



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenants' Application: CNC, CNR, OLC, MNDC, FF

Landlord's Application: OPR, OPC, OPB, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with cross applications. The tenants filed to dispute a 1 Month Notice to End Tenancy for Cause; orders for the landlord to comply with the Act, regulations or tenancy agreement; and, monetary compensation for damage or loss under the Act, regulations or tenancy agreement. The landlord applied for an Order of Possession for unpaid rent, cause and breach of an agreement; monetary compensation for unpaid rent; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit.

Preliminary and Procedural Matters

The landlord acknowledged that he served one copy of his Application for Dispute Resolution and evidence package to the male tenant only. Although the landlord was required to serve a hearing package upon each tenant, both tenants appeared at the hearing and the female tenant confirmed that her husband had shared the landlord's hearing package with her, she had reviewed the landlord's hearing package and was prepared to respond to it. In these circumstances, I deemed both tenants to be sufficiently served with the landlord's hearing documents pursuant to the authority afforded me under section 71 of the Act.

I noted that the landlord was seeking an Order of Possession for unpaid rent yet the tenants had not indicated on their Application that they wished to dispute a Notice to End Tenancy for Unpaid rent. The tenants acknowledged that they had received the 10 Day Notice that the landlord sought to enforce. The tenants explained that after filing their Application they enquired with staff at the Service BC office as to the failure to indicate they were disputing a 10 Day Notice on their Application. The tenant claimed that they were advised by the Service BC staff that the 10 Day Notice would be dealt

with as part of this hearing. While I could not verify the circumstances described by the tenants, I found their explanation to be possible and out of an abundance of fairness to the tenants I amended their Application to consider the 10 Day Notice dated March 2, 2015 to be under dispute. Of further consideration was that the landlord had submitted evidence with respect to the March 2, 2015 10 Day Notice and I found he was not prejudiced by the amending the tenants' Application. Nor, did he object to the amendment.

Finally, both parties had sought to amend their Applications to increase their monetary claims by way of written submissions included in their evidence submissions as opposed to amending their Application in a manner that complies with the Rules of Procedure. Neither party objected to amending the Applications and both parties had prepared to respond to the additional claims. Therefore, I permitted the amended monetary claims to correspond to the parties' respective written submissions.

Issue(s) to be Decided

1. Should the 10 Day Notice to End Tenancy for Unpaid Rent be upheld or cancelled?
2. Should the 1 Month Notice to End Tenancy for Cause be upheld or cancelled?
3. Is the landlord entitled to an Order of Possession?
4. Are the tenants entitled to monetary compensation for the amounts claimed, as amended?
5. Is the landlord entitled to monetary compensation for the amounts claimed, as amended?
6. Is the landlord authorized to retain all or part of the tenants' security deposit?
7. Is it necessary to issue orders for compliance to the landlord?

Background and Evidence

The 24 month fixed tenancy commenced March 1, 2014 and the tenants paid a security deposit of \$650.00. The tenants are required to pay rent of \$1,300.00 on the 1st day of every month.

The rental unit is an upper suite in a house and during the tenancy the basement suite has been either tenanted or vacant. The BC Hydro and Fortis BC accounts are in the tenant's name. The tenants were of the position the landlord is responsible for reimbursing them 40% of the utility bills to reflect the utilities used for the basement suite. The landlord was of the position that utilities are to be split based upon the number of people living in the respective units. Nevertheless, both parties provided

consistent testimony that the landlord has reimbursed the tenants for utilities attributable to the basement suite.

In October 2014 water infiltrated the rear of the house while the house was in the process of being re-roofed due to a significant rain and wind storm. A significant restoration and renovation project followed. Although the tenancy agreement required to carry tenant's insurance, they failed to obtain such insurance. The lack of tenant's insurance contributed to an arrangement whereby the tenants were permitted use of a limited amount of space in the rental unit and provided storage containers in the driveway by the landlord's insurer to store many of their personal possessions. I heard that the tenants have regained access to the entire rental unit in March 2015.

