Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, RR, FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was sufficiently served by mailing to where the landlord carries on business. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to a monetary order and if so how much?
b. Whether the tenant is entitled to an order reducing the rent?
c. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

The tenancy agreement that was signed on June 13, 2013 provided that the tenancy would start on June 15, 2013, was for a fixed term ending on December 31, 2013 and continuing on a month to month basis after that. The rent was set at $855 per month

payable on first day of each month. The tenant(s) paid a security deposit of $427.50 and a pet damage deposit of $427.50 on May 17, 2013.

The tenant testified that she responded to an advertisement on Craiglist that identified an apartment of 700 square feet was for rent. The landlord denies they would have put the square footage in their advertisements and they produced a number of advertisements which identified the units as bachelor, one bedroom or two bedroom but did not indicate the square footage.

The tenant testified she inspected a rental unit in the building around the middle of May. She testified she told the building manager that she thought that unit was on the small side and the building manager advised her of a one bedroom unit that was in the process of being renovated. She inspected the unit that was being renovated. There is a dispute on the evidence with respect to representations about the size of the unit. The tenant testified the building manager told her it was about 900 square feet. The building manager testified that he told her he was not sure about the size but thought it was between 800 and 900 square feet. The tenant testified she wanted to think about it.

The tenant testified she returned the next day and paid a security deposit and pet damage deposit. The building manager testified she return 2 days and looked at the unit a second time. The tenant denies looking at the unit a second time. The documentary evidence indicates that the tenant paid a security deposit and pet damage deposit on May 17, 2013.

The tenant went to the rental property on June 13, 2013 to sign the tenancy agreement and obtain the keys. She inspected the unit on that day prior to signing the tenancy agreement. She testified that she had a discussion with the female Building Manager asking whether the landlord had papers setting out the size of the unit. The female Building Manager responded saying that she did not have any papers but she thought it was between 700 and 800 square feet. The tenant responded saying the male building

manager (her husband) had told her that it was much larger and she asked for a reduction of rent. The Building Manager refused saying that the rent is set by the type of unit, not square footage. The tenant asked if they had a tape measure and the Building Manager responded saying they did not. The Building Manager showed the Tenant papers showing the previous tenant had paid $950 per month for the same unit. The tenant testified she signed the lease after hearing this fact, even though she was a little reluctant as she did not know the actual size. The tenant was given the keys on June 13, 2013 and given two days of free rent.

The tenant came to the rental unit on June 15, 2013 with a tape measure and calculated the interior to be 585 square feet. Her boyfriend also measured it and he calculated it to be 560 square feet. The tenant returned to the Building Manager with this information and requested a reduction in rent on the basis that it was 30% smaller that what she was first told. The male Building Manager told her he would talk to head office. The Head Office for the landlord initially did not have any documents relating to the size of the rental units in the building. After further investigation the landlord was able to find a document based on a contractors quotation to repair hardwood floors made 3 years ago indicating the rental unit was 760 square feet in size.

In late June the male Building manager talked to the tenant and advised that Head Office would not reduce the rent. The tenant subsequently talked to the representative of the landlord at Head Office. The representative told the tenant they rent the premises on the type/category and not square footage. She also stated that in an effort to resolve the matter the landlord would agree the tenant could vacate the rental unit at the end of July and the landlord would release the tenant from the liquidated damage claim of $450 for leaving prior to the end of the fixed term. The tenant stated that she did not want to leave the rental unit.

The tenant testified the rental unit is cramped. Further, she operates a home based business and it is very difficult to store her inventory given the limited size. However,

the tenant does not wish to rescind the tenancy agreement. She seeks a reduction of rent only. The landlord objected to the use of the rental unit for a home based business.

The tenant submits she is entitled to compensation based on the following:

- She submits the landlord misrepresented the size of the rental unit, she relied on the misrepresentation and she seeks a reduction of rent of $100 per month..
- She testified that she operates a home based business and there are problems relating to the storage of her inventory.
- This was only the second time that she has rented an apartment.
- The landlord knew or should have known the correct size of the rental unit. She wants to protect other prospective tenants from misrepresentation.
- She stated there are similar apartments in New Westminster going for $750 per month but she failed to present proof to establish this allegation.

