Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Vancouver Luxury Realty
and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

This hearing on the cross applications of the parties was previously adjourned at the conclusion of all testimony and consideration of the landlord's application, due to issues raised by the landlord about service of the tenants' application for dispute resolution. That matter was dealt with and as a result, this portion of the hearing was convened to deal only with the tenants' application for dispute resolution under the Residential Tenancy Act (the "Act").

An Interim Decision was issued on July 23, 2013, is incorporated herein by reference, and should be read in conjunction with this Decision.

The parties were reminded that this hearing is a continuation of the originally convened hearing, and that they were still under a continuing obligation to provide sworn evidence.

I note that the agent for the owner, a property management company, is referred to as landlord for purposes of this Decision, and the owner is referred to as that, being represented at this hearing by his son.

Issue(s) to be Decided (as stated before)

1. Is the landlord entitled to retain the tenants' security deposit and pet damage deposit, further monetary compensation and to recover the filing fee?
2. Are the tenants entitled to a monetary order to include their security deposit and pet damage deposit, doubled, further monetary compensation and to recover the filing fee?

Background and Evidence

Tenants' application-

The tenants' monetary claim is in the amount of $22,056, as follows:

Pet damage deposit, doubled	$6250
Security deposit, doubled	$6250
Rent reduction	$7000
Moving costs	$2056
Repayment of lease break fee	$400
Filing fee	$100
TOTAL	**$22,056**

The tenants' relevant documentary evidence included copies of extensive email communication between the parties regarding repair and other issues, condition inspection reports, copies of photographs of the rental unit, an invoice for cleaning, a notice from Fortis BC, a statement from and engineering and transportation company, an invoice from a plumbing and heating company, a statutory declaration referred to during the Interim Decision, a moving company invoice, advertisements by the landlord, the tenancy agreement, a notice from the tenants that they were ending the tenancy on or before April 15, 2013, and further extensive email communication between the parties regarding end of tenancy issues.

In support of their application, the tenant submitted the following:

Pet damage deposit and security deposit-The tenant contended that he was entitled to a return of both deposits, as the landlord extinguished their rights to make a claim against the deposits as there was no move-in condition inspection report; additionally the tenant claimed that there was no allegation of damage caused by a pet.

The tenant said that his written forwarding address was provided to the landlord on the move-out condition inspection report and a third time by registered mail April 30, 2013.

Rent reduction-The tenant submitted that he was entitled to a reimbursement of a portion of rent paid while he was in the rental unit for the reason that the landlord failed to address the many issues of repair or remediation as given by the tenant.

The tenant remarked that the rental unit was not cleaned when they moved in, prompting the tenants to hire a professional cleaner.

The tenant further remarked that the water coming from the taps was a rust colour, for the entire tenancy, that the taps in the bathroom broke off and that he had use of only two bathrooms and ½ of the rental unit.

The tenant submitted that during the entire tenancy, the only repair request dealt with by the landlord was the boiler, which caused the tenants to be without heat for 5 days.

The tenant submitted that the rental unit was overpriced as compared to other rental units on the market, considering the condition and lack of repairs. The tenant listed numerous deficiencies, too many to list, but including plumbing issues with hot water or the lack of, electrical issues, poorly painted home, dead bugs, a door stopper falling out of the wall, doorknobs falling off, garage door opener not working, and stains on the carpet.

Moving costs-The tenant contended that he was entitled to moving costs as there were no repairs made by the landlord and as such, the tenants were forced to move from the rental unit early.

Repayment of lease break fee-The tenant contended that he was entitled to a reimbursement of the lease break fee, which he paid as his research showed that this amount was a market value rate for such a fee.

As to why the tenant believed he should be reimbursed this amount, he submitted that the landlord's failed to advertise the rental unit, as shown by the Statutory Declaration he submitted into evidence.

Landlord's response-

The landlord, in an opening statement, contended that the Statutory Declaration by their former agent should be stricken from the tenant's evidence and not considered, as he had proof that the declarant had lied, and further reiterated that she breached her fiduciary duty to his company, as agent.

The landlord further stated that the volume of evidence submitted by the tenant shows that the tenant takes the "law into his own hands" and that the data is greatly exaggerated.

The landlord stated that the owner has taken every precaution to address the tenant's concerns during the tenancy and that in a gesture of goodwill, the owner offered the tenant the opportunity to move with a month's notice.
The landlord contended that the tenant refused to sign the condition inspection report.

As to the other specific issues, the landlord responded as follows:

Pet damage deposit-The landlord said that the tenant's evidence shows that there was pet damage.

The landlord agreed that he received the tenant's written forwarding address by April 15, 2013, and directed my attention to several pages of the tenant's documentary evidence to support his contention that the rental unit was vigorously advertised for re-rent.

The landlord contended that the tenant refused to sign the condition inspection report.

Rent reduction-The landlord submitted that either he, as the owner's agent, or the owner himself, left no issue raised by the tenant unattended, and that certain of the concerns were not addressed, as these were cosmetic in nature; however the enjoyment of the property was not affected.

The landlord submitted that he would concede that the tenant should have a small amount for compensation for the first month's rent.

