Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the Landlord: MNDC, FF
For the Tenants: MNDC, MNR, MNSD, FF

Introduction

This hearing dealt with the Cross Applications of the parties for Dispute Resolution under the Residential Tenancy Act (the "Act").

The landlord applied for a monetary order for money owed or compensation for damage or loss, for unpaid rent, and authority to retain the tenant's security deposit and to recover the filing fee for the Application.

The tenant applied for a monetary order for money owed or compensation under the Residential Tenancy Act (the "Act") or tenancy agreement.

The hearing process was explained to the parties. Thereafter the parties gave affirmed testimony, 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

Is the landlord entitled to a monetary order, authority to retain the tenant's security deposit, and to recover the filing fee for the Application?

Are the tenants entitled to a monetary order?

Background and Evidence

I heard testimony that this one year, fixed term tenancy started on May 1, 2011, was to end on April 30 2012, and actually ended on or about November 25, 2011, when the tenants vacated the rental unit. Monthly rent was $1,280.00 and the tenants paid a security deposit of $640.00 on or about May 5, 2011. The landlord has not returned the tenants' security deposit.

The rental unit is in the basement suite, with the landlord's home being on the main floor.

Landlord's Application:

The landlord listed her monetary claim on the details of dispute on her application as loss of rent for December 2011 and possibly January 2012 and a bill from a handyman for $188.16, all of which actually totals $2,748.16, but which the landlord has listed for a total of $3,388.16. The landlord also mentions that she is requesting compensation for repairs to the mechanical room, but has not listed an amount. A calculation shows that the difference in the two totals is equal to the amount of the tenants' security deposit.

In the landlord's evidence submitted February 3, 2012, the landlord also claimed the amount of agents' fee of $266.65, the "damage" deposit of $640.00, partial payment from a plumber of $100.00 and cleaning and repairs for $80.00.

The landlord, however, did not amend her application seeking the additional amounts and serve it on the tenants, as required by the Residential Tenancy Branch Rules of Procedure. As a result, I have excluded the amount requested in the landlord's evidence and proceeded on the amount claimed in the landlord's application.

The landlord's relevant evidence included a copy of the November 8, 2011, notice from the tenants of their intent to vacate the rental unit early, for February 1, 2012, another notice from the tenants stating the move out date was moved up to November 28, 2011, the tenancy agreement, an undated email from the landlord's agent, asking the tenants of their availability for a move out inspection, an email train between the tenants and the landlord's agent, ending with another undated request for a move out inspection, a note dated December 17, 2011, from a plumbing company stating that the water leak in the tenants' rental unit did not require an after-hours emergency call, a plumbing company invoice, dated December 27, 2011, 2 advertisements for the rental unit, and photographs of the rental unit.

In the landlord's testimony, she stated that the tenants notified her in writing on November 8, 2011, that they were vacating the rental unit on February 1, 2012, to which she agreed. However, the landlord stated that the tenants then submitted a written notice on November 25, 2011, that they were vacating by November 28, 2011.

The landlord submitted that her agent advertised the rental unit immediately, but was not able to secure new tenants in either December, 2011 or January 2012. As a result, according to the landlord, she lost rent revenue in the amount of $2,560.00 due to the tenants' breach of their fixed term tenancy.

Upon query, the landlord stated the rental unit was advertised once in early December, but no further attempts were made, as, according to the landlord's rental agent, it would be a waste of money to advertise in mid-December.

As to the claim for $188.16, this amount represented the bill from the handyman hired by the tenants, which was presented to the landlord. The landlord stated that she disagreed that there was an emergency situation as alleged by the tenants, and that

she does not owe this amount. Upon query, the landlord confirmed that she has not paid this amount.

As to the landlord's claim for a compensation for repairs, the landlord stated that the tenants had unauthorized work done on the mechanical room, located in the tenants' rental unit, which was not necessary. The landlord submitted that although the tenants claimed that the work was due to an emergency situation, there existed no emergency, as shown by her plumber's statement.

Tenants' Application:

The tenants' monetary claim is in the amount of $2,055.26, which includes $1,280.00 for a return of their security deposit, doubled, reimbursement for a handyman of $188.16, change of address expense of $47.04, a moving truck for $47.72, storage locker for 2 months of $358.40, lost wages for attending the hearing for $83.94 and the filing fee of $50.00.

The tenants' relevant evidence included a timeline of events during the tenancy, a witness' signature of the tenants' allegations, a notice dated November 8, 2011, explaining why the tenants were moving out on February 1, 2012, a letter dated November 19, 2011, to the landlord, alleging a lack of heat in the rental unit, a notice dated November 25, 2011, informing the landlord the tenants were moving out by November 28, 2011, and listing the reasons for the early move, a handyman's receipt for an after-hours call to repair a water leak, a receipt for a change of address form and moving truck, a copy of a condition inspection report and photographs.

