Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenants' application: MNDC, MNSD, FF, O
Landlord's application: MNR, MNSD, MNDC, FF, O

Introduction

This was a hearing with respect to applications by the tenants and by the landlord. The hearing was conducted by conference call. The tenants attended and were represented at the hearing by their lawyer. The landlord's agent attended on behalf of the landlord.

Issue(s) to be Decided

Are the tenants entitled to the return of their security and pet deposits and the refund of rent paid under the tenancy agreement?

Is the landlord entitled to a monetary award, including an award for loss of revenue and if so, in what amount?

Is the landlord entitled to retain all or part of the tenants' security and pet deposits?

Preliminary matter

The tenants submitted documentary evidence to the Residential Tenancy Branch by fax on September 29, 2014. The evidence consisted of a biographical summary and a Curriculum Vitae of an intended expert witness that the tenants wished to have present medical evidence at the hearing. According to the supplied documents the witness is a chemist with expertise related to medical products, particularly medical implants, and their design and testing. The only medical evidence submitted by the tenants was a copy of an August 14, 2014 letter from the female tenant's family doctor wherein he said that the tenant has suffered long-term chronic health problems that have included an auto-immune disorder with other disabling medical conditions. There insufficient evidence to show that expert evidence from a chemist with expertise in medical

products has any relevance to this proceeding. The tenant's application was filed in June. The proposal to lead this expert evidence was not received at the Residential Tenancy Branch until September 30, 2014. The proposed evidence is not apparently relevant to the issues that I must address in this proceeding. There is no summary of the proposed evidence and as I informed the parties at the hearing there is an inadequate foundation for this proposed expert evidence to establish that it is relevant to any issues in this proceeding; it is late and I declined to hear the evidence of the intended expert witness.

Background and Evidence

The rental unit is a town house in North Vancouver. The tenancy began on March 1, 2014 for a one year term. The monthly rent was $1,695.00, payable on the first of each month. The tenants paid a security deposit of $847.50 and a pet deposit of $424.00. According to the landlord's representative, the tenants, who resided in Edmonton, responded to an internet advertisement in February and inquired about renting a townhouse. She said they wished to rent the unit sight unseen, but the landlord's representative was not prepared to agree to a rental before the tenants had met with her or viewed the unit. The tenants then arranged for their son, who lives in North Vancouver, to view the rental unit. The son inspected the unit in the presence of the landlord's representative. The landlord's representative told him about repairs and upgrades to be made to the unit before it would be re-rented; they included carpet replacement and painting of the entire unit. The day following the inspection the tenants telephoned and said they wished to rent the unit to be occupied by the tenants and their two cats.

The tenants belongings were shipped to the rental unit and placed in the unit by the landlord's employees, but the tenants did not move into the unit until mid-March.

On April 24, 2014 the tenants sent an e-mail message to the landlord's representative. The message stated in part as follows:

> Unfortunately, we now have a huge problem because our home in Edmonton just will not sell. We have already reduced the price (reluctantly, I might add), but yesterday our realtor called to tell us that she still has had no offers on our home and she wants to reduce the price again. We have refused and cancelled the listing because we are not about to give our home away just to get rid of it. Besides, the price that the realtor wants us to come down to will not give us enough from the proceeds to buy at the level we want to here. Thus, (name of tenant) and I have decided that the best thing that we can do, both financially and

> for peace of mind, is to pack up and go home for the time being. We would like to go sooner than later, so we are wondering if you would be willing to accommodate us with this. What can we do about the lease that we have in place? We are aware that there is a form called a "Mutual Agreement to End a Tenancy" that we can both fill out once we have agreed terms. We will appreciate whatever you can do for us, and, of course, we will leave the home just the way we found it. Thank you in advance....

The landlord's representative responded by e-mail message the same day. In her reply she suggested first that the tenants reconsider their decision to move and then went on to say:

> Of course I need a month's notice, given at the first of the month. The earliest I could try to rent it for will be June, but you are responsible for the rent until I get it rented, whenever that may be. I have no idea how long it will take, though I will advertise and try to rent it for you. If you look up your lease, you will see there is also a fee for leaving before the year is up.

