Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes CNR, MNDC, FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. On July 15, 2013, the tenants sent the landlord an email advising that they intended to vacate the rental unit by September 15, 2013, prior to the scheduled September 30, 2013 end to their fixed term tenancy agreement. The landlord confirmed that the tenants' notice to end tenancy was received as stated by the tenants. The landlord testified that the 10 Day Notice was posted on the tenants' door on August 9, 2013. The female tenant testified that the 10 Day Notice was received after it was placed in their mailbox by the landlord. I am satisfied that the above documents were received by the parties and that the landlord served the 10 Day Notice to the tenants in accordance with the *Act*.

The tenants testified that they handed a copy of their dispute resolution hearing package to one of the landlord's representatives on August 14, 2013. The landlord testified that this package was received within a few days of its issuance on August 14, 2013. I am satisfied that the tenants served this package to the landlord and that both parties served their written evidence to one another in accordance with the *Act*.

At the hearing, the landlord requested the issuance of an Order of Possession if the tenants' application to cancel the 10 Day Notice were dismissed.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Are the tenants entitled to a monetary award for losses arising out of this tenancy? Are the tenants entitled to recover their filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, including diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenants' claim, the landlord's response and my findings are set out below.

This fixed term tenancy for a rental unit in a high-rise, elevator serviced strata building commenced on September 15, 2012. According to the terms of the Residential Tenancy Agreement (the Agreement), the tenancy is scheduled to end by September 30, 2013, by which time the tenants committed to have vacated the premises. Monthly rent is set at $1,250.00, payable in advance on the first of each month, plus heat and hydro. The landlord continues to hold the tenants' $625.00 security deposit.

The tenants maintained that by way of a January 31, 2013 email, the landlord provided them with a notice to end their tenancy by September 30, 2013. In that email, the landlord noted that the owner of this rental unit was planning to sell this rental property. The tenants claimed that they had rented the premises under the expectation that they would be able to remain in the rental unit beyond the stated end date to their tenancy. The landlord testified that the January 31, 2013 email was by no means a notice to end tenancy, as it advised the tenants that they were entitled to remain in the rental unit as per their Agreement until September 30, 2013, the stated date when this tenancy was to end. The male landlord testified that he did not realize that the tenants had initialed the provision in the Agreement confirming that they would end their tenancy on September 30, 2013.

The tenants' application for a monetary award of $2,870.00 included the following:

Item	**Amount**
Return of Tenants' Move-in Fee	$100.00
Loss of Full Access to Front Door of Building due to Door Code Problems (4 months @ $200.00 = $800.00)	800.00
Compensation for Failure to Provide a Promised Storage Locker (12 months @ $60.00 per month = $720.00)	720.00

Compensation for Loss of Enjoyment of Life	1,250.00
Total Monetary Order	**$2,870.00**

They also requested the recovery of their $50.00 filing fee for their application.

Both parties agreed that the tenants have not paid any of their August or September 2013 rent, a total of $2,500.00.

The landlord confirmed that he has not yet applied for a monetary award to recover unpaid rent. The landlord submitted written evidence for this hearing in the apparent hope that the landlord would be able to recover this rent without having to initiate a separate application. I advised the landlord that I could not consider his application for a monetary Order for unpaid rent owing for all of August and September without having an application properly before me.

Analysis – Tenants' Application to Cancel 10 Day Notice

Section 26(1) of the *Act* establishes that " a tenant must pay rent when it is due under the tenancy agreement" even if the landlord has not complied with the *Act*. Tenants cannot arbitrarily refrain from paying regularly scheduled rent because they believe that a landlord has contravened the *Act* or has not provided them with the services or facilities to which they are entitled. Similarly, without a signed agreement with the landlord tenants cannot decide to end a tenancy early nor can they advise the landlord that their security deposit is to be applied to their outstanding rent.

In this case, I find that the January 2013 email the landlords sent was by no means a notice to end tenancy. None of the information contained in that email was at odds with the very specific terms included in their Agreement requiring the tenants to vacate the rental unit by September 30, 2013, when the Agreement ended. The *Act* requires that any notice to end tenancy provided by a landlord has to be sent on the proper approved form and must be in writing.