Further the owner testified that there was a miscommunication between him and the landlord's agent.

The landlord further contended that not only is the tenant not entitled to reimbursement of the lease break fee, but that he is obligated to pay a much greater amount, as per their application for dispute resolution.

The landlord denied that the tenant was entitled to moving expenses.

Tenant's rebuttal-

The tenant submitted that he added to the condition inspection report as completed by another landlord's agent, and added items to the list and never refused to sign the documents, as shown by his evidence.

The tenant submitted that the landlord stopped showing the property on April 10, and accepted the 2nd applicant.

Further the tenant said that his email evidence shows that the owner wanted to complete the list of repair requests, but failed to do so; that the cleanliness of the rental unit was not to the tenant's standard, in light of the monthly rent amount; and that the furnace was not serviced for three months.

The tenant submitted that another landlord's agent he was dealing with finally stopped accepting his calls.

Landlord's surrebuttal-

The landlord said that 95% of the issues raised by the tenant were taken care of, but that the tenant kept bringing forth more and more issues.

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, which falls in sections 7 and 67, 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 of the actual loss or damage claimed and **fourth**, proof that the claimant followed section 7(2) of the Act by taking reasonable steps to mitigate or minimize the loss or damage being claimed.

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

Landlord's application-

Unpaid rent- As to the issue of unpaid rent for the period of April 15-30, 2013, Section 45(2) of the Act states that a tenant may end a fixed term tenancy by giving the landlord written notice to end the tenancy effective on a date that is not earlier than one month

after the date the landlord receives the notice, is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In other words, the tenant must give written notice to the landlord ending a fixed term tenancy at least one clear calendar month before the next rent payment is due and that is not earlier than the end of the fixed term.

In the case before me, I accept that the tenants provided insufficient notice that they were ending the fixed term tenancy agreement prior to the end of the fixed term and I find the tenants were responsible to pay monthly rent to the landlord until the end of the fixed term, here, December 14, 2013, subject to the landlord's requirement that they take reasonable measures to minimize their loss.

In this instance, I find the landlord failed to submit sufficient evidence that they took reasonable steps to mitigate their loss of unpaid rent. I reached this conclusion after a review of the tenant's documentary evidence, which shows that the landlord advertised the rental unit listing an availability on December 15, 2013, not April 15, 2013, when the landlord knew in advance that the tenants were vacating by that date.

I further considered that although the landlord disagreed with the tenant's presentation of the documentary evidence showing the listing, or lack of listing, through his multiple submissions, the landlord failed to provide evidence showing otherwise.

In the face of the disputed verbal testimony of the parties, I relied on the physical proof of the tenants.

As I find the landlord submitted insufficient evidence that they have met step 4 of their burden of proof, I dismiss their monetary claim for unpaid rent or loss of rent revenue for April 15-30, in the amount of $3125.

Loss of rent revenue- As to the landlord's claim that they suffered a loss of rent revenue for the first 8 days of May 2013, when the succeeding tenant moved into the rental unit, due to the tenants ending the tenancy prior to the end of the fixed term, I find the landlord submitted insufficient evidence that the rental unit remained empty until May 8.

I reached this conclusion after a review of the tenant's documentary evidence, which was a sworn statement by the landlord's agent handling the affairs of this tenancy at the end. The Statutory Declaration stated that the declarant was a licensed property

manager, that she performed the move-out inspection, that there were no damages to the rental unit, that a new lease was executed by the succeeding tenant (actual name given), that a rent payment for May in the amount of $6125 was given by the new tenant, and that the start date of the new tenancy was May 1, 2013.

Although the landlord argued that I should discount this statement due to the alleged breach of a fiduciary duty to the landlord by that agent, I find that is an argument best made in another venue, and that even if true, does not affect the validity and merit of the sworn statement. As for this hearing and dispute resolution, I find the document compelling and persuasive as giving detailed accounts and although the landlord stated that he had proof this agent lied, he failed to present such evidence.

Due to the above, I find the landlord failed to prove that they suffered a loss of rent revenue for May 1-8, and I dismiss their monetary claim for such.

"Breaking the Lease" fee-Although not termed a liquidated damages clause, the landlord is treating the lease break fee contained in an addendum to the tenancy agreement as such.

Residential Tenancy Branch Policy Guideline #4 (Liquidated Damages) states that in order to be enforceable, a liquidated damages clause in a tenancy agreement (clause 10 of the addendum in this case) must be a genuine pre-estimate of loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. I agree with this policy.

In this case, the landlord was not able to explain how the liquidated damages were a genuine pre-estimate on the day the tenancy agreement was signed or were intended to compensate them for their time and expense in re-renting the rental unit as a result of the early end to tenancy by the tenant. The landlord submitted no proof of expenses, past or present, related to advertising or other expenses in leasing the rental unit.

I also could find no evidence from the landlord to explain the justification of $3215 as a reasonable amount for administration costs.

I was heavily persuaded by the Statutory Declaration, in which the landlord's former agent handling the end of this tenancy and securing a new tenant, declared that the landlord did not spend any money on marketing the property, did not compensate or reimburse her for costs incurred associated in re-renting the property, and did not compensate her in finding a new tenant.

