Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

Landlord's application filed July 28, 2010: MNDC; FF
Tenants' application filed December 3, 2010: MND; MNSD; FF

Introduction

This hearing dealt with cross applications by the parties. The Landlord filed an application seeking compensation related to loss or damage suffered due to a breach under the tenancy agreement or Residential Tenancy Act (the "Act"); and to recover the cost of the filing fee from the Tenants.

The Tenants filed a cross application seeking return of the security deposit; compensation related to loss or damage suffered due to a breach under the tenancy agreement or Act; and to recover the cost of the filing fee from the Landlord.

This matter was originally set for Hearing on December 20, 2010. At the request of both parties, it was adjourned to April 18, 2011. The Hearing could not be concluded within the time allotted on April 18, 2010 and was adjourned to May 18, 2011.

Both parties appeared at the Hearing and the two subsequent reconvened Hearings, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross examine the other party, and make submissions to me.

It was established that the Landlord served the Tenants with her Notice of Hearing documents in accordance with the provisions of Section 89(1)(a) of the Act on July 28 or 29, 2010. It was also established that the Tenants served the Landlord with their Notice of Hearing package in accordance with the provisions of Section 89(1)(c) of the Act, by mailing the documents on December 3, 2010. Service in this manner is deemed to be effected 5 days after mailing the documents.

Issues(s) to be Decided

- Did the Tenants end the tenancy in accordance with the provisions of Section 45 of the Act?
- Is the Landlord entitled to compensation for damage or loss pursuant to the provisions of Section 67 of the Act?
- Are the Tenants entitled to a monetary award against the Landlord in the equivalent of double the amount of the security deposit pursuant to the provisions of Section 38 of the Act?
- Are the Tenants entitled to compensation for damage or loss pursuant to the provisions of Section 67 of the Act?

Background and Evidence

On April 13, 2010, the parties entered into a fixed term tenancy commencing May 1, 2010 for a period of one year. Monthly rent was $2,390.00, due on the first day of each month. The Tenants paid a security deposit in the amount of $1,195.00 at the beginning of the tenancy. A copy of the tenancy agreement was provided in evidence.

The rental unit is situated in a Strata building. The Tenants signed a Form K Agreement on April 13, 2010, acknowledging receipt of the Strata Corporation's Bylaws. A copy of the Form K, together with two pages of the Strata Corporation's Bylaws, were provided in evidence. The 2 pages of the Bylaws include Sections 10; 11; 12(1)(a) – (f); and 43(1) – (10).

On July 9, 2010, the Tenants wrote to the Landlord providing written notice that they were ending the tenancy effective July 31, 2010. The Landlord testified that she received the Tenants' notice on July 13, 2010.

Regarding the Landlord's application

The Landlord testified that it was against the Strata Corporation's Bylaw 43(2) to rent or lease a suite for less than 6 months. She stated that Bylaw 43(10) provides that an owner is subject to a fine in the amount of $500.00 if the owner contravenes Section 43(2) of the Bylaws. The Landlord submitted that she could not re-rent the suite until November 1, 2010, or face paying a fine. The Landlord seeks loss of revenue for the months of August, September and October, 2010, in the amount of $7,170.00.

The Tenants submitted that Bylaw 43(9) allows a landlord to re-lease or re-rent a suite for up to 120 days after a tenancy ends without having to re-apply for permission to re-

rent. The Tenants submit that the Landlord could have re-rented the suite, but chose not to. The Tenants submitted that they could not live in the rental unit any longer, due to health concerns, and that they advised the Landlord about the concerns but the Landlord did not address them in a timely fashion.

The Landlord testified that Bylaw 10(1) requires a tenant or owner to pay a fine of $100.00 if a tenant moves into or out of a suite without providing the manager 7 days notice of the move. She stated that Bylaw 10(5) levies a fee of $100.00 every time an occupant moves into the building. The Landlord testified that the Tenant did not provide the manager 7 days notice of the date they were moving. She seeks $200.00 from the Tenants further to the provisions of Bylaw 10(1) and (5).

The Tenants submit that the $100.00 fee contemplated in Bylaw 10(5) is the Landlord's responsibility to pay, not the Tenants, and that it is for move in fees only. The Tenants testified that they called the property manager to book an appointment to move and were advised by the property manager that she does not handle the bookings. The Tenants testified that they advised the Landlord, who eventually gave them a key to the elevator.

