



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, DRI, MNDC, FF

Introduction

This hearing dealt with the tenants' application for dispute resolution under the Residential Tenancy Act (the "Act"), seeking to cancel a 1 Month Notice to End Tenancy for Cause (the "Notice"), to dispute an additional rent increase, a monetary order for money owed or compensation for damage or loss and for recovery of the filing fee.

The parties appeared, the hearing process was explained and they were given an opportunity to ask questions about the hearing process. I note that the attending landlord is the partner of the landlord listed in the application for dispute resolution and in the tenancy agreement and has had the primary communication with the tenants.

Thereafter all parties gave affirmed testimony, were provided the opportunity to present their evidence orally and to 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 Residential Tenancy Branch Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Preliminary Issues-

#1-The landlord contended that she did not received the tenants' evidence in a timely manner as the tenants did not use the address listed on one of the notices to end the tenancy issued by the landlord. The landlord said she was currently in Thailand and that it was her brother who faxed the documents to her.

The tenant confirmed that she used the address of the landlord provided for in the tenancy agreement for service of documents and the landlord confirmed that she had not provided a new contact address to the tenants for service of documents.

I find the tenants submitted their evidence as required by the Rules and have accepted their evidence for consideration.

#2-The landlord provided evidence less than 5 business days prior to the hearing and such evidence was not contained in the hearing file; however, the evidence was made available to me by email the day of the hearing. I asked the landlord if the evidence had been sent to the tenants and she affirmed that it had. The tenant confirmed that she had received it a few days before the hearing.

I allowed the tenant to request an adjournment of the hearing in order to properly submit a response to the landlord's evidence and the tenant replied that she was not requesting an adjournment.

I then informed the parties that I accepted the landlord's late submission of evidence and would review and consider the landlord's evidence prior to issuing a Decision. I also allowed the landlord to provide oral evidence referencing their written evidence.

#3-The tenants applied seeking cancellation only of a 1 Month Notice to End Tenancy for Cause; however on the same day as their application for dispute resolution was made, the landlord also issued the tenants a 2 Month Notice to End Tenancy for Landlord's Use of the Property. The tenant made clear that cancellation of the 2 Month Notice was also an issue. I therefore have amended the tenants' application for dispute resolution to also seek cancellation of the 2 Month Notice.

Issue(s) to be Decided

Have the tenants established an entitlement to have the Notices to End Tenancy cancelled, to a monetary order, to have a rent increase be cancelled and to recover the filing fee?

Background and Evidence

I heard undisputed evidence that this tenancy started on April 15, 2011, the tenants' current monthly obligation for rent is \$1400.00, and that the tenants paid a security deposit of \$700.00 at the beginning of the tenancy. The original tenancy was for a fixed term of 2 years, ending on April 30, 2013.

The tenant said the parties agreed to an additional 1 year, with the fixed term ending on April 30, 2014. The landlord initially said that this was not the case, but after questioning, agreed that the listed landlord, TM, did agree to this term, as indicated by his initials on the document, which was submitted by the tenants.

The tenant's relevant evidence included email correspondence between the parties, the Notices to end the tenancy issued by the landlord, a receipt for a storage unit, the tenancy agreement with amendments, the advertisement for the rental unit, listed in January 2013, rent payments through E-transfers, and correspondence from the contractor.

The landlord's relevant evidence included email communication between the parties and interact E-Transfers showing payments of rent from the tenants.

Notices to end the tenancy-

Pursuant to the Residential Tenancy Branch rules of procedure, the landlord proceeded first in the hearing and testified in support of issuing the tenants a 1 Month Notice to End Tenancy for Cause. The Notice was dated January 21, 2013, was delivered to the tenants by leaving it with the tenants on that date, listing an effective end of tenancy on February 22, 2013.

A 1 month notice to end the tenancy is not effective earlier than one month after the date the tenant receives the notice and 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. Section 53 of the Act allows the effective date of a Notice to be changed to the earliest date upon which the Notice complies with the Act; therefore, I find that the Notice effective date is changed to February 28, 2013.

