



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the tenants: MNDC, MNSD, FF
For the landlord: MNR, MNSD, FF

Introduction

This was the reconvened hearing dealing with the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the “Act”).

The original hearing was adjourned due to the landlord’s contention that they had not received the tenants’ amended application in time for the hearing. The hearing was then adjourned in order that the landlord could respond and file evidence in response to the tenants’ application for dispute resolution.

The tenants applied for a monetary order for money owed or compensation for damage or loss, for a return of their security deposit, and for recovery of the filing fee.

The landlord applied for a monetary order for money owed or compensation for damage or loss and unpaid, for authority to retain the tenants’ security deposit, and for recovery of the filing fee.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. 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.

At the outset of the hearing, each party confirmed that they had received the other party's evidence. Neither party raised any issues regarding service of the application or the evidence.

I have reviewed all testimony and other evidence. However, although an extensive amount of evidence was received, particularly by the tenants, only the evidence relevant to the issues and findings in this matter are considered and described in this decision.

Preliminary Matter:

At the original hearing, the landlord's legal counsel requested that he be allowed to have a court reporter in attendance at the next hearing. I agreed to this request and a court reporter was in attendance at the adjourned hearing.

At the conclusion of the hearing, the legal counsel agreed that he would send a transcript to the tenants and to the Residential Tenancy Branch ("RTB") and I so order.

Issue(s) to be Decided

1. Are the tenants entitled to a monetary order for money owed or compensation for damage or loss, a return of their security deposit, and to recover the filing fee?
2. Is the landlord entitled to a monetary order for money owed or compensation for damage or loss and unpaid rent, for authority to retain the tenants' security deposit, and to recover the filing fee?

Background and Evidence

The evidence shows that this 6 month, fixed term tenancy started on February 1, 2012, ended on July 31, 2012, monthly rent was \$1100.00 and the tenants paid a security deposit of \$550.00 at the beginning of the tenancy.

Tenants' Application

The tenants have applied for a monetary order for \$8944.08. This includes a request for their security deposit of \$550.00, doubled to \$1100.00, reimbursement of all the rent paid during the tenancy, in the amount of \$6600.00, storage fees of \$1234.08, and postage of \$10.00.

Security Deposit, doubled

The tenants said they provided their written forwarding address on June 30, 2012, on their written notice to end the tenancy effective July 31, 2012, in the same envelope they delivered their July 2012 rent.

The tenants also contended that they requested a final inspection of the rental unit from the landlord in their email notice to the landlord, but that the landlord never responded. As a consequence the tenants performed their own move-out condition inspection and

compiled a condition inspection report. The tenants contended that they also placed several phone calls to the landlord near the end of July and the landlord never responded to their requests to arrange a move-out inspection.

To date the landlord has not returned their security deposit, despite their requests, according to the tenants.

In response, the landlord submitted that the tenants extinguished their rights to recover the security deposit as they failed to attend the move-out inspection, despite 2 written notices to the tenants attempting to arrange a mutually agreeable time. The landlord said that the 2 notices were posted on the tenants' door, by another employee of the landlord. I note that this employee was not present at the hearing and when queried as to her whereabouts that day, the landlord replied that she was not at work.

In response to the landlord's submissions, the tenants submitted that the first time they saw the 2 notices requesting a final inspection was when they received the landlord's evidence package as they were never posted on their door.

The tenants further said that it was well known that they were just waiting to the end of the fixed term so that they could leave the rental unit and that they did not intend to stay beyond that.

Return of rent paid during the tenancy-

The tenants submitted that they are entitled to a refund of all rent paid during the 6 month tenancy due, in part, to the landlord's lack of response when they made requests of the landlord for such issues as a bedbug infestation and smoking. The tenants submitted that when they did notify the landlord, someone attended the rental unit, but that the person did not perform a proper inspection and offered no meaningful remedy. The tenant questioned as to whether or not the person attending the rental unit was in fact a property pest control technician as he refused to leave a business card when requested.

The tenants submitted that due to the lack of an adequate response to the bedbug issue, they were unable to move their furniture into the rental unit. Additionally, the tenants submitted that many nights were spent away from the rental unit due to being uncomfortable at the thought of bedbugs in their home. As well, according to the tenants, they were unable to sleep comfortably in the rental unit due to constant scratching.

The tenants also contended that the only remedy offered was a chemical spray, which would be ineffective absent the entire residential property being treated.

In other instances, the tenants claimed that construction noise continued unabated during their tenancy, causing sleep disruptions and a loss of quiet enjoyment.

The tenants said that the last letter they sent to the landlord was on March 29, 2012, and that thereafter, they did not send anymore written demands due to the lack of an adequate response from the landlord. The tenants contended that they knew early on that they would not renew their lease, and bided their time until the end of the fixed term.

In response, the landlord's legal counsel submitted that there was no record of the tenants making a further request or complaint following March 29, 2012, letter. The legal counsel went on to submit that the landlord responded immediately by having a pest control company attend the rental unit, after which the technician reported not having observed any bedbugs.

The legal counsel said that as far as the landlord knew, the problem was resolved after the pest control company attended as they never received any other notices from the tenants.