After the water infiltration event, the parties discussed a rent reduction for the tenants during the period of time the restoration project was underway. The tenants requested a rent reduction equivalent to 100% of the rent for October 2014 and 50% of the monthly rent for the months until the restoration was completed. The tenants were of the position that the landlord had agreed to the tenants' request for compensation. The landlord was of the position that he agreed to put the request forth to his insurance company and that he would pass along compensation he receives for loss of rent to the tenants. The landlord testified that the insurance claim is not yet finalized and he has yet to be compensated for loss of rent from his insurance company. Both parties provided consistent testimony that the landlord required the tenants to pay the full amount of rent even though the restoration project was underway and the tenants had very limited use of the rental unit.

End of Tenancy

The tenants paid the full monthly rent for November 2014, December 2014, January 2015 and February 2015 albeit late. The landlord served the tenants with 10 Day Notices to End Tenancy for Unpaid Rent for each of these months. In February 2015 the tenancy relationship deteriorated further when the landlord requested the tenants use the bathroom in the basement suite while new flooring was installed in the two bathrooms in the rental unit at the same time. On February 24, 2015, the landlord served the tenants with a 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) indicating the reasons for ending the tenancy were: repeated late payment of rent and breach of a material term of the tenancy agreement. The tenants filed to dispute the 1 Month Notice within the time limit for doing so.

On March 1, 2015 the tenants texted utility bills to the landlord along with an explanation that they were withholding \$300.00 from the rent for March 2015 due to utilities they

determined they were entitled to recover from the landlord. On that same day, the tenants e-transferred \$1,000.00 to the landlord for March's rent. The landlord responded via text message to advise the tenants that it was illegal to withhold rent and that he considered the matter of utilities to be separate from their obligation to pay rent.

On March 2, 2015 the landlord served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) that indicated rent of \$300.00 was outstanding and a stated effective date of March 12, 2015. The tenants have not paid the outstanding rent of \$300.00 to date. Both parties provided consistent testimony that at no time did the landlord authorize the tenants to withhold \$300.00 from rent. Nor, had the tenants obtained prior authorization from an Arbitrator to withhold any amount from rent.

On March 4, 2015 the tenants initiated their Application for Dispute Resolution to dispute the 1 Month Notice and the 10 Day Notice, as explained in the *Procedural and Preliminary Matters* section of this decision.

On March 9, 2015 the landlord initiated his Application seeking, among other things, an Order of Possession. The tenants e-transferred \$1,300.00 to the landlord for the month of April 2015. The landlord requested an Order of Possession effective April 30, 2015.

Tenants' Monetary Claim

The tenants seek compensation for loss of use of the rental unit and loss of quiet enjoyment related to repeated entry by tradesmen during the restoration. The tenants seek \$3,900.00 which is calculated as the sum of 100% of the rent for October 2014 plus 50% of the monthly rent for the months of November 2014 through February 2015. The tenants described their living area as being approximately 10' x 10' during the restoration. The landlord was agreeable that the tenants suffered a loss of use as put forth by the tenants and did not dispute their request for compensation in the amount claimed.

The tenants seek compensation for the extra utilities used to power equipment during the restoration project. The tenants put forth that their share (60%) of the utilities for the period of October 2014 through to February 2015 totalled \$1,112.06 and they seek 10% of this amount, or \$111.21 as compensation. The landlord was agreeable to compensating the tenants the amount requested for the utilities consumed by equipment during the restoration project.

Landlord's Monetary Claim

The landlord seeks to recover the unpaid rent of \$300.00 for the month of March 2015 due to the tenants' failure to pay the amount required under the tenancy agreement.

The landlord seeks to recover late fees of \$250.00 based upon a term in the tenancy agreement that provides for late fees of \$50.00 per occurrence.

The landlord had applied for loss of rent for April 2015 but withdrew this claim since the tenants paid this amount. The landlord has applied for loss of rent for May 2015; however, as the landlord has not suffered a loss of rent for May 2015 at the time of this proceeding I found the claim pre-mature and dismissed this portion of the claim with leave to reapply.