Therefore I find the liquidated damages clause, or rather, the “Breaking the Lease” clause in this tenancy agreement to be a penalty and unenforceable and I dismiss their claim for $3215.

As I have dismissed the landlord’s monetary claim in its entirety, I dismiss their request to recover the filing fee.

Tenants’ application-

In the case before me, I find the tenancy ended and the tenants provided their written forwarding address on April 15, 2013.

I cannot determine that either party extinguished their rights to either make a claim against the two deposits or to have the deposits returned by any failure to inspect and properly complete condition inspection reports for either the move-in or move-out, due to the multiple landlord’s agents involved in both process and the disputed verbal testimony.

Security deposit-

Under section 38 (1)(d), I find the landlord properly filed an application claiming against the tenants’ security deposit for unpaid rent within 15 days of receiving the tenants’ written forwarding address and the end of the tenancy to keep the deposit. The tenants are therefore not entitled to double recovery of the deposit, and I dismiss that portion of the tenants’ application.

However I find the tenants are still entitled to recover their security deposit as I have dismissed the landlord’s application claiming against the security deposit.

I therefore award the tenants the amount of $3125 for a return of their security deposit.

Pet damage deposit-

Pursuant to section 38 (7) of the Act, a pet damage deposit may be used only for damage caused by a pet.

As the landlord’s claim was for unpaid rent, loss of rent revenue and a lease break fee, and not for damage caused by a pet, I therefore find that the landlord possessed no such right to make a claim against the pet damage deposit and was required to return

the tenants' pet damage deposit within 15 days of April 15, 2013; the landlord failed to do so.

Therefore pursuant to section 38(6)(b), the landlord must pay the tenants double the amount of the pet damage deposit of $3125, or $6250 and I award the tenants this amount.

Rent reduction-

The tenants' claim for a reduction in rent involves their claim that the repairs were not addressed in a timely manner, up to the end of the tenancy, or at all, the condition of the rental unit was not as promised, the multiple attendances by tradespersons to repair the boiler, resulting in a loss of use and quiet enjoyment of the rental unit, for which they should be compensated.

Under section 32 of the Act, a landlord must repair and maintain a rental unit so that it complies with health, safety, and building standards required by law and is suitable for occupation by a tenant given the age, character and location of the rental unit. A tenant is also responsible for maintaining reasonable health, cleanliness and sanitary standards throughout the rental unit and other residential property to which the tenant has access.

It is important to note that major repair issues, extermination problems and other issues with the rental unit may occur from time to time; however, such events do not automatically entitle a tenant to compensation. Rather, the tenant must demonstrate that the landlord was aware of the problem and was negligent in dealing with the problem which caused the tenant to suffer a loss of use of the rental unit or loss of quiet enjoyment of the unit. Negligence may include inadequate or an unreasonably delayed response to a known problem.

I am satisfied through the evidence provided by the tenant that there were significant ongoing issues with the state of the rental unit, which caused the tenancy to be devalued. In reaching this conclusion, the email communications between the parties of the tenants reporting repair requests, with the landlord's response, which were extensive, shows that up until March 15, 2013, the landlord informed the tenants that the owner would like to fix the deficiencies. By this time, this tenancy had degraded and the tenants issued their written notice to end the tenancy.

I, however, do not find that the tenancy was devalued by the amount of $7000 as claimed by the tenants, as there was no evidence that the tenants suffered a loss of use

of most of the rental unit, such as the tenants still had use of the bedrooms, at least some of the bathrooms, the kitchen and other facilities. I find that the lack of repairs, many to be cosmetic in nature, were more in the way of a nuisance, rather than a substantial loss of use.

I also considered that the landlord conceded the tenant should be entitled to an amount of small compensation for the first month of the tenancy.

I find a reasonable amount for the devaluation of the tenancy to be $500 per month for the 4 months of the tenancy, for a total of $2000.

Moving costs-

In these circumstances the tenants opted to end the tenancy early and I do not find that the landlord breached a material term of the tenancy agreement so as this tenancy ended early by that breach. I therefore find I have no authority under the Act to compensate the tenants for their decision to end the tenancy early and I dismiss their claim for $2056.

Reimbursement of the lease break fee-

I find the evidence supports that the tenant voluntarily paid the landlord this fee, and I can find no justification under the Act to require that landlord repay this fee. I therefore dismiss their monetary claim for $400.

As I find merit with the tenants' application, I award the tenants recovery of their filing fee of $100.

I therefore find the tenants are entitled to a monetary award of $11,475, comprised of their security deposit returned in the amount of $3125, the pet damage deposit of $3125, doubled to $6250, a reduction in rent for $2000, and recovery of the filing fee of $100.

Conclusion

The landlord's application is dismissed.

The tenants' application has been granted in part as I have found they are entitled to a monetary award of $11,475.

The tenants are granted a monetary order in the amount of $11,475 and it is enclosed with their Decision.

Should the landlord fail to pay the tenants this amount without delay after being served the order, 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 is advised that costs of such enforcement are recoverable from the landlord.

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: September 27, 2013

Residential Tenancy Branch