



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord requested compensation for damage or loss under the Act, compensation for unpaid utilities, to retain the security deposit and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The tenant applied requesting return of double the security deposit and compensation for damage or loss under the Act.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing.

Preliminary Matters

After a significant amount of questioning it was determined that the tenant received the hearing package and evidence served by the landlord.

The tenant's evidence was mailed on January 23, 2014; but sent to the rental unit address. The landlord had not yet received that evidence. The tenant's evidence was set aside and the tenant was able to provide oral testimony in relation to the evidence.

The parties agreed that a 10 day notice to end tenancy for unpaid rent issued on August 19, 2013 and given to the tenant contained a current service address. However, the tenant used the rental unit address for service of his hearing package. The landlord confirmed that she did receive that package in early January, 2014.

Both parties attempted to amend the monetary portions of their applications, by completing a monetary worksheet and serving that document as evidence. Residential Tenancy Rules of Procedure section 2.5 requires a party to amend an application at least 7 days prior to the hearing and to then serve the amended application at least 5 days prior to the hearing. As neither party followed this procedure; only the matters indicated on the applications were considered.

The tenant alleged the landlord had altered the tenancy agreement; his co-tenant had signed the agreement, but the copy in the landlord's evidence did not indicate that signature. The co-tenant's name was on the 1st page of the tenancy agreement. The co-tenant was not named as a respondent.

Issue(s) to be Decided

Is the landlord entitled to compensation for utilities in the sum of \$129.00?

Is the landlord entitled to compensation for cleaning and removal of furniture in the sum of \$250.00?

Is the landlord entitled to compensation for adjustment to the rent in the sum of \$600.00?

Is the tenant entitled to double the \$525.00 security deposit or may the landlord retain the deposit?

Is the landlord entitled to the \$50.00 filing fee cost?

Background and Evidence

The fixed-term tenancy commenced on June 1, 2013 and was to end on May 30, 2014. Rent was \$1,050.00, due on the 1st day of each month. A security deposit in the sum of \$525.00 was paid. A move-in inspection report was completed. A copy of the tenancy agreement and inspection report was supplied as evidence.

The tenancy agreement required the tenant to pay 1/3 of utility costs. During the hearing the tenant agreed that he was responsible for the utility costs.

There was no dispute that the tenancy ended effective August 29, 2013 as the result of a 10 day Notice to end tenancy for unpaid rent that had been issued on August 19, 2013. On September 4, 2013 the landlord was issued a monetary order in the sum of \$1,050.00 and an Order of possession.

The tenant issued an October 2, 2013 letter providing his forwarding address. That letter was mailed to the rental unit address, not the service address given on the Notice ending tenancy. The landlord said that her tenant called to say mail had arrived and that she received the letter on October 11 or 12th, 2013. On October 26, 2013 the landlord submitted the application claiming against the deposit.

The tenant had agreed to meet the landlord at 8 a.m. on August 29, 2013, to complete in the move-out inspection report. At 7:11 a.m. the tenant sent the landlord a text message indicating he had to leave; during the hearing the landlord located this text message and read it aloud. When the landlord arrived at the unit the keys were in a plastic bag and note from the tenant was left, which indicated "ran out of time sorry had to leave earlier." A copy of this note was supplied as evidence.

The tenant testified that he thought the landlord would be at the unit between 7 and 8 a.m. and that he left the unit at 8:30, as the landlord had not arrived.

After the tenant vacated the landlord hired a cleaner. The inspection report indicated that garbage had been left in the unit, the kitchen was not cleaned, the appliances were dirty, the bathroom was not cleaned, a double mattress with left in the bedroom, another bedroom appeared to have never been cleaned and that a lot of boxes of china, cups, plates, a DVD player and old furniture were left in the garage.

An August 30, 2013 receipt issued for 8 hours of cleaning in the sum of \$200.00 was supplied as evidence of cash payment for the cleaning service.

The tenant said he left a mattress in the garage, not the bedroom. The tenant stated he cleaned as much as he could and that the remaining cleaning should only have taken 1 hour; the tenant said the landlord's cleaning receipt was false as the cleaner had not signed the receipt. The tenant said the household goods left behind could have been sold by the landlord.

