



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the landlord: MNSD, MNR, MND, MNDC, FF
For the tenant: MNSD, CNL, MNDC, FF

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the "Act").

The landlord applied for authority to retain the tenants' security deposit, a monetary order for unpaid rent, alleged damage to the rental unit and for money owed or compensation for damage or loss, and for recovery of the filing fee.

The tenants applied for a return of their security deposit, doubled, a monetary order for money owed or compensation for damage or loss, an order cancelling the landlord's 2 Month Notice to End Tenancy for Landlord's Use of the Property (the "Notice"), and for recovery of the filing fee.

Both parties attended the telephone conference call hearing. The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter all parties were provided the opportunity to present their evidence orally, refer to documentary evidence submitted prior to the hearing, make submissions to me and respond to the other's evidence.

At the outset of the hearing, neither party raised any issues regarding service of the application or the evidence.

I have reviewed the oral and written evidence of the parties before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Preliminary matter-The tenancy has now ended and as a result, I have excluded the tenants' request for cancellation of a Notice from the landlord.

Issue(s) to be Decided

1. Is the landlord entitled to retain the tenants' security deposit, further monetary compensation, and to recover the filing fee?

2. Are the tenants entitled to a return of their security deposit, further monetary compensation, and to recover the filing fee?

Background and Evidence

The undisputed evidence was that this tenancy began on September 1, 2011, ended on September 30, 2013 when the tenants vacated the rental unit, monthly rent listed in the tenancy agreement was \$885, and the tenants paid a security deposit of \$425 on or about September 1, 2011. I note that in their respective documentary evidence, both parties referred to monthly rent being \$850.

The landlord's relevant documentary evidence included a page containing the breakdown of the landlord's monetary claim, email communication between the parties regarding tenancy issues, and before and after photos of the yard of the rental unit.

The tenants' relevant documentary evidence was contained in a large binder of documents, including a written response, a Notice of Claim filed in the Provincial Court of British Columbia (Small Claims) on October 24, 2013, the written tenancy agreement, a written statement, email communication between the parties, text message communication between the parties, photos of the rental home, allegedly still vacant after the tenants vacated, pictures of the condition of the yard upon move-in, pictures of the yard after the tenant worked on the yard, according to the tenant, further pictures of the yard, a receipt for the security deposit, receipts described by the tenant as costs for landscaping, and further before and after photos.

I note that the Notice of Claim filed in the Small Claims Court relates to the claim filed by the landlord against the tenants for plant replacement, steps restructure, trellis rebuilt, stones replaced, and repair labor, for a total of \$3681. The Claim also contains the tenants' response to the landlord's claim and a counter claim of \$23,756, for landscaping work and yard maintenance.

Landlord's application-

The landlord's monetary claim is \$1275, comprised of alleged loss of rent revenue for October 2013, of \$850, and \$425, which she submitted was the value of the security deposit (incorrectly labelled "damage deposit"), for cost of re-landscaping yard and replacing the removed plants, blocks, trellis, stone steps, etc.

The landlord submitted that she is entitled to a loss of rent revenue of \$850 for October, 2013, due to insufficient notice from the tenants that they were vacating the rental unit, which came in the form of an email from the tenants on September 8, 2013, that they were vacating the rental unit on September 30, 2013.

The landlord then replied in an email to the tenants that she now had "committed" the rental unit for October 1.

In response to my question as to her efforts to minimize her loss, the landlord admitted that it was very hard to re-rent the rental unit as it was up for sale.

As to the issue of the yard work and maintenance, the landlord said that she agreed the tenants could use the garage for performing yard work.

In response, the tenants submitted that they were informed on August 28, 2013, in an email from the landlord that she was putting the rental home up for sale and would start showing the home to potential buyers.

The tenants also submitted that they gave their notice to move out by the end of November, not October 1, as the email stated only that they had secured another place for October 1, and that the landlord prevented them remaining the rental unit in November, although they were prepared to pay rent for that month.

The tenants submitted the landlord began showing the home without giving the proper 24 hour notice.

The tenants also submitted an email which shows that on September 18, prior to the end of the tenancy, the landlord informed them that she would not be returning their "damage" deposit.

As to the yard work and landscaping, the tenants submitted that this was apart and separate from the tenancy agreement.

Tenants' application-

The tenants' monetary claim is \$3400, comprised of their security deposit of \$450, doubled, \$850 for the landlord not giving a proper 2 Month Notice to End Tenancy for Landlord's Use of the Property, which is 1 month's rent, and \$1700, for an "illegal" eviction.

The tenants submitted that they are owed double their security deposit as the landlord failed to return their security deposit within 15 days of the end of the tenancy, or October 15, 2013.

