Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL FF MNSD OLC MND MNR

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the *Act*), I was designated to hear this matter. This hearing dealt with applications from both parties:

The landlords applied for:

- a Monetary Order pursuant to section 67 of the *Act*;
- an Order permitting the landlords to retain the security and pet deposits pursuant to section 38 of the *Act;* and
- a return of the filing fee pursuant to section 72 of the *Act*.

The tenants applied for:

- a Monetary Order for a return of the pet and security deposits pursuant to section 38 of the *Act*;
- a cancellation of the landlords' 2 Month Notice pursuant to section 49 of the *Act*;
- an Order directing the landlords to comply with the *Act* pursuant to section 63
- a return of the filing fee pursuant to section 72 of the *Act*.

Both the tenants attended the hearing, while landlord B.K. and agent P.M. appeared on behalf of the landlords. Both parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The landlords confirmed receipt of the tenants' application for dispute resolution and evidentiary package by way of Canada Post Registered Mail on April 6, 2017. Pursuant to sections 88 & 89 of the *Act* the landlords are found to have been duly served with the tenants' documents.

The tenants confirmed receipt of the landlords' application for dispute resolution on April 28, 2017 by way of Canada Post Registered Mail. No evidentiary package was submitted by the landlords. Pursuant to sections 89 of the *Act* the tenants are found to have been served with the landlords' application for dispute resolution.

After hearing opening remarks concerning the landlords' application, the landlords' agent asked that the landlords' application be amended to reflect only unpaid rent for the month of September 2016 and a return of the filing fee. As the tenants would not be prejudiced by this amendment, I amend the landlords' application pursuant to section 64(3)(c) to reflect only unpaid rent for September 2016 and a return of the filing fee.

Similarly, the tenant E.S., explained that she had committed an error in calculating her monetary order. I amend the tenants' application pursuant to section 64(3)(c) to reflect a monetary order of $5,700.00

Issue(s) to be Decided

Is either party entitled to a Monetary Order?

Should the landlords be directed to return the pet and security deposits to the tenants? If so, should they be doubled?

Is either party entitled to a return of the filing fee?

Can the tenants cancel the 2 Month Notice to End Tenancy?

Should the landlords be directed to comply with the *Act*?

Background and Evidence

Testimony was presented at the hearing that this tenancy began in August 2014 and ended in September 2016. Rent was $2,850.00 per month while, security and pet deposits of $1,425.00 each were collected at the outset of the tenancy and continue to be held by the landlords.

The tenants explained that they were seeking a Monetary Order of $5,700.00. This sum represented a doubling pursuant to section 38 of the *Act* of their pet and security deposits which the landlords have not returned to them.

The landlords maintained that no such notice was issued and that the tenants were obliged to pay rent for the month of September 2016. As this rent was not paid, the landlords have applied to retain the tenants' security and pet deposits in lieu of payment.

On July 31, 2016 the landlords emailed the tenants notice of their intention to perform renovations on the suite. This email titled, "Two Month Notice to End Tenancy at 123 XYZ street" explained that the landlords were, "formally giving you [the tenants] notice to end our tenancy agreement at our rental property at 123 XYZ street, Victoria, B.C., on September 30th, 2016. Under the residential tenancy act, landlords have the right to end a tenancy for any major

renovations. Our renovations will commence shortly after you vacate the property. Needless to say, the house will be uninhabitable during our renovations." The landlords' email continues by noting that the tenants did not receive permission from the landlords to operate two businesses from the premises and contains a quote from the website of the Residential Tenancy Branch concerning Major Construction.

The tenants acknowledged not paying rent for September 2016; however, they argued that they vacated the premises in September 2016 as a result of this email which they took to be a 2 Month Notice to End Tenancy and rent was therefore not due to the landlord pursuant to section 51(1) of the *Act*. On August 31, 2016 the tenants emailed the landlords acknowledging receipt of the "2 Month Notice" and explaining that they will comply with the wishes of the landlords. This email informed the landlords that it was the tenants' understanding that rent was not due for September 2016 saying, "as per BC Residential Tenancy regulations, we are not required to pay the final month's rent."

