



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNSD, MNDC, O

Introduction

This hearing dealt with a tenant's application to cancel a 1 Month Notice to End Tenancy for Cause and for recovery of the overpaid portion of the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the outset of the hearing, the tenant stated that although she does not agree with the landlord's reasons for issuing the Notice to End Tenancy she has decided to accept the end of the tenancy due to the stressful situation. Both parties turned their minds to determining the date and time for the end of the tenancy and the move-out inspection. I have recorded that agreement by way of this decision and the Order that accompanies it.

Issue(s) to be Decided

1. What are the terms of the mutual agreement with respect to ending this tenancy?
2. Did the tenant overpay the security deposit?

Background and Evidence

The parties mutually agreed upon the following terms during the hearing:

1. The tenancy shall end as of 2:00 p.m. on January 31, 2017 and the landlord shall be provided an Order of Possession to reflect this date and time.
2. The parties shall meet at the property for purposes of performing the move-out inspection at 2:00 p.m. on January 31, 2017.
3. The landlord shall not make audio recordings of the tenant during the remainder of the tenancy.

4. The tenant will ensure the noise level in the rental unit is reasonable during the remainder of the tenancy.

As for the tenant's request to recover \$412.50 from the landlord for an overpaid security deposit I was provided the following submissions.

It was undisputed that that monthly rent is \$825.00 and the landlord collected a security deposit in the amount of \$825.00.

The written tenancy agreement is the standard agreement that is produced by the Residential Tenancy Branch. The standard terms 4. 1) a) and b) were crossed out and initialled by both parties. Part a) requires that the security deposit must not exceed one half of the monthly rent. Part b) provides that the landlord will keep the security deposit during the tenancy and pay interest on it in accordance with the regulation. These are the standard terms that are required to be in every tenancy agreement.

The tenant pointed out that the landlord over charged her for the security deposit and she seeks return of the overpaid portion of \$412.50. The tenant confirmed that she paid the amount of full rent for January 2017 and the landlord did not dispute this statement.

The landlord was of the position that the parties mutually agreed to amend the tenancy agreement and that it is an acceptable practice to amend contracts in this way under the common law. As such, the landlord was of the position that the terms, as amended, are legal and enforceable. The landlord stated that he is a realtor with a great amount of experience with writing contracts and that he has other rental properties where he has amended the tenancy agreement similarly.

Analysis

Pursuant to section 63 of the Act, I have the authority to assist parties in reaching a mutual agreement during the hearing and to record the agreement in the form of a decision or order. I have accepted the mutual agreement reached by the parties during this hearing and I make the terms an Order to be binding upon both parties. In recognition of the mutual agreement, I provide the landlord an Order of Possession that is effective at 2:00 p.m. on January 31, 2017.

As for the overpaid security deposit, I find the tenant is correct and the landlord's position is not correct, as explained below.

The landlord argued that the common law applies to contracts and that under the common law a term may be amended by agreement of both parties.

Section 91 of the Act provides that the common law applies to tenancy agreements, except where modified or varied by the Act. Section 91 states:

Common law applies

- 91** Except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia

The Act specifically limits the amount that a landlord may collect for a security deposit under section 19 of the Act and that an overpayment may be recovered by the tenant by withholding the overpaid portion from rent or otherwise. Section 19 states:

Limits on amount of deposits

- 19** (1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.
- (2) If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment

Section 6 of the Act provides that any term in a tenancy agreement that contradicts or violates the Act is not enforceable. This section prevents parties from agreeing to contract out of the Act. Section 6 states, in part:

Enforcing rights and obligations of landlords and tenants

- 6** (1) The rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement.
- (3) A term of a tenancy agreement is not enforceable if
- (a) the term is inconsistent with this Act or the regulations,

- (b) the term is unconscionable, or
- (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

The landlord and tenant may have attempted to contract out of the Act by requiring the tenant to pay and allowing the landlord to collect a security deposit in excess of one-half of the monthly rent, but such a term is not enforceable. Accordingly, the security deposit remains limited to one-half of the monthly rent, or \$412.50, and the tenant is entitled to recover the overpaid portion from the landlord. Since the tenant did not deduct the overpayment from rent and the tenancy is about to end, I order the landlord to pay to the tenant \$412.50 without delay and I provide the tenant with a Monetary Order to ensure payment is made. The remainder of the security deposit, in the amount of \$412.50, remains in trust to be administered in accordance with the Act at the end of the tenancy.

I noted that the landlord had altered a number of other standard terms in the tenancy agreement. As the landlord was informed during the hearing, standard terms are not subject to amendment, even if the tenant agrees to amend a standard term and the standard terms, as provided in the Residential Tenancy Regulation Schedule apply in every circumstance.

Below, I have referenced the relevant portions of the Act and the Regulations for the landlord's reference, with my emphasis underlined.

Sections 13 and 14 of the Act provide for requirements for a tenancy agreement.

Requirements for tenancy agreements

- 13** (1) A landlord must prepare in writing every tenancy agreement entered into on or after January 1, 2004.
- (2) A tenancy agreement must comply with any requirements prescribed in the regulations and must set out all of the following:
- (a) the standard terms;

Changes to tenancy agreement

- 14** (1) A tenancy agreement may not be amended to change or remove a standard term.

Below, are the relevant portions of the Residential Tenancy Regulations that provide for standard terms that must be included in a tenancy agreement.

Standard terms that must be included in a tenancy agreement

- 13** (1) A landlord must ensure that a tenancy agreement contains the standard terms.

- (1.1) The terms set out in the schedule are prescribed as the standard terms.

The Schedule provides for many standard terms that are to be included in the tenancy agreement and is found at the end of the Regulation. The standard terms are also printed on the tenancy agreement that is produced by the Residential Tenancy Branch.

I strongly encourage the landlord to familiarize himself with the requirements of the Act with respect to administering the security deposit that remains in trust for the tenant as failure to comply with the Act may result in the security deposit being doubled in favour of the tenant. Should either parties have any questions with respect to their respective obligations under the Act and Regulations, I strongly encourage the party to refer to the Residential Tenancy Branch website and/or contact an Information Officer with the Branch.

Conclusion

The tenancy shall end at 2:00 p.m. on January 31, 2017 by mutual agreement, as recorded in this decision, and the landlord is provided an Order of Possession to serve and enforce if necessary.

The landlord has been ordered to return the overpaid portion of the security deposit in the amount \$412.50 to the tenant without delay. The tenant has been provided a Monetary Order in the amount of \$412.50 to ensure payment is made. The remainder of the security deposit, in the amount of \$412.50, remains in trust for the tenant to be administered in accordance with the Act at the end of the tenancy.

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: January 26, 2017

Residential Tenancy Branch