Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD,

Introduction

The Application for Dispute Resolution filed by the Tenant seeks the following:

a. A monetary order in the sum of $8087.63.
b. An order to recover the cost of the filing fee.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. The hearing was originally scheduled for September 19, 2016. For the reasons set out in the Interim Decision of that date I ordered that the hearing be adjourned to the next available date. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

There have been problems with the exchange of evidence including the following:

- The tenant testified that she sent her Application for Dispute Resolution and evidence by registered mail addressed to the landlord but the landlord refused to pick up the package. The Supreme Court of British Columbia has held that a party cannot avoid service by refusing to pick up their registered mail.
- The landlord testified he mailed documents to the tenant including a tenancy agreement for the subject property. The tenancy agreement included a number of handwritten additions. The tenant testified she received a portion of those documents but it did not include a copy of the tenancy agreement for the rental unit. I determined it was appropriate to continue with the hearing as the matter had already been adjourned.

I find that the Application for Dispute Resolution/Notice of Hearing was sufficiently served on the landlord by mailing, by registered mail to where the landlord resides and it was sufficiently served even though the landlord failed to pick the materials. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to a monetary order and if so how much?

b. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

The parties entered into a tenancy agreement with respect to another rental unit owned by the landlord located on Regan Avenue. Initially the tenant rented the upper suite of the house. Later that year the tenant took over the rental of the entire house. She sub-letted the downstairs suite to a friend.

In 2012 the tenant moved to the downstairs suite and her daughter and son in law moved into the upstairs suite. However, she continued to rent the entire house.

On March 11, 2015 the parties entered into another tenancy agreement that provided that the tenancy would start on March 1, 2015. The term was not filled in. The law implies a month to month tenancy. The rent was $1650 per month. The agreement records that the landlord has received a security deposit of $825 from the previous lease.

In early December 2015 the landlord contacted the tenant and advised that he was putting the house up for sale. An open house was held and the house was quickly sold.

The tenant provided evidence that the landlord told her that he would give her two months notice as outlined by the Residential Tenancy Act and that no rent was to be paid for the last month of the tenancy.

The tenant gave evidence that she was given a 2 month Notice to End Tenancy. This is not accurate. On December 5, 2015 the parties signed a Mutual Agreement to End the Tenancy on February 29, 2016. The landlord did not use a 2 month Notice to End Tenancy form.

The tenant testified that mid way through January the landlord advised the tenant that he had he had cancelled the direct deposit for the rent for February. He also stated that the tenant would have to deal with the new owners for the return of the security deposit.

The new owners took possession of The Regan Street home in early February. The tenant vacated the rental unit on February 29, 2016 and she moved into to live with one of her daughters. The other daughter and her husband (who were living upstairs) rented a townhouse commencing March 1, 2016. The new owners returned the security deposit to the tenant.

In early January the landlord advised the Tenant that he was building a house on the Sunshine coast and he intended to move there in the late spring. He also stated he was looking for a long term tenant to move into his house on Levis Street.

On January 14, 2016 the landlord gave the tenant a letter that stated that the tenant would have first choice of renting the house on Levis Street. The letter states that he was not sure of the

date that the house would be available but that he would be notifying the tenant of this dated on February 9, 2016 or before.

The tenant testified that in February 2016 he had been informed that he had been given a possession date of May 1, 2016 for his new house which would allow the tenant to begin her tenancy at the Levis Street house on May 15, 2016.

On March 7, 2016 the landlord and tenant met and filled out a residential tenancy agreement form. The tenant testified the landlord took the agreement and failed to give her a copy. The tenant testified the agreement was a one year fixed term, with rent of $1850 and was for the entire rental unit. The landlord testified he gave the tenant a copy. The landlord produced a form of agreement at the hearing. However, the tenant testified the landlord never provided her with the agreement and she has never seen it. The form of agreement provided by the landlord included the following:

- There is a handwritten section that the rental unit was for "Top Floor upstairs only."
- The agreement was dependent on the tenant paying the rent for the Regan Street address of $1691.
- If the security deposit of $925 and $625 was not paid by March 20, 2016 the Levis Street unit would not be rented to the Tenant
- The term was for one year and was to end on May 15, 2017.

The tenant disputes the handwritten portions set out above.

The tenant provided the landlord with a cheque dated March 7, 2015 with has the notation "damage deposit." She testified the parties agreed that $300 should be added to this sum for the tenant selling a washer/dryer to the landlord. She also provided a second cheque dated March 15, 2016 that had the notation rent for May 15 to May 31.