The tenant submitted that they were forced to move from the rental unit early due to the landlord's lack of repair to the rental unit and failure to address the issues raised by the tenants, despite many requests for the same.

Included in the requests, according to the tenant, was to request the landlord supply cable to the bedroom, the landlord's dog howling at early hours, the landlord's clutter around the tenants' rental unit, the thermostat not working and the sprinkler system engaging every night, wetting the tenants' possessions.

Of even more serious importance, according to the tenant, he noticed water leaking around the hot water tank, located in the mechanical room, which was headed towards the tenants' living area. The tenant submitted that he considered this to be an emergency and attempted to call the landlord on several occasions, but the landlord would not take his phone call.

The tenant submitted that on one call, he heard footsteps overhead and then heard his own voice being played on the message machine, but did not receive a return call.

The tenant submitted that the landlord failed to provide the tenants an emergency contact number, which was needed due to the landlord's failure to respond to their calls.

The tenant submitted that the first he heard from the landlord during what he considered to be the emergency of the water leaking, was when she yelled down to get out of the mechanical room.

The written notice of November 19, 2011, from the tenants to the landlord, stated that the tenants were having trouble heating the rental unit and reiterating to the landlord that they, the tenants, heard a running water sound, which upon inspection was determined to be water accumulating and draining via an external pipe.

In that written notice, the tenant asked the landlord to contact him within a reasonable time and informing the landlord that he would be communicating with the landlord in writing due to lack of response.

The notice of November 25, 2011, from the tenants informed the landlord that as they have had no response from her regarding the water damage, they, the tenants would be leaving by November 28, 2011.

Upon query, the tenant stated that when he saw water heading towards the tenants' suite, he considered this to be an emergency situation.

The tenant submitted that the landlord's repeated failure to address their concerns and requests compelled the tenants to vacate the rental unit early.

In response, the landlord stated that she had a friend inspect the leak the day after she told the tenants to get out of the mechanical room and he determined that the leak was not an emergency. Upon query as to the landlord's friend's qualifications to make such a determination, the landlord stated he had as many qualifications as the tenants' handyman.

The landlord allowed that she did receive a phone call from the tenants on November 17, and returned the tenants' phone call on November 18, but they did not answer.

The landlord stated that there was water and it was a problem, but the landlord disputed that it was an emergency situation.

The landlord further acknowledged yelling at the tenants when she heard them in the mechanical room, located in the tenants' rental unit, but contended the tenants knew this room was off limits.

Upon query the landlord called a plumber after the tenants vacated.

Analysis

Based on the testimony, evidence and 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 as follows:

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.

Where the claiming party has not met all four elements, the burden of proof has not been met and the claim fails.

Landlord's Application

I accept that the tenants ended their tenancy early by vacating the rental unit as of November 28, 2011, in violation of Section 45 of the Residential Tenancy Act. The tenants were required to end this tenancy by providing the landlord with 30 days written notice unless the tenants could show that the landlord had breached a material term of the tenancy agreement and had not corrected the problem within a reasonable timeframe pursuant to section 45(3) of the *Act*.

The tenants argued that they were entitled to end this tenancy early due to the landlord's failure to address their issues with the leaking water, lack of heat, issues with the landlord's dog, clutter and sprinkler system and garbage, placing their health and safety in jeopardy and by failing to reasonably protect their right to quiet enjoyment of their rental unit by ensuring their property was protected.

I accept the tenants' arguments. The tenants submitted written documentation of their requests and proved to my satisfaction that the landlord failed to respond to their reasonable requests. In reaching this conclusion I was persuaded by the landlord's admission that she received the phone call from the tenants regarding the leaking water on November 17, 2011, and did not attempt to return their call until November 18, 2011. The landlord contended that she was informed by her friend, who is not a licensed plumber, that there was no emergency. However, the landlord's response to a call from her tenants that an emergency existed was to do nothing and it was not upon the landlord to wait until later to decide for herself if an emergency existed. Additionally, the tenants reduced this request to writing on November 19, 2011, with no response from the landlord.

I am further troubled by the landlord's lack of response to the tenants' written request to address the lack of heating.

Section 32 of the Act requires a landlord to provide and maintain a residential property in a state that complies with the health, safety and housing standards required by law and having regard for the age, character and location of the rental unit, make it suitable for occupation by a tenant.

Section 33 of the Act requires the landlord to make emergency repairs where they are urgent, necessary for the health or safety of anyone or for the preservation or use of the residential property; and are required for the primary heating system.

The landlord provided no testimony or evidence that she ever addressed the issue of lack of heating or the running water with the tenants. I find that the landlord did not act promptly, reasonably and as required by the *Act* in responding to the tenants' water leak and lack of heating.