The Landlord also seeks to recover a rental agent's tenant placement fee ($1,195.00); administrative expenses ($500.00); and the cost of running rental ads ($330.40).

Regarding the Tenants' application

The Tenants are seeking a monetary award in the equivalent of double the amount of the security deposit ($2,390.00). The Tenants stated that they provided the Landlord with written notification of their forwarding address on August 4, 2010. The Landlord has not returned any of the security deposit to the Tenants.

The Landlord testified that the Tenants did not participate in a Condition Inspection at the end of the tenancy and therefore forfeited their right to claim against the security deposit.

The Tenants stated that there was no opportunity given by the Landlord for a Condition Inspection Report until she left a message on the Tenant' s phone on the 6th of August. The Tenants submit that they discovered the message on August 16, 2010 and called the Landlord, leaving a message suggesting two dates for the inspection. The Tenants testified that the Landlord did not return their call until August 31, 2011 and by then it was too late. The Tenants testified that they were never provided with a Notice of Final Inspection Opportunity.

The Landlord testified that she gave the Tenants opportunities for the move out Condition Inspection on August 8, 19, and 31, 2010. She stated that she conducted the move out inspection by herself and provided the Tenants with a copy on April 10, 2011.

The Tenants testified that the shower in the main bathroom of the rental unit could not be used due to unrepaired leaks. The Tenants stated that the intercom to the front entrance of the building didn't work throughout the tenancy. The Tenants submit that a secure locker was included in the rent and that they were not provided with a secure, lockable, private locker until June 18, 2010. The Tenants submitted that a locker of the same size would cost about $50.00 per month if rented elsewhere. The Tenants testified that they did not have working lights in the living room and that dimmer switches and a light in a small bedroom were not working properly. The Tenant wrote a letter to the Landlord on June 8, 2010, outlining these deficiencies and that some of them were attended to on June 19, 2010.

The Landlord testified that she had difficulty attending to repairs in the Tenant's suite because they would not provide access. In particular, the Landlord testified that the Tenants denied access to a contractor on July 10, 2010.

The Tenants testified that the Landlord did not always give proper notice. For example, she would telephone the Tenants at 9:00 at night for access the following day, or send notice by e-mail.

The Tenants seek rent abatement for the term of the tenancy, for the deficiencies as outlined above, calculated as follows:

May, 2010	$150.00
June, 2010	$150.00
July, 2010	$50.00
	$350.00

The Tenants testified that on or about May 1, 2010, they discovered water pooling on the floor of the main bathroom. The Tenants testified that on May 20, 2010, a washing machine in the suite immediately above the Tenants' suite leaked, which flooded their suite, the suites adjacent, and all the way down to the lobby (2 floors below). The Tenants testified that the restoration company installed two fans and a dehumidifier in their suite, which were very noisy and made the suite uninhabitable for several days. The Tenants testified that the resulting moisture caused mould growth in the rental unit which caused breathing problems for the Tenants. The Tenants seek compensation for

the costs of hotel stays and meals in the amount of $1,970.64. The Tenants also seek compensation for the cost of hiring movers, in the amount of $2,088.80.

The Landlord testified that the Tenants were exaggerating the amount of water damage to the rental unit. She stated that there was a small bead of moisture in the shower, which did not saturate the walls of the bathroom and therefore could not cause mould. She stated that the leak from the upstairs washing machine was all contained in a bucket. The Landlord stated that she addressed the Tenants' concerns with respect to mould as soon as they were made known to her by arranging an inspection by a mould expert. The Landlord alleges that a small area of a dark substance that the Tenants found on a baseboard was dirt, which a mould expert wiped away. The Landlord submitted that the Tenants should have made a claim on their insurance if they suffered damages as a result of the washing machine overflowing.

The Tenants also seek compensation for loss of peaceful enjoyment of the rental unit in the amount of $600.00 ($200.00 per month of the tenancy) and to recover the cost of serving the Landlord by registered mail ($11.14).

Analysis

It is important to note that these Hearings were challenged by the degree of animosity and mistrust between the parties. Both parties expressed concern that they were not provided with equal opportunity to give testimony. These Hearings lasted a total of 3 hours and 15 minutes, and I took care to ensure that both parties had ample opportunity to provide me with their testimony. In addition, both parties provided me and each other substantial documentary evidence. I have reviewed all oral and written evidence before me **that met the requirements of the rules of procedure**. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision. Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard.

