



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the tenant: MNDC, FF
For the landlord: OPR, MNR, 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 tenants applied for a monetary order for money owed or compensation for damage or loss and for recovery of the filing fee.

The landlords applied for an order of possession for the rental unit due to unpaid rent, a monetary order for unpaid rent, and for recovery of the filing fee.

All 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 the 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, each party confirmed that they had received the other party's evidence. 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-Although the landlords originally applied for an order of possession for the rental unit, the tenancy had ended by the time of the hearing; I therefore have excluded this request from further consideration.

Issue(s) to be Decided

1. Are the tenants entitled to monetary compensation and to recover the filing fee?

2. Are the landlords entitled to monetary compensation and to recover the filing fee?

Background and Evidence

The undisputed evidence shows that this one year, fixed term tenancy began on October 1, 2013, was to be through October 1, 2014, it actually ended on April 30, 2014, when the tenants vacated the rental unit, monthly rent was \$950, and the tenants paid a security deposit of \$475 at the beginning of the tenancy, which has not yet been returned to the tenants.

The rental unit is a condominium in a 60 unit, floor building.

Tenants' application-

The tenants' original monetary claim was \$3239.30; however, the tenants amended their monetary claim to \$1099.27, which they contended was for loss of quiet enjoyment and for damages.

In support of their application, the tenants submitted that from the time they moved into the rental unit until the end of January, there were no issues with the rental unit; however, beginning at the end of January 2014, a problem with second hand smoke developed. The tenants described the effects of the second hand smoke as changing the "feel/smell" of the rental unit, and that they contacted the landlord on February 5, 2014, to notify her of the issue.

The tenants further submitted that they requested a contact number to the strata corporation so that they could address the issue with a strata representative and instead they were told by the landlord that they were not allowed to talk anyone on the strata council or the strata corporation in charge of the building.

The tenants submitted that they were told to provide the name or location of the offending cigarette smoker, and at the time, believed the smoker lived in the unit above them. The tenants submitted that they later discovered the offending smoker was in the unit below them.

The tenants submitted that no one contacted them during the month of February to deal with the issue, that they were not provided a strata contact number and that the landlord refused to speak with the strata council, all the while experiencing extreme reactions to the second hand smoke.

The tenants submitted that all during the month of March, no one attended the rental unit, either the landlord, a representative, or someone from the strata council, to attend the rental unit to experience the feel and smell of the second hand smoke. Due to the inactions of the landlord, according to the tenants, they made the decision by the end of March to move out of the rental unit, as the issue of second hand smoke was never

dealt with by the landlord. The tenants submitted a notice to the landlords that they were ending the tenancy on or before April 30, 2014, in a letter dated March 31, 2014.

The tenants described the effects of the second hand smoke as causing itchy, watery eyes, coughing, and headaches and that despite all their efforts, they were unable to keep the smoke from permeating the rental unit, all causing a loss of use and quiet enjoyment of the rental unit.

The tenants' monetary claim was broken into days during February, March and April on which they tenants allegedly suffered "excessive, significant, or considerable" second hand smoke and the corresponding percentages for the loss of quiet enjoyment.

The tenants' relevant documentary evidence included, but was not limited to, email communication between the parties, a timeline of events pertaining to the second hand smoke complaints, a photo of the balcony of another rental unit showing cigarette paraphernalia, a written response to the landlords' application and evidence, and a doctor's statement.

Landlords' response-

The landlord submitted that the tenants were aware that smoking was allowed in the separate units in the strata condo building, although the common areas were non-smoking, as noted in the addendum to the tenancy agreement initialled by the tenants, which allows for smoking on the balcony.

The landlord submitted that when the tenants notified her of a problem with second hand smoke, she immediately contacted the strata council to inquire as what could be done about smoking in the unit above the tenants, which was owner occupied. The landlord submitted that the council finally agreed to discuss and vote on a strata bylaw prohibiting smoking in the strata building, but that the bylaw was defeated. Ultimately the strata council informed the landlords that the strata building was a smoking building and that would not change.

The landlord submitted that she also spoke with the strata about different filtration and air flow systems, but nothing was accomplished.

The landlord submitted that for two months, the tenants complained of the resident in the unit above them, and in turn she informed the strata council, who began fining the resident for disturbances. The landlord submitted that it was later the tenants informed them the offending smoker was in the unit below them.

The landlord submitted that at the end of the tenancy, the curtains in the rental unit did not smell of smoke, which called into question whether the second hand smoke was an issue. The landlord also questioned why the tenants chose to remain in the rental unit three months after the first sign of a second hand smoke issue arose, if it was at the level complained of by the tenants.

The landlord denied being able to control other owners in the strata building.

Landlords' application-

The landlords' monetary claim is \$2400, comprised of unpaid rent for April 2014, in the amount of \$950, loss of rent revenue for May 2014, in the amount of \$950, and a fee for finding a new tenant, in the amount of \$500.

In support of their application, the landlord submitted that the tenants did not pay rent owed for April 2014, despite residing in the rental unit.

As to the landlord's claim for loss of rent revenue for May, the landlord submitted that the tenants broke their fixed term tenancy agreement when they vacated at the end of April. Additionally, the landlord submitted that they did not receive timely notice from the tenants of a specific date as to when they would be vacating and on April 26, the tenants finally informed the landlords of a specific move-out date at the end of April.