The landlord submits there is no basis for a reduction in rent based on the following:

- The tenant viewed the rental unit on two occasions prior to signing the tenancy agreement. The first occasion was around the middle of May prior to giving the landlord a security deposit and pet damage deposit. The second occasion was prior to signing the tenancy agreement. She had ample opportunity to determine whether the size of the unit met her needs and if she was uncertain about the size she had ample opportunity to take measurements herself.
- The landlord submits rental units in the rental property are rented on the basis of the type of unit (bachelor, one bedroom and 2 bedrooms) and not square footage.
- The previous tenant rented this rental unit for $950 per month which is $95 more than the rent paid by the tenant.
- The landlord never represented the size of the rental unit as being accurate or a warranty. The tenant was always told that the Building Manager was not sure and that this was an estimate only.

- The advertisements in Craiglist advertise the rental unit according to type and not according to size.
- There are no provisions in the tenancy agreement about the size of the rental unit.

Analysis

Law of Negligent Misrepresentation

In *Kingu v. Walmar Ventures Ltd.*, 10 B.C.L.R. (2d) 15 at 23, [1986] B.C B.C.J. No. 597 (C.A.), McLachlin J.A. (as she then was) sets out what a plaintiff must prove in order to succeed in a claim for negligent misrepresentation:

> (1) A false statement negligently made;
>
> (2) A duty of care on the person making the statement to the recipient. A duty of care does not arise unless
>
> > (a) the person making the statement is possessed of special skill or knowledge on the matter in question, and
> >
> > (b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;
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> (3) Reasonable reliance on the statement by its recipient;
>
> (4) Loss suffered as a consequence of the reliance.

In San-Co Holdings Ltd. v. Kerr, 2009 BCSC 1747 the court dismissed a claim brought by a real estate investor based on negligent misrepresentation where the real estate agent mistakenly told the purchaser that the 19,000 square feet was all on the main floor where in fact it was on a main floor and mezzanine. The Court applied Kingu and accepted that a false statement had been negligently made. However, the court determined the recipient had not reasonably relied on the statement as he had attended the site, he was experience and knew the site contained both a main floor and mezzanine and could not expect he would be given space for free. Further, the court held the purchaser had failed to prove a loss and it set out the test for the measure of damage in paragraph 44 as follows:

> [44] Further, and in any event, to succeed on a claim for negligent misrepresentation, the plaintiff must establish damages. The proper measure of damages is the difference between the price paid and the fair market value taking into account the true condition of the property at the date of sale: *Sorenson v. Kaye Holdings Ltd.*, 1979 CanLII 621 (BC CA), [1979] 6 W.W.R. 193, 14 B.C.L.R. 204, (C.A.); *Cosway v. Boorman's Investment Co. Ltd.*, 2008 BCSC 1482 (CanLII), 2008 BCSC 1482.

In Sleightholm v. East Kootney Realty 1999 CanLII 5603 (BC SC) the court dismissed the plaintiff's based on negligent misrepresentation where a house which was represented to be 1120 square feet on two floors when in fact the Plaintiff testified it to be 1032 square feet on the main floor and 988 square feet in the basement, or 2020 square feet over all. The court stated

> [11] The only evidence of a false statement before me is the representation in the information sheet. The evidence before me does not, in fact, conclusively establish that that measurement is wrong. The measurements the plaintiff says were taken in his presence, have no particular authority since they appear to be either hearsay, or the unqualified opinion of the plaintiff himself. On the other hand, Mr. Lewis, the agent, did not particularly contest the matter on those grounds. While I might be disposed to grant leave to produce better evidence were this crucial to the plaintiff's case, I am prepared to proceed on the basis that I assume the discrepancy in size can be conclusively proved. I do so because even if I make that assumption, the case must, in any event, fail. This is because:
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> a) the statement respecting the size of the house was contained in a document the accuracy of which was specifically not warranted or guaranteed;
> b) here were no other statements as to size upon which specific reliance could have been placed;
> c) the evidence discloses no specific reliance on any estimate of size, except the plaintiff's after-the-fact assertions;
> d) the plaintiff had ample opportunity to inspect what he was in fact getting.

