Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, MNDC, FF, 0

Introduction

This matter dealt with an application by the Tenants to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property dated June 1, 2011, for compensation for damage or loss under the Act or tenancy agreement and to recover the filing fee for this proceeding. At the beginning of the hearing the Tenants withdrew their application to cancel the 2 Month Notice.

The Tenants claimed at the beginning of the hearing that they had not received the Landlord's evidence package which she said she sent to them by priority post courier on July 12, 2011. The Tenants admitted that they were not presently at their residence so could not receive the evidence package even if it had been delivered and they agreed to proceed with the hearing without it.

Issue(s) to be Decided

1. Are the Tenants entitled to compensation and if so, how much?

Background and Evidence

This month-to-month tenancy started on September 1, 2006. The Parties tenancy agreement contains the following term:

> "Additional obligations: along with normal lawn care – cutting and edging – to keep garden beds weeded and watered and pruned back, plants, bushes and trees as required. Tenants will receive a cheque from Landlord every 4 months for prior 3 months for $300.00 ($100.00 monthly) if obligations have been met to the Landlord's approval."

The Landlord made 2 such payments of $300.00 to the Tenants in December 2006 and in the summer of 2007 but then stopped. The Tenant, J.L., said she contacted the Landlord a couple of times and left messages about the payments however the Landlord never returned her messages and she did not pursue it. The Tenants said throughout the tenancy they regularly mowed, edged and weeded the lawns and flower beds and in the Spring and Fall trimmed bushes and pruned trees although they admitted the Landlord was responsible for trimming a hedge. The Tenants said the

Landlord initially inspected the property every month but stopped after about 3 months. The Tenants said they rarely saw the Landlord and when they did she never said she was unhappy with the manner in which the property was being maintained.

The Landlord said she contacted the Tenant, J.L., by telephone at some point in 2007 and told J.L. that she believed the Tenants were only doing the bare minimum and that she wouldn't be paying them any longer (which the Tenants denied). The Landlord argued that she thought she had a verbal agreement with the Tenants to cancel the yard maintenance agreement although she admitted that J.L. did not respond to her comment and she never took steps to amend the written tenancy agreement. The Landlord argued that the fact that the Tenants had not taken steps earlier to enforce the agreement is evidence that the agreement was cancelled.

The Landlord said she and her spouse drove by the property many times throughout the tenancy and noticed that the yard was not being kept to "reasonable standards." The Landlord said she and her spouse came to the rental property a few times during the tenancy to clip hedges and clean up the yard. In particular, the Landlord recalled that in the Spring of 2010 she weeded, trimmed bushes and cut tree limbs. The Landlord provided copies of photographs of the rental property taken in late-May or early June 2011 which generally show the lawn was not cut or edged and that some trees were not trimmed.

The Tenants argued that they could not do the yard work in May because it was a very wet Spring but that they have since that time cleaned up the yard. The Tenants denied that the Landlord or her spouse came to the rental property to do yard work as they claimed. The Tenants admitted that the Landlord came to the rental property last Spring to trim a hedge and prune some trees but argued that was the only time during the tenancy. The Tenants said they rarely saw the Landlord or her spouse during the tenancy and disputed that they frequently viewed the property as they claimed because they lived in another community.

Analysis

The Landlord argued that there was no jurisdiction to hear the Tenants' compensation claim because it was an employment matter. With all due respect, I disagree. RTB Policy Guideline #1 (Responsibility for Residential Premises) says that a Tenant of a single family dwelling is responsible for routine yard maintenance including cutting grass, weeding and in some cases, weeding flowerbeds. A Landlord is responsible for more labour intensive projects such tree cutting and pruning. A Landlord cannot require a Tenant to perform the Landlord's duties unless the parties enter into an agreement authorizing the Tenant to provide those services either for compensation or as rent. Consequently, the Act contemplates that there will be some employment arrangements that fall under the Act. Given that this agreement relates to the parties' respective responsibilities under the Act to maintain the rental property and given that this

agreement is set out as a term or the tenancy agreement, I find that there is jurisdiction to hear this part of the Tenants' application.

RTB Rule of Procedure 11.11 states as follows:

> "Except as provided by the Act, the Dispute Resolution Officer may exclude witnesses from the in-person or conference call dispute resolution proceeding until called to give evidence and, as the Dispute Resolution Officer considers it appropriate to do so, may exclude any other person from the dispute resolution proceedings."