The tenants sent a lengthy e-mail message in reply on April 29, 2014. In the message the tenants complained that the rental unit was decrepit, insect infested, damp and noisy. They complained about the presence of mould in the toilets, noise from the road, and from a nearby service station as well as noise from partying in nearby residences. They also complained about insects said to be everywhere in the rental unit and particularly of carpet beetle larvae. The tenant complained that insects including silverfish were putting his expensive book collection at risk and he complained that it was damp in the rental unit. The tenants said in part that:

> We are giving notice that we are leaving by way of this email. We will actually be leaving fairly soon. We would like to complete a "Mutual Agreement to End a Tenancy" form with you if you are willing. We are not accusing you of defrauding us in this matter, but we do feel that we were not given the true picture of what it would be like to live here. As for the insects and other problems, well, they should speak for themselves. We feel that the right thing to do here would be for you to let us go home without charging us any additional rent, including May; for you to forgo the liquidated damages, and for you to return our damage and pet deposits. We, for our part, will leave the townhouse as we found it on March 15. We will probably leave on May 2, and would ask that you grant us those two days gratis. Please have a good think about all this before you reply.

There was a further exchange of e-mails; the tone becoming increasingly acrimonious. The landlord responded and said that the tenants had not informed the landlord that there was a bug problem before they elected to move out. The landlord objected to the tenants' proposal to avoid paying rent for May and stated the landlord's position with respect to the tenants' obligations to clean the rental unit. The tenants replied and said that they would end the tenancy effective May 31, but would move their belongings sooner than that day. The tenants said they would not be available to perform a move-out condition inspection but suggested that their son could do it for them. The tenants moved out of the rental unit on or about May 3rd. The landlord's representative said that she attempted to arrange for the tenants' son to attend for a condition inspection, but was unsuccessful because there was no response to the landlord's e-mail requests.

The tenants sent an e-mail to the landlord dated May 15, 2014. In it they reiterated their complaints about the rental unit. The tenants referred to newly acquired knowledge of a rat infestation in the rental unit. They referred to the female tenant's health problems said to have been communicated to the landlord's representative and stated that the landlord's representative had: "swindled us out of our money under false pretences and that the Residential Tenancy Agreement should be declared null and void because of that." The tenants then proposed that the landlord should return money to the tenants in the amount of $7,268.00, sign a mutual agreement to end tenancy and absorb any cleaning costs.

The tenants filed their application for dispute resolution on June 2, 2014. They claimed payment of the sum of $6,356.50, being three months' rent plus the amount of their security and pet deposits. The application was later amended to correct errors and mis-spellings of the parties named in the originally filed application.

The tenants have alleged that the landlord's representative misrepresented the rental unit and knowingly withheld information that the rental unit was infested with insects and the remains of rats. They said that the landlord's representative was made aware of the female tenant's varied and serious health problems before the tenant agreed to rent the unit and that the landlord's representative concealed information about the rental unit from the tenants. They claimed that this amounted to a deliberate deception and that the appropriate remedy would be a finding that the tenancy agreement is null and void. The tenants claimed that they should be refunded all rent paid under the void tenancy agreement as well as the return of their deposits.

The tenants submitted several photographs; one was a picture of a plastic bag said to contain bugs found in the rental unit. There were two more pictures, out of focus, of

what appeared to be a worm or larva and there was a picture of the inside of a toilet bowl with some dark staining, said to be some form of mould.

The tenants said that as a result of their inquiries they learned that there was a rat infestation in the rental unit. The tenants received information from the North Vancouver District, including a copy letter to the landlord dated February 7, 2014. In the letter a municipal employee said that the District received a report that one of the rental units at the landlord's rental property, which was the rental unit later occupied by the tenants: "has become affected by a rodent (rat) infestation. The report states that live rats have been witnessed inside the unit and that rat feces have been seen throughout the unit with an accompanying strong smell of rat urine. The municipal officer referred the landlord to the applicable Standards of Maintenance bylaw and Rodent Control bylaw and instructed the landlord to:

