Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- 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 her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord provided the tenant with a 2 Month Notice to End Tenancy for Landlord Use of Property (the Notice) on or about August 26, 2010. This Notice required the tenant to end the tenancy and vacate the rental unit by November 1, 2010. The tenant testified that she received the Notice from the landlord. The tenant testified that she sent the landlord a copy of her dispute resolution hearing package by registered mail on November 26, 2010. The landlord confirmed receiving this package by registered mail. I am satisfied that these documents were served to one another in accordance with the *Act*.

On March 30, 2011, the Residential Tenancy Branch received a written amendment to the tenant's application reducing her requested monetary award from $3,897.64 to $2,650.00, maintaining that the landlord did not use the property for the purpose stated in his Notice. At the hearing, I revised the tenant's request.

At the hearing, the tenant testified that the matter of her security deposit was addressed in a dispute resolution hearing on December 7, 2010. That hearing considered the landlord's application for a monetary order for compensation for damage, for retention of the tenant's security deposit and for recovery of his filing fee for that application. At that hearing, the tenant obtained a monetary Order requiring the landlord to return $585.00 from her security deposit. As the parties agree that the matter of the security deposit has already been addressed through the landlord's previous application, the tenant withdrew her application to obtain her security deposit from the landlord.

Issues(s) to be Decided

Is the tenant entitled to a monetary Order for an amount that is double the monthly rent established during the tenancy as a result of the landlord's failure to use the premises for the purposes intended? Is the tenant entitled to recovery of her filing fee?

Background and Evidence

This one-year fixed term tenancy commenced on November 7, 2009. Monthly rent was set at $1,300.00, payable on the first of each month. As noted above, the tenant's security deposit has been returned and is not before me.

The tenant testified that she vacated the rental unit on October 31, 2010 to comply with the landlord's Notice. The tenant said that she has moved into another unit four doors away from the dispute address rental unit. She entered oral and written evidence that the landlord has not moved into the rental unit and is seldom there. She requested a monetary Order of double her monthly rent pursuant to subsection 51(2)(b) of the *Act* because the landlord failed to move back into the rental unit from his previous residence in Powell River. In her March 20, 2011 letter, she maintained that the landlord was on the rental premises on 12 dates between November 1, 2010 and February 16, 2011.

The landlord entered no written evidence. He and his wife gave oral testimony that they have three homes and split time between their residences. The landlord's wife said that she spends more of her time in her Edmonton and Powell River homes. The landlord identified additional dates beyond those identified by the tenant when he stayed at the dispute address. He testified that he stays overnight in the residence when he has been in the Vancouver area to attend to various appointments (e.g., doctor, dentist, fire alarm system maintenance, etc.,).

The landlord and his wife testified that there is no requirement in the *Act* preventing them from spending time at each of their homes. They testified that they are in fact using the dispute address for their own purposes, although they admit that this is not their principal residence.

Analysis

Section 49 (3) of the *Act* provides that "A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit." Section 51 (2) of the *Act* provides that if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice, the landlord

must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

In this case, neither party presented anything other than their own testimony regarding the landlord's use of the former rental property. Although the tenant's relocation to a nearby rental unit allowed her to monitor to a certain extent the landlord's comings and goings, she provided no witnesses to support her assertion that the landlord rarely uses her former rental premises. However, the tenant's written evidence of March 20, 2011 supports the landlord's assertion that he did in fact use the disputed rental unit from November 1, 2010 until February 16, 2011. The landlord maintains that he stayed at the disputed rental unit more frequently than the 12 days the tenant cited over this period. While the landlord testified that the hydro account for the former rental premises has now been placed in his name, he provided no evidence of this, nor did he or his wife submit any written evidence that this had occurred. He did not produce any witnesses who could corroborate his claim that he uses the former rental premises from time to time when he is in the Vancouver area.

The exact number of days or nights when the landlord has used the premises has little bearing on my decision. Instead, the onus of proving a claim for a monetary Order of this type is on the tenant to demonstrate on a balance of probabilities that the landlord has failed to use the property for the purpose stated in his Notice. The landlord's Notice stated that "the rental unit will be occupied by the landlord or the landlord's spouse or a close family member." The tenant seems to have interpreted this to mean that the landlord had to move into the former rental unit on a full-time basis at the exclusion of any other residences he may keep. I recognize that the tenant may have expected that the landlord would vacate one of his other residences and make her former rental unit his permanent residence. I am unaware of any requirement in the *Act* that would prevent the landlord from occupying the rental unit as he has when he is in the Vancouver area.

The landlord testified that he and his wife have no intention of renting the premises again based on their experience from this tenancy. The tenant did not dispute this oral testimony and has not claimed that the landlord has rented her former premises to anyone else. I accept the oral testimony from the landlord and his wife that they use each of their residences and that no one else is occupying this former rental unit.

Although the landlord's use of the former rental unit is not continuous, the tenant has not provided evidence to demonstrate that this intermittent but exclusive use of the premises fails to comply with the terms of the Notice he issued to end her tenancy. I find that the landlord is occupying the former rental unit, albeit at a lesser level of usage

than would be the case if he and his wife did not have other residences they also occupy. There is no requirement in either section 49 or subsection 52(2)(b) of the *Act* requiring the landlord to occupy the tenant's former rental unit as his principal residence or a principal residence of a close family member. As such, I find that the tenant has failed to meet the standard required to demonstrate her entitlement to a monetary Order pursuant to subsection 52(2)(b) of the *Act*.

Although it is not determinative in reaching my decision, I also note the timing of the tenant's application. The tenant included her request for a monetary award pursuant to subsection 52(2)(b) of the *Act* with her other request regarding the return of her security deposit. The delay in scheduling this hearing provided her more than four months of additional time to make her case that the landlord had not complied with the terms of the Notice. She has failed to demonstrate any such entitlement. She submitted her application for this monetary award on November 26, 2010, less than four weeks after she vacated this rental unit. I do not find that her application was submitted within what would be considered to be a reasonable period of time following the effective date of the landlord's Notice. Even if the landlord intended to move into the rental unit on a full-time basis, it is unlikely that this could have occurred by November 26, 2010, when the tenant submitted her application for this monetary award.

Conclusion

I dismiss the tenant's application without leave to reapply. Since the tenant has been unsuccessful in her application, she bears responsibility for her own filing fee for her application. The tenant's application to obtain a return of her security deposit was withdrawn at the commencement of this hearing.

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*.