



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNR, MND, MNDC, MNSD, FF

Introduction

This hearing was scheduled in response to the landlord's application for a monetary order as compensation for unpaid rent / compensation for damage to the unit, site or property / compensation for damage or loss under the Act, Regulation or tenancy agreement / retention of the security deposit / and recovery of the filing fee.

Both parties attended and / or were represented and gave affirmed testimony.

Issue(s) to be Decided

Whether the landlord is entitled to any of the above under the Act, Regulation or tenancy agreement.

Background and Evidence

Pursuant to a written tenancy agreement, the 2 year fixed term of tenancy is from January 1, 2013 to December 31, 2014. Monthly rent of \$4,500.00 is due and payable in advance on the first day of each month. A security deposit also in the amount of \$4,500.00 was collected. Pursuant to a "Residential Rental Additional Addendum," the tenant agreed to pay a further \$40.00 per month for "alarm." A move-in condition inspection report was completed.

By email dated July 2, 2013, the tenant gave notice to end tenancy effective September 1, 2013. By way of email reply dated July 28, 2013, the landlord's agent, "JY" informed the tenant in part as follows:

Regards to ending the tenancy, owner agrees that,

- Either to end the tenancy Sep 1 or Aug 15 is fine, if it's Aug 15 we'll just collect half month rent
- Tenant will not receive full \$4500 deposit back as we both signed the addendum: "tenant is awared [sic] that the landlord will make a claim against the security deposit if the tenant ends the tenancy prematurely." Owner

- consider the property is in livable condition and will only pay the damage for the media room and a bedroom in basement of \$1200.
- Monthly rent will not be reduced. **[Reproduced as written.]**

Subsequently, the tenant vacated the unit effective August 15, 2013, and rent paid for August was limited to \$2,250.00.

A move-out condition inspection report was completed with the participation of both parties, however, the report is undated where it concerns the move-out date and the date of the move-out condition inspection itself. More notably, however, the move-out condition inspection report reflects no detailed record of the condition of the unit at the time when the tenant vacated. The tenant's forwarding address is documented on the move-out condition inspection report.

Thereafter, the landlord's application for dispute resolution was filed on August 29, 2013, and new renters were found for the unit effective October 1, 2013.

The tenant submitted a 3 ring binder full with documentary evidence in response to the landlord's application. In short, the tenant disputes all aspects of the landlord's claim. Further, the tenant identifies a range of miscellaneous concerns she had with the unit which she claims contributed to the early end of tenancy, and which she considers form the basis of her own entitlement to certain compensation. However, the tenant testified that she has not presently filed her own application for dispute resolution.

Analysis

The full text of the Act, Regulation, Residential Tenancy Policy Guidelines, Fact Sheets, forms and more can be accessed via the website: www.rto.gov.bc.ca

At the outset, the attention of the parties is drawn to the following statutory provisions:

The Act

Section 23: **Condition inspection: start of tenancy or new pet**

Section 24: **Consequences for tenant and landlord if report requirements not met**

Section 35: **Condition inspection: end of tenancy**

Section 36: **Consequences for tenant and landlord if report requirements not met**

The Regulation

Section 20: **Standard information that must be included in a condition inspection report**

Section 21: **Evidentiary weight of a condition inspection report**

Based on the testimony and the considerable documentary evidence submitted by both parties which includes, but is not limited to, email exchanges, receipts, cost estimates and photographs, the various aspects of the landlord's claim and my findings around each are set out below.

\$49,400.00: restitution from profits made during tenancy sublet (approximately half of the rental income deemed to be earned)

Section 34 of the Act speaks to **Assignment and subletting**:

34(1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.

(2) If a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).

(3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

In several email exchanges between the tenant and "JY" prior to the start of tenancy, the tenant made it clear that she would be hosting international students. Related to this, by email dated December 6, 2012, "JY" stated in part:

We normally don't prefer tenants to sublet the property but I know you will have students coming for sure so we'll collect a full month deposit instead of half. \$4500.

I find that the above email constitutes written consent from the landlord to sublet.

Further, the parties are informed that the Director has the authority to hear claims for compensation up to \$25,000.00, and that claims in excess of that amount must be made through the Supreme Court of British Columbia.

Following from all the above, I find that the landlord has failed to meet the burden of proving entitlement under the legislation to the compensation sought. In the result, this aspect of the claim is dismissed.

\$2,500.00: loss of rental income from August 16 to 31, 2013 - "repairs done on property post tenancy took two weeks"

I find that "JY's" email to the tenant dated July 28, 2013, as above, reflects agreement between the parties that the tenancy will end either August 15 or September 1, 2013. Further, as earlier noted, in her email "JY" notes that if it is August 15, 2013, then only half a month's rent will be collected. The basis of this aspect of the claim therefore appears to be that cleaning and repairs required at the property after the tenant vacated, were such that the landlord's ability to re-rent the unit in a timely manner were delayed and, thus, there was a loss of rental income. However, despite photographic evidence which I find is inconclusive, in the absence of the detailed, comparative results of move-in and move-out condition inspection reports, I find that there is insufficient evidence to support this aspect of the application and it is therefore dismissed.

***\$4,500.00:** loss of rental income for September 2013*

Section 45 of the Act speaks to **Tenant's notice**, in part as follows:

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
- (c) 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.

Section 7 of the Act addresses **Liability for not complying with this Act or a tenancy agreement**:

7(1) 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.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their

tenancy agreement must do whatever is reasonable to minimize the damage or loss.

I also note clause # 5 in the “residential rental additional addendum,” as follows:

5. The tenant is aware that the landlord will make a claim against the security deposit if the tenant ends the tenancy prematurely.

