Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNR, OPN, MNSD, FF

Introduction

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

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained 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. I have considered all of the evidence and testimony provided.

Preliminary Matters

The parties confirmed that the tenancy has ended; the landlord does not require an order of possession. The parties also confirmed that deposits were not paid; therefore the landlord does not have a claim against deposits.

The tenant confirmed receipt of the landlords'' written submission. The tenant did not make a written submission.

Issue(s) to be Decided

Is the landlord entitled to compensation for liquidated damages?

Is the landlord entitled to compensation for loss of January 2016 rent, rent revenue and gas costs?

Background and Evidence

On December 9, 2015 the tenant signed a fixed-term tenancy agreement that included a two page addendum. A copy of the agreement was supplied as evidence; the addendum was not. The parties had agreed to a fixed-term commencing January 1, 2016; ending June 30, 2017 at which point the tenant would be required to vacate. Rent was $1,525.00 due on the first day of each month.

The landlord read from the addendum liquidated damages clause:

"Agree to pay an administration charge of one half a month to break the lease. Does not release the tenant from his or her responsibilities under the Residential Tenancy Act and if the landlord is not able to immediately rent the property upon the tenant vacating the tenant may be held liable for all rent due for the remainder of the lease or until such time as the property can be re-rented."

(Reproduced as read by landlord)

On December 31, 2016 a condition inspection report was completed and signed by the tenant and landlord. The tenant was given the keys to the rental unit.

The parties agreed that the tenant immediately communicated with the landlord, asking that storage units that had been in the unit when it was viewed needed to be removed. One of the units contained the landlords' personal property. The tenant sent an email on January 2, 2016 to say she had her own property that would be placed in the space taken up by the storage units and that furniture was not listed in the lease. The tenant asked if the landlord would sell the units; the tenant would then remove them from the rental. On January 3, 2016 the tenant emailed the landlord to say that if the landlord refused to sell the furniture to her the tenant would not move into the unit. The tenant said the rental unit was approximately 1,200 square feet.

The tenant said when she had viewed the rental unit she had been left with the impression that the storage units belonged to the tenants. The furniture was not included on the tenancy agreement and they should have been removed as they took up too much space.

The tenant was not satisfied with the landlords' response as the shelving units were not going to be removed from the rental and the landlord did not wish to sell the units. The landlord had told the tenant that removal would result in the need for drywall repairs and to disassemble the units would result in costs to the landlord.

On January 4, 2016 the landlord responded to the tenant that the lease was valid and fully executed. The landlord said the storage units were fixtures in the rental unit; they were attached to the walls, in the same manner as the kitchen cabinets. The landlord said they would attempt to re-list the rental unit and if rented before the end of the month rent might be pro-rated for the tenant. The landlord referred the tenant to the Residential Tenancy Branch (RTB.)

The tenant said she called the RTB and she was told because the fixtures are not indicated on the tenancy agreement she was within her right to terminate the contract.

The tenant said she left the keys to the unit on January 4, 2016 and vacated. On January 7, 2016 the landlord emailed the tenant asking she return the keys to the office. The tenant responded on January 7, 2016 to say the keys were in the unit on the counter in the rental unit.

The landlord was able to rent the unit effective February 1, 2016. The landlord has claimed the loss of January 2016 rent in the sum of $1,525.00.

As the tenant ended the tenancy before the end of the fixed term the landlord has claimed liquidated damages in the sum of $762.50.

The landlord supplied a copy of a gas bill in the sum of $427.72 paid by the landlord for usage based on a bill issued on February 4, 2016. The landlord said the tenant left the heat turned on high and is responsible for this cost.

The tenant said that when she entered the unit on January 1, 2016 the heat had been turned on high as the carpets had just been cleaned. The tenant opened the windows and turned the heat off. The tenant said she did not leave the heat on. The tenant said she had called the gas company to establish expected heating costs for a month and was told normal usage would cost approximately $90.00

Analysis

I have weighed the tenants' submission against the landlords' claim that the tenant ended the tenancy in breach of the Act. From the evidence before I find that the parties had entered into a fixed-term tenancy agreement. There was no dispute that a contract was signed and that the tenant was given the keys to the rental unit.