The landlords submitted that they began advertising the rental unit on April 19, 2014, for the same amount of monthly rent and as of the day of the hearing, the rental unit had not been re-rented. As such, the landlords submitted they are entitled to loss of rent revenue as per the fixed term tenancy agreement.

As to the property management fee, the landlord submitted that as they live out of province, it was necessary to hire a property management company to deal with finding new tenants.

The landlords' relevant documentary evidence included, but was not limited to, a written submission explaining their application, written notice from the tenants that their tenancy was ending on or before April 30, 2014, a copy of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "Notice") served upon the tenants due to unpaid rent for April, email communication to the tenants asking their exact move-out date to arrange with the strata for moving, an advertisement for the rental unit, dated April 19, 2014, the written tenancy agreement, the condition inspection report, and communication with the strata council regarding the tenants' complaints.

Tenants' response-

The tenants submitted that they sent their notice to end their tenancy to the landlords via registered mail on March 31, 2014, and provided the tracking number of the registered mail. Upon a discussion, the tenants discovered that they used the postal code not of the landlords, but their own postal code on the registered mail.

The tenants further disputed that the landlord advertised the rental unit for re-rent.

Analysis

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.

Tenants' application-

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

A breach of quiet enjoyment includes when a tenant's right to enjoy their premise in peace and without unreasonable disturbance.

Residential Tenancy Branch Policy Guideline 3 also suggests that a loss of quiet enjoyment could result in inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.

In the case before me, I find that the tenants failed to prove that the landlords have violated the Act or the tenancy agreement as the issue of the second hand smoke derived or originated from other owner occupied units in the condo building, outside the control of the landlords.

I further find that the landlords neither misinformed nor misled the tenants as to whether or not there would be smoking in the condo building, as shown by the addendum to the tenancy agreement, initialled by the parties, acknowledging that smoking was permitted on the balcony to the rental unit.

Although the landlords were not legally able to control the actions of other owners, I find that the landlords nonetheless did take action seeking a remedy to the second hand smoke, with repeated communication with the strata council, with the result that the other owner was fined. The end result, however, was that the tenants misinformed the landlords of the true offending party.

Due to the above, I find the tenants failed to meet the second step of their burden of proof as I find they failed to prove that the landlords violated the Act.

As a result, I dismiss the tenants' application, without leave to reapply.

Landlords' application-

Rent for April- Under section 26 of the Act, a tenant is required to pay rent in accordance with the terms of the tenancy agreement and is not permitted to withhold rent without the legal right to do so. A legal right may include the landlord's consent for deduction; authorization from an Arbitrator or expenditures incurred to make an "emergency repair", as defined by the Act. I do not find the tenants had a legal right to withhold rent.

I find that the tenants owed rent for the month of April 2014, pursuant to the terms of their tenancy agreement, and did not pay.

I therefore award the landlords the amount of \$950 for unpaid rent for April 2014.

*Loss of rent revenue-*As to the issue of loss of rent revenue for May 2014, Section 45(2) of the Act states that a tenant must give written notice to the landlord ending a fixed term tenancy at least one clear calendar month before the next rent payment is due and that is not earlier than the end of the fixed term.

In the case before me, I accept that the tenants provided insufficient notice, whether their notice was sent within a month of the effective date, that they were ending the fixed term tenancy agreement prior to the end of the fixed term and I find the tenants were responsible to pay monthly rent to the landlords until the end of the fixed term, here, October 1, 2014, subject to the landlords' requirement that they take reasonable measures to minimize their loss.

I find the landlords submitted sufficient oral and documentary evidence that they took reasonable measures to mitigate their loss by immediately advertising the rental unit and have thus far been unable to find a new tenant.

Although the hearing occurred on May 15, 2014, the tenants were obligated to pay monthly rent until the end of the fixed term and I find it unlikely the landlords will be able to receive any rent revenue for May 2014. I therefore find the landlords are entitled to a monetary award for loss of rent revenue for the month of May 2014, of \$950.

Fee for finding a new tenant-

In this case, I find that the landlords have chosen to incur costs that cannot be assumed by the tenants. I do not find the tenants to be responsible for the landlords choosing to rent a property in another town from where the landlords reside, which would then

require the landlords to secure the services of an agent. The dispute resolution process allows an applicant to claim for compensation or loss as the result of a breach of Act and not for costs incurred to conduct a landlord's business, such as hiring an agent. Therefore, I find that the landlords are not entitled to costs for hiring an agent, as they are costs which are not named by the *Residential Tenancy Act*. I therefore dismiss the landlords' claim for \$500, without leave to reapply.

I approve the landlords' request to recover their filing fee of \$50.

Due to the above, I find the landlords are entitled to a total monetary award of \$1950, comprised of unpaid rent for April 2014, in the amount of \$950, loss of rent revenue for May 2014, in the amount of \$950, and the filing fee of \$50.

Conclusion

The tenants' application has been dismissed, without leave to reapply.

The landlords' application has been approved in large part as I have granted them a monetary award of \$1950.

I direct the landlords to retain the tenants' security deposit of \$475 in partial satisfaction of their monetary award of \$1950 and I grant the landlords a final, legally binding monetary order for the balance due pursuant to section 67 of the Act for the amount of \$1475, which I have enclosed with the landlords' Decision.

Should the tenants fail to pay the landlords this amount without delay after the order has been served upon them, the order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an order of that Court. The tenants are advised that costs of such enforcement are recoverable from the tenants.

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: May 20, 2014

Residential Tenancy Branch