The cause as stated on the Notice alleged that the tenants are repeatedly late paying rent.

The landlord submitted that of the 20 months of the tenancy so far, the tenants have made 10 late payments.

When questioned the landlord said she sent 3 emails to the tenant about the late payments, 2 in November 2011, and 1 on March 3, 2012.

In response, the tenant said that at the beginning of the tenancy, all four parties were sitting around the bar at the rental home, at which time the tenants offered to give the landlord 24 post dated rent cheques for the 2 year fixed term.

According to the tenant, the landlords said they did not want the cheques as they were out of the country for periods of time and were not sure they would be able to make the deposits. Instead, the landlord suggested "e-transfers" from the tenants' bank account to the landlord's bank account.

The tenant said that the landlord told them that the minimum amount which may be transferred during a 24 hour period was \$1000.00 and that they did not expect the full payment of rent on the 1st day of the month. According to the tenant, the landlord said that it would be fine as long as the rent was paid in full in the first few days of the month.

The tenant also mentioned that of the 20 rent payments, 10 payments had been made early.

As to the 2 Month Notice to End Tenancy for Landlord's Use of the Property, issued on January 28, 2013, for an effective move out date of March 31, 2013, the landlord said that renting the home was "too much hassle" and that they planned on moving back in to raise their family, as they most likely would not be living out of the country much longer.

When questioned about the tenants' evidence showing the rental home being advertised for rent, on January 11, 2013, for a monthly rent of \$2000.00, the landlord explained that they relisted the home as they did not believe they were receiving fair market value for the home at \$1400.00 per month.

Tenants' monetary claim-

The tenants also submitted a request for a monetary order in the amount of \$1396.52, consisting of truck/storage rental costs of \$273.12, 1 day of pay at \$363.40, hydro and gas increase for \$60.00 and loss of use and privacy for \$700.00. In support of that claim, the tenant submitted that in March 2012, a leak in the garage was detected and reported to the landlords.

The tenant submitted that they believed the landlord's insurance would cover the costs of the repair; however, after waiting for months, it was not until November 21, 2012, that contractors attended the rental home to repair the leak.

Since that time, the tenants have endured noise and loss of use of the garage space. Additionally, the contractors have left many tools, debris and building material in the garage and in the yard. To date, according to the tenant, the contractors have not completed the repairs and that they have not had use of the deck and half of the garage since November 2012. The tenant also said that the contractors have not been back to the home in over a month, causing a continuing loss of use and enjoyment of the home.

As to the claim for storage and truck rental, the tenants said they were told by the landlords that they had to immediately remove their personal property from the garage in order to accommodate the contractors, forcing immediate costs for storage and truck rental. The tenant also claimed that due to the rush to remove their belongings, the landlord was required to miss a day of work.

The tenant also claimed for loss of quiet enjoyment due to the landlord pressuring the tenants to pay more in monthly rent and when they did not agree, the landlord issued a Notice to end the tenancy.

In response, the landlord said that when they rented the house, a small leak was pointed out to the tenants. The landlord also submitted that numerous emails had been submitted between themselves and the insurance adjusters in the months after being notified by the tenants.

The landlord also claimed that the tenants received advanced notice of the repair and therefore it was not necessary to incur storage and truck rental.

The landlord submitted that the deck cannot be repaired until temperatures have reached 10 Celsius for three consecutive days, according to the information received from the contractor.

The landlord said that they agreed to reimburse the tenants increased hydro and gas expenses, pending receipt of the tenants' bills verifying an increase.

Dispute of an additional rent increase-

When questioned about the rent increase, the tenant said they have not received notice of an increase on a form recognized by the Residential Tenancy Branch ("RTB"); rather they received an email from the landlords requesting an increase in rent.

Analysis

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

Once the tenants made an application to dispute the Notices, the landlord became responsible to prove the Notices to End Tenancy are valid.

