Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF, O

Introduction and Preliminary Issue
This hearing dealt with an application by the tenant for a monetary order. The landlords did not appear.

The Application for Dispute Resolution and Notice of Hearing had been sent to both landlords by registered mail to an address in Edmonton, Alberta, which is the address of the male landlord's parents. They were returned "unclaimed" by Canada Post.

The tenant testified that prior to entering into the tenancy agreement she knew the landlords socially. The landlords had told her they were living with the male landlord's parents in Edmonton and later, when the arrangements for the tenancy agreement were being made, they again told her they were living with the male landlord's parents.

The tenant and the male landlord had also communicated by e-mail. The e-mail address includes the name of the landlords' business, which is a well-known local firm.

After the issue arose between the parties the tenant consulted a lawyer. The lawyer sent a demand letter addressed to the landlords at this e-mail address. The tenant received a text message from the male landlord within minutes of the lawyer's e-mail being sent. The message said: "Good luck trying to sue me you have a contract you better reconsider or good luck Your lawsuits based on a lie you can be charged with perjury you want to go to court let's do it."

When the unclaimed letters were returned to the tenant her lawyer sent copies of the Application for Dispute Resolution and Notice of Hearing to the landlords at the same e-mail address. No response was received.

Section 89 of the *Residential Tenancy Act* sets out the means by which an application for dispute resolution may be served on a respondent. They include sending a copy by registered mail to the address at which the person resides or as ordered by an

arbitrator. A document served by mail is deemed delivered on the fifth day after it is mailed. (Section 90) In addition, Section 71(2) allows an arbitrator to order that:

- a document has been sufficiently served for the purposes of the Act on a date the arbitrator specifies; or,
- a document not served in accordance with section 88 or 89 is sufficiently given or served for the purposes of the Act.

I am satisfied that the tenant did have and did send e-mails to the landlords' e-mail address. Based on the landlord's immediate response to the lawyer's demand letter I am also satisfied that the male tenant is receiving and reading e-mails at this address. Pursuant to section 71 I find that both landlords were served with the Application for Dispute Resolution and Notice of Hearing on November 8, 2013.

Issue(s) to be Decided

Is the tenant entitled to a monetary order and, if so, in what amount

Background and Evidence

The tenant originally met the landlords at a dinner. The landlords were talking about their home which they had rented, furnished, for the previous year. The tenant suggested that she would be interested in renting it.

A few weeks later, on May 21, 2013, the tenant and the landlords met and signed a tenancy agreement. They agreed that it would be a fixed term tenancy of one year commencing August 1, 2013, at a monthly rent of $3500.00. The tenant paid a security deposit of $1750.00 and gave the landlord twelve post-dated cheques for the rent.

The tenant gave notice to end tenancy at her current residence and made arrangements for her move. These arrangements were complicated by the fact that she was participating in a wedding in Edmonton the first weekend of August. She hoped to get the keys on July 30 and she had made arrangements with her family and maid to manage the move on August 1. She says the landlords knew of her travel arrangements.

On July 30 the landlord sent her a text message advising that he would be arriving in Kelowna on the morning of July 31 and he could give her the keys that afternoon.

The tenant did not hear from the landlords. After she left for Edmonton she spent three days trying to contact the landlords leaving messages on both landlords' telephones.

Finally, on Saturday, August 3, she received a text message from the male landlord advising that the rental unit was too dirty to move into and he could not find any

cleaners. He asked her for the name of her cleaning lady. The tenant responded that she was no longer interested in moving into the rental unit.

On July 6 the tenant received another text from the landlord advising her that they could not find anyone to clean the property and she would not be able to move in until August 12. The tenant testified that the landlord did not offer any adjustment to the rent or any other accommodation for her situation. Once again, she responded that she did not want to rent the unit.

Meanwhile, the tenant's belongings had been delivered to family members. When she returned to Kelowna on August 5 she had to find a place to stay. She testified that after she received the text message from the landlord on August 6 she drove by the rental unit and observed that the lights were on, people were in the house, and the landlords' motor vehicle was parked outside.

The landlords cashed her August 1 rent cheque on August 6. The tenant stopped payment on the post-dated cheques.

On August 9 the tenant's lawyer sent a letter to the landlords demanding return of the security deposit and the August rent. The letter also stated that the landlord could treat the firm address as the tenant's forwarding address for the purposes of delivery. The landlord's response was quoted earlier. Since then the tenant has received no communication from the landlords nor has she been served with an application for dispute resolution by them.

Analysis

Section 16 of the *Residential Tenancy Act* states that the rights and obligations of a landlord and a tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

Section 7(1) states that if a landlord or a tenant does not comply with the Act, regulation or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

As explained in *Residential Tenancy Policy Guideline 16: Claims in Damages*, where a landlord and a tenant enter into a tenancy agreement each is expected to perform his or her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of

an abatement of rent or a monetary award for the portion of the premises or property affected.

The rental unit was not ready on August 1 as contracted for by the landlords and the earliest date suggested by the landlords for occupancy was August 12. Given the manner in which events unfolded there is no guarantee that the rental unit would have been ready for occupancy on that date.

Even if the landlords intend to enforce the terms of the tenancy agreement, which they have apparently taken no steps toward doing, the tenant is entitled to compensation for the period that the unit was not available to the tenant. I award the tenant one half month's rent, $1750.00, as damages for the rental unit not being available until August 12. No finding is made and no award is given for any period after August 12 for which the unit may not have been available.

With respect to the security deposit, section 38(1) of the *Residential Tenancy Act* provides that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant or file an application for dispute resolution claiming against the deposit. Section 38(6) provides that if a landlord does not comply with section 38(1), the landlord must pay the tenant double the amount of the security deposit. The legislation does not allow any flexibility on this issue.

The landlords have apparently accepted that this tenancy has ended. They also had the tenant's forwarding address in writing as provided by her lawyer, which the landlord clearly received and acknowledged. Although a substantial period of time has passed since either of these events, the landlords have neither returned the security deposit to the landlords nor filed an application for dispute resolution claiming against the deposit. Accordingly, I find that the landlords are subject to the section 38(6) penalty and that the tenants are entitled to an order that the landlord pay her the sum of $3500.00, representing double the security deposit.

Finally, I further order that as the tenant was successful on her application she is entitled to reimbursement from the landlords of the $100.00 fee she paid to file it.

In summary, I grant the tenant a monetary order in the amount of $5350.00.

Conclusion

A monetary order in favour of the tenant has been made. If necessary, it may be filed in the Provincial 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: January 07, 2014

Residential Tenancy Branch