- Have a pest control company (if not already done so) inspect the whole property both inside and out and address and cease any rodent control issues that exist

The tenant submitted a copy e-mail said to be from an occupant of another unit in the rental property. The e-mail was dated September 19, 2014. It was said to be from "W.E." but it was included in a forwarded message sent by the female tenant to her husband. In the message the occupant said that on April 29, 2014 the tenants came to her door and told her that they would be vacating the unit the next day. According to the message, the occupant made some disparaging remarks about the landlord's representative, in particular about her untrustworthiness and she told the tenants that neighbours who occupied the rental unit prior to the tenants' occupation had reported the presence of wood bugs to the landlord's representative to no avail and she said that there had been a rat infestation in their unit reported to the health board.

The tenants alleged at the hearing that there was a dead rat or rats inside the walls of the rental unit and they claimed that this was the reason why there were bugs in the rental unit.

The landlord's representative responded to the tenants' evidence with her own documentary evidence and testimony. She said that there had been a dead rodent in the wall of the rental unit during the previous tenancy. She said it was attended to immediately and she submitted an invoice for the remedial work. According to the landlord's representative, "We had opened the wall, removed the rodent, vacuumed, sprayed and cleaned the inside of the wall, then closed it up with new wall board. The DOH asked us to hire a rodent company and we gladly did, and did not hear again from the DOH, except to thank us for our cooperation." The landlord submitted a copy

invoice for the investigation and removal of the rodent and the clean up and repair of the wall. The work commenced on February 3, 2014 and was concluded on February 6, 2014. The landlord's representative noted that the rental property was on the edge of a stream and it was not uncommon for there to be raccoons, rodents and even bears in the vicinity of the rental property.

In her written submission she said that there was absolutely no truth to the tenant's suggestion that the department of health was: "on the verge of condemning the townhouse" as claimed by the tenant. She said that the unit was fully repainted and the living room carpet was replaced before the tenants moved in and all other carpets were steam cleaned, the drapes professionally cleaned. A new stove was installed and the townhouse was fully cleaned before the tenants occupied it.

The landlord's representative testified that despite her efforts to arrange a move-out inspection, the tenants' son did not respond and the inspection therefore was not performed with the tenants or their representative. The landlord's representative said that the rental unit was left dirty; it was not vacuumed, the floors were not cleaned and the upstairs bedrooms were loaded with cat hair. The landlord's representative said that she had the place thoroughly cleaned and showed the unit to prospective tenants approximately 13 times before securing a rental commencing July 1, 2014 at a monthly rate $20.00 less than paid by the tenants under their agreement.

In the landlord's application filed September 9, 2014 it has claimed a monetary award for the following:

• June rent:	$1,695.00
• Stop payment/bank charge:	$7.50
• Late fee charge:	$25.00
• Loss of rental income for balance of term:	$160.00
• Hydro account:	$12.54
• Cleaning:	$140.00
• Carpet cleaning:	$105.00
• Rented cleaning equipment:	$75.51
• Liquidated damages:	$800.00
• Payment for renting:	$847.00
Total:	$3,867.55

The landlord submitted a copy of a hydro invoice for charges incurred from June 8 to June 30th in the amount of $12.54. The landlord included an invoice for renting a pressure washer that was used to pressure wash the porch. The landlord also included an invoice, apparently from the landlord's employee said to be for: "advertising, making appointments for viewing with prospective tenants and renting (address of rental unit) for July 1, 2014. As agreed 1/2 months rent = $847.50." In addition to this amount, the landlord claimed $800.00 as liquidated damages pursuant to a clause in the tenancy agreement that provided for payment of the said sum if the tenants ended the tenancy before the end of the fixed term. The clause provided that the amount was: "for all costs associated with re-renting the rental unit."

Analysis

The tenants sent an e-mail message to the landlord on April 24, 2014 seeking to end their fixed term tenancy early. They made no mention of problems with the rental unit, but based their request solely upon their difficulty in securing the sale of their house in Edmonton at a satisfactory price. It was only after the landlord's representative made it plain in her reply, stating that the landlord expected the tenants to adhere to their lease obligations until the unit was re-rented, that the tenants began to put forward an escalating series of complaints about the rental unit that they have claimed should render the tenancy agreement void.

