



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER EVICTION SERVICES
AND ROYAL PROVIDENCE MANAGEMENT INC
And [tenant's name suppressed to protect privacy]

DECISION

Dispute Codes:

MNSD, MNDC, MNR, MND, MND, FF

Introduction

This Dispute Resolution hearing was convened to deal with an application by the landlord for a monetary claim of \$980.00 for rent for the month of November 2012 and reimbursement for the \$50.00 fee paid for this application.

The hearing was also convened to deal with a cross application by the tenant for the return of double the security deposit under the Act. The tenant was also seeking reimbursement for the \$50.00 fee paid for this application.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Neither party raised any objections regarding service of the application or evidence. Although I have reviewed all testimony and other evidence, only evidence relevant to the issues and findings in this matter are referenced in this decision.

Issues to be Decided for the Tenant's Application

Is the tenant entitled to return of double the security deposit under section 38 of the Act?

Issues to be Decided for the Landlord's Application

Is the landlord entitled to monetary compensation under section 67 of the Act for rent or loss of rent?

Burden of Proof: The burden of proof was on the tenant to establish that 15 days had expired from the time that the forwarding address was given, without the landlord either refunding the deposit or making an application to keep it. The landlord had the burden of proof to show that compensation for damages and loss was warranted and supported by the evidence submitted.

Background and Evidence

The tenancy began in September 2012 with rent of \$980.00. A security deposit of \$490.00 had been paid. The landlord testified that the tenancy was for a one-year fixed term, while the tenant disputed this testimony and stated that the tenancy was only a month-to-month tenancy.

Submitted into evidence by the landlord was a copy of the tenancy agreement showing a fixed term starting on September 1, 2012 and expiring on August 31, 2013. The tenant submitted a copy of the tenancy agreement identical to the one submitted by the landlord, except that no fixed term was featured on this copy of the contract.

The parties agreed that the tenant gave written notice dated September 30, 2012, informing the landlord that the tenant would be vacating the unit effective October 31, 2012. A copy of this notice was in evidence.

The tenant stated that they brought the Notice to the building manager's office and placed it under the door on September 30, 2012. The landlord testified that this notification was not received by the landlord until October 2, 2012.

The tenant testified that they vacated the unit on October 31, 2012, as promised, but did access the unit after that date only for the purpose of doing the final cleaning.

The landlord testified that the tenant was still in possession of the unit as of November 2, 2012. This was the date that the landlord issued the 10-Day Notice to End Tenancy for Unpaid Rent served it on the tenant by posting it on the door. The landlord testified that the tenant did not return the keys until November 2, 2012.

The tenant testified that they never received the 10-Day Notice to End Tenancy for Unpaid Rent, that was not posted until November 2, 2012, because, by that time, they had already permanently vacated the rental unit.

A copy of the move-in and move-out condition inspection report form was submitted into evidence, showing that only the move-in condition inspection report was completed. The landlord confirmed that, after receiving the tenant's written Notice to vacate, the landlord did not attempt to schedule a move-out inspection, nor serve the tenant with an inspection notification.

The landlord is claiming that rent of \$980.00 is owed for the month of November 2012, based on the 10-Day Notice to End Tenancy for Unpaid Rent dated November 2, 2013. The landlord also stated that, because the tenancy agreement was for a fixed term, the tenant violated the fixed term by ending the tenancy prior to the expiry date of the agreement, resulting in a loss of revenue to the landlord in the amount of \$980.00 for the month of November 2012. The landlord testified that they advertised the vacancy after the tenant gave notice in early October 2012. However, according to the landlord, they were unable to find a replacement tenant until the month of December 2012.

The tenant disagreed with the landlord's testimony and argued that the tenancy was not for a fixed term as evidenced by the tenancy agreement they submitted into evidence. The tenant's position is that the tenant gave the landlord adequate notice to end the month-to-month tenancy by providing, on September 30, 2012, a one month written notice to move as required under the Act.

The tenant also disputed the landlord's claim that efforts were made to advertise and show the unit in October 2012, after the tenant had given written notice to vacate. The tenant pointed out that the landlord did not show the rental unit at any time during their final month.

The tenant testified that they served the landlord with their forwarding address on November 2, 2012, but the landlord failed to refund their \$490.00 security deposit and the tenant is claiming a refund equal to double the security deposit.