I find pursuant to section 44(f) of the Act that the tenancy ended effective January 7, 2016 when the tenant informed the landlord that she had left the keys to the rental unit on the counter.

Section 45(2) of the Act provides:

Tenant's notice

45 *(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(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****.*
>
> *(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].*

A fixed-term tenancy is meant to give both parties assurance. A tenant understands that the tenancy cannot be ended unless there is cause or unpaid rent. A landlord understands that they have a tenant paying rent for a set period of time. If a tenant wishes to end a fixed-term tenancy the onus is on the tenant to prove that the landlord breached a material term of the agreement. A material term is one 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 have considered the requirement of section 45 of the Act against the facts before me and find that the tenant ended the tenancy in breach of section 45 of the Act. The presence of shelving units that were attached to the wall did not form a material breach of the tenancy. The tenant had other remedies; such as filing an application to request removal of the units. Whether the tenant would succeed or not, is unknown, but the issue of shelving installed in what the landlord described as a 1,600 to 1,800 square foot three bedroom townhouse does not meet the standard of a material breach.

Therefore, I find pursuant to section 65(d) and 67 of the Act that the landlord is entitled to compensation for the loss of rent revenue from January 1 to 7, 2016 and rent revenue from January 8 to 31, 2016 totaling $1,525.00.

RTB policy suggests that a liquidated damages clause sets out advance agreement between the parties of damages payable in the event of a breach of the tenancy agreement. The sum must be a genuine pre-estimate of the loss at the time the contract is entered into; otherwise the clause may be held to constitute a penalty and be found unenforceable.

The liquidated damages clause includes what is referred to as an “administration charge” imposed if the tenant breaks the lease. I have considered the imposition of an administration charge against Residential Tenancy Regulation, section 7, which sets out the allowable non-refundable fees that may be levied.

I find on the balance or probabilities that an administration charge is the equivalent to the imposition of a fee or penalty, if the tenant chooses to break the lease. Essentially the clause recognizes a tenant may break the lease and end the tenancy, with a subsequent charge applied. The clause then sets out the landlords’ right to pursue loss of rent revenue.

If a tenant is able to end the tenancy by paying a charge then the tenancy would be at an end and no further compensation would be due the landlord. However, I have determined that the clause forms a penalty for breaking the lease and that it is not a fee contemplated by the Regulation. Therefore I find that the liquidated damages clause is unenforceable. As a result the landlord is able to pursue and succeed in a claim for loss of rent revenue beyond the end of the tenancy.

I have considered the claim for the cost of gas and find that the tenant is responsible for a nominal amount in the sum of $20.00. On January 7, 2016 the landlord knew the keys were in the unit and was able to enter the unit to ensure that it was in order. It is effective January 7, 2016 that the tenants’ responsibility for the rental unit ended and the tenant cannot be held responsible for costs incurred after that date. There was no explanation provided as to why the landlord did not enter the unit to ensure the heat was set at a reasonable level once the tenancy

had ended, which would have mitigated the loss claimed. Therefore, I find that the balance of claim for gas is dismissed.

As the landlord's application has merit I find, pursuant to section 72 of the Act that the landlord is entitled to recover the $100.00 filing fee from the tenant for the cost of this Application for Dispute Resolution.

Based on these determinations I grant the landlord a monetary Order in the sum of for the balance of $1,645.00**.** 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.

Conclusion

The landlord is entitled to compensation in the sum of $1,525.00 for the loss of rent revenue and unpaid rent.

The landlord is entitled to compensation in the sum of $20.00 for gas costs.

The balance of the claim is dismissed.

This decision is final and binding and 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: September 30, 2016

Residential Tenancy Branch