To prove a loss and have one party pay for the loss requires the other party to prove four different elements:

First, proof that the damage or loss exists. Secondly, that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement. Thirdly, to establish the actual amount required to compensate for the claimed loss or to repair the damage. And lastly, proof that the Applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

In the circumstances before me the both parties have the burden of proving their own claims.

- Did the Tenants end the tenancy in accordance with the provisions of Section 45 of the Act?

Section 45 of the Act provides:

Tenant's notice

45 (1) A tenant may end a periodic 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, and

(b) 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.

(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.

(3) **If a landlord has failed to comply with a material term of the tenancy agreement** or, in relation to an assisted or supported living tenancy, of the service agreement, **and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure**, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

(emphasis added)

This was a fixed term tenancy that ended prior to the date specified in the tenancy agreement. The Tenants submitted that they ended the tenancy in accordance with the provisions of Section 45(3) of the Act. On June 8, 2010, the Tenants provided the Landlord with a list of deficiencies, a copy of which was provided in evidence. On July

9, the Tenants provided the Landlord with written notice that they were ending the tenancy on July 31, 2010, because the Tenants alleged that the Landlord failed to attend to any of the concerns outlined in the Tenants' letter of June 8, 2010. The Tenants' main concern was that there was mould in the rental unit and that it was causing health problems. The Tenants did not provide sufficient evidence of the existence of mould in the rental unit. The Tenants were concerned with remediation of the rental unit and the presence of mould, and yet did not cooperate with the Landlord with respect to access to the rental unit to address their concerns. Based on the testimony of both parties and the documentary evidence provided, I find that the Landlord was attempting to correct the problems within a reasonable period. Therefore, I find that the Tenants did not end the tenancy in accordance with the provisions of the Act.

- Is the Landlord entitled to compensation for damage or loss pursuant to the provisions of Section 67 of the Act?

With respect to the Landlord's application for loss of revenue for the months of August, September and October, 2010, I find that the Landlord has failed to prove part 4 of the test for damages: proof that the Landlord took steps to mitigate or minimize the loss being claimed. Strata Corporation Bylaw 43(10) states that if an owner rents or leases a strata lot to a tenant for less than 6 months:

> "the owner shall be subject to a fine of $500.00, and for a continuing contravention, in accordance with Bylaw 34, $500.00 every seven days, and the strata corporation shall take all necessary steps to terminate the lease or tenancy"

It is important to note that there is no provision in the Residential Tenancy Act for a strata corporation to terminate a lease or tenancy.

The Landlord submitted that she could not re-rent the suite without incurring a fine of $500.00 every 7 days. The Landlord did not provide a copy of Bylaw 34 and therefore it is not proven that she would be fined $500.00 every 7 days. Bylaw 9 states that if a tenancy terminates for any reason, the owner may re-rent or re-lease the strata lot, without acquiring permission from the strata, within 120 days of the date the tenancy terminated. Therefore, I find that the Landlord could have re-leased the rental unit and then perhaps claimed the $500.00 loss against the Tenants, if the strata corporation chose to levy the fine. The Landlord did not make any attempt to re-lease the rental unit for the months of August, September and October, 2010, pursuant to the provisions of

Section 7(2) of the Act, and therefore is not entitled to compensation from the Tenants for her loss of revenue. This portion of her claim is dismissed.

The Landlord did not provide sufficient evidence to prove her claim for recovery of the $100.00 move-in fee or the $100.00 fine for the Tenants' failure to provide 7 days notice of their move-out (i.e. copy of the invoice from the Strata Corporation indicating such fee or fine was charged against the Landlord). Therefore, the Landlord has not satisfied part 1 of the test for damages and this portion of her application is dismissed.

I dismiss the Landlord's application for recovery of the "tenant placement fee" in the amount of $1,195.00 as it seems excessive and the Landlord did not provide an invoice which discloses what services were provided or that the Landlord paid such a fee.

The Landlord did not provide sufficient evidence to prove her claim that she paid $330.40 for advertising the suite and this portion of her claim is dismissed.

