Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing was convened by way of conference call in response to an application made by the landlords for a monetary order for unpaid rent or utilities, for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit, and to recover the filing fee from the tenant for the cost of this application.

The named landlord attended the hearing and acted as agent on behalf of the landlord company. The tenant also attended the conference call hearing. The landlord called one witness, and both parties and the witness gave affirmed testimony. The parties also provided evidence in advance of the hearing to the Residential Tenancy Branch and to each other, and the parties were given the opportunity to cross examine each other and the witness on the testimony given and evidence provided, all of which has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Is the landlord entitled to a monetary order for unpaid rent or utilities?
- Is the landlord entitled to keep all or part of the pet damage deposit or security deposit in full or partial satisfaction of the claim?

Background and Evidence

This fixed term tenancy began on January 1, 2012 and was to expire on December 31, 2012, although the landlord agreed that the tenant could move into the rental unit early at no charge. The tenant vacated the rental unit on January 13, 2012 without notice to the landlord. Rent in the amount of $1,000.00 per month was payable in advance on the 1st day of each month. The landlord collected a security deposit from the tenant in the amount of $500.00 at the outset of the tenancy.

The landlord testified that the parties had attended at a Dispute Resolution Hearing under file number 782657 and at that hearing the tenant was successful in obtaining a monetary order as against the landlords for double the amount of the security deposit

and recovery of a portion of the filing fee paid by the tenant, for a total monetary award in the amount of $1,025.00.

The landlord also testified that the tenant paid rent for the month of January, 2012 and then provided a letter on January 13, 2012 stating that the tenant had already vacated the rental unit and requested the security deposit be returned. Prior to that, the tenant had requested access to the electrical room in the condominium complex that housed the rental unit for a Telus technician so that services could be provided to the rental unit. Technicians usually have a key to a lock-box for access to the electrical room, but this technician did not have a key. The landlord company only has one rental unit in the complex and did not have a key to that room. The tenant called the landlord and the landlord spoke to the tenant as well as the technician. The landlord tried to contact someone on the strata council, but the representative was on vacation. The tenant yelled at the landlord for not doing the job of a landlord and hung up the phone. The landlord called back and told the tenant that he tried to get ahold of the building manager.

The rental unit was listed by the landlord for re-rental on Castanet in January, 2012, as well as on Kijiji, Rent Kelowna Properties website, the Coldwell Banker website, For Rent On Line and the rental unit was shown about 2 dozen times. No one wanted to pay that amount or enter into a lease.

The rental unit was finally re-rented for June 1, 2012, and the landlord claims unpaid rent for the months of February, March, April and May, 2012, for a total of $4,000.00 and recovery of the $50.00 filing fee for the cost of this application.

The landlord's witness is also an employee of the landlord company and testified that the rental unit was listed for rent about 2 days after the tenant moved out. The listings were on Rent Kelowna Properties, For Rent On Line, Kijiji, Castanet and the Coldwell Banker website for the same rental price as this tenancy. The rental unit was shown by the witness in January and February, and was shown up until new tenants were found. The rental unit was re-rented for June 1, 2012.

The witness also testified that the tenant had called about access to the electrical room in early January, and the witness did what she could to assist. The witness was present during the telephone conversation between the landlord and the tenant. The witness contacted the strata manager, who was on vacation, but the strata manager's assistant called the witness back. The strata manager's phone number is also posted throughout the building.

The tenant testified that the intention was to stay for the entire fixed term. The tenant's daughter witnessed the conversation between the landlord and the tenant, and told the tenant's other daughters. The daughters complained to the landlord company, but no one from the landlord company ever called the tenant. The telephone conversation between the landlord and the tenant on January 5, 2012 became heated and the tenant felt very threatened by the treatment of the landlord.

On January 30, 2012 the landlord sent an email directed to the tenant at the tenant's daughter's email address. The email had gone into junk mail and the tenant's daughter located it some days later. The email stated that the landlord would return the post-dated cheques.

The tenant also testified that she is 71 years old and was fearful of the landlord after the heated telephone exchange on January 5, 2012. The tenant placed an ironing board between the door and cupboards or closet for security at night and stayed in a hotel for 3 nights. The tenant stated she was truly fearful of the landlord, otherwise, the tenant would have stayed. It cost the tenant alot of money to move again so soon after the tenancy began.

The tenant also provided statements from witnesses. The first letter states that the writer was at the rental unit on January 5, 2012 when the telephone conversation took place. It states that the landlord was rude to the technician, yelling at the technician and insisted the tenant secure the services of Shaw Cable rather than Telus, and called the technician an "English Ass." When the tenant told the landlord that she could not stay on the phone, the landlord started yelling and the tenant hung up. The landlord called back immediately and uttered words to the effect, "Is this how you want to start your tenancy with me? I have rented to 17 year old girls that could figure this better than you have." The tenant hung up the phone again and the landlord again called back. The tenant did not answer the phone. The writer states that he was totally disgusted with what was heard, and every word was heard. The landlord was rude and threatening.