Due to the above, I find the landlord fundamentally breached the tenancy agreement and the Act. I find the only remedy was to end the tenancy.

Under sections 62 and 44(1)(f) of the Act, I order the tenancy ended effective November 28, 2011, the date given on the tenants' written notice to the landlord of their intent to vacate.

As I have found that the tenancy ended on November 28, 2011, by the landlord's own actions, I find the landlord is not entitled to loss of rent revenue for December, 2011 and January, 2012, and I therefore **dismiss** her monetary claim for $2,560.00.

Even had I not dismissed the landlord's claim for loss of rent revenue for the above reason, I would still make the decision to dismiss the landlord's claim due to her lack of taking reasonable steps to mitigate her loss. One step the landlord would be required to take is to advertise the rental unit. By the landlord's own admission, her rental agent decided it would be a waste of money to advertise the rental unit beyond the first attempt, which occurred in the first week of December, and there was no evidence that any further advertising took place.

As to the landlord's claim for $188.16 for the tenants' handyman bill, the landlord has not paid this bill and therefore has not suffered a loss. I therefore **dismiss** her monetary claim for this amount.

Implied in the landlord's application was a request to be compensated in the amount of $640.00, which is the amount of the tenants' security deposit. Upon query, the landlord could not explain why she included this amount in her claim for compensation or loss.

As the landlord has not established that she has suffered a loss in this amount, I **dismiss** this portion of her application.

Due to the above, I dismiss the landlord's application in its entirety, without leave to reapply.

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

Tenants' Application:

Section 38 of the Residential Tenancy Act requires that within 15 days from the later of either the date on which the tenancy ended, November 28, 2011 in this instance, or the landlord receives the tenant's forwarding address in writing, the landlord must either return the tenant's security deposit or make a claim against the deposit.

The evidence shows that the landlord received the tenant's written forwarding address on their Notice of November 25, 2011, with a request for a return of the security deposit.

The landlord confirmed that she has not returned the tenants' security deposit. I next considered whether the landlord made a claim against the security deposit. Upon a review of the landlord's application, I find that the landlord has not made a claim against the security deposit. In her application, the landlord did not mark the application for MNSD, which would indicate a claim against the security deposit. Additionally the landlord did not include a claim against the security deposit as part of her details of dispute or evidence. Rather the landlord sought inexplicably to obtain, not retain, an additional $640.00 from the tenants. I find that these together establish that the landlord has not filed a claim against the security deposit.

I further find that the tenants did not extinguish their rights to a return of their security deposit as I find the landlord insufficient evidence to prove the tenants were given a final notice of opportunity to inspect in the approved form, as required by the Residential Tenancy Branch regulations.

I therefore find the tenants are entitled to a return of their security deposit, doubled, pursuant to Section 38(6) of the *Act* and I therefore find the tenants have established a **monetary claim** in the amount of **$1,280.00,** comprised of their security deposit of $640.00, doubled.

As to the tenants' claim for a handyman bill, I find the tenants submitted insufficient evidence that the invoice of the handyman has been paid. I therefore find that the tenants have failed to prove the third step in their burden of proof and I **dismiss** their clime for $188.16.

As to the tenants' claim for a moving fee of $47.72, change of address fee of $47.04 and storage fees of $358.40, these are choices made by the tenants on how to facilitate their moving and I find the tenants have failed to provide sufficient evidence to hold the landlord responsible for choices made by the tenants. I therefore **dismiss** the tenants' claim for $453.16**.**

Costs incurred that relate to processing a claim for damages are limited to the cost of the filing fee, which is specifically allowed under section 72 of the Act. I find that I do not have authority to award any other costs related to a dispute resolution proceeding and I therefore **dismiss** the tenants' claim to recover costs for attending the hearing in the amount of $83.94.

As I have found that the tenancy ended on November 28, 2011, due to the actions of the landlord, I also find pursuant to Section 62 of the Act that the tenants are entitled to monetary compensation in the amount of **$84.16,** which is reimbursement of prorated daily rent paid for November 29 and 30, 2011 ($1,280.00 x 12 months = $15,360.00 ÷ 365 days = $42.08 daily rate x 2 days).

As I have found merit with the tenants' application, I award them recovery of the filing fee of $50.00.

Due to the above I find the tenants have established a total **monetary claim** in the amount of **$1,414.16**, comprised of their security deposit, doubled, in the amount of $1,280.00, prorated rent for November 29 and 30, 2011 for $84.16, and for recovery of the filing fee of $50.00.

I am enclosing a monetary order for **$1,414.16** 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.

Conclusion

The landlord's application is dismissed, without leave to reapply.

The tenants are granted a monetary order in the amount of $1,414.16.

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 23, 2012.

Residential Tenancy Branch