



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

FIINAL DECISION

Dispute Codes:

CNL, MNDC, MNSD, OLC, PSF, MND, O, OPL, FF

Introduction

This was a cross application hearing.

This hearing was scheduled in response to the tenants' Application for Dispute Resolution made on July 15, 2016, in which the tenant has applied to cancel a Notice ending tenancy for landlords' use of the property; compensation for damage or loss under the Act; return of the security deposit; an order the landlord comply with the Act; an order the landlord provide service or facilities required by law and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

On August 19, 2016 the landlord applied requesting compensation in the sum of \$8,000.00 for damage to the rental unit an order of possession for landlords' use of the property, to retain the security deposit and to recover the filing fee cost.

On October 4, 2016 the landlord submitted an amendment to the application setting out a claim for damage to a bathroom counter.

On August 23, 2016 the tenant amended the application to increase the monetary claim and request return of the security deposit.

Both parties were present at the each hearing and were affirmed. At the start of each hearing I introduced myself and the participants.

This final decision should be read in conjunction with the interim decisions issued on September 7 and October 21, 2016.

Preliminary Matters

The tenants' application was originally considered on September 7, 2016 at which time the application was joined to be heard with the landlords' application scheduled for October 20, 2016. On October 20, 2016 the landlord made submissions and the tenant responded to that claim. The hearing was adjourned to December 12, 2016 at which time the tenant was to make a final comment on painting costs and present the tenants' claim.

The reconvened conference call hearing was scheduled to be heard on December 12, 2016 at 9:00 a.m. The reconvened hearing commenced at the scheduled time on December 12, 2016. The landlord and the landlords' legal counsel attended the hearing at the scheduled time.

The hearing remained open for 11 minutes. Neither the tenant or the tenant's witnesses or advocate entered the conference call hearing.

At 9:11 a.m. the tenants' application was dismissed and the hearing was ended.

The landlord had completed submissions at the hearing held on October 20, 2016 and was informed a decision on that application would be issued.

Background and Evidence

The tenancy commenced on December 1, 2015 as a fixed term to May 31, 2016. Rent was \$900.00 per month due on the first day of each month. An extra \$30.00 was paid for internet service. A security deposit in the sum of \$450.00 was paid.

A move-in condition inspection report was not completed. An addendum was not signed and the tenancy agreement made no reference to smoking.

During the hearing held on October 20, 2016 the parties made submissions in relation to the end of tenancy. The fixed-term was to end effective May 31, 2016 at which time the tenant would vacate the unit. The tenant remained beyond the end of the term, paid rent and receipts for use and occupancy were not issued.

On June 27, 2016 the landlord issued a two month Notice ending tenancy for landlords' use of the property. The Notice was effective August 31, 2016.

As compensation payable pursuant to section 51 of the Act the tenant did not pay August 2016 rent. The tenant said that on August 10, 2016 she gave 10 days written notice to vacate. The parties confirmed that the tenant vacated the rental unit on August 23, 2016.

A move-out condition inspection report was not completed.

The landlord received the tenants' forwarding address when the landlord was served the tenants' application for dispute resolution.

Landlords' Claim

At the hearing held on October 20, 2016 the following was established as the landlords' claim for compensation:

Bathroom countertop estimate	500.00
Key cut	10.00
Painting due to smoke damage	1,390.00
TOTAL	\$1,900.00

The landlord submitted copies of text messages as evidence. A number of these messages were illegible as the text font was small and blurred.

The landlord said that the 15 year old arborite in the bathroom had never been previously damaged. The landlord had not had a smoker live in the rental unit in the past. After the tenant vacated it appeared there was a cigarette burn in the counter. The landlord said the cost of a new counter, based on an estimate, would be \$500.00. The tenant had said she did not smoke but the landlord noticed smoking was occurring and sent text messages asking the tenant to cease.

