Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD MNDC FF

Preliminary Issues

At the outset of the proceeding the Tenant submitted that the co-Tenant's surname was listed incorrectly on the Landlords' application for Dispute Resolution. The Tenant provided the correct surname and requested that the style of cause be amended to reflect the correct name. The Landlord was given opportunity to comment on the name change request and stated that she had no comments, issues, or concerns with the request.

From the tenancy agreement submitted into evidence I confirmed that the co-Tenant's surname was written on the tenancy agreement as the same name which the Tenant stated was her correct surname. Accordingly, I amended the style of cause to show the correct surname for the co-Tenant, pursuant to section 64(3)(c) of the Act.

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Landlords on July 9, 2015. The Landlords filed seeking a Monetary Order for: money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement; to keep all or part of the security deposit; and to recover the cost of the filing fee from the Tenants for this application.

The hearing was conducted via teleconference and was attended by the Landlord L.G., the Landlords' Agent, and the Tenant J.S. The Landlords' Agent submitted that she would be presenting arguments on behalf of both Landlords. L.G. affirmed that she would be presenting the evidence on behalf of herself and the co-Landlord S.N. Therefore, for the remainder of this decision, terms or references to the Landlords importing the singular shall include the plural and vice versa, except where the context indicates otherwise

The Tenant affirmed that he was a licensed lawyer currently practicing in B.C. and that he would be representing himself and would be acting as Agent for the co-Tenant R.L., in her absence. Therefore, for the remainder of this decision, terms or references to the Tenants importing the singular shall include the plural and vice versa, except where the context indicates otherwise

I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

On November 27 2015 the Landlords submitted 11 pages of evidence to the Residential Tenancy Branch. The Landlord affirmed that they served the Tenants with copies of the same documents that they had served the Residential Tenancy Branch (RTB). The Tenant acknowledged receipt of these documents and raised no issues relating to service or receipt of the documents. As such, I accepted the Landlords' documents as evidence for these proceedings.

On December 1, 2015 the Tenants submitted 23 pages of evidence via fax and on December 7, 2015 the Tenants submitted a hard copy of the same 23 pages of evidence to the RTB. The Tenant affirmed that they served the Landlords with copies of the same documents that they had served the RTB, excluding the two pages confirming service/receipt by the Landlords. The Landlord acknowledged receipt of these documents and no issues were raised relating to service of receipt of the documents. As such, I accepted the Tenants' documents as evidence for these proceedings.

Both parties were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Have the Landlords proven they suffered a loss?
2. If so, have the Landlords proven entitlement to liquidated damages?
3. Have the Landlords proven entitlement to retain a portion of the security deposit?

Background and Evidence

The Tenants began occupying the rental unit in mid- March, 2013. The parties entered into three consecutive fixed term tenancy agreements. The most recent tenancy agreement began on March 1, 2013 and was scheduled to end on February 29, 2016. Rent of $2,200.00 was payable on or before the first of each month and on February 15, 2013 the Tenants paid $1,100.00 as the security deposit. A move–in condition inspection report form was completed and signed by both parties on March 18, 2013.

The most recent tenancy agreement was signed by the Landlords on January 29, 2015 and signed by the Tenants on February 7 and February 9, 2015. That agreement provided for liquidated damages as follows:

> *5. LIQUIDATED DAMAGES. If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of $200 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.*

On April 20, 2015 the Tenants sent an email to the Landlords advising the Landlords they had purchased a home which they would be taking possession of in mid - June 2015. The email continued with the Tenants informing the Landlords moving forward as follows:

> *As a result, we need to sort out what to do about our present lease. Our preference would be to enter into a Mutual Agreement to End Tenancy for the end of June. (This is a standard form provided by the RTB, which I would happily complete for our respective signatures.)*
>
> *We are planning on moving the weekend of the 27th, which would allow you and [Landlord's name] time to make any desired repairs or renovations before new tenants moved in.*
>
> *I would be happy to swing by one evening this week to discuss this further if you would like.*
>
> [Reproduced as written excluding the Landlord's name]

The Tenants returned vacant possession of the property and served the Landlords with their forwarding address on June 28, 2015. A condition walk through was conducted on June 28, 2015; however, no move-out condition inspection report form was completed.

The parties met on May 3, 2015 during which the Tenants requested the Landlords sign a mutual agreement to end the tenancy and when that was refused the Tenants requested the Landlords' permission to sublet or assign their tenancy agreement. The Landlords refused the Tenants requests for the following reasons: (1) the Landlords wanted control on who would be residing in the rental unit; and (2) the Landlords wanted the new tenants to pay an increased amount of rent.

