Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, for the return of all or part or double of the pet and or security deposit, and to recover the cost of the filing fee from the Landlord for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony.

Issue(s) to be Decided

1. What were the terms of the tenancy agreement?
2. When did the Tenants provide the Landlord with their forwarding address?
3. Have the Landlords breached the *Residential Tenancy Act*, (the Act), regulation or tenancy agreement?
4. If so, have the Tenants met the burden of proof to obtain a Monetary Order as a result of that breach, pursuant to sections 7 and 67 of the Act?

Background and Evidence

During the hearing each party was given the opportunity to provide their evidence orally and to respond to each other's testimony. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

At the outset of the hearing the Landlord advised the names listed on the application are his name and "the company name" which displays the correct spelling of his surname.

The Tenants affirmed they met with the Landlord's Agent, J.H., on April 18, 2011, when they discussed the terms of their tenancy agreement starting May 1, 2011, for the monthly rent of $650.00. They paid their security deposit of $375.00 and signed the

tenancy agreement in the presence of J.H., April 18, 2011, for what they believed to be a month to month tenancy. They were provided the carbon copy of the agreement by J.H. which they have provided a true certified copy in their evidence. They pointed out that their copy of the tenancy agreement does not have the owner's signature and sections 4, 5, and 6, were blank and are areas which pertain to the length of tenancy, liquidated damages, and rent and fees.

The Landlord affirmed that J.H. had previously conducted some tenancy business for him, such as maintenance work, but that J.H. did not have signing authority. He later confirmed that J.H. would have tenancy agreements to have for new tenants. When I asked the Landlord why the copy of the tenancy agreement he provided in evidence was different from the one the Tenant's provided he stated that he was not sure why his was different. Upon further review the Landlord stated that it is his signature on the last page and the date is in his writing, as are some of the other areas of the tenancy agreement, so he believes he met with the Tenants to finalize the agreement for a fixed term tenancy agreement ending April 30, 2012, which included liquidated damages of $375.00. Upon further questioning the Landlord stated he could not say for certain that he was present during the discussion of the terms or signing of the agreement.

The Tenants argued that they did not meet the Landlord until at least a month after residing in the rental unit when he attended the unit demanding that they begin to pay $30.00 per month for parking. They did so for the remaining five months of their tenancy and are now seeking to have this parking fee returned $150.00 (5 months x $30.00) as it was not part of the lease agreement they had signed and they did not discuss this when they signed their agreement. When asked why they did not seek assistance sooner instead of just paying the parking the Tenants advised they did not know their rights at that time.

The Tenants advised they are also seeking compensation for a four day period they were not able to reside in the unit when their toilet broke and caused a flood. They stated that the toilet was not repaired for four days and the female Tenant had to reside at a friend's for that period between August 12 and August 15, 2011.

The Landlord confirmed the toilet broke on a Friday and was not repaired until the following Monday so he was in agreement to paying the Tenants $25.00 per day for a total of $100.00 as claimed. When asked when he first met the Tenants the Landlord stated he could not recall exactly and upon further questioning about how the tenancy agreement was completed, specifically the length of the tenancy and liquidated damages, in the absence of the Tenants, the Landlord stated he could not answer as he could not recall.

The Tenants advised that on August 26, 2011 they provided the Landlord and the new female maintenance person, who resided in the lower level of the building, a copy of their written notice to end their tenancy effective September 30, 2011. The Landlord's copy was sent via regular mail and the maintenance person's copy was personally served to her at her door. They vacated the property and attended the move out inspection on October 1, 2011 at which time they provided the Landlord with a forwarding address.

The Landlord confirmed the Tenants had vacated the unit and provided their forwarding address on October 1, 2011. He states that he recalls receiving the notice verbally at a time when he was standing at the Tenants' door. When asked why he was at the Tenants' unit he stated he could not remember but he recalls that he requested she provide him the notice in writing. The Landlord states he did not receive the written notice until he received the Tenants' evidence package. The Landlord stated that he is pretty sure that the unit was re-rented as of October 15, 2011.

