



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Has the Landlord breached the *Residential Tenancy Act* (the Act), regulation, and/or tenancy agreement?
2. If so, has the Tenant met the burden of proof to obtain a Monetary Order as a result of that breach, pursuant to section 67 of the Act?

Background and Evidence

At the outset of the hearing the Landlord confirmed his first and last name which indicated the Tenant had reversed these names on the application for dispute resolution. The Tenant acknowledged this and requested that I correct the Landlord's name in the style of cause for this decision.

The parties agreed they entered into a fixed term tenancy agreement that began on March 25, 2011 which was set to expire on February 28, 2013. Rent was payable on the first of each month in the amount of \$2,800.00 and on March 4, 2011 the Tenant paid \$1,400.00 as the security deposit. The Landlord agreed to allow the Tenant to assign the tenancy and a new written tenancy agreement was entered into by the Landlord and new tenant on November 17th and 18th, 2011 for the monthly rent of

\$2,695.00, which began on December 1, 2011 and was for the remainder of the fixed term ending February 28, 2013.

The Tenant affirmed that they approached the Landlord for his permission to assign the lease and that the Landlord was in agreement to the assignment only if they paid him a \$1,500.00 fee. They pointed out to the Landlord that he could not profit from an assignment under the *Residential Tenancy Act*. The Tenant stated the Landlord replied to this by saying "don't quote the law to me I am a lawyer".

The Tenant advised they began to advertise for a new tenant at the same rent and then decided to lower the rent in their advertisement to bring in prospective tenants. They showed the unit and found a tenant willing to take over the lease that they thought would work out and introduced him to the Landlord. They had offered to pay the Landlord the difference in the rental amount to ensure there was no shortfall of rent caused to the Landlord.

After they met with the Landlord he told them they had to pay the Landlord two cheques, one for \$1,500.00 for assigning the lease and the \$1,575.00 rent shortfall. They paid the assignment fee even though they knew this was wrong. They paid it with the intention to file this dispute as soon as the new tenant was settled. They feared they would lose the new tenant or the opportunity to assign the lease so they agreed to pay the Landlord.

The Landlord confirmed receipt of both cheques and stated the \$1,500.00 was the fee he had to pay his Agent that he hired to find a replacement tenant. He made reference to e-mails provided in his evidence where he is of the opinion the Tenants agreed to pay this agent fee. Then he read a document that he and the Tenants signed which states "The lease agreement is expired on *27th of Nov, 2011 of course after inspection the suite and make sure the cheques are cleared, Tenants know about the breaking the agreement and moving the before lease expired and the Tenant aware of \$1500.00 payment as a agreement to Landlord and paying for both side no claiming receiving* " [sic].

The Landlord confirmed he provided no evidence that he paid an agent a fee to find another tenant. He then stated that his agent found a tenant for higher rent who was willing to rent the space as of January 1, 2012.

The Tenant confirmed he had agreed to pay two weeks rent to the agent only if they found a prospective tenant to whom the lease was assigned. They had seen this agent's advertisements which were for much higher rent than what they were paying

which is proof the Landlord was seeking to profit from this assignment. The Tenant advised that prior to the assignment of lease the Landlord's agent did not show the unit to any prospective tenants. The Landlord's agent had contacted him about a week or so after the new tenancy agreement was already signed to say they had someone who may be interested.

In closing the Tenant pointed out that the document the Landlord read was proof he was charging them a \$1,500.00 fee which is referenced as "*breaking the agreement*" which is the basis of this claim.

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 style of cause of this application to display the Landlord's first and last name in the correct order as the Tenant had reversed them when completing the on-line application.

I have carefully considered the aforementioned and the documentary evidence submitted by the Landlord which included, among other things, copies of e-mails between the parties and the agent hired by the Landlord; a copy of a written agreement which all parties signed on November 17, 2011 which the Landlord read into evidence; and copies of the Tenants' tenancy agreement and the assigned tenancy agreement entered into by the Landlord and his new tenant.

I favor the evidence of the Tenant, who stated they agreed to pay the \$1,500.00 in order to carry out the assignment of their lease in fear the Landlord would not accept the new tenant, over the evidence of the Landlord who stated that the fee was charged to cover his costs paid to his agent to find a new tenant. I favored the evidence of the Tenant over the Landlord, in part, because the Tenant's evidence was forthright and credible and supported by the e-mails referenced by the Landlord whereby the Tenant wrote to the Landlord's agent stating "*we agree to pay the fee of two weeks rent for a **successful letting*** [My emphasis added]" The Tenants readily acknowledged that they paid the lease breaking fee and signed the document agreeing to this payment. In my view the Tenant's willingness to admit they did this in light of the advice from the *Residential Tenancy Branch staff* that this was a breach of the Act, 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 explanation that he was required to pay money to his agent to be improbable. Given that the Landlord had provided several other documents in defense of the Tenant's claim it would be reasonable to conclude if he did pay a fee to his agent he would have provided a copy of the receipt if such a payment was made. Furthermore, the e-mails in evidence prove the Landlord's agent was seeking money equal to two weeks rent from the Tenant and not the Landlord. Rather, I find the Tenant's explanation that the document the Landlord read into evidence supports that the Landlord was charging the \$1,500.00 fee for agreeing to allow the Tenants to assign the lease, to be plausible given the circumstances presented to me during the hearing. Accordingly I find the Landlord charged and was paid \$1,500.00 by the Tenants as a fee to allow the Tenants to assign their fixed term tenancy agreement in breach of section 34(3) of the Act.

Section 34(3) of the Act provides that a landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

For all the aforementioned reasons, I find the Tenant has met the burden of proof to establish his claim and I award him **\$1,500.00**.

Conclusion

The Tenants' copy of this decision will be accompanied by a Monetary Order in the amount of **\$1,500.00**. 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 09, 2012.

Residential Tenancy Branch