Despite the mutual acknowledgement of the parties that tenancy will end either August 15 or September 1, 2013, there is no evidence of a “mutual agreement to end a tenancy” document. Further, the attention of the parties is drawn to section 5 of the Act which provides that **This Act cannot be avoided**, as follows:

5(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that the tenant’s manner of giving notice to end the fixed term tenancy does not comply with the above statutory provisions. I also find that the landlord undertook to mitigate the loss of rental income by advertising for new renters in a timely fashion. In the result, as new renters were found effective October 1, 2013, I find that the landlord has established entitlement to loss of rental income for September as claimed.

\$700.00: *cost to repair pool*

The pool and / or its condition are not specifically identified on either the move-in condition inspection report or the move-out condition inspection report. Further, documentary evidence submitted in direct support of this aspect of the claim is limited to a receipt showing the only pool related cost as \$200.00 for power washing the “swimming pool deck,” and photographs claiming to reflect a before-and-after-tenancy comparison. In summary, I find that the landlord has failed to meet the burden of proving entitlement to this aspect of the claim, and it is therefore dismissed.

\$1,450.00: *cost of cleaning the unit*

Section 37 of the Act speaks to **Leaving the rental unit at the end of tenancy**, in part:

37(2) When a tenant vacates a rental unit, the tenant must

- (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and...

In the absence of the comparative results of fully completed move-in and move-out condition inspection reports, I find on a balance of probabilities that the landlord has established entitlement limited to **\$293.00** [(\$100.00 + \$336.00 + \$150.00) ÷ 2]. This finding is based mainly on photographs as well as invoices for garbage disposal, yard cleaning and junk removal. I find that these costs were incurred as a result of the tenant's refuse as well as refuse from repairs / renovations being undertaken at the unit.

\$2,500.00: *early termination / re-listing for rent / agent's fee*

Residential Tenancy Policy Guideline # 4 addresses "Liquidated Damages," and provides in part:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the 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. In considering whether the sum is a penalty or liquidated damages, an Arbitrator will consider the circumstances at the time the contract was entered into.

I note that there is no liquidated damages clause in the subject tenancy agreement. Further, I note that documentary evidence in support of this aspect of the claim is limited to page 1 of what is a 4 page document. The page submitted in evidence is page 1 of a 1 year contract entered into between the landlord and an agent. This page identifies the broad responsibility of the agent to "manage the Property on behalf of the Owner," and sets out a range of miscellaneous duties.

It is understood that the landlord was displeased with the manner in which "JY" managed this tenancy on her behalf, and that after "JY's" services were ended, the landlord hired a new agent.

Further to the absence of a liquidated damages clause, I find that no reasonable grounds have been established for the tenant to be held responsible for the landlord's dissatisfaction with "JY's" services, and costs subsequently incurred by the landlord to contract with a new agent. Accordingly, this aspect of the application is dismissed.

\$1,391.80: landlord's costs related to travel from overseas to "deal with [the] matter" (including costs of plane ticket, days taken off work and fees for a nurse)

In the landlord's absence from the Vancouver area, I note that the tenancy was managed locally by "JY." The landlord's decision to travel from overseas to Vancouver in order to "deal with [the] matter," appears in part to be a reflection of her dissatisfaction with "JY's" services. Similar to the reasons set out above, I find that no reasonable grounds have been established for the tenant to be held responsible for these costs, and I consider that they are properly regarded as a cost of doing business. In short, I find that the landlord has failed to meet the burden of proving entitlement to this aspect of the claim, and it is therefore dismissed.

\$7,500.00: estimated cost of repairs to lawn

Clause # 7 in the "Residential Rental Additional Addendum" reads as follows:

7. Tenant agrees to shovel snow / maintain the landscaping at standard at their cost.

Documentary evidence in support of this aspect of the claim is comprised mainly of an email from a landscaping company to the landlord dated August 19, 2013, which reads:

- A. Take out front and backyard turf, add new topsoil, and pave new turf. \$5000
- B. Clean up yards and take out weeds in the garden. Cut edge and add scaping fabric and pave around 3" deep Bark Mulch. \$2500

The landlord's agent testified that this work has not yet been completed. In any event, I find that the yard and its condition are not specifically identified on either the move-in condition inspection report or the move-out condition inspection report. In short, I find there is insufficient evidence to support this aspect of the claim and it is dismissed.

\$2,000.00: expense of selling furniture at a loss

It is understood that the tenant rented the house as partially furnished, and that when tenancy ended the landlord claims to have sold the furniture at a loss. I note the following comment related to furniture on the move-in condition inspection report:

Most of existing furniture in house is in various states of disrepair.

Further to the foregoing, there is no documentary evidence of actual costs that may have been incurred by the landlord in this regard, and neither is there any comparative documentation related to particular furnishings on the move-in or move-out condition inspection reports. In short, this aspect of the application must be dismissed.

\$2,500.00: legal cost to file the application and attend the hearing

Section 72 of the Act speaks to **Director's orders: fees and monetary orders**. With the exception of the filing fee for an application for dispute resolution, the Act does not provide for the award of costs associated with litigation to either party to a dispute. Accordingly, while I find that the landlord has established entitlement to recovery of the **\$100.00** filing fee, the balance of this aspect of the application is dismissed.

Entitlement: \$4,893.00 (\$4,500.00 + \$293.00 + \$100.00)

I order that the landlord retain the security deposit of **\$4,500.00**, and I grant the landlord a **monetary order** for the balance owed of **\$393.00** (\$4,893.00 - \$4,500.00).

Conclusion

Pursuant to section 67 of the Act, I hereby issue a **monetary order** in favour of the landlord in the amount of **\$393.00**. Should it be necessary, this order may be served on the tenant, filed in the Small Claims Court and enforced as an order of that Court.

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: December 16, 2013

Residential Tenancy Branch