The landlord also submitted that the tenants refused the treatment offered by the pest control company.

As to the construction noise, the legal counsel submitted that the suites in the residential property were undergoing renovations as is the landlord's right, as the tenants were aware when they moved in as their suite had just been renovated.

The legal counsel also submitted that the construction noise was not out of the ordinary and that it did not occur at night, which would cause the tenants no night time disturbances impacting their sleep.

The legal counsel also pointed out that there were several other construction projects ongoing in surrounding properties, the noise for which the landlord would have no control.

Storage fees-

The tenants contended that as they could not move their furniture into the rental unit due to the presence of bedbugs, they were forced to rent a large storage unit to contain their personal property during the tenancy so that their furniture would not be contaminated.

Due to the lack of an adequate response to their bedbug complaints, the tenants submit that the landlord should be responsible for reimbursement of their storage costs.

In response, the legal counsel submitted that there was no basis for the bedbug claim and therefore no reason the tenants could not move their personal property into the rental unit. The legal counsel pointed out that the tenants mentioned they were intending on making a claim for the alleged bedbugs, but nothing further happened. The legal counsel further pointed out that the storage receipt was for a period of time prior to the beginning of the tenancy, suggesting that this was the tenants' choice to keep their belongings stored.

Mailing and bedbug medication-

The lack of an adequate response to their bedbug complaints caused the tenants to purchase medication, according to the tenants.

Additionally the tenants are claiming reimbursement of mailing costs.

In response, the legal counsel said that there was no evidence of a bedbug problem in the rental unit and that the tenant's doctor's note did not specifically lay blame upon any bedbugs from the rental unit.

The tenants' relevant evidence included a monetary claim worksheet, written statements from the tenants, a statement from the succeeding tenant in the rental unit, 2 doctor's note, notices from the landlord to the tenants concerning a suite inspection for an electrician, a pest control company inspection and a hot water tank failure, a March 8, 2012, letter to the landlord notifying the landlord of the bedbugs issue and smoking in the residential property, follow up notices to the landlord, a record of phone calls made by the tenants, a letter dated June 30, 2012, informing the landlord that they were ending the tenancy on July 31, 2012, with an additional request for final inspection, an additional request made on August 16, 2012, giving the landlord a forwarding address and requesting a return of their security deposit and photographs of the rental unit.

Landlord's Application

The landlord has applied for a monetary order for \$1100.00, for loss of rent revenue for the month of August 2012. The landlord also requested they be granted authority to retain the tenants' security deposit and to recover the filing fee of \$50.00

Loss of rent revenue for August 2012-

The landlord contended that due to the insufficient notice given by the tenants, that being on July 3, 2012, in an email from the tenants that they intended to end the tenancy at the end of July, they suffered a loss of rent revenue for the month of August 2012.

When questioned the landlord's agent said that the steps taken to re-rent the rental unit included advertising on popular free online websites.

The landlord's agent could not recall the dates of showings of the rental unit when questioned.

In response, the tenants contend that they issued their notice to end the tenancy on June 30, 2012, when they delivered their July 2012 rent cheque. The tenants further contended that they followed up that notice with the July 3, 2012, email as they had received no response from the landlord.

In response to that, the landlord's agent said that she did not deposit the July rent until July 3, 2012. When questioned, the landlord's agent confirmed that the office was closed on June 30, 2012, and that she was not in the office the holiday weekend of June 30- July 2, 2012.

The landlord's relevant evidence included a report from the pest control company, the tenancy agreement, the July 3, 2012, email from the tenants of their notice to vacate at the end of July, and copies of notices of a final inspection.

Analysis

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

In a claim for damage or loss under the Act or tenancy agreement, the claiming party, both parties in this case, has to prove, with a balance of probabilities, four different elements:

First, proof that the damage or loss exists, **second**, that the damage or loss occurred due to the actions or neglect of the respondent in violation of the Act or agreement, **third**, verification or proof of the actual loss or damage claimed and **fourth**, proof that the party took reasonable measures to mitigate their loss.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

Tenants' application-

Security Deposit, doubled

Under section 38 of the Act, at the end of a tenancy a landlord is required to either return a tenant's security deposit or to file an application for dispute resolution to retain the security deposit within 15 days of the later of receiving the tenant's forwarding address in writing and the end of the tenancy. If a landlord fails to comply, then the landlord must pay the tenant double the security deposit and pet damage deposit.

In the case before me, the *undisputed* evidence shows that the landlord received the tenants' written forwarding address on July 3, 2012, and the last day of the tenancy was July 31, 2012, the landlord did not apply for arbitration claiming against the security deposit and did not return any portion of the tenants' security deposit within 15 days of July 31, 2012.

In the case before me I accept that email was a frequent method of communication between the parties, as demonstrated by the tenants' evidence.

Although the Act does not recognize email transmission as an acceptable method of delivery of documents, I order that the delivery of the tenants' forwarding address and request for a final inspection through the July 3, 2012 email to the landlord, with the landlord's submission of the email with their evidence, sufficiently served, pursuant to section 71 of the Act.