The landlord paid \$50.00 cash to have someone take the mattress and other garbage away for disposal.

The tenancy agreement addendum included a term indicating the tenancy would end May 30, 2014 and that written notice was required "to end the lease contract." The term also indicated:

"The rental cost for less than the agreed term is \$1,250.00/month to be adjusted accordingly base on the number of month times the difference in costs."

As the tenancy ended as the result of non-payment of rent, the landlord has claimed a portion of the payment required by the tenancy agreement term. The tenant caused the tenancy to end prior to the end of the fixed term, resulting in a loss to the landlord.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Residential Tenancy Branch policy suggests that an arbitrator may also award "nominal damages", which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right. I have considered nominal damages in relation to some of the compensation claimed by the landlord/tenant.

In relation to the security deposit section 36 (a) of the Act provides:

36 (1) *The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if*

(a) the landlord complied with section 35 (2) [2 opportunities for inspection], and

(b) the tenant has not participated on either occasion.

The tenant was to meet with the landlord on August 29, 2013 at 8 a.m. When the tenant sent the text message indicating he would not be at the unit at the agreed time he did not offer an alternative. I have rejected the tenant's submission that he was to meet the landlord between 8 and 8:30 a.m.; this is based on his own text message which aligns with the landlord's submission that they were to meet at 8 a.m. The landlord arrived at the scheduled time, but the tenant had vacated. Therefore, pursuant to section 36 of the Act, I find that the tenant extinguished his right to return of the security deposit and that the landlord is entitled to retain the deposit.

On the evidence before me I find that the tenant did not leave the rental unit reasonably clean. The tenant acknowledged that items were left behind, some garbage and a mattress. I found the claim made by the landlord reasonable and minimal, given the cleaning that was detailed in the condition inspection report. The tenant declined to participate in the move-out inspection, which resulted in the landlord completing that report in his absence. The landlord has provided verification of the sum claim. Therefore, I find that the landlord is entitled to cleaning costs in the sum of \$200.00.

In the absence of verification of the cost for removal of garbage I find that the landlord is entitled to a nominal sum of \$20.00. There was no dispute that garbage and a mattress had been left on the property by the tenant.

In relation to the claim for liquidated damages, I have considered Residential Tenancy Branch policy which suggests that liquidated damages must be a genuine pre-estimate of the loss at the time the contract is entered into; otherwise the clause may be found to constitute a penalty and, as a result, be found unenforceable.

Policy suggests that an arbitrator should determine if a clause is a penalty clause or a liquidated damages clause by considering whether the sum is a penalty. The sum can be found to be a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. Policy also suggests that generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

The term included on the tenancy agreement addendum imposes payment equivalent to rent owed for each month of the term after the tenant vacates. A landlord is entitled to claim for the loss of any rent revenue and to show they have taken steps to mitigate the loss. However, imposition of an automatic sum equivalent to rent owed, as liquidated damages is extravagant and an amount I find is equivalent to a penalty. Therefore, the claim for adjustment to the rent is dismissed.

Pursuant to section 62(3), as the tenant agrees he owes utility costs, I Order the tenant to pay \$129.00 in utility costs.

I find that the landlord's application has merit and that the landlord is entitled to recover the \$50.00 filing fee from the tenant for the cost of this Application for Dispute Resolution.

The landlord has established a monetary claim, in the amount of \$399.00, which is comprised of \$129.00 for utility costs; \$200.00 cleaning; \$20.00 garbage removal and \$50.00 in compensation for the filing fee paid by the landlord for this Application for Dispute Resolution.

Based on these determinations I grant the landlord a monetary Order in the sum of \$399.00. In the event that the tenant does not comply with this Order, it may be served on the tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The tenant's application is dismissed.

Conclusion

The landlord is entitled to compensation for utilities, damage as claimed in the sum of \$399.00.

The tenant's right for return of the security deposit is extinguished; the landlord will retain the deposit.

The balance of the landlord's claim is dismissed.

The tenant's claim is dismissed.

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: February 07, 2014

Residential Tenancy Branch

