



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNR, MNSD, FF

Introduction

This was a cross-application hearing.

The tenants applied requesting return of the security deposit paid.

The landlord applied requesting compensation for unpaid rent, to retain the security deposit and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing.

Preliminary Matters

At the start of the hearing the tenants said that they had not received notice of the landlord's hearing. The landlord supplied evidence showing that each tenant had been served via registered mail sent on December 14, 2012 to the service address provided on the tenant's application for dispute resolution. The tenants applied on November 27, 2012; the landlord applied on December 5, 2012.

The landlord's application was reviewed with the tenants. I determined that the matters were sufficiently linked and that they should be heard together. An adjournment was offered, to allow the tenants to be served with a copy of the landlord's application and 24 page evidence submission. The tenants each declined and stated that they wished to proceed with both applications.

During the hearing specific documents, such as the tenancy agreement and a copy of a December 18, 2012 advertisement were reviewed with the tenants.

Issue(s) to be Decided

Is the landlord entitled to compensation in the sum of \$1,500.00 for unpaid December 2012 rent?

May the landlord retain the security deposit in the sum of \$750.00 in partial satisfaction of the claim?

Are the tenants entitled to return of the security deposit?

Is the landlord entitled to the filing fee cost?

Background and Evidence

There was no dispute that on October 31, 2012 the tenants signed a 2 year fixed-term tenancy agreement that was to commence effective December 1, 2012. Rent was to be \$1,500.00; a security deposit in the sum of \$750.00 was paid.

The parties agreed that on November 18, 2012 the tenants informed that the landlord that they would not take possession of the unit. On either November 25 or 26th the tenants sent the landlord a forwarding address and then a 2nd address was provided to the landlord as part of the tenant's application.

The tenants said that when they viewed the unit on a 2nd occasion, November 18, 2012, they found it was not to their liking, it was too small and they were not allowed to view a clubhouse that is on the property. The tenants immediately informed the landlord and her agent that they would not take possession of the unit.

The tenants alleged that the landlord failed to take adequate steps to locate a new occupant and that she cancelled all advertising. The tenants had been looking for ads for the unit on popular web sites and could not find any.

The landlord stated that the tenants had viewed the home in late October and were very insistent that they be allowed to rent the unit. The tenants wanted to give their current landlord notice.

The landlord agreed that once the tenants said they would not move into the unit, she told the tenants they needed to assist in locating new occupants effective December 1, 2012 and that if a new occupant could be located the deposit would be immediately returned. The tenants said they had no ability to assist the landlord as they did not have access to the unit or any photographs.

The landlord submitted a copy of an advertisement she placed on a popular web site effective November 18, 2012; the tenants were told that a copy of the advertisement

had been submitted as evidence by the landlord. The tenants declined an offer to have the advertisement sent to them for consideration.

The landlord said that in mid-December she was able to secure a new occupant, effective January 1, 2013. The landlord is claiming a loss of December 2012 rent in the sum of \$1,500.00; less the deposit she is holding.

The tenants said that had wanted to negotiate with the landlord and that they attempted to have the landlord sign a mutual agreement to end the tenancy. The tenants believed that the landlord purposely allowed the unit to remain vacant and that she did not make sufficient efforts to re-rent the unit.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Section 16 of the Act provides:

Start of rights and obligations under tenancy agreement

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

(Emphasis added)

There was no dispute that the parties signed a tenancy agreement that was for a fixed-term, commencing December 1, 2012 and that rent was to be \$1,500.00 per month. Therefore, I find that the rights and obligations of both parties commenced effective October 31, 2012, the date the tenants signed and entered into the tenancy agreement.

As provided by section 17 of the Act: I find that the tenancy was further confirmed when the tenants paid a security deposit in the sum of \$750.00.

Landlord may require security deposit

17 A landlord may require, in accordance with this Act and the regulations, a tenant to pay a security deposit as a condition of entering into a tenancy agreement or as a term of a tenancy agreement.

Therefore, I find that a fixed-term tenancy was to commence on December 1, 2012 and that, in accordance with section 45(3) of the Act, the tenants could not give notice ending that fixed term tenancy. The Act allows a tenant to end a fixed-term agreement only when the landlord has breached a material term of the tenancy; there was no evidence before me that this occurred.

I have rejected the tenant's submission that they were entitled to end the tenancy because upon a 2nd viewing they found it too small and they had not been able to view the total property. The tenants signed an agreement, undertaking to rent the unit and when they decided not to take possession they also had an obligation to minimize the loss the landlord might experience. There was no evidence before me that the tenants took any steps to assist the landlord in locating a new occupant for December 1, 2012.

I accept the evidence before me and the affirmed testimony of the landlord that she did place an advertisement for the unit on a popular web site effective November 18, 2012, the date the tenants informed the landlord they would not move into the unit. The landlord had only 12 days to locate a new occupant; a period of time that I find was insufficient. It is not unreasonable to accept that potential occupants would need to give notice to their current landlords; just as the tenants had said they needed to do in October. I find that the landlord was able to mitigate the loss she has now claimed by locating a new occupant effective January 1, 2013.

Therefore, I find that the tenants breached the tenancy agreement by failing to take possession and pay rent that was due. I find that the landlord did mitigate the loss she has claimed and that she is entitled to compensation for the loss of December 2012 rent revenue in the sum of \$1,500.00.

I find that the landlord is entitled to retain the \$750.00 security deposit in partial satisfaction of the claim.

I find that the landlord filed claiming against the deposit within 15 days of receipt of the tenant's service address provided on the tenant's application. Further, the landlord applied within 15 days of November 25, 2012, the date the tenants said they first sent an address to the landlord.

As the landlord's claim has merit I find that the landlord is entitled to the \$50.00 filing fee.

Based on these determinations I grant the landlord a monetary Order in the sum of \$800.00. In the event that the tenants do not comply with this Order, it may be served on the tenants, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The tenant's application for return of the deposit is dismissed.

Conclusion

The landlord is entitled to compensation for loss of rent revenue.

The landlord is entitled to retain the deposit.

The landlord is entitled to filing fee costs.

The tenant's application is dismissed.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: March 07, 2013

Residential Tenancy Branch

