also denied telling the Landlord (M.V.) that she did not need to advertise the rental unit and said that as the property managers, she assumed the Landlords would do so. However, the Tenant said she received an e-mail from the Landlord on May 5, 2010 which stated, "in this case, you would have to advertise the unit and look for tenants to replace you." The Tenant said she started looking at the Landlords' web site toward the end of May 2010 but did not see any listings for the rental unit until June 21, 2010.

Analysis

Clause 6 of the tenancy agreement deals with liquidated damages and states in part as follows:

“should the tenant vacate the premises before the expiry of the tenancy created by this Agreement, there will immediately become payable by the Tenant to the Landlord monies for all costs incurred as liquidated damages ...(which are) charges such as rent lost due to suite vacancy, advertising costs, leasing commissions (\$300.00 + GST), administrative costs and any other reasonable costs incurred.”

I find this clause is confusing because it is not a liquidated damages clause. In particular, the clause does not set out a stipulated sum representing an amount of pre-estimated damages or (liquidated damages) but rather is a list of items (only one indicating a value) for which the Tenant may be liable if the tenancy is ended early. This confusion is evident based on what the Tenant said the Landlord told her she would be liable for if she broke the lease and what the Landlord (M.V.) herself wrote on the move out condition inspection report. However, I find that this clause is sufficiently clear to indicate that the \$300.00 in question is only for a commission and that the Landlord may also seek amounts for a loss of rental income. Consequently, under the terms of the tenancy agreement, I find that the Landlords are not restricted to the amount of \$300.00 as the extent of their compensation for damages.

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 (by giving one clear month's prior written notice). 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.

In this case, the Tenant argued that the Landlords failed to mitigate their losses because they did not take any steps to re-rent the rental unit until June 21, 2010. The Landlords argued that the Tenant told them not to advertise. In this matter, the Landlords have the burden of proof and must show (on a balance of probabilities) that the Tenant agreed to assume full responsibility for re-renting the rental unit. This means that if the Landlords' evidence is contradicted by the Tenant, the Landlords will need to provide additional, corroborating evidence to satisfy the burden of proof. However, I find that the Landlords have not provided sufficient evidence to show that the Tenant agreed to be solely responsible for re-renting the rental unit. While it seems reasonable that only one of the Parties would advertise on Craig's List to avoid



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duplication, it is not reasonable that the Landlords would not advertise on their own web site until 2 months after the Tenants gave written notice and 3 weeks after the tenancy ended. Furthermore, I find that the e-mail sent by the Landlords to the Tenant on May 5, 2010, corroborates the Tenant's evidence that the Landlords instead advised the Tenant that she would have to find a new tenant.

In failing to advertise the rental unit until June 21, 2010, I find that the Landlords failed to take reasonable steps to re-rent the rental unit and as a result, I also find they are not entitled to recover a loss of rental income and their application is accordingly dismissed without leave to reapply.

The Tenants gave the Landlords written authorization at the end of the tenancy to deduct \$300.00 from the security deposit for breaking the lease. The Landlord claimed that the Tenant's co-Tenant also gave her written authorization to keep the balance of her share of the security deposit (of \$375.00). Consequently, I find that the Tenant is entitled to the return of the balance of her share of the security deposit in the amount of \$375.00 and I Order the Landlords to return it to her forthwith.

Conclusion

The Landlords' application is dismissed without leave to reapply. A monetary order in the amount of **\$375.00** has been issued to the Tenant and a copy of it must be served on the Landlords. If the amount is not paid by the Landlords, 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: November 01, 2010.

Dispute Resolution Officer