I find that Landlord is entitled to compensation for the administrative costs of re-renting the suite, due to the Tenants ending the tenancy early, contrary to the provisions of Section 45 of the Act. There is no provision in the tenancy agreement for liquidated damages, which are an express sum that parties agree to when they sign the tenancy agreement. There is a clause in the tenancy agreement which states, ".... if the Tenant terminates the tenancy in less than 12 months, $costs will be charged by the Landlord and the Tenant will pay this amount as a service charge for tenancy changeover costs, such as advertising, interviewing, administration, re-renting, for this short term tenancy." I find the amount of $500.00 claimed by the Landlord to be a reasonable amount and grant this portion of her application.

- Are the Tenants entitled to a monetary award against the Landlord in the equivalent of double the amount of the security deposit pursuant to the provisions of Section 38 of the Act?

The Landlord submitted that the Tenants' right to claim against the security deposit was extinguished when they did not participate in a move-out condition inspection. Section 35(2) of the Act requires the Landlord to offer the Tenant at least two opportunities for a move-out condition inspection, as prescribed. Section 17 (2)(b) of the Residential Tenancy Regulation requires the Landlord to provide the Tenant with a Final Notice of Inspection Opportunity if the Tenant does not agree to meet the Landlord. The Landlord did not provide the Tenant with a Final Notice of Inspection Opportunity and therefore, I find that the Landlord's right to claim against the security deposit is extinguished. The

Landlord may still apply the security deposit towards satisfaction of her monetary award, pursuant to the provisions of Section 72 of the Act.

Section 38(1) of the Act provides that (unless the Landlord has the Tenants' consent to retain a portion of the security deposit) at the end of the tenancy and after receipt of a Tenants' forwarding address in writing, the Landlord has 15 days to either:

1. repay the security deposit in full, together with any accrued interest; or
2. make an application for dispute resolution claiming against the security deposit.

Based on the evidence before me, I find that the Landlord did not return the security deposit within 15 days of receipt of the Tenants' forwarding address, nor did the Landlord file for dispute resolution against the security deposit.

Section 38(6) of the Act provides that if the Landlord does not comply with Section 38(1) of the Act, the Landlord **must** pay the Tenants double the amount of the security deposit. Therefore, the Tenants are entitled to a monetary order for double the security deposit, in the amount of $2,390.00. No interest has accrued on the security deposit.

- Are the Tenants entitled to compensation for damage or loss pursuant to the provisions of Section 67 of the Act?

Having found that the Tenants did not end the tenancy in accordance with the provisions of Section 45 of the Act, I dismiss their claim for moving costs.

There is no provision in the Act for the recovery of the cost of serving a party. This portion of the Tenants' application is dismissed.

The Tenants seek rent abatement for the loss of the use of their main bathroom; intercom system; secure storage and certain lights for a various amounts of time. I find that the tenancy was devalued by the loss of use of these items, and therefore I allow this portion of their claim in the amount of $350.00.

I find that the Landlord acted in a reasonable, timely fashion in attempting to remediate the rental unit after the Tenants discovered the small leak in the shower and later, the flood from the washing machine upstairs. Therefore, I dismiss the Tenant's claim for loss of peaceful enjoyment, as the Landlord was not responsible for either of these unfortunate occurrences and acted in a reasonable manner to attempt to rectify them.

The parties disagreed with respect to the amount of water leaking from the shower and also the amount of water that escaped when the washing machine flooded the Tenants'

suite. The Tenants did not provide any evidence (written or orally) from independent sources with respect to the number of days the fans were in their home, or the extent of the water damage (i.e. whether there were fans in other parts of the building). The Tenants did not provide sufficient evidence to prove that there was mould in the rental unit. Therefore, the Tenants application for the cost of hotels and food is dismissed.

Set-off of the parties' monetary awards

The Landlord has established a claim of $500.00 against the Tenants. The Tenants have established a total claim of $2,740.00. Both parties have been partially successful in their claims and I order that they bear their own cost of filing their applications.

I hereby set off the Landlord's award against the Tenants' award and provide the Tenants with a monetary order in the amount of $2,240.00.

Conclusion

I hereby provide the Tenants a Monetary Order in the amount of $2,240.00 for service upon the Landlord. This Order may be filed in the Provincial Court of British Columbia (Small Claims) 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: June 06, 2011.

Residential Tenancy Branch