The tenants are claiming that they are entitled to receive monetary compensation equivalent to 1 month's rent, as the landlord failed to serve the tenants with a 2 Month Notice to End Tenancy for Landlord's Use of the Property; further the tenants submitted that they are entitled to monetary compensation equivalent to 2 months' rent as the home was still empty in December, having not been sold. The tenants stated they believe the rental unit had been sold after being informed the home was committed.

In response, the landlord submitted that it was the tenants who gave notice and she did not evict them.

In response to my question, the landlord stated that she informed the tenants the rental unit was committed as she needed time to paint and get the home ready for sale.

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 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-

Loss of rent revenue-

I find the email sent to the landlord from the tenants on September 8, 2013, informing the landlord the tenants found a place for October 1, to be unclear as to when the tenants were actually vacating. The landlord assumed the tenants were leaving by October 1 and the tenants contended that this email states they wanted to stay until November 1; however the email sought a free month's rent for November for the home being for sale and for time to dismantle the garage, without actually living there; further there was no acceptance to this proposal from the landlord.

I find a reasonable person would infer from the email that the tenants were vacating the rental unit by the end of September, as alternate accommodation had been secured, absent an agreement from the landlord that they could stay for extra time.

I next considered whether or not the landlord had taken reasonable steps to minimize her loss and in this case, I find the landlord submitted no evidence to prove that she had done so. The landlord admitted that it would have been difficult to re-rent the home as it was up for sale, and therefore made no attempts to secure rental income for October 2013, which would minimize her loss. Additionally, the landlord informed the tenants that the rental home had been committed and that she was taking possession.

Due to the above, I find the landlord submitted insufficient evidence to meet step 4 of her burden of proof and I dismiss her claim for \$850.

Value of the security deposit-

Without laying out an itemized claim for charges against the security deposit, with corresponding proofs of loss, I find the landlord submitted insufficient evidence to prove that she is entitled to retain the security deposit.

I therefore dismiss her claim for value of the security deposit.

Tenants' application-

Security deposit, doubled-

Under section 38(1) of the Act, at the end of a tenancy a landlord is required to either return a tenant's security deposit or to file an application for dispute resolution claiming against the security deposit within 15 days of the later of receiving the tenant's forwarding address in writing and the end of the tenancy.

Section 38(6) of the Act states that if a landlord fails to comply, or follow the requirements of section 38(1), then the landlord must pay the tenant double the amount of their security deposit.

When a landlord fails to properly complete a condition inspection report, as is the case here, the landlord's claim against the security deposit for damage to the property is extinguished. In this case, the landlord applied to keep the security deposit in partial compensation of monetary claims for damage to the property as well as for lost revenue for October 2013.

As the landlord's claim was not only for damage to the property, I find that the landlord complied with the requirement under section 38 and Residential Tenancy Branch Policy Guideline 17 (9) to make an application within 15 days of the end of the tenancy, and I dismiss that portion of the tenants' application.

However I find the tenants are still entitled to recover their security deposit of \$425 as provided hereafter.

Compensation under section 51 of the Act-

Under section 49 of the Act, a landlord may issue the tenant a 2 Month Notice to End Tenancy for Landlord's Use of the Property (the "Notice"), listing different reasons, one of which is when a landlord sells the rental unit and the purchaser has asked in writing that the landlord give a notice to the tenant in writing.

A tenant who receives such a 2 Month Notice is entitled to the equivalent to 1 month's rent under section 51(1). If the landlord fails to use the rental unit for the stated purpose listed on the 2 Month Notice, then by virtue of section 51(2), the tenant is entitled to compensation equivalent to 2 months' rent.

The tenants claim that, in effect, they received notice comparable to a 2 Month Notice with the landlord's email that she was placing the rental unit for sale and that they were being evicted, entitling them to the monetary compensation as noted above, or a total of three months' rent.

I reject this argument of the tenants as the landlord did not serve the tenants a 2 Month Notice to End Tenancy for Landlord's Use of the Property. In fact, I find the landlord's email from August 28, 2013, mentioning that she assumed the tenants would want to stay and that she, the landlord, would provide "brilliant" references confirms that no notice to end the tenancy was being issued. I find, rather, the tenants ended the tenancy through their September 8, 2013, email to the landlord.

As I have found that the tenants did not receive a 2 Month Notice and that they ended the tenancy themselves, I dismiss their monetary claim for \$850 for 1 month's rent compensation and \$1700 for 2 months' rent compensation.

As I have dismissed the landlord's application and found at least partial merit with the tenants' application, I award the tenants recovery of the filing fee of \$50.

I therefore find the tenants are entitled to a monetary award of \$475, comprised of their security deposit returned in the amount of \$425 and recovery of the filing fee of \$50.

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 \$475.

The tenants are granted a monetary order in the amount of \$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.

The parties are advised that the issues and matters contained in their respective monetary claims before Provincial Court of British Columbia (Small Claims) are not addressed in this Decision, were not dealt with, and this Decision has no impact on any matter before the Provincial 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 15, 2014

Residential Tenancy Branch