At the beginning of the hearing, the Dispute Resolution Officer advised the Landlord that her witness could not be present in the same room or listen to the evidence prior to him giving his independent, oral evidence. The Landlord assured the Dispute Resolution Officer that her witness had left the room. However, when the Landlord's witness gave his evidence, it was clear that he had been listening in on the proceedings. In particular, the Landlord's witness claimed at the outset of his evidence that he had overheard the Landlord advise the Tenant in a telephone conversation in 2007 that she would not make any further payments. When asked to elaborate, he said "the conversation was as [landlord's name] just said and he proceeded to repeat the Landlord's evidence word for word. The Landlord's witness denied that he had overheard the Landlord's oral evidence and claimed that the Landlord had told him what she had said as he entered the room. The Tenants also objected when the Landlord's witness again began reciting ***verbatim*** the Landlord's earlier submissions regarding the Tenants' delay in making their claim. I find it unlikely that the Landlord's witness would have known exactly what the Landlord had said in her oral evidence at the hearing unless he had been listening to that evidence. Consequently, I find that the Landlord did not follow the direction of the Dispute Resolution Officer in excluding her witness and as a result, I give no weight to the corroborating evidence of her witness.

The Landlord initially argued that in order to be compensated for extra yard maintenance, the Tenants required the Landlord to approve their efforts and "sign off on it." The Landlord later admitted however, that the term of the tenancy agreement says nothing about requiring the Landlord's written approval. The Landlord also argued that the agreement was cancelled by a verbal agreement of the Parties in 2007, however she admitted that the Tenants did not verbally agree to cancel the agreement because they did not respond when she told them she would no longer pay them. The Landlord further argued that the Tenants' failure to pursue this matter after 4 years is evidence that the agreement was cancelled. However, the Tenants denied that the Landlord told them she would not pay them anymore and instead claimed she just stopped paying them and would not respond to their messages asking for payment. The Tenants argued that they continued to fulfill the Landlord's yard care duties as agreed to under the tenancy agreement and are therefore entitled to be compensated for that.

As the Landlord is the one alleging that the Parties' written agreement was cancelled, she bears the evidentiary burden of proving that assertion. However, given the

contradictory evidence of the Parties and in the absence of any reliable, corroborating evidence to resolve the contradiction, I find that there is insufficient evidence to conclude that there was an agreement to cancel the written agreement regarding yard work.

The Landlord argued that the Tenants should not be entitled to compensation because they did not maintain the property to reasonable standards during the tenancy. However, the Landlord provided no evidence of this other than a few photographs taken during the Spring of 2011. The Landlord also claimed that on a few occasions, she cleaned up the yard but she could only recall one such occasion. The Tenants denied that the Landlord came to the rental property to do yard work except for the one occasion and argued that whenever they did see the Landlord she never said anything about being dissatisfied with the state of the property (which the Landlord admitted). I find that there is little reliable evidence that the Landlord routinely inspected the rental property during the tenancy. Furthermore, I find that there is little evidence that the Landlord performed those duties on more than one occasion during the tenancy. Consequently, I find that there is little evidence that the Landlord took steps to determine if the rental property was being maintained to "reasonable standards." As a result, I find that the Landlord unilaterally decided not to fulfill her part of the maintenance agreement and unreasonably withheld her approval and accordingly, I find that the Tenants are entitled to be compensated as provided under the Parties' agreement.

However, s. 7(2) of the Act says that a Party who suffers damages must take reasonable steps to mitigate their losses. I find that the Tenants' delay of 4 years to seek compensation for additional yard maintenance is unreasonable. In other words, had the Tenants taken steps to enforce their agreement at an earlier date, they would not now be seeking in excess of $5,000.00 from the Landlord. Consequently, I find that the Tenants' compensation award should be reduced due to their failure to mitigate their damages. As a result, I award the Tenants compensation for 18 months which represents the maximum period of time that would be considered reasonable to delay before seeking to enforce the agreement. Given that part of this period would have included a 3 month period during the winter when little maintenance would be necessary, I find that the Tenants would only have been compensated for 15 months or $1,500.00 during this time.

As the Tenants have recovered less than $5,000.00, I find that they are entitled pursuant to s. 72 to recover ½ of the filing fee they paid for this proceeding or $50.00.

Conclusion

A Monetary Order in the amount of **$1,550.00** 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.

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: July 25, 2011.

Residential Tenancy Branch