In this regard the case of ***Davie v. Huckschlag et al. (unreported) Vancouver Registry No. C910767 July 5, 1993 (B.C.S.C.) is on point. There Mr. Justice Cowan found:***

> The plaintiff conceded in his evidence that the final offer he made was not based on square footage. Clearly in my view that was the case. The plaintiff said he was concerned about the size of the house; he attended the premises on at least two occasions to take measurements. He was, I find, satisfied that the size of the premises

> as a result was satisfactory for his needs. I accordingly find as a fact that there was no reliance by the plaintiff on the misrepresentations as to the square footage.

Mr. Justice Cowan went on to say:

> Even if it could be said that there was some reliance by the plaintiff on the represented square footage of the home, the evidence, in my opinion, does not reliably establish that the value of the property at the time would have been materially affected.

In Payne v. Eagle Ridge Pontiac GMC Ltd., 2010 BCSC 1085 (CanLII) the court dismissed a Plaintiff's claim based on negligent misrepresentation relying on the following:

> [12] In Lewis N. Klar, Allen M. Linden, Earl A. Cherniak & Peter W. Kryworuk, *Remedies in Tort*, looseleaf (Toronto: Carswell, 1987), Vol. 2, the authors state the following regarding the onus of establishing the loss in a claim for damages for negligent misrepresentation at 16.iv.53-54:
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> > Where a negligent misrepresentation induces the plaintiff to enter into a contract, the plaintiff who seeks damages in tort is entitled, so far as money can do so, to be put into the position in which he would have been had the negligent statement not been made, not that in which he would have been had the statement been true. What that position would have been is a matter that the plaintiff must establish on a balance of probabilities. The plaintiff has discharged the burden of proof once he or she has established the loss occasioned by the transaction. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue which requires the court to speculate as to what would have happened in a hypothetical situation. The defendant has the burden of displacing the plaintiff's assertion that, but for the defendant's misrepresentation, the plaintiff would not have entered into the transaction.
> >
> > ...
> >
> > The plaintiff must supply reasonable proof of the damages allegedly suffered.
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> [Footnotes omitted; emphasis added.]

Analysis:

After carefully considering all of the evidence I determined the tenant has failed to establish a claim for the following reasons.

- The written tenancy agreement does not contain any warranty of the size of the rental unit.
- The square footage of the rental unit could not be seen as a latent defect. The tenant viewed the rental unit on two occasions before agreeing to rent it.
- The landlord did not warrant the size of any of their rental units. The rental unit are rented on the basis of type/category (bachelor, one bedroom and two bedrooms) and not size. The tenant alleged but failed to prove that there was a representation in the Craiglist advertisement as to size.
- The representations made by the landlord prior to the signing of the tenancy agreement were always prefaced by the words “I do not know for sure,” “approximate” or “estimate.” The tenant failed to prove this guarded statement amounts to a misrepresentation in law. Even if one accepts that it is a misrepresentation the tenant has failed to prove other necessary elements.
- The tenant failed to prove that she reasonably relied on it on the estimates given by the landlord’s agent. The tenant viewed the rental unit on two separate occasions before she signed the tenancy agreement and she was satisfied with her inspection as evidenced by her agreeing to sign the tenancy agreement.
- The tenant failed to prove that she would not have rented the rental unit had she known its actual square footage. The tenant’s decision to enter into the tenancy agreement was a result of what she viewed and not square footage.
- The tenant failed to prove damages. Where a negligent misrepresentation induces the plaintiff to enter into a contract, the plaintiff who seeks damages in tort is entitled, so far as money can do so, to be put into the position in which he would have been had the negligent statement not been made, not that in which he would have been had the statement been true. The tenant was able to rent the subject rental unit for some $95 less than the amount of the previous tenant. I determined based on the evidence presented that the tenant would have rented the rental unit for the agreed rent even if the “estimate” or misrepresentation had not been made.

As a result I ordered that the tenant's application be dismissed without liberty to re-apply.

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: July 30, 2013

Residential Tenancy Branch