The other witness letter is from a daughter of the tenant who states that she was present when the Telus technician spoke to the landlord, and the landlord argued on the phone with the technician and suggested that the tenant should just get Shaw and make it easier. The technician replied that the tenant did not want Shaw. The landlord was unreasonable and wanted to speak to the tenant again. During that conversation, the witness states that the landlord made some negative remark about the "English" technician. The landlord called the tenant back after the tenant hung up the phone, and the witness heard the landlord's loud angry voice saying, "Is that how you want to start your tenancy with me?" The landlord then made a comment about how he has rented to 17 year olds that could figure things out better than the tenant, and the tenant hung

up the phone again. The landlord called again, but the tenant did not answer, clearly shaken by her conversation with the landlord. The witness letter states that the witness was very upset and worried about leaving the tenant alone, and the technician was also concerned and stayed for at least a half hour. On his way out, the technician met with a strata representative and called to advise the tenant that he had access to the electrical room and would hook up the services. The landlord was rude, angry, aggressive and extremely threatening which could be heard from across the room, and described it as a very disturbing situation.

During cross examination, the tenant was asked if the landlord attempted to put the tenant in contact with someone who could open the door, to which the tenant replied, "No, you didn't." The tenant was asked if the tenant was fearful of eviction or an assault, to which the tenant replied, "Both, otherwise I would have stayed. It cost me alot to move, I truly was fearful."

Analysis

Firstly, the landlord has applied for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit. That matter was already dealt with at a dispute resolution hearing in which the tenant was successful in receiving a monetary order for double the amount of the security deposit for the landlord's failure to return it or apply for dispute resolution within 15 days of the date the tenancy ended or the date the tenant provided a forwarding address in writing. I cannot rule on an application that has already been adjudicated, and the landlord's application therefore cannot succeed.

With respect to mitigation, the landlord provided copies of advertisements that were placed on March 10, 2012 and March 26, 2012 but none others. The landlord testified that it is not possible to print off advertisements that have expired. I do not accept that testimony. As a property manager, the landlord ought to know that when applying for a monetary order of this nature, proving mitigation is necessary, and printing off the advertisements before they expire may have been a prudent thing to do. However, I accept the testimony of the landlord's witness that the advertisements were placed in January and ran until the rental unit was re-rented for June 1, 2012 and that the witness personally showed the rental unit to perspective renters in January and in February, 2012. Therefore, I find that the landlord has proven mitigation.

The landlord's agent takes the position that the tenancy has not ended just because the tenant moved out; the tenancy continues because of the dates stated on the tenancy agreement. I disagree with the landlord's position; the tenancy ends when the landlord and the tenant no longer have a landlord and tenant relationship. In this case, the

tenant has moved out, the landlord advertised the unit for rent, and re-rented the rental unit.

In the circumstances, I don't believe that the telephone conversation between the parties on January 5, 2012 was quite the way it was described by the landlord's agent during his in-chief testimony. In fact, the landlord did not dispute the facts as set out by the tenant.

The tenant's position is that the landlord's disturbing behaviour caused the tenant to be fearful and therefore, the tenant was justified in ending the tenancy prior to the end of the fixed term.

During the course of the hearing, the landlord became clearly frustrated with the hearing process, and questioned the value of a fixed term tenancy if a tenant is permitted to leave a tenancy prior to the end of the fixed term.

In determining whether or not the landlord has established a claim as against the tenant, I refer to the Policy Guidelines which are available to the parties on the Residential Tenancy Branch website: www.rto.gov.cbc.ca

Policy Guideline 30 states that neither a landlord nor a tenant may end a fixed term tenancy prior to the end of the fixed term except for cause. It also states that during a fixed term tenancy, a tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement.

Policy Guideline 6 states that the Courts have found that a landlord's failure to provide a tenant with the tenant's right to quiet enjoyment is a material term of the tenancy, and a tenant may elect to treat the tenancy agreement as ended, however the tenant must first so notify the landlord in writing. It also states that it is necessary to find that there has been a significant interference with the use of the premises. Harassment is defined in the Policy Guideline as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome." The Guideline also states that "Substantial interference that would give sufficient cause to warrant the tenant leaving the rented premises would constitute a breach of the covenant of quiet enjoyment, where such a result was either intended or reasonably foreseeable." I also accept that the Guideline speaks to repeated or persistent threatening or intimidating behaviour, however in this case, the tenant didn't wait for a repeated incident.

In the circumstances, I find that the landlord's agent did make attempts to get a key for the electrical room, however the actions and language of the landlord while speaking with the tenant were very unprofessional and I cannot ignore the testimony of the tenant

and written documentation from witnesses that the 71 year old tenant was subjected to disturbing, rude and threatening language and conversation that caused her to be fearful of an assault and of being evicted by the landlord.

It is clear in the evidence that the tenant gave the landlord notice in writing that the tenant had vacated the rental unit after the tenant had already moved out. The tenant vacated the rental unit on January 13, 2012 and gave the landlord written notice of that on January 17, 2012, having paid rent for the month of January, 2012. I find that the landlord breached a material term of the tenancy causing the tenancy to end prior to the end of the fixed t`erm, and that the tenant was justified in moving out of the rental unit prior to the end of the fixed term because of that breach.

Conclusion

For the reasons set out above, the landlord's application is hereby dismissed in its entirety without leave to reapply.

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 12, 2012.

Residential Tenancy Branch