The tenants failed to pay their August 2013 rent in full within five days of receiving the 10 Day Notice. I find that the tenants had no legal authority to withhold their August 2013 rent. In this case, the tenants were required to vacate the premises by August 22, 2013. As that has not occurred, I find that the landlord is entitled to a 2 day Order of Possession. The tenants testified at the hearing that they are no longer living in the rental unit but are undertaking the final stages of cleaning the premises so as to return the rental unit to the landlord in satisfactory condition. The landlord will be given a formal Order of Possession which must be served on the tenant(s). If the tenants do

not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

Analysis – Tenants' Application for a Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must 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 other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 65(1)(f) of the *Act* allows me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

I will review the tenants' claim in the order set out in the Details of Dispute section of Schedule "A" they attached to their application for dispute resolution and as outlined above.

The tenants' claim for a return of their $100.00 move-in fee resulted from their assertion that the management of the strata building where this rental unit was located did not provide them with the expected level of service in return for the required $100.00 move-in fee they were charged through the landlord. The male tenant (the tenant) testified that the strata management did not secure their exclusive access to a padded elevator during their move-in to this building. The tenant provided undisputed sworn testimony that when the tenants tried to communicate their concerns about the deficiencies in the move-in process (and all other issues) to the strata management, they were advised that the strata management only dealt with strata owners directly and that they would have to take up their concerns with their landlord. Although the tenants recognized that this was a standard charge applied to anyone who moves into this strata building and the charge paid to the landlord was forwarded to the strata management, the tenants maintained that the landlord did not act diligently on their behalf in seeking and obtaining redress from the strata management and council for the deficiencies in the service provided by the strata management to the tenants.

The landlord responded that this event occurred at the commencement of this tenancy and the tenants had not made an issue of this until the landlord refused to let them break their fixed term Agreement without cost to the tenants. The tenant confirmed that

the tenants had not made a specific request for compensation from the landlord until late in this tenancy.

Under these circumstances, I find that there was considerable delay in the tenants' request for reimbursement of their move-in fee to the landlord. While the tenants did send a number of emails to the landlord and the strata management about their dissatisfaction with the arrangements made when they moved into this building, it was not until very late in this tenancy that the tenants alerted the landlord that they wanted the landlord to compensate them for their $100.00 move-in fee. The landlord has a duty under section 7(2) of the *Act* to take reasonable efforts to mitigate tenant's losses. However, I find that by the time the tenants formally advised the landlord of the nature of their claim, it was unlikely that any degree of effort by the landlord to recover the tenants' move-in fee would have been successful. I find that the tenants have not raised their specific request for financial compensation for the return of their move-in fee in a timely fashion and by failing to do so have acquiesced with respect to this element of their claim for a monetary award. Had they provided evidence that they sought financial compensation for this item at a more timely point in their tenancy, I may have viewed this portion of their application differently. Based on the evidence before me and for the reasons outlined above, I dismiss the tenants' claim for recovery of their move-in fee without leave to reapply.

The tenants testified that they were without a functioning access code to this high rise strata complex from the commencement of their tenancy until January 30, 2013. They entered into written evidence a lengthy series of emails they sent to both the strata management and their landlord to try to obtain proper front door access when someone came to visit or even when one of their family members came to the front of this building without one of the two key fobs provided to them by the landlord. In their sworn testimony, they described the considerable disruption caused to their daily lives as a result of having to be physically present when anyone attempted to access the front door of this secure building in order to access their rental unit.

The landlord testified that he believed that the problem with the access to the building was actually resolved before Christmas of 2012. However, he did not dispute the accuracy of the tenants' emails which revealed an ongoing problem with accessing the building, which continued until at least January 23, 2013. The landlord also testified that the tenants were at least partially responsible for the delays in having the access code problem remedied because they were not available on some of the dates and times when the landlord and the strata management proposed attending to this problem. The tenants gave undisputed testimony that they were almost always within 10-15 minutes of the rental unit as the male tenant works nearby. They also referred to emails

confirming that they expressed a willingness to let the strata management workers attend to this matter on little notice.

After reviewing the evidence presented, I find that the tenants did not receive full value for reasonable access to this rental unit from the commencement of this tenancy until January 30, 2013. In renting a suite in a controlled access high rise building, tenants would expect to be able to have remote access to allow family and friends to enter the building without physically having to wait at the front door for them to appear. While the landlord might be allowed a week or two to sort out such problems, I find that the landlord did not take effective action to ensure that the tenants were receiving full and proper access to the rental unit they had rented as part of their Agreement.