The Landlord advised he has not returned the security deposit to the Tenants, he does not have their written permission to withhold it, and he does not possess an Order issued by the *Residential Tenancy Branch* authorizing him to retain the deposit.

Analysis

Pursuant to section *64 (3)(c)* of the Act which stipulates the director may amend an application for dispute resolution or permit an application for dispute resolution to be amended, I have corrected the spelling of the Landlord's surname in the style of cause of this application.

When considering the terms of the tenancy agreement, I favor the evidence of the Tenants, who stated they met with the Landlord's agent to sign the tenancy agreement and pay the deposit and that they did not sign an agreement for a fixed term tenancy agreement nor were they informed about any liquidated damages; over the evidence of the Landlord who stated that he could not recall if he was with the Tenants during the signing of the agreement and he could not explain why his copy of the tenancy agreement is different than their copy. I favored the evidence of the Tenants over the Landlord, in part, because the Tenants' evidence was forthright and credible. The Tenants readily acknowledged that they signed the tenancy agreement, a legal document, with critical sections left blank. In my view the Tenants willingness to admit this when they could easily have filled in the blanks on their copy selecting a month to month tenancy with a lower rent payable lends credibility to all of their evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Landlord's explanations that he simple could not remember or could not comment on issues pertaining to differences in the tenancy agreements to be improbable. Given that the Landlord wants to retain the security deposit money it is reasonable to conclude he is seeking ways to do so and by filling in a liquidated damages clause and a fixed term tenancy on the tenancy agreement may provide an opportunity to seek damages under the Act. I find that the Landlord's explanation that he simply could not remember why he was at the Tenants' door when they allegedly told him they were ending their tenancy to be improbable. Upon review of the Landlord's entire testimony, noting how often the Landlord stated he could not remember issues pertaining to this tenancy, I find it improbable that he could then distinctly remember not receiving the Tenants' written notice to end tenancy and yet he was able to re-rent the unit by October 15, 2011. Rather, I find the Tenants' explanation that they had entered into a written tenancy agreement with the Landlord's agent for a month to month tenancy for $650.00 per month to be plausible given the circumstances presented to me during the hearing. Furthermore, when a written tenancy agreement is altered, all parties must initial every change or addition to the agreement. When items are added or amended in the absence of one party the tenancy agreement becomes void.

For all the aforementioned reasons, and on a balance of probabilities, I find the parties entered into a month to month tenancy that began May 1, 2011, for the monthly rent of $650.00. I further find that the Tenants provided the Landlord written notice to end the tenancy effective October 1, 2011, in accordance with section 44 of the *Residential Tenancy Act*.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7

and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

The Tenants seek the return of $150.00 for parking fees paid for the last five months of their tenancy agreement. There is no evidence before me to indicate the Tenants took action to minimize their loss and therefore I find there to be insufficient evidence to meet the test for damages as listed above. Accordingly, I dismiss their claim of $150.00 for parking fees.

The Landlord agrees to compensate the Tenants for having to be out of the unit during the toilet repair in August 2011, in the amount claimed of **$100.00.**

In this case the evidence supports the tenancy ended October 1, 2011 and the Tenants provided the Landlord their forwarding address on October 1, 2011.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit.

In this case the Landlord was required to return the Tenants' security deposit in full or file for dispute resolution no later than October 16, 2011.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit.

As per the aforementioned, I find that the Tenants have provided sufficient evidence to prove their claim for the return of double their security deposit plus interest. Accordingly I approve their claim in the amount of **$750.00** (2 x $375.00 + Interest of $0.00).

The Tenants have primarily succeeded with their application; therefore I award recovery of the **$50.00** filing fee.

Conclusion

The Tenants' decision will be accompanied by a Monetary Order in the amount of **$900.00** ($100.00 + 750.00 + 50.00). This Order is legally binding and must be served upon the Landlord.

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: March 08, 2012.

Residential Tenancy Branch