



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for a Monetary Order for compensation for a loss of rental income and other expenses, to recover the filing fee for this proceeding and to keep the Tenants' security deposit in partial payment of those amounts.

At the beginning of the hearing, the Tenants admitted that they had not served the Landlord with copies of their documentary evidence as required by RTB Rule of Procedure #4. As the Landlord does not have an opportunity to respond to this evidence it is excluded pursuant to RTB Rule of Procedure 11.5(b).

Issue(s) to be Decided

1. Is the Landlord entitled to compensation and if so, how much?
2. Is the Landlord entitled to keep the Tenants' security deposit?

Background and Evidence

This tenancy was supposed to start on June 23, 2012. The Parties executed a tenancy agreement on June 17, 2012 in which they agreed to a one year fixed term tenancy at a rental rate of \$2,200.00 per month. The Tenants gave the Landlord a cheque for \$1,100.00 in payment of a security deposit as well as a cheque for \$580.00 for 8 days pro-rated rent for June. The Tenants said they also gave the Landlord six post-dated rent cheques payable for the 1st day of each month which the Landlord has not returned to them.

The Landlord claims that the Tenants advised her on June 27, 2012 (the day they were supposed to pick up the keys) that they would not be moving in due to a family emergency. The Tenants claim that they advised the Landlord on June 21, 2012 that they would not be moving in and noted that on her application for dispute resolution the Landlord claimed that it was June 20, 2012 when they advised her. The Landlord claimed that on June 27, 2012 she asked her rental agent to advertise the rental unit again and a new tenant could not be secured until August 23, 2012. Consequently, the Landlord sought compensation for a loss of rental income for 8 days of June, all of July

and 21 days of August. The Tenants argued that the Landlord agreed in a series of e-mail correspondence that they would only be responsible for compensating her for one month's rent. The Tenants also argued that a term in the addendum to the Parties' tenancy agreement states that *"if the tenants end the tenancy earl[ier] than 12 months the tenants will lose the deposit amount of \$1,100.00."*

The Landlord also sought to recover an agent's fee of \$1,100.00 because she said she was too busy to look for a new tenant on her own. The Landlord admitted that there is nothing in the tenancy agreement whereby the Tenants agreed to pay an agent fee to re-rent the rental unit if they ended the tenancy early. The Tenants disputed this part of the Landlord's claim and said the Landlord did not use an agent when they rented the rental unit and accordingly the rental rate they negotiated with the Landlord was reduced by \$100.00 per month or \$1,200.00 to reflect this.

The Landlord further sought to recover compensation of \$300.00 for a couch. The Landlord said she had some of her furniture stored in the rental unit but the Tenants did not want to use it. The Landlord said she could not move the couch into storage on her own so she advertised it for sale for \$1,000.00 and then \$300.00 but as the Tenants wanted early possession of the rental unit, the only way she could get rid of it in time was to give it away. The Tenants argued that the Landlord agreed to provide them with an unfurnished suite and that they merely asked her to move it and not to get rid of it.

Analysis

Section 45(2) of the Act says that a tenant of a fixed term tenancy cannot end the tenancy earlier than the date set out in the tenancy agreement as the last day of the tenancy. If a tenant ends a tenancy earlier, they may have to compensate the landlord for a loss of rental income that he incurs as a result. Section 7(2) of the Act states that a party who suffers damages must do whatever is reasonable to minimize their losses. This means that a landlord must try to re-rent a rental unit as soon as possible to minimize a loss of rental income.

Although the Landlord claimed that the tenancy agreement was signed on June, 25, 2012, the document itself bears a date of June 17, 2012. Consequently, I find that the Parties entered into a tenancy agreement for a one year fixed term on June 17, 2012. I also find on a balance of probabilities that the Tenants advised the Landlord on June 21, 2012 that they would not be moving into the rental unit. I find that it does not stand to reason that the Tenants cancelled the agreement on June 27, 2012 as the Landlord claimed given that they were supposed to take possession of the rental unit on June 23, 2012 and therefore would have needed the keys prior June 27, 2012. Consequently, pursuant to s. 45(2) of the Act, the Tenants were still liable for a loss of rental income incurred by the Landlord as a result of ending the fixed term tenancy early.

However, the addendum to the tenancy agreement states that if the Tenants end the tenancy before the end of the fixed term, they will forfeit their security deposit. I find that this clause is contrary to s. 20(e) of the Act. Furthermore, RTB Policy Guideline #4 (Liquidated Damages) says at p. 1 that

“a clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown to be a genuine pre-estimate of loss. If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.”

I find that the clause of the tenancy agreement that provides that the Tenants will forfeit their security deposit if they end the tenancy early is a penalty clause and not a genuine pre-estimate of damages. I draw this conclusion based on the fact that the clause in question says nothing about it being a genuine pre-estimate of damage to cover the Landlord's expenses if the tenancy ended early and the Landlord provided no evidence to suggest that it was. Consequently, I find that the amount of the Tenants' security deposit (\$1,110.00) is the upper limit that the Landlord can claim for not only a loss of rental income (for the term of the lease) but also for any other expenses (including agent or advertising fees) she may have incurred due to the tenancy ending early.

I also find that the Landlord is not entitled to recover compensation for a sofa she gave away because it was her choice to give the sofa away instead of to store it and continue to advertise it. Consequently, I find that the Landlord cannot hold the Tenants responsible for her inability to find someone to help her move the sofa from the rental unit and that part of her claim is also dismissed without leave to reapply. As the Landlord has only been partially successful on her application, I find that she is entitled to recover one-half of the filing fee she paid for this proceeding or \$25.00. Consequently, I find that the Landlord is entitled to a monetary award as follows:

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|---|---------------------|
| Loss of rental income for June 23-30, 2012: | \$580.00 |
| Loss of rental income and other damages: | \$1,100.00 |
| Filing fee: | <u>\$25.00</u> |
| Balance: | \$1,705.00 |
| Less: Payment from tenants for June rent: | (\$580.00) |
| Security deposit received from Tenants: | <u>(\$1,100.00)</u> |
| Balance owing: | \$25.00 |

As a result, the Landlord will receive a Monetary Order for the balance owing of \$25.00.
I Order the Landlord pursuant to s. 62(3) of the Act to return the Tenants' post-dated cheques to them forthwith.

Conclusion

A Monetary Order in the amount of \$25.00 has been issued to the Landlord and a copy of it must be served on the Tenants. If the amount is not paid by the Tenants, the Order may be filed in the Provincial (Small Claims) Court of British Columbia and enforced as an Order of that Court.

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: September 13, 2012.

Residential Tenancy Branch