A few days later the landlord advised the Tenant that he had sold the home on the Sunshine coast and would not be moving out. The landlord failed to return the monies paid by the tenant.

Analysis:

In Faryna v. Chorny, [1952] 2 D.L.R. 354, the B.C. Court of Appeal set out the following test for assessing credibility:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (page 357)"

I do not accept the testimony of the landlord that the form of tenancy agreement with the handwritten additions represents the agreement between the parties for the following reasons:

- The provision that the tenant was renting the upstairs portion only is inconsistent with the tenant's situation at the Regan Street address and not something the tenant would agree to.
- Similarly, the requirement that the tenancy agreement was contingent on the tenant paying the rent for February at the Regan Street address is not something the tenant would agree to.
- The landlord failed to provide any other documents which might support those terms were to be included.
- The landlord testified he gave a copy of the agreement to the Tenant at the meeting in March. However, the telephone conversation audio recording produced by the Tenant is inconsistent with this as it states the landlord was trying to arrange a meeting to give back the tenancy agreement.
- I prefer the evidence of the tenant that she has not received a copy of the tenancy agreement. I do not accept the testimony of the landlord that he provided the tenant with a copy of this tenancy agreement prior to the hearing.

I am satisfied the parties entered into an agreement to rent the Levis Street address. However, the written agreement produced by the landlord is inconsistent with the evidence and no weight can be given to it. I determined the tenant failed to prove that it was a one year fixed term agreement. The previous agreement between the parties was a month to month tenancy. I determined there was an oral agreement for a month to month tenancy. I am satisfied the landlord breached the agreement when he told the tenant he was not vacating the rental unit and therefore was not able to rent it to the Tenant.

With regard to each of the tenant's claims I find as follows:

a. The tenant seeks an order for double the security deposit. The Residential Tenancy Act provides that a landlord must return the security deposit plus interest to the tenants within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenants forwarding address in writing unless the parties have agreed in writing that the landlord can retain the security deposit, the landlord already has a monetary order against the tenants or the landlord files an Application for Dispute Resolution within that 15 day period. It further provides that if the landlord fails to do this the tenant is entitled to an order for double the security deposit.

   The tenant paid a security deposit of $925 (composed of a cheque in the sum of $625 dated March 7, 2016 and $300 for the sale of a washer/dryer). I determined the tenancy ended on in late March 2016 when the landlord advised the tenant she could no longer move in. I further determined the tenant

sufficiently provided the landlord with her forwarding address in writing in late March 2016 and it was sufficiently provided even though the landlord failed to pick up the registered mail. .

The parties have not agreed in writing that the landlord can retain the security deposit. The landlord does not have a monetary order against the tenants and the landlord failed to file an Application for Dispute Resolution within the 15 days from the later of the end of tenancy or the date the landlord receives the tenants' forwarding address in writing.

The landlord has filed a claim with respect to the failure of the tenant to pay the rent for February at the Regan Street address. It is not appropriate for me to comment on the validity of that claim as it is due to be heard in March. However, it does not relate to the legal right of the landlord to keep a security deposit that was for the Levis Street address. In my view a claim to keep the deposit at the Levis Street address to satisfy a dispute at another address is frivolous and an abuse of process.

As a result I determined the tenants have established a claim against the landlord for double the security deposit or the sum of $1850.

b. I determined the tenant is entitled to the return of $925 for the rent for May 15, 2016 to May 31, 2016. The landlord refused to permit the tenant to move into the rental unit. The landlord does not have a legal right to that sum.

c. I dismissed the tenant's claim of $537.63 and $575 for a storage unit. The tenant vacated the Regan Street address at the end of February and rented these units to store here belongings. At this time the earliest she could expect the rental unit at the Levis Street address to be available was the middle of May. The landlord's breach of the tenancy agreement in refusing the tenant to move into the Levis Street rental unit did not cause the tenant to loss money for the cost of these two storage units. Further, one of the units was for her daughter and son in law who had rented a townhouse at this time.

d. I dismissed the tenant's claim for additional rent she has had to pay. The tenant claimed the difference between the rent for the Levis Street address and the rental unit she is presently in. However, she failed to prove this claim. The tenant failed to present evidence that the two rental units are of the same quality. Further, she failed to present sufficient evidence as to whether she acted reasonably in renting this rental unit.

Monetary Order and Cost of Filing fee

I ordered the landlord(s) to pay to the tenant the sum of $2825 plus the sum of $50 in respect of the filing fee (reduced to reflect the partial success of the Tenant) for a total of $2875.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial 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: November 21, 2016

Residential Tenancy Branch