On September 9, 2016 the landlords contacted Landlord BC, and were advised that neither party had officially ended the tenancy, that an emailed notice to end tenancy was not binding and that the RTB form to end the tenancy is required and must be signed by both parties. The landlords presented this information to the tenants in an email dated September 11, 2016. This email went on to list various solutions which the landlords proposed to the tenants as a way of amicably ending the tenancy, following what the landlords deemed a, "meaningless" legal notice to end tenancy.

Following receipt of this email, the tenants and the landlords exchanged a series of emails arguing each other's position on the matter.

On September 20, 2016 tenant A.S., attended the house to perform a condition inspection. The landlords did not attend but informed during the hearing that tenant A.S. was met by their agent "Joseph." As part of the tenants' evidentiary package, submissions dated April 6, 2017 written by tenant A.S. explained that the landlords did not attend the condition inspection and that it was completed by, "His friend who I think is a Realtor [to do] the inspection." In his letter, tenant A.S. continues, "I took care of the move out inspection. And because I have never done this before I didn't think to ask for a copy of the inspection. But I can verify that we gave our new address 123 XYZ avenue, Victoria BC A#B #C# and it was written on the move out inspection form."

Oral testimony presented at the hearing by the tenants informed that the parties agreed that the premise was left in an acceptable manner and no deductions were to be levied against the tenants. During the hearing the tenants explained that they provided their forwarding address to the landlords on this date, following the conclusion of the condition inspection. The landlords' agent explained he was informed by the landlords that they had seen a copy of the condition inspection report and did not recall seeing a copy of the tenants' forwarding address. Neither

party retained a copy of this inspection report. The landlords confirm that the tenants forwarding address was received on March 28, 2017 via email.

Following the conclusion of submissions by the tenants and agent E.S., landlord B.K., asked to present some testimony. After initially agreeing to hear the landlord's oral testimony, I declined to allow landlord B.K. to present submissions as it became evident that this oral testimony concerned matters beyond the scope of unpaid rent for September 2016. Specifically, the landlord wished to reference businesses which the tenants were purportedly running from the home.

Residential Tenancy Branch Rule of Procedure 3.6 allows me to limit a party's evidence. It says, "All evidence must be relevant to the claim(s) being made in the Application(s) for Dispute Resolution. The arbitrator has the discretion to decide whether evidence is or is not relevant to the issues identified on the application and may decline to hear evidence that they determine is not relevant."

Analysis

Testimony and evidence presented at the hearing shows that this tenancy ended in September 2016 when the tenants vacated the rental unit. The question therefore is whether the email which the landlords sent to the tenants on July 31, 2016 should be considered a 2 Month Notice to End Tenancy.

Section 44 of the *Act* states:

A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 *[tenant's notice]*;

(i.1) section 45.1 *[tenant's notice: family violence or long-term care]*;

(ii) section 46 *[landlord's notice: non-payment of rent]*;

(iii) section 47 *[landlord's notice: cause]*;

(iv) section 48 *[landlord's notice: end of employment]*;

(v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii) section 50 *[tenant may end tenancy early]*;

In this case, it is evident that no formal 2 Month Notice under section 49 of the *Act* was served on the tenants. However, Section 18 of the *Residential Tenancy Policy Guidelines* states, "A

form not approved by the Director is not invalid if the form used still contains the required information and is not constructed with the intention of misleading anyone. As a result, it is advisable to apply to an arbitrator to dispute the notice, so that the validity of the notice can be determined. Where a tenant accepts a Notice To End A Tenancy that is in the old form or is not in the required form and the tenant vacates in response to the notice, the landlord cannot rely upon the failure to give notice in the required form and allege that the tenant owes the landlord rent as a result of the improper ending of the tenancy."