I do not find that there were circumstances so dire that they would support a finding that the tenancy agreement should be considered void from the outset. The tenants had their son inspect the unit at the landlord's insistence before they agreed to rent it, based on his inspection. They moved into the unit on or about March 15th and there is no evidence of any complaint concerning the rental unit, in particular no written notice of any problem or defect from that day until April 24th when the tenants wrote to ask to be let out of their agreement for reasons wholly unconnected to any deficiencies in the rental unit.

Section 45(3) of the *Residential Tenancy Act* provides:

> (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

If there is any merit to the tenants' complaints, only made after the tenancy agreement ended, they might constitute breach of a material term, but the tenants did not, as required by the Act, give the landlord written notice of the alleged failure to comply with a material term of the tenancy agreement and they did not give the landlord a reasonable period within which to correct the situation. The tenants learned after the tenancy ended that the landlord performed work to remove a dead rodent and make consequent repairs. There is insufficient evidence to show that this was a continuing problem or that it presented a hazard to the tenants. I do not find that the landlord was under any obligation to disclose the fact of this repair to the tenants before entering into a tenancy agreement with them. I do not find that the tenant's health problems created any higher obligation upon the landlord; if the tenant's health was discussed, I find it was only mentioned anecdotally, as a reason for leaving the harsh winter climate in Edmonton. If there were insects in the rental unit, then the tenants should have promptly advised the landlord so that the problem could be immediately treated. The tenant's gave no such notice and I do not find that the tenants have presented credible evidence that they had adequate grounds to end the fixed term tenancy early. The tenants' application for a monetary award in the amount of the rental payments is dismissed without leave to reapply, as is their claim for a declaration that the tenancy agreement is null and void.

With respect to the landlord's claim, the tenancy was for a fixed term that would not end until February 28, 2015. I find that the landlord acted appropriately to mitigate its damages related to the breach of the fixed term tenancy by securing a new tenant to rent the unit commencing July 1, 2014. I find that the landlord is entitled to recover loss of rental income for July in the amount of $1,695.00. I do not allow the claim for a bank charge or a late rent payment charge of $25.00 because the landlord knew the tenant's disputed the payment of June rent I find that the landlord should bear the cost of attempting to process a cheque, knowing that the payment was disputed. The June payment was not made late, it was not paid because it was disputed and the landlord's claim amounts to a claim for loss of rental income and not for a late rent payment.

Commencing July 1st the rental unit was re-rented for $20.00 less per month than the tenants had been paying. I find that the landlord is entitled to a rent differential of $20.00 per month for the balance of the term, for a total of $160.00. I allow the claim for Hydro costs for June in the amount of $12.54.

I accept the landlord's evidence that the rental unit was not properly cleaned by the tenants and I allow the claims for cleaning in the amount of $140.00 and for carpet cleaning in the amount of $105.00. I do not allow the claim for the rental of pressure

washing equipment, because I am not satisfied that the need for pressure washing was dues to any fault or neglect on the part of the tenants.

The landlord has claimed liquidated damages of $800.00 as provided by the tenancy agreement, said to be for “for all costs associated with re-renting the rental unit.” The landlord has also claimed actual costs for re-renting as set out in an invoice. The landlord may not claim a liquidated amount said to be compensation for its costs and then claim in addition the actual costs. The claim for a liquidated amount obviates the need for proof of actual damages, but it also precludes claiming in addition the actual damages. This is an unwarranted duplication of claims. The claim for liquidated damages is allowed the claim for actual damages for the cost of re-renting is dismissed.

Conclusion

The tenants’ claims have been dismissed without leave to reapply. The sums awarded to the landlord amount to $2,912.54. The landlord is entitled to recover the $50.00 filing fee for its application, for a total award of $2,962.54. I order that the landlord retain the security and pet deposits of $1,271.50 in partial satisfaction of this award and I grant the landlord an order under section 67 for the balance of $1,691.04. This order may be 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: October 29 2014

Residential Tenancy Branch