



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution under the Residential Tenancy Act (the "Act") for a monetary order loss of rent, for an order to retain the tenants' security and pet damage deposits, and to recover the filing fee for the Application.

The parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and to make submissions to me.

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.

Issue(s) to be Decided

Have the tenants breached the Residential Tenancy Act or tenancy agreement, entitling the landlord to a monetary order for loss of rent, an order to retain the security deposit and to recover the filing fee?

Background and Evidence

The tenancy agreement signed by the parties on December 21, 2011, demonstrated that this fixed term tenancy was to start on January 13, 2012, to end on January 31, 2013, and that rent was \$1,600.00 per month. The tenants paid a security and pet damage deposit of \$800.00 each on December 21, 2011.

The landlord's application contained a monetary claim for loss of rent revenue for the entire lease period, in the amount of \$20,180.59, and recovery of the filing fee.

The landlord's agent submitted that on January 9, 2012, the tenants telephoned the landlord's agent's office to inform her that they were not intending on moving into the rental unit as cable service was not available at the residential property.

The landlord's agent submitted that cable was not a material term of the tenancy agreement and in any case, the landlord's agent submitted that internet and satellite cable service was offered at the dispute address.

Upon query the landlord's agent stated that she agreed cable service was important to the tenants.

Upon further query, the landlord's agent stated that the rental unit was immediately placed back on the market for rent, with no success as of the day of the hearing.

In response, the tenants' relevant evidence included the tenancy agreement with an addendum, responses from multiple cable service providers informing the tenants that the rental unit was not located in their service areas, and a breakdown of the tenants' typical monthly usage for internet service, and the tenants' written notice to the landlord, dated January 11, 2012, notifying the landlord that due to the lack of cable service being available to the rental unit, they would not be moving in.

The tenants submitted that after signing the tenancy agreement, they began calling to arrange for services to begin at the rental unit on the date of their expected occupancy. Thereafter, the tenants submitted they learned that the rental unit address was out of the service area for the cable company providers. This caused the tenants to send the written notice to the landlord, informing them that they, the tenants, would not move into the rental unit.

The tenants submitted that the lack of cable service to the rental unit was a breach of a material term of the tenancy agreement, which stated that the "tenants agree to pay cable and telephone bills which they must put in their names as of their move-in date."

The tenants submitted that their personal, educational and professional needs required them to have access to cable provided internet service, that they were led to believe cable was accessible, due to the phrase in the tenancy agreement, and would not have entered into a tenancy agreement had that not been the understanding. The tenant submitted that the rental unit was a home built in 1971 and they had no reason to believe, especially in light of the wording in the tenancy agreement, with the use of the word "must," that cable service was not provided to the rental unit.

The tenants pointed out that the landlord's response concerning "satellite cable" being provided is a contradiction in terms and does not exist. Additionally the tenant stated that true satellite service is erratic and too costly for the amount of internet usage of the tenants.

Analysis

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 claiming party has 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 claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed. In this case, the onus is on the landlord to meet this burden of proof.

Section 45 (3) of the Residential Tenancy Act authorizes a tenant to end a tenancy by giving proper notice if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure.

In the case before me, the landlord disputes that the term in the tenancy agreement requiring the tenants to put the cable service in their name is a material term of the agreement.

The tenants submitted that they relied on this language in the tenancy agreement to determine that they would have cable access.

To determine the materiality of the term in the tenancy agreement, I must determine the importance of the cable provision in the overall scheme of the tenancy agreement. A material term is a term that is of such importance that the most trivial breach of the term gives the other party the right to end the tenancy.

As the burden of proof is upon the landlord, I find that the landlord failed to substantiate that the reference to the cable service in the tenancy agreement was not a material term

of the agreement and I find that the tenants' inability to obtain cable service to the rental unit to be a ground to end this tenancy.

In reaching this conclusion I was strongly influenced by the fact that the tenants submitted evidence showing the amount of their average cable provided internet service usage was substantial and I find that the tenants performed due diligence in seeking to obtain the service, with no success. I was also influenced by landlord's agent's lack of awareness of the services provided in the area wherein the rental unit was located, particularly when the landlord's agent stated that the tenancy agreement was only a standard agreement, with each term apparently not having any particular meaning.

I find that the tenants detrimentally relied on the term of the tenancy agreement referring to a requirement that cable service be put in their name to their detriment and I further find, upon a balance of probabilities, that the tenants substantiated their position that the term was a material term.

As I have determined that the term in the tenancy agreement referring to cable service was a material term, I must further look to ensure that the tenants gave proper written notice. Upon a review, I find that tenants complied with the Act as I find that it would not be possible for the landlord to correct the situation after receiving written notice, due to the location of the rental unit.

I therefore find the tenants had grounds to end the tenancy and that the tenancy has ended. I therefore find the landlord has failed to meet the second step in their burden of proof.

I therefore find that the landlord is not entitled to monetary compensation and I **dismiss** the landlord's application, without leave to reapply.

Had I not dismissed the landlord's claim for a monetary order for the above reasons, I would still make the determination that the landlord failed to meet step four of their burden of proof due to the lack of documentary evidence that the rental unit was advertised. I was unable therefore to determine that the landlord took reasonable measures to mitigate their loss.

As I have dismissed the landlord's application, I decline to award them the recovery of the filing fee.

Conclusion

I dismiss the landlord's application, without leave to reapply.

As I have dismissed the landlord's application, I **direct** that the landlord return to the tenants their security deposit of \$800.00 and pet damage deposit of \$800.00.

I **grant** the tenants a monetary order pursuant to section 67 of the Act for the amount of **\$1,600.00**.

I am enclosing a monetary order for **\$1,600.00** with the tenants' Decision. This order is a **legally binding, final order**, and it may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement should the landlord fail to comply with this monetary order.

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 06, 2012.

Residential Tenancy Branch