The landlord requested compensation in the amount of \$1,000.00 for a "re-rental fee". The tenancy agreement provides the following clause:

"In the event that the Tenant vacated the Premises (whether pursuant to a termination notice or abandonment) before the end of the Term, the Tenant shall be obligated to pay Rent until the end of the Term or until a suitable new tenant is found to occupy the Premises. The Tenant will also pay an additional re-rental fee of \$1000.00 plus all the cost associated with finding a new tenant for the Premises, any bailiff and storage costs, and any and all costs incurred pursuing the remedies available to the Landlord under the law. The tenant agrees that any money owing after the tenancy has ended will be charged at a 12% per annum interest rate beginning from when the first portion of money was owing until the last payment in full has been made."

[reproduced as written]

The landlord also seeks compensation of \$275.00 because two trips had to be made to remediate and renovate the flooring in two bathrooms in the rental unit instead of having both bathrooms remediated/renovated at the same time. The landlord points to the tenant's refusal to use the bathroom in the vacant basement suite as the reason for the additional trip by the floor installer.

The tenant testified that only the Master bedroom ensuite was damaged by water in October 2014 and that the landlord took it upon himself to have the main bathroom renovated at the same time. The tenant explained that she cannot walk down stairs and that is the reason she refused to use the bathroom in the basement suite. The tenants

do not believe they are responsible for extra costs related to the landlord's decision to renovate the main bathroom at the same time as the ensuite remediation.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons with respect to each Application, as amended.

End of Tenancy

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has the legal right to withhold rent. The Act provides for very specific and limited circumstances when a tenant may legally withhold rent, such as: overpayment of rent, overpayment of a security deposit or pet damage deposit or, emergency repairs made by a tenant. Where one of these legal rights do not apply and the tenant is of the position he or she is entitled to compensation from the landlord the tenant's remedy is to seek authorization to withhold rent from the landlord or file an Application for Dispute Resolution to obtain authorization from an Arbitrator before withholding rent.

Where a tenant does not pay all of the rent that is due the landlord is at liberty to issue a 10 Day Notice to End Tenancy for Unpaid Rent and the tenant has five days to pay the outstanding rent to nullify the Notice or the tenant has five days to dispute the Notice by filing an Application for Dispute Resolution. In this case, the tenants did not pay the outstanding rent but disputed the Notice, as per their amended Application. Where a tenant files to dispute a 10 Day Notice the tenant must be prepared to prove they either paid the rent or had a legal right to withhold rent. In the case before me, the tenants took it upon themselves to determine an amount for which they felt entitled to receive from the landlord and withheld it without authorization from the landlord or an Arbitrator. I find that their actions do not meet one of the circumstances under the Act that would permit the tenants withhold rent legally. Therefore, I find the 10 Day Notice issued by the landlord on March 2, 2015 to be a valid Notice and there is no basis under the Act to cancel it.

In light of the above, I uphold the 10 Day Notice issued March 2, 2015 and I find the tenancy legally ended on the effective date of March 12, 2015.

I have considered that the tenants paid for occupancy for the month of April 2015 and I am satisfied that this payment did not reinstate the tenancy as the landlord had put the

tenants on notice that he was seeking to regain possession of the rental unit by way of serving them with his Application for Dispute Resolution. Therefore, I grant the landlord's request for an Order of Possession effective April 30, 2015.

Having found the tenancy came to an end on March 12, 2015 due to unpaid rent, I find it unnecessary to consider the validity of the 1 Month Notice.

Tenants' monetary claim

The tenants are claiming \$2,900.00 for loss of use of the rental unit and loss of quiet enjoyment after water infiltrated the rental unit in October 2014 and the restoration project that took place up to and including the month of February 2015. Residential Tenancy Policy Guideline 16: *Claims in Damages* provides the following policy statement under the heading "Breach of Contract":

Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/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.

[my emphasis added]

It was undisputed that the tenants suffered a loss of use of the rental unit for several months after the water infiltration and I accept that this was not due to negligence on part of the landlord. Regardless, the tenants are entitled to be compensated for the portion of the premises for which they were deprived use and enjoyment. Given the tenants' claim that they were deprived use and enjoyment equivalent to \$2,900.00 was largely undisputed by the landlord I award this amount to the tenants.

As the landlord agreed to the tenant's request for compensation for additional utilities consumed to run equipment during the restoration project of \$111.20 I award this amount to the tenants.