On April 19, 2016 the landlord issued a letter to the tenant asking the tenant why she had rented the unit if she smoked and her son smoked. The landlord alleged the tenant was smoking marijuana and that the landlord could smell cigarette smoke. The landlord wrote that when the tenant smoked outside the smoke would come in the landlords' window and driveway and enter the house. The landlord stated the tenant would smoke under the landlords' bedroom window and that she had asked the tenant to move off the property when smoking.

The landlord had a key cut for the tenant, even though the suite was for one person only. The parties had agreed the tenant required only one key, but the landlord gave the tenant the second key for guests. The key has been returned. The landlord said the funds would not have been spent on the key if the tenant had not requested the key.

The landlord said the smell of smoke in the rental unit could not be eliminated. When the door is opened to the unit there is a stench. Just prior to the tenancy commencing the bathroom, bedroom and living room had been painted. The landlord obtained a painting estimate from a friend. The landlord will paint the unit, to eliminate the smell of smoke.

The tenant stated that at the start of the tenancy you could see the damage on the bathroom counter. The landlord only made the claim after the tenant had applied for dispute resolution on July 15, 2016. The landlord applied claiming against the tenant on August 19, 2016 and did not obtain an estimate until August 26, 2016. The tenant said this was not damage that she caused.

The tenant did not dispute that a key was issued for a guest. The tenant did not want to have a key cut herself. The key was returned to the landlord.

The tenant said that the unit was not painted when she moved in, as another tenant moved out immediately before she took possession. It was not possible the unit had been painted. The walls were chipped and had holes; it did not appear the unit had been painted for a long time.

The tenant said she did not smoke in the rental unit and agrees walking into a home where people smoke is disgusting. The tenant said she smokes, but is discreet and smokes outside.

Analysis

A party that makes an application for monetary compensation has the burden to prove their claim. The burden of proof is based on the balance of probabilities. An applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

When a landlord fails to arrange and complete an inspection there is no agreement obtained with the tenant, on the state of a rental unit. The landlord has the burden of proving the counter was damaged during the tenancy. I find, on the balance of probabilities it is just as likely that the counter was damaged prior to the start of the tenancy, as the tenant said it was. Therefore, in the absence of a move-in condition inspection report setting out the state of the counter at the start of the tenancy, I find that the claim for damage to the 15 year old bathroom counter is dismissed.

It is expected that a landlord will provide a key to the tenant for use by the guests. The key was returned to the landlord. Therefore, I find that the landlord has not suffered a loss. I find that the claim for the cost of the key is dismissed.

From the evidence before me I find there was not a term of the tenancy that prohibited smoking in the rental unit. The tenant has acknowledged that she smoked; although it is in dispute when the landlord became aware of the fact the tenant did smoke. From the evidence before me I find that the tenant smoked outside, but even if the tenant had smoked in the rental unit the tenant would not have been in breach of a term of the agreement.

If the tenant had smoked in the rental unit I find that the landlord has failed to bring any evidence forward that proves, on the balance or probabilities that the unit was painted just prior to the start of the tenancy and then damaged by smoke. A move-in condition inspection report was not completed, that would set out the condition of the walls at the

start of the tenancy. In the absence of any evidence that the rental unit had been freshly painted just prior to the start of the tenancy and, in the absence of evidence that the walls were damaged to the point of needing paint, I find that the claim for painting is dismissed.

Residential Tenancy Branch policy suggests that when a landlord applies claiming against a deposit any residue of the deposit should be ordered returned to the tenant. Therefore, as the landlord is holding a security deposit in the sum of \$450.00 and the claim against the security deposit is dismissed, I order, pursuant to section 62(3) of the Act, the landlord to return the security deposit to the tenant.

Based on these determinations I grant the tenant a monetary order in the sum of \$450.00. In the event that the landlord does not comply with this order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an order of that Court.

I note that no portion of the tenants' claim has been considered on its merits.

Conclusion

The tenants' application is dismissed.

The landlords' application is dismissed.

The tenant is entitled to return of the \$450.00 security deposit.

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: December 12, 2016

Residential Tenancy Branch