The Landlords submitted that they perceived the Tenants to be in breach of their contract based on the Tenants' intention to vacate the rental unit, as stated in the Tenant's April 20, 2015 email. They argued that despite the Tenants' notice not being in one of the three prescribed forms, they still accepted the email as the Tenants' notice to end their tenancy.

On April 28, 2015 the Landlords placed an advertisement on the internet to re-rent the unit. They argued that the Tenants had not requested permission to sublet or assign their lease in their April 20, 2015 email. When the parties met on May 3, 2015 the Landlords informed the Tenants they were too late to make the request to assign or sublet because the Landlords had already placed the advertisement.

The Landlords submitted that the Tenants' rent was below market value; therefore, they were seeking a replacement tenant who would pay the market value. The Landlord asserted that if the Tenants had had a replacement tenant lined up prior to their May 3, 2015 meeting they would have considered that tenant.

The Landlords argued that they took action by advertising the unit quickly so that the payment of rent would be uninterrupted. They interpreted the Tenants' email as notice to end the tenancy and retained $200.00 of the security deposit for liquidated damages plus $50.00 for the filing fee. The Landlords returned the $850.00 balance of the security deposit by way of their July 10, 2015 cheque that was sent to the Tenants via registered mail.

The Tenant submitted that their intention in sending their April 20, 2015 email was to reach an agreement. The Landlords had been out of town at the time they sent their email so they were unable to meet in person until May 3, 2015.

The Tenant asserted that the Landlords did not respond to their April 20, 2015 email. The Landlords did not call or email to ask about payment of rent moving forward. Rather, the Landlords stayed quiet until the meeting on May 3, 2015 during which the Landlords made no mention of the payment of rent moving forward. Rather, the Landlords stated they were unwilling to enter into a written mutual agreement.

The Tenant argued that the Landlords also refused their requests to sublet or assign the lease, arguing that it was “too late” because they had already placed an advertisement on the internet. The Tenant argued that the Landlords also explained that they wanted to re-rent the unit for a higher rent. The Tenant submitted that the Landlords did not re-rent the unit for almost a month after they sent their email, a month prior to when the Tenants were planning on moving out, so it was not too late for them to find someone to assign the lease to or to sublet.

The Tenant asserted that the Landlords’ responses turned on their intent on re-renting the unit for a higher rent and choosing a “perfect tenant” that could live with the Landlords as neighbors.

The Tenant argued that they never said or implied that they would not be paying rent or that they intended on breaching their written contract. They were careful in choosing their words so as not to imply a breach as they had full intentions of meeting their obligations of the lease.

The Tenant submitted that moving out of a rental unit while continuing to pay rent does not breach or end their obligation to the tenancy agreement. Rather, their tenancy ended due to frustration of their contract which resulted from the Landlords entering into a tenancy agreement with replacement tenants.

The Landlords submitted that they interpreted the language of the liquidated damages clause to mean they were entitled to be paid the amount listed on the tenancy agreement if the Tenants did not stay for the full length of the tenancy.

The Landlord testified that they signed a tenancy agreement on May 23, 2015 with the replacement tenants. That tenancy agreement began on July 1, 2015 for the monthly rent of $2,450.00 which included the cost of hydro. The Landlord submitted that the cost of hydro included in the rent was estimated to be $125.00 per month; therefore they were receiving rent of $2,325.00 which was $125.00 higher than what the Tenants were paying.

In closing, the Tenant submitted that the Landlords’ perception of a breach does not make it a breach.

Analysis

After careful consideration of the foregoing, the documentary evidence, and on a balance of probabilities I find as follows:

Section 7 of the Act provides as follows in respect to claims for monetary losses and for damages made herein:

> 7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Section 45 (2) of the Act stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

Section 52 of the *Act* provides that in order to be effective, a notice to end a tenancy must be in writing and must

> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,
> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and
> (e) when given by a landlord, be in the approved form.

The Landlords submitted adverse evidence that they knew the Tenants' April 20, 2015 email was not in the prescribed form for a notice to end tenancy, as required by section 52 of the *Act*. Notwithstanding the foregoing, I accept the Landlords' submission that they perceived the April 20, 2015 email to be a notice to end tenancy and a breach of the tenancy agreement. That being said, I also accept the Tenant's submission that a perception of a breach does not make it a breach.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. Upon review of the liquidated damages clause at section 5 of the tenancy agreement, I find that the clause turns on evidence of one of the following two breaches:

> (1) *If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or*
>
> *(2) if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term,*

Residential Tenancy Policy Guideline 8 defines a material term as a term written into the tenancy agreement that both parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. I concur with this definition.

