



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes:

MNR, MNSD, MNDC, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for compensation for unpaid rent; damage or loss under the Act, to retain all or part of the security deposit and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The tenant applied requesting return of the deposit and filing fee costs. The details of the tenant's application included a request for compensation for damage or loss; the application has been amended to include this portion of the tenant's claim.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing.

Issue(s) to be Decided

Is the landlord entitled to compensation for December, 2010, rent in the sum of \$1,050.00?

Is the landlord entitled to cleaning costs in the sum of \$40.00?

May the landlord retain the deposit in partial satisfaction of the monetary claim or is the tenant entitled to return of all or a portion of the deposit paid?

Is the tenant entitled to compensation in the sum of \$315.00 for damage or loss under the Act?

Is either party entitled to filing fee costs?

Background and Evidence

This fixed-term tenancy agreement, a copy of which was supplied as evidence, commenced on November 22, 2010; rent was \$1,050.00 due on the first day of the month. A deposit in the sum of \$525.00 was paid on November 22, 2010. The tenancy was to end or convert to a month-to-month tenancy effective May 31, 2011.

The unit was one of 46 in an older, wood-frame building.

The tenant vacated the rental unit on November 30, 2010.

The parties agreed that on December 4, 2010, the landlord received an email from the tenant that contained the tenant's written forwarding address and request for return of the deposit paid. Within 15 days the landlord applied, claiming against the deposit.

A number of emails sent between November 25, 2010, and December 6, 2010; were submitted as evidence by both parties. There is agreement that on November 25, 2010, the tenant first complained of noises that were keeping him up at night. On the next day the landlord spent 20 minutes in the unit and responded by email to the tenant that he could hear only doors being slammed.

On November 28 the tenant again emailed the landlord with a complaint of noise after 4 p.m. and a banging sound throughout the night; the tenant gave written permission to the landlord for entry to the unit. The tenant could not sleep due to the noise.

By November 30 the tenant had not had a further response and he emailed the landlord at 8:11 a.m. The tenant indicated that he assumed the noise had not been fixed, that this problem had not been disclosed at the start of the tenancy and unless the landlord could confirm repair on that date the tenant would hand in his keys between 4 and 4:30 p.m.

A 9:39 a.m. the landlord responded that he would attend the unit on December 1, 2010, with a plumber, for further investigation of the reported noise. The tenant responded at 10:21 a.m. that he was not satisfied and he would be dropping of his keys and cleaning out his belongings. At 11:45 a.m. the landlord responded asking the tenant to call him at a number provided, as he wished to show the tenant an alternate suite that was available. The tenant confirmed that he did not call the landlord and he proceeded to vacate the rental unit.

The tenant stated he suffered a loss of quiet enjoyment due to the noises that completely disturbed his sleep for 5 or 6 nights of his tenancy and that the failure of the landlord to respond in a reasonable period of time justified his ending the tenancy. The tenant is claiming return of rent paid in the sum of \$315.00.

The landlord confirmed that he did not offer the tenant a time to complete a move-out condition inspection as he felt the tenant had not given proper notice.

The landlord is claiming \$40.00 cleaning costs; the tenant stated he left the unit clean.

The landlord is claiming loss of December rent revenue in the sum of \$1,050.00 and was able to re-rent the unit effective January 7, 2011.

Analysis

The tenant reported sounds that were disturbing his sleep and on the next day the landlord investigated, finding no cause. When the tenant next reported the problem on November 28 the landlord did not respond until the tenant emailed again on November 30, when the tenant requested notice of repair having been made.

Once the landlord received the tenant's first email sent on November 30, the tenant was asked to telephone the landlord so that he could be shown an alternate suite. Rather than accept this offer made by the landlord, so that the claim the tenant is now making could be minimized, the tenant decided to vacate the rental unit.

When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Section 28 of the *Act* determines a tenant's right to quiet enjoyment of the tenancy. I find that the tenant was disturbed, that the landlord made some efforts to respond, ultimately, within 5 days of the initial complaint made, by offering the tenant alternate accommodation.

I find that the tenant did not allow the landlord a reasonable period of time to bring in a plumber and to respond to the complaint of noise. Further, I find the tenant failed to mitigate his claim made, by his decision to vacate rather than telephone the landlord on November 30, 2010, so that he could arrange to view an alternate rental unit.

A period of only 5 days elapsed between the time of the initial email of complaint and the time the tenant moved out; what I find was insufficient time to allow the landlord to resolve the concern. I find the efforts of the landlord were within the provisions of the *Act* and that the tenant's claim for compensation is dismissed.

Section 45(2) of the *Act* provides:

(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In other words; a tenant may not end a fixed-term tenancy prior to the end date of the tenancy agreement end.

I find that the tenant breached section 45 of the Act as he vacated the rental unit prior to the end of the fixed-term; May 31, 2011. The tenant's remedy, if he felt the landlord was not complying with the Act, was to submit an application seeking orders that the landlord take whatever action was necessary as provided by the Act.

Therefore, as the tenant breached the terms of the fixed-term tenancy agreement, I find that the landlord is entitled to loss of rental income in the sum of \$1,050.00 for December, 2010. I find that the landlord mitigated a potential further loss by locating new occupants effective January 7, 2011.

I find that the tenancy ended on November 30, 2010; the date the tenant vacated the unit. The landlord confirmed that the tenant was not offered an opportunity to complete a move-out inspection. As the tenant was not provided with a time to complete the inspection and he denied any cleaning was required, I dismiss the landlord's claim for cleaning costs.

Section 72(2) of the Act provides a dispute resolution officer with the ability to deduct any money owed by a tenant to a landlord, from the deposit due to the tenant. Therefore, I find that the landlord may retain the tenant's security deposit, in the amount of \$525.00, in partial satisfaction of the monetary claim for unpaid rent.

I find that the landlord's application has merit, and that the landlord is entitled to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

Conclusion

I find that the landlord has established a monetary claim, in the amount of \$1,100.00, which is comprised of \$1,050.00 loss of December, 2010, rent revenue and \$50.00 in compensation for the filing fee paid by the landlord for this Application for Dispute Resolution.

The landlord will be retaining the tenant's security, in the amount of \$525.00, in partial satisfaction of the monetary claim.

Based on these determinations I grant the landlord a monetary Order for the balance of **\$575.00**. In the event that the tenant does not comply with this Order, it may be served on the tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The balance of the landlord's claim is dismissed.

The tenant's claim is dismissed.

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: February 16, 2011.

Residential Tenancy Branch