I next considered the landlord's contention that the tenants extinguished their rights to the security deposit by their failure to attend a move-out final inspection, pursuant to section 36(1) of the Act.

I do not accept the landlord's argument that the tenants were given two such opportunities to inspect the rental unit at the end of the tenancy. In reaching this conclusion, the tenants stated they never received the notices said by the landlord to be posted on the tenants' door and the landlord's representative who was said to have posted the notices was not in attendance or made available for testimony to confirm the delivery of the documents.

I was further influenced by the tenants' request for a final inspection in their notice to vacate and in the photographs taken by the tenants of the rental unit on the final inspection they performed in the landlord's absence, showing the clean condition of the rental unit. I also accepted the tenants' testimony and written evidence that they attempted to arrange a final inspection through telephone calls, with no response. I find the actions of the tenants were consistent with seeking a final inspection and I can find no reasons for the tenants to avoid such an inspection.

I therefore find that the tenants did not extinguish their rights to their security deposit.

The landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the tenant, not by their assumption that the tenants had extinguished their rights to the security deposit. Therefore, I find that the landlord is not entitled to retain any portion of the security deposit, and under section 38 I must order the landlord to pay the tenants double their security deposit of \$550.00.

Return of rent paid during the tenancy-

The tenants' claim to have all their rent paid during the 6 month tenancy returned stem from their contention that they were not able to enjoy and fully use the rental unit due to such issues as bedbugs, smoking and construction noise.

Section 28 (b) of the Act provides that tenants are entitled to quiet enjoyment including the right to privacy and freedom from unreasonable disturbance.

In this case, I find that the tenants submitted insufficient evidence that they addressed their concerns of a loss of their quiet enjoyment with the landlord on a consistent basis and not at all after March 29, 2012. As the landlord submitted evidence that a pest control company attended the rental unit and the tenants failed to notify the landlord that the issues continued thereafter, the landlord would be unable to make reasonable attempts to address those concerns during the course of the tenancy. As such, I find

that the tenants failed to prove that they took reasonable measures to mitigate their loss.

I also find the tenants submitted insufficient evidence that the landlord's actions caused them to suffer stress, anxiety, or insomnia, which was detrimental to their mental health as I did not find the two doctor's notes to be conclusive.

Due to the above I dismiss the tenants' claim for \$6600.00.

Storage fees-

As I have found that the tenants submitted insufficient evidence that the landlords were notified of issues concerning quiet enjoyment surrounding the bedbugs on a consistent basis and not at all after March 29, 2012, I likewise find they have submitted insufficient evidence for reimbursement of storage fees. I therefore dismiss their claim for \$1234.08 for storage fees.

Mailing and bedbug medication-

I also find that I do not have authority under the Act to award an applicant for costs associated with mailing or prescriptions as these are not costs enumerated as recoverable. I therefore dismiss their monetary claim for \$10.00.

I find the tenants' application contained merit and I award them recovery of the filing fee of \$50.00.

Due to the above, I find the tenants are entitled to a total monetary award of \$1150.00, comprised of their security deposit of \$550.00, doubled, and the filing fee of \$50.00.

Landlord's Application

Loss of rent revenue for August 2012-

Section 45 of the Act requires a tenant to give written notice to end the tenancy that is not earlier than one month after the date the landlord receives the notice and is the day before the day in the month that rent is payable under the tenancy agreement. In other words, one clear calendar month before the next rent payment is due is required in giving notice to end the tenancy.

If a tenant ends a tenancy earlier, they may have to compensate the landlord for a loss of rental income that the landlord may incur 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.

As the landlord presented no evidence that the tenants had a pattern of late payments of rent or that the July payment was made late, I accept the tenants' evidence that they made their July payment on Saturday, June 30, 2012, as I find it logical that the landlord would not have received it until July 3, 2012, when they first returned to their office after a long, holiday weekend.

As the tenants' evidence showed a clear intention of leaving the rental unit at the end of the fixed term, July 30, 2012, I can find no reason that the tenants would not provide that written notice with their rent cheque. I therefore concluded that the tenants gave sufficient notice of their intent to vacate the rental unit on July 31, 2012.

Even had I not found that the tenants gave sufficient notice of their intent to vacate, I also find that the landlord provided no documentary evidence of their efforts to re-rent the rental unit and would have not succeeded in recovering lost rental income on that basis as well. Consequently, as I find the tenants complied with the Act in providing sufficient notice and I find the landlord submitted insufficient evidence of any attempt to mitigate their loss, I dismiss their claim for loss of rent revenue of \$1100.00.

As I have dismissed the landlord's monetary claim, I likewise dismiss their request to retain the tenants' security deposit.

As I have dismissed the landlord's monetary claim, I dismiss their request for recovery of the filing fee.

Conclusion

The tenants have proven a total monetary claim of \$1150.00 comprised of their security deposit of \$550.00, doubled to \$1100.00, and recovery of the filing fee of \$50.00.

I therefore grant the tenants a final, legally binding monetary order in the amount of \$1150.00, which I have enclosed with the tenants' Decision.

Should the landlord fail to pay the tenants this amount without delay, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court.

The landlord's application is dismissed.

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: January 30, 2013

Residential Tenancy Branch