I find that the tenants' loss in value of their tenancy, although considerable, was not in the magnitude of the $200.00 monthly loss claimed by the tenants. However, I find that the tenants are entitled to a monetary award of $125.00 for each of the four months from October 2012 to January 2013, when the value of their tenancy was reduced by their lack of full access to the building containing the rental unit. This results in a monetary award of a total of $500.00 in the tenants' favour. I make this finding pursuant to section 65(1)(f) of the *Act*. In coming to this determination, I find that there was a 10% loss in the value of their tenancy as a result of this access problem.

The parties presented conflicting evidence with respect to the tenants' claim for compensation for the lack of a storage locker with this tenancy.

In their written evidence and in the tenant's detailed description of the information conveyed to the tenants when one of the landlord's representatives showed the rental unit to the tenants, the tenants maintained that a key component of the tenancy was the landlord's provision of a 5 foot deep and 6 foot tall storage locker in this strata building. The landlord asked the tenant to confirm that he was certain that this locker had been promised to the tenants. The tenant said that he was 100% certain that the landlord's representative at the initial showing advised the tenants that this large storage locker came with this tenancy. The tenants also provided written evidence that they had to rent an external storage locker at monthly costs varying between $60.90 to $64.96.

The landlord testified that no storage locker was promised to the tenants and, in fact, few storage lockers exist in this strata building. He said that of the three units that his company manages in this building, none have storage lockers included in the tenancy agreement.

Under such circumstances and despite emphatic sworn testimony from the tenant, I find that the best evidence in such cases is provided in the written terms of the tenancy agreement. In this case, although there is a location in the Agreement where storage could be checked as being included in the monthly rent, this area of the Agreement was left unchecked. Many other areas of this portion of the Agreement signifying what was to be included in the rent were checked. As such, I find that the written terms of the Agreement signed by the tenants made no mention of the provision of storage to the tenants. Accordingly, I dismiss the tenants' application for a monetary award for the lack of storage without leave to reapply.

Section 28 of the *Act* outlines a tenant's right to quiet enjoyment of the rental premises, which include "freedom from unreasonable disturbance" and "exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29" of the *Act*.

Although I have given the tenants' request for a monetary award for the loss of quiet enjoyment during their tenancy careful consideration, I find that they have not adequately demonstrated their entitlement to any such award. The tenants entered written evidence that "We have experienced a great deal of stress re-arranging our family life according to showings and having to constantly 'fight for our rights'". I find that the examples the tenants provided in sworn testimony and written evidence did not exceed what could be expected when a landlord is attempting to show a property for sale to prospective purchasers. The landlord testified that the tenants were very co-operative with the landlord's efforts to show the property to potential purchasers and did not express concerns about problems that this was causing until such time as the landlord rejected the tenants' request to end this tenancy early without penalty. Although the realtor may have made unreasonable requests to obtain one of the two access fobs provided to the tenants, requests repeated by the landlord's representatives, the tenants did not surrender one of these access fobs. The landlord had to create a separate access fob for the realtor. Providing access to a landlord trying to sell a rental property is required under the *Act*.

I find that the tenants have not provided sufficient evidence to demonstrate that the access provided to the landlord or the landlord's realtor resulted in a loss of quiet enjoyment for which they are entitled to receive compensation from the landlord. I dismiss the tenants' application for a monetary award for loss of quiet enjoyment without leave to reapply.

As the tenants have been partially successful in their application, I allow them to recover $25.00 of their filing fee from the landlord, pursuant to section 72(1) of the *Act*. This

results in a total monetary award in the tenants' favour as a result of their application in the amount of $525.00 ($500.00 = $25.00 = $525.00).

Section 72(2)(a) of the *Act* reads in part as follows:

> ***72*** *(2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other,... the amount may be deducted*
>
> > *(a) in the case of payment from a landlord to a tenant, from any rent due to the landlord, ...*

In this case, there is undisputed evidence that the tenants have not paid either their August or September 2013 monthly rent. In accordance with section 72 (a) of the *Act*, I order that the monetary award of $525.00 provided in the tenants' favour in this decision is to be deducted from the $2,500.00 in monthly rent owing for August 2013 and September 2013. This monetary award reduces the amount still owed by the tenants to the landlord for August 2013 and September 2013 from $2,500.00 to $1,975.00.

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant(s). Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I order that $525.00 be deducted from the $2,500.00 in rent owed by the tenants to the landlord for August and September 2013.

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 24, 2013

Residential Tenancy Branch