Analysis: Tenant's Application

The tenant made application for the return of the security deposit. Section 38(1) of the Act states that, within 15 days of the end of the tenancy and receiving the tenant's forwarding address, a landlord must either:

- repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations, OR ;
- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I accept the tenant's testimony that their written forwarding address was provided to the landlord on or after November 2, 2012. I find that the landlord's original application was submitted on November 16, 2012 and the amended application was filed on November 21, 2012, seeking to retain the deposit for unpaid rent or loss of revenue.

I find that the tenant is not entitled to be credited with double the security deposit, because the landlord filed an application claiming the deposit within the 15-day

deadline. Accordingly, I find that a security deposit of \$490.00 is being held in trust by the landlord on behalf of the tenant.

Analysis: Landlord's Application

Rent Owed

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act, the Regulations or the tenancy agreement.

I find that the landlord has based the claim for rental arrears for November 2012 based on their position that the tenant occupied the rental unit for part of November and on the 10-Day Notice to End Tenancy for Unpaid Rent that was posted on the door on November 2, 2012.

However, under the Act, a posted Notice is deemed to be received in 3 days. Therefore I find that the Notice was deemed to have been served on November 5, 2012 at a time when the rental unit was no longer occupied, nor in the possession of the tenant.

In this instance, I find that the tenancy was terminated by the tenant effective October 31, 2012. I find that because the 10-Day Notice to End Tenancy for Unpaid Rent was served after the tenant was no longer residing in the rental unit, it was not properly served on the tenant. Given the above, I find landlord's claim for rental arrears based on the tenant's alleged occupancy during the month of November 2012, has no merit as the Notice was served after the tenancy had ended and the tenant did not live in the unit during November 2012..

Loss of Revenue

With respect to the landlord's second allegation, that they incurred a loss of one month revenue for the month of November, 2012, I find that this would be considered as a claim in damages, either founded on the tenant's violation of the fixed term or the tenant's violation of the Act by giving inadequate Notice to vacate for a month-to-month tenancy.

Section 7 of the Act states that, if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount of, and order a party to pay, compensation to the other party. It is important to note that, in a claim for damage or loss under the Act, the party claiming the damage or

loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage,
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent.

I find that, whether the tenancy was for a fixed term or was a month-to-month tenancy, the tenant did not end the tenancy in compliance with the Act.

If I accept that the tenant signed a fixed-term agreement, as the landlord's evidence indicated, the tenant's termination of the tenancy before the expiry date of the fixed term would be a violation of the agreement.

On the other hand, if I accept the tenant's position that the tenancy was a month-to-month tenancy, I find that section 45 of the Act does permit a tenant to end a periodic tenancy by giving the landlord written notice to end the tenancy. I find that the Act requires that the Notice must be effective on a date that: (a) is not earlier than one month after the date the landlord receives the notice, and; (b) is the day before the day in the month that rent is payable under the tenancy agreement. (my emphasis)

Section 90(d) of the Act provides that a document left in a mail slot is deemed to have been served on the 3rd day after it was left. Therefore, even if I accept the tenant's position that this was a month-to-month tenancy, I find that the tenant gave insufficient notice to end the tenancy because the tenant's Notice was deemed by the Act, as served on October 2, 2012, not on September 30, 2012. This would be considered inadequate notice by the tenant, pursuant to section 45 of the Act.

Having found that the tenant violated the Act and that the landlord did suffer a loss as a result, I find that the landlord must still meet element 4 of the test for damages by proving that a reasonable attempt was made to mitigate their losses.

Although the landlord provided verbal testimony that the rental vacancy was advertised without delay, I find that no evidence was submitted in support of this claim and the tenant refuted the claim by pointing out that they were never contacted by the landlord to show the rental unit to prospective renters during the month of October 2012.

Given the above, I find that the landlord's claim for loss of revenue for November 2012 has not sufficiently met the test for damages to support granting a monetary order against the tenant. I find that the landlord's monetary claim must be dismissed.

Based on the testimony and evidence presented during these proceedings, I find that the tenant's security deposit must be returned. I find that the tenant is entitled to monetary compensation in the amount of \$540.00 comprised of \$490.00 refund of the security deposit and the \$50.00 cost of the tenant's application.

I hereby grant a monetary order in favour of the tenant in the amount of \$540.00. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The landlord is not successful in the application and the tenant is partially successful in the cross application and is granted a monetary order for the security deposit and the cost of the application.

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 26, 2013

Residential Tenancy Branch