1 Month Notice to End Tenancy for Cause-

In this instance, the burden of proof is on the landlord to prove the tenants are repeatedly late paying rent.

Residential Tenancy Branch Policy Guideline 38 suggests that three late payments are the minimum number sufficient to justify a notice under these provisions.

In the case before me, I accept the oral and written evidence of the tenants and find that the tenants offered to pay 24 post dated cheques for the length of the original tenancy and that the landlords requested another method of payment. The landlord did not dispute that this offer was made by the tenants.

I find that the landlords agreed that payments of rent would be made in installments and could be received within the first few days of the month as I find on a balance of probabilities that the landlord requested interact E-transfers for rent payments. In reaching this conclusion, I relied partially on the written evidence which showed the landlords during the tenancy were in Mexico and other provinces and due to the landlord's statement in the hearing that she was calling from Thailand.

I also find the tenants were credible as there was no evidence that the landlord ever raised this matter as an issue that needed to be corrected and the landlord has failed to

provide any documentary or corroborating evidence that the tenants were informed of the landlord's change in practice to have rent paid by the due date. I therefore find the landlord cannot now rely on this provision to end the tenancy.

I therefore find the landlord's 1 Month Notice to End Tenancy for Cause dated January 21, 2013, is not supported by the evidence, and therefore has no force and effect. I order that the Notice be cancelled with the effect that this tenancy will continue until it may otherwise end under the Act.

If the landlord does elect to enforce the provision in the tenancy agreement requiring payment of rent on the first day of the month, they should be prepared to accept pre-paid, post dated cheques from the tenants.

2 Month Notice to End Tenancy for Landlord's Use of the Property-

The Notice was issued pursuant to section 49(3) of the Act which provides "a landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or close family member of the landlord intends in good faith to occupy the rental unit."

In the case before me, I find the end of the fixed term, as shown by the evidence of the tenants, is April 30, 2014, and the landlord through their Notice attempted to end the tenancy on March 31, 2013.

As attempting to end the tenancy earlier than the end of the fixed term is prohibited by section 49 (2) of the Act, I find the landlord issued an invalid 2 Month Notice to End Tenancy for Landlord's Use of the Property and I therefore order that the Notice be cancelled with the effect that this tenancy will continue until it may otherwise end under the Act.

Even had I not dismissed the Notice for the above stated reason, I would still make the decision to cancel the Notice as I find the landlord did not issue the Notice in good faith. In reaching this conclusion, I relied upon the landlord's advertisement of the rental unit in the same month as issuing the 2 Month Notice, for a monthly rent of \$2000.00, and the extensive amount of evidence, including the landlord's oral evidence during the hearing, showing the landlord was unhappy with the amount of monthly rent the parties agreed upon, desiring an increase to \$2000.00 per month.

As to both Notices, I inform the landlord that the issuance of further unfounded Notices could be considered vexatious and give the tenants cause to pursue monetary compensation for loss of quiet enjoyment.

Dispute of an additional rent increase-

Section 42 (3) of the Act states that a notice of a rent increase must be in the approved form.

In this case, as the evidence shows that the landlord attempted to receive more rent in an email request, I find the landlord failed to issue a notice in the approved form, and I grant the tenants' request to have such a request or notice for an additional rent increase be cancelled.

Monetary claim-

In a claim for damage or loss under the Act or tenancy agreement, the claiming party, the tenants 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 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.

As to the tenants' request for storage/truck rental, gas and hydro costs and lost income, I find the tenants submitted insufficient evidence that they suffered a loss as the result of the landlord's breach of the Act.

Where a rental unit is damaged by an unforeseen event, such as flooding or a water leak, it is upon the landlord to repair the rental unit and residential property. Tenant's insurance generally covers damages or losses a tenant may incur as a result of an unforeseen event such as flood or a water leak. Damage to a tenant's property or other losses, other than the loss of use of the rental unit, are not the responsibility of the landlord unless the landlord has been negligent in the duty owed to the tenant.