In summary, the tenants have been awarded compensation totalling \$3,011.20.

Landlord's monetary claim

It was undisputed the tenant's withheld \$300.00 from the rent that was payable to the landlord under the tenancy agreement and I award that amount to the landlord.

With respect to late fees, I find the term in the tenancy agreement that provides for late fees of \$50.00 is non-compliant with section 7 of the Residential Tenancy Regulations which limits late fees to \$25.00. Section 6 of the Act provides that where a term in a tenancy agreement violates or conflicts with the Act or Regulations it is not enforceable. Therefore, I find the term in the tenancy agreement that provides for late fees is not enforceable and I make no award for late fees to the landlord.

The landlord seeks compensation of \$1,000.00 pursuant to the term in the tenancy agreement that provides for a "re-rental fee" in the event the tenants "vacated the Premises...before the end of the term". In reading the term as it is written, I find the vacate date is the event that triggers the application of this term. Although it is reasonably likely that the tenants will vacate the rental unit before the fixed term expires considering the landlord has been provided an Order of Possession awards for compensation are intended to be restorative and not made in anticipation of an event. Therefore, I find the claim for the "re-rental fee" to be premature and this portion of the landlord's claim is dismissed with leave.

Although I have dismissed the landlord's claim for the re-rental fee with leave, it is important to note that I have made no determination as to whether the term is enforceable or qualifies as a valid liquidated damages clause. For further information, a landlord may only charge non-refundable "fees" that are provided under section 7 of the Residential Tenancy Regulations. Policy statements with respect to liquidated damages clauses are provided in Residential Tenancy Policy Guideline 4: *Liquidated Damages*. These references may be found on the Residential Tenancy Branch website.

Finally, I deny the landlord's claim to recover additional costs related to installing bathroom flooring in the two bathrooms at different times. While a landlord has the right to renovate his property, the landlord has a duty to provide tenants with living accommodation suitable for occupation. I find that a functional bathroom is necessary for occupation by a tenant. I appreciate that the landlord offered the tenants access to the basement suite so as to provide the tenants access to a functional bathroom while the upstairs bathrooms were being repaired or renovated; however, I find the tenant provided a reasonable explanation as to why she was not able to use the basement suite bathroom. Ultimately, I find the landlord's decision to renovate the main bathroom

at the same time as the ensuite was his decision and he shall bear the costs related to his decision.

In summary, the landlord has been awarded compensation totalling of \$300.00 by way of this decision.

Monetary Order

As both parties have been awarded compensation by way of this decision, I offset the monetary awards and provide the tenants with a Monetary Order in the net amount of \$2,711.20 [\$3,011.20 - \$300.00]. As the landlord's award has been offset by the tenants' award, I do not authorize the landlord to retain the security deposit and it remains in trust for the tenants to be administered in accordance with the Act.

Both parties shall bear the cost of filing their own Applications as I found both Applications to have merit.

Orders for compliance

As the tenants are now in possession of the entire rental unit, having awarded the tenants compensation for their losses, and having denied the landlord compensation where the claim conflicts with the Act or Regulations, I am of the position that the tenants' issues are resolved and it is unnecessary for me to issue any other orders to the landlord for compliance.

Conclusion

The tenancy has ended for unpaid rent and the landlord has been provided an Order of Possession effective April 30, 2015 to serve upon the tenants and enforce if necessary.

The landlord has been awarded compensation for unpaid rent in the amount of \$300.00. The landlord's claim for loss of rent for May 2015 and a re-rental fee was found to be premature and dismissed with leave. The remainder of the landlord's monetary claims against the tenants were dismissed without leave.

The tenants were awarded compensation totalling \$3,011.20 for loss of use and enjoyment of the rental unit and utilities related to equipment running during the restoration project.

The monetary awards have been offset and the tenants have been provided a Monetary Order in the net amount of \$2,711.20 to serve upon the landlord and enforce if necessary.

The security deposit remains in trust for the tenants to be administered in accordance with the Act.

No orders for compliance have been issued with this decision.

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: April 10, 2015

Residential Tenancy Branch

