



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNR, FF

Introduction

This hearing was convened as a result of the landlord's successful application for review regarding the Decision dated September 19, 2012, which dismissed their original application for dispute resolution, said Decision being suspended by a Dispute Resolution Officer's (DRO) Decision issued on September 28, 2012 pending the review hearing.

The Decision of September 19, 2012, dismissed the landlord's application due to their failure to attend the hearing.

The landlord applied for a review based upon their contention that they were unable to attend the original hearing on September 19, 2012, due to circumstances beyond their control. The landlord's application was granted due to the reviewing DRO's finding that the landlord was unable to attend because of circumstances that could not be anticipated and were beyond their control. The reviewing DRO also decided that a new hearing was to be conducted.

This review hearing dealt with the landlord's application for a monetary order for unpaid rent, for authority to retain the tenant's security deposit and for recovery of the filing fee.

At the review hearing the parties appeared and the hearing process was explained. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally, refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent, for authority to retain the tenants' security deposit and to recover the filing fee?

Should the suspended Decision of September 19, 2012, be set aside, varied or confirmed?

Background and Evidence

There is no dispute that this 6 ½ month fixed term tenancy began on August 15, 2011, that monthly rent was \$625.00 and the tenants paid a security deposit of \$312.50 at the beginning of the tenancy, on or about August 15, 2011.

The landlord said she was uncertain of the date the tenants vacated, but said she believed May 3, 2012 was the date they moved out.

The tenancy agreement provided that the tenants were to vacate the rental unit on February 29, 2012; however, the landlord explained that the parties agreed that the tenants could remain on a month to month basis.

The tenants' agent, the male tenant's father, stated that the tenants moved all their personal property primarily out of the rental unit on April 26, 2012, and the remaining few possessions the next day on April 27, 2012.

The landlord's monetary claim is \$650.00, which includes unpaid rent of \$625.00 for May 2012, and the late fee of \$25.00.

In support of their application, the landlord submitted that on April 26, 2012, a flood occurred within the residential property complex, affecting the rental unit.

The landlord agreed that the rental unit became uninhabitable on April 26, 2012, and that they tried to work with the tenants to "re-home" them, without success.

When questioned, the landlord said that she did not know when the rental unit became habitable as she never followed up with the restoration company after the tenants vacated.

I specifically asked the landlord the following question: "You had a rental unit which was uninhabitable and expected the tenants to pay rent?"

The landlord replied: "Yes." In explanation, the landlord said that the reason she expected the tenants to pay rent was due to the tenants' failure to purchase tenant's insurance, as required under the tenancy agreement, which would have covered the tenants' additional living expenses if the dwelling became unfit for occupancy.

In response, the tenant's agent said that the tenants were forced to move out on April 26, 2012, due to the flood and were never informed as to when the rental unit would again become habitable. The tenants submitted that it was a hardship for them to move suddenly.

As to the alternate rental unit the tenants were offered, the monthly rent was more than the tenants were paying and they could not afford an increased rent, according to the tenant's agent.

Analysis

Based on the relevant oral and written evidence and on a balance of probabilities, I find as follows:

Section 44 of the Act provides that a tenancy will end, among other things, when a tenancy is frustrated.

Residential Tenancy Branch Policy Guideline 34 provides that a contract is frustrated when it becomes incapable of being performed, through no fault of the other party. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

Guideline 34 further goes on to say:

For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

I agree with this Policy and find that due to circumstances beyond the control of either the landlord or the tenants, the rental unit became uninhabitable for an indefinite

amount of time on April 26, 2012, such that the tenancy agreement could not be performed. In other words, by the landlord's own evidence, the rental unit as agreed upon in the tenancy agreement could not continue to be provided to the tenants. I find the flood rendering the rental unit uninhabitable was unforeseen by either party. The landlord herself could not say as of the day of the hearing, which was 6 months post flood, when the rental unit was again livable.

I also find the landlord failed to offer a suitable alternate accommodation at the same rate of rent such that the tenancy could continue. I also reject the landlord's position as I find it unreasonable that the tenants were to purchase tenant's insurance to protect the landlord against the landlord's losses, as was the stated reason at the hearing. There is no certainty for the tenants that an insurance claim would be paid, and if it were to be paid, that a timely reimbursement would be made.

Due to the above I therefore find that the tenancy agreement became frustrated as of April 26, 2012, and the landlord and tenants were discharged from fulfilling their obligations under that tenancy agreement as of that date. As I have found this, I find that the tenants were not obligated to pay the landlord rent for May 2012, and I therefore dismiss the landlord's application, without leave to reapply.

As I have dismissed the landlord's application claiming against the tenants' security deposit, I find the tenants are entitled to a return of their security deposit.

Conclusion

For the reasons stated above, the landlord's application is dismissed, without leave to reapply.

I order the landlord to return the tenants' security deposit of \$312.50.

In the event the landlord fails to return the tenants' security deposit without delay, I grant the tenants a final, legally binding monetary order in the amount of \$312.50, which I have enclosed with the tenants' Decision.

The monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court.

Having dismissed the landlord's application without leave to reapply for the reasons stated above, I find that the Decision of the Residential Tenancy Branch dated

September 19, 2012, should be set aside due to a monetary order now being granted to the tenants.

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* and is being mailed to both the applicant and the respondent.

Dated: November 02, 2012.

Residential Tenancy Branch