In light of the above, I find the tenants submitted insufficient evidence that their resulting losses were a result of the landlord's negligence.

As to the tenants' request for loss of use of the rental unit, Section 32 of the Act requires a landlord to provide and maintain a residential property in a state that complies with the health, safety and housing standards required by law and having regard for the age, character and location of the rental unit, make it suitable for occupation by a tenant.

On a balance of probabilities, I find the tenants have established an ongoing loss of use of the rental home as they have not had full use of their garage, yard or deck since November 2012.

I accept that the landlord has taken some steps in remedying this situation; however I find that these steps have resulted in insufficient action necessary to restore full use of

the rental unit to the tenants. I find this insufficient response has caused the tenants to suffer a loss of use and enjoyment of their rental unit. I accept that the lack of full use of the tenants garage, yard or deck value has diminished the value of the tenancy by \$50.00 per month and I award the tenants compensation of \$50.00 per month for loss of enjoyment of the rental unit starting November 2012, through the day of the hearing, in the amount of \$200.00 (\$50.00 per month for November 2012 through February 2013).

Until the completion of the construction repairs restoring the tenants to full use of the rental home, I grant the tenants a continuing rent abatement of \$50.00 per month and I further authorize the tenants to reduce future monthly rent payable by \$50.00 until such time as the contractor has issued its final report certifying the completion of the project and removal of their equipment and rubbish.

Upon receipt of the written report verifying completion of the project and removal of their equipment and rubbish, the tenants will be obligated to resume payment of the full monthly rent starting the month following receipt of the written report. Example: if the landlord supplies the report on April 2, 2013, the tenants' rent for April is reduced by \$50.00, but the tenants would have to pay the full amount of rent payable for May 2013.

If the tenants are not satisfied with the project and rubbish and equipment removal being complete and continues to withhold rent, the landlord is required to file an application for dispute resolution to prove to the Residential Tenancy Branch that he has complied with this Decision.

As to the tenants' claim for compensation for loss of quiet enjoyment, under Section 28 of the *Residential Tenancy Act*, a landlord must not harass or cause the tenant to be harassed. I find the evidence supports that the landlord has engaged in ongoing attempts to force the tenants to pay an increased amount of monthly rent and because the tenants did not agree, to evict the tenants through invalid Notices to end the tenancy. I find these actions to have deprived the tenants of their quiet enjoyment, for which they are entitled to compensation.

I find that the tenancy has been devalued and the tenants are entitled to 10% for the landlord's breach in not providing the tenants with their right to quiet enjoyment for the months of December 2012, and January and February 2013.

I find the tenants are entitled to the above compensation and I award the tenants \$420.00 (10% of \$1400.00 for December 2012 and January and February 2013, each). I award the tenants recovery of the filing fee of \$50.00.

Due to the above, I find the tenants have established a total monetary claim in the amount of \$670.00, comprised of monetary compensation for loss of use of the rental unit in the amount of \$200.00, loss of their quiet enjoyment in the amount of \$420.00 and recovery of the filing fee of \$50.00.

I authorize the tenants to deduct the amount of \$670.00 from their next or a future monthly rent payment in satisfaction of their monetary award.

In the alternative, I grant the tenants a final, legally binding monetary order pursuant to section 67 of the Act in the amount of \$670.00, 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. Costs of enforcement may be recoverable from the landlord.

Conclusion

The 1 Month Notice to End Tenancy for Cause and the 2 Month Notice to End Tenancy for Landlord's Use of the Property issued by the landlord are cancelled and are of no force or effect.

The tenants have been granted a monetary award of \$670.00, are authorized to deduct this amount from their next or a future month's rent payment and in the alternative, are granted a monetary order in that amount.

The tenants are authorized to deduct \$50.00 from future months' rent payments until completion of the construction project and equipment and rubbish removal.

The landlord's email notice that rent is to be increased is cancelled.

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: February 25, 2013

Residential Tenancy Branch