There was no evidence before me that the Tenants breached a material term of the tenancy agreement. Therefore, there was insufficient evidence to prove the Tenants breached a material term of their tenancy agreement that caused the Landlords to end the tenancy before the end of any fixed term.

Section 44(1)(d) of the *Act* stipulates that the tenancy ends on the date the tenant vacates or abandons the rental unit. It does not state the tenancy agreement or any legal obligation to the tenancy agreement ends on the date the tenant vacates the rental unit.

Residential Tenancy Policy Guideline 16 provides that 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.

I agree with the aforementioned policy and note that there is no provision in the *Act* or in the tenancy agreement that stipulates a tenancy agreement will end or be breached if a tenant continues to pay rent during a period they are not occupying the rental unit. Such a provision would be seen to be unconscionable as there are many scenarios where a tenant may be paying rent during a time they are not occupying the rental unit, such as when a tenant is travelling or on vacation.

In regards to the second manner in which the tenancy agreement could be considered breached, for the purpose of enforcing the liquidated damages clause, stipulates that a tenant must inform the landlord of their intention to breach their agreement and their intention to end the tenancy by vacating and vacate before the end of the fixed term.

Upon review of the Tenants' April 20, 2015 email I accept the Landlords' interpretation or perception that the Tenants informed them that they would be vacating the rental unit before the end of the fixed term of February 29, 2015 when the Tenants wrote:

> *We are planning on moving the weekend of the 27th, which would allow you and [Landlord's name] time to make any desired repairs or renovations before new tenants moved in.*

I further accept that the Tenants vacated the property on June 28, 2015, prior to the end of the fixed term. Therefore, I find there was sufficient evidence to prove the Tenants informed the Landlords of their intention to end the tenancy by vacating and the Tenants vacated the rental unit before the end of the fixed term.

However, I find there was insufficient evidence to prove the Tenants informed the Landlords of an intention to breach their agreement. I made this finding in part as there was undisputed evidence that the Tenants initiated communication with the Landlords to inform them of their intent to move out; however, there was no evidence before me that would indicate the Tenants intended on breaching their obligations to the tenancy agreement. Rather, the evidence was the Tenants informed the Landlords about their desire to work towards a mutual agreement on how

the tenancy would end. I interpret the aforementioned to be the Tenants informing the Landlords they wanted to work with the Landlords in order to uphold their obligations to the tenancy agreement.

I agree with Residential Tenancy Policy Guideline 34 which provides that a contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

Based on the above, I do not accept the Tenants' submission that their tenancy agreement was frustrated. Rather, I conclude this tenancy ended by mutual agreement. I make this conclusion in part as there was undisputed evidence that the Landlords failed to inquire about the Tenants' intentions regarding their obligations to the tenancy agreement, such as asking the Tenants what their intentions were regarding payment of rent after they vacated.

In addition, there was no evidence before me that would suggest the Landlords informed the Tenants of their intention to enforce the liquidated damages clause. It was the Landlords' personal choice to refuse all alternatives that would have allowed the Tenants to meet their obligations of the tenancy agreement in favor of the Landlords entering into a tenancy agreement with replacement tenants for a higher rent.

Based on the Landlords' actions of advertising the unit for rent, showing the unit, and entering into a new tenancy agreement May 23, 2015, I conclude the Landlords agreed that the Tenants would move out to support the Landlords' choice to rent the unit for a higher amount.

After consideration of the foregoing, and in absence of any evidence to prove the actual costs incurred by the Landlords to re-rent the unit, I find the Landlords submitted insufficient evidence to prove the Tenants breached their obligation to the tenancy agreement which caused the Landlords to suffer a loss. Rather, the evidence supports the contrary, that the Landlords will incur a financial gain from the increased rent. Accordingly, I dismiss the application, without leave to reapply.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Landlords have not succeeded with their application; therefore, I decline to award recovery of the filing fee. I order the Landlords to return the $250.00 balance of the security deposit plus $0.00 interest to the Tenants forthwith, pursuant to section 67 of the *Act.*

Conclusion

The Landlords were not successful with their claim and their application was dismissed without leave to reapply. The Landlords were ordered to return the balance of the security deposit of $250.00 to the Tenants forthwith.

The Tenants have been issued a Monetary Order for **$250.00**. In the event the Landlords do not return the balance of the security deposit forthwith, as ordered above, the Tenants may serve the Monetary Order upon the Landlords and enforce the order in Small Claims 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: December 18, 2015

Residential Tenancy Branch