For the following reasons I find that the email dated July 31, 2016 titled, "2 Month Notice to End Tenancy" to be a valid 2 Month Notice. While not in an approved form, the email contained the date on which the tenants were to vacate the rental unit, the reason for the issuance of the notice and the address of the rental unit. Furthermore, the landlords cited a portion of the Residential Tenancy Branch website which provides a definition of 'Major Construction,' demonstrating that the landlords were aware that the reason for the issuance of the 2 Month Notice was allowable under section 49 of the *Act.* Although the notice was not signed by the landlord, it was clearly issued by him as part of an email exchanged between landlord and tenant. The tenants relied on this notice and vacated the premises in accordance with the landlords' stated intention.

Section 68(1) of the *Act* reads:

If a notice to end a tenancy does not comply with section 52 *[form and content of notice to end tenancy]*, the director may amend the notice if satisfied that

(a) the person receiving the notice knew, or should have known, the information that was omitted from the notice, and

(b) in the circumstances, it is reasonable to amend the notice.

As to the first of these factors, it is evident that the tenants who received the notice knew it had been sent by the landlords (who did not sign it the notice because it was delivered via email.) As to the second factor, given the fact the landlords issued the 2 month notice with the intention of persuading the tenant to vacate, and given the fact the tenants did so in response to that notice, it would be reasonable to amend it to include the landlords' signature.

Section 51(1) of the *Act* notes that, **"**A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement…(2) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of this section that amount is deemed to have been paid to the landlord." I find that the July 31, 2016 by email is a valid 2 Month Notice and that the tenants were entitled to withhold September 2016 rent as they did not receive from the landlords an amount that was equivalent to one month's free rent.

The second aspect of both the landlords' and the tenants' application concerns a return of the pet and security deposits. Testimony was presented at the hearing that the landlords put pet and security deposits towards the unpaid rent for September 2016.

Section 38 of the *Act* requires the landlord to either return a tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the *later* of the end of a tenancy and, or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy as per section 38(4)(a). A landlord may also under section 38(3)(b), retain a tenant's security or pet deposit if an order to do so has been issued by an arbitrator.

During the hearing both parties agreed that the tenancy ended in September 2016. The landlords had therefore until October 15, 2016 to apply to retain the tenants' security deposit. The landlords did not do this. Under section 38 of the *Act*, the landlords did not have to apply by this date, if they applied for dispute resolution within 15 days of receiving the tenants forwarding address in writing. Both parties acknowledged that a condition inspection report was completed at the conclusion of the tenancy and that this condition inspection report was lost. The landlords' agent explained that the landlords had informed him that it was their recollection that the tenants' forwarding address was not present on this condition inspection report. The landlords informed that they only received the tenants' forwarding address via email on March 28, 2017. The tenants maintained that they provided their address to the landlords on September 20, 2016 the same day of the condition inspection report.

As the tenants are the ones seeking a return of their security and pet deposits, the burden of proof remains with them. I find their written submission dated April 6, 2017, along with the tenants' oral testimony, to paint a consistent picture of the events which took place during the condition inspection and this included the tenants providing the landlord a forwarding address on September 20, 2016. Notably, the landlords' agent was unable to conclusively recall whether or not the condition inspection report completed by the parties contained the tenants forwarding address. The landlords did not retain the document related to this inspection. The available evidence therefore satisfied me, on the balance of probabilities that the tenants gave the landlords their forwarding address on September 20, 2016. It follows that the landlords did not seek an Order to retain the security and pet deposits within the time limit imposed by section 38 of the *Act.* Since the tenants' security and pet deposits were not returned to them pursuant to section 38 of the *Act,* I find that the tenants are entitled to a double the return of the security and pet deposits.

As the tenants were successful in their application, they may recover the $100.00 filing fee from the landlords. The landlords' application for a return of the filing fee is dismissed.

Conclusion

I issue a Monetary Order in the tenants' favour in the amount of $5,800.00 against the landlords. The tenants are provided with a Monetary Order in the above terms and the landlords must be served with this Order as soon as possible. Should the landlords fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

Item	**Amount**
Return of Security Deposit (2 x $1,425.00)	$2,850.00
Return of Pet Deposit (2 x $1,425.00)	2,850.00
Return of Filing Fee	100.00
Total =	$5,800.00

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: September 5, 2017

Residential Tenancy Branch