Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNR, MNSD, FF

Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, for a monetary Order for unpaid rent or utilities, to keep all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

The Landlord stated that on July 14, 2017 or July 15, 2017 the Application for Dispute Resolution, the Notice of Hearing, and evidence the Landlord submitted with the Application were sent to the Tenants, via registered mail, at the service address noted on the Application. The female Tenant acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

On December 06, 2017 the Tenants submitted 5 pages of evidence in response to the Landlord's claims. The female Tenant stated that this evidence was served to the Landlord, via registered mail, on December 06, 2017. The Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The Tenants filed an Application for Dispute Resolution, in which they applied for a monetary Order for money owed or compensation for damage or loss and for the return of their security deposit.

The female Tenant stated that on December 06, 2017 the Application for Dispute Resolution, the Notice of Hearing, and evidence the Tenants submitted with the Application were sent to the Landlord, via registered mail, at the service address noted on the Application. The Landlord acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. The parties were advised of their legal obligation to speak the truth during these proceedings.

All of the evidence submitted by the parties has been reviewed, but is only referenced in this written decision if it is relevant to my decision.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit, to compensation for unpaid utilities, and to keep all or part of the security deposit?
Are the Tenants entitled to compensation because the rental unit was not used for the reason stated in the Two Month Notice to End Tenancy for Landlord's Use of Property?
Are the Tenants entitled to the return of their security deposit?

Background and Evidence

The Landlord and the Tenant agree that:

- the tenancy began on August 01, 2013, although the Tenants were permitted to move in a few days early;
- the addendum to the tenancy agreement declares that if the monthly charges of heat and electrical services exceed $325.00 per month the Tenants will pay 75% of the "amounts exceeding the limit";
- the Tenants paid a security deposit of $500.00;
- the tenancy ended on June 30, 2017;
- the Tenants provided a forwarding address, in writing, on June 30, 2017;
- the security deposit was not returned; and
- the Tenants did not give the Landlord written authority to retain the security deposit.

The Landlord submitted a hydro bill dated October 20, 2015, which indicates there were monthly charges of $282.66 and an equal payment due for that month, in the amount of $117.00.

The Landlord submitted a hydro bill dated October 18, 2016, which indicates there were monthly charges of $164.80 and an equal payment due for that month, in the amount of $152.00.

The Landlord submitted a hydro bill dated January 19, 2017, which indicates there were monthly charges of $627.01 and an equal payment due for that month, in the amount of $433.00.

The Landlord submitted a hydro bill dated February 20, 2017, which indicates there were monthly charges of $569.64 and an equal payment due for that month, in the amount of $433.00.

The Landlord submitted a hydro bill dated March 20, 2017, which indicates there were monthly charges of $460.46 and an equal payment due for that month, in the amount of $433.00.

The Landlord submitted a hydro bill dated April 19, 2017, which indicates there were monthly charges of $395.29 and an equal payment due for that month, in the amount of $433.00.

The Landlord did not submit any gas bills.

The Landlord stated that between November 01, 2016 and May 31, 2017 she asked the Tenants to pay an additional $128.75 for hydro and gas per month, which she states was collected because her monthly hydro payments increased to $433.00 on the basis of her equal payment plan and her average gas bill increased to $63.00 per month.

The female Tenant stated that between November 01, 2016 and May 31, 2017 they paid an additional $130.00 for hydro and gas, which was paid, in part, because the Landlord's monthly hydro payment was increased to $433.00 on the basis of her equal payment plan.

The Landlord had a very difficult time articulating the months for which she believes utilities are owed. She eventually stated that she is seeking compensation for utility payments, in the amount of $128.75 per month, for the period between June 01, 2016 and October 30, 2016. The Landlord stated that in those months she was paying monthly hydro payments of $152.00 on the basis of her equal payment plan. The Landlord argued that the monthly payments she was paying during this period did not accurately represent the annual hydro charges, and that she should have been paying equal monthly payments of $433.00 for those months. Her claim is based on her submission that she should have been paying $433.00 per month.

The female Tenant stated that prior to the Landlord filing an Application for Dispute Resolution, she was never asked to pay any additional hydro for the period between June 01, 2016 and October 30, 2016. She stated that she was never given any hydro bills, with the exception of one from November of 2016, until she was served with evidence for these proceedings.

The Landlord stated that she met with the female Tenant in May of 2016 and showed her several bills, although she did not leave copies of the bills with her.

The Landlord is seeking compensation, in the amount of $114.05, for removing personal property that was left in the yard of the rental unit. The Landlord submitted photographs of some of the items that were removed from the property.

The female Tenant stated that when this tenancy ended the Tenants paid a third party to remove all of their unwanted personal items, with the exception of pool pieces which were inadvertently overlooked. The Tenants submitted a social media posting and an email that corroborates this testimony.

The female Tenant stated that when the pool lining was rolled up it would be approximately 3' X 3'. The Landlord stated that if the pool pieces were rolled up they would be approximately 4' X 4' X 4'.

The female Tenant stated that the items shown in the Landlord's photographs belonged to the occupants of a separate suite on the residential property. She stated that although these occupants had a small private yard they left personal property on the Tenants' portion of the yard because they did not have sufficient room in their small yard. The Landlord stated that she presumed the abandoned property belonged to the Tenants because it was on the Tenants' portion of the yard.

The female Tenant stated that she believed the occupants of the separate suite vacated their suite at the end of May of 2017. The Landlord stated they vacated at the end of April of 2017.

The Landlord and the Tenants agree that the Tenants were served with a Two Month Notice to End the Tenancy for Landlord's Use of Property, which required them to vacate the unit by June 30, 2017. The Notice declared that the tenancy was ending because it was to be occupied by the Landlord or a close family member of the Landlord. The parties agree that the tenancy ended on the basis of that notice.

The Tenants are seeking compensation, pursuant to section section 51(2) of the *Residential Tenancy Act (Act),* because steps were not taken to accomplish the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice or the rental unit was not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice.

The Landlord stated that she ended the tenancy because she intended to live in the rental unit on a part-time basis, although she also maintains a home in a different community. She stated that she moved into the rental unit on July 01, 2017; that she maintains one room in the house for herself; that her father has stayed at the rental unit since the tenancy ended; and that she currently rents one of the rooms to a roommate.

The female Tenant stated that she does not believe the Landlord moved into the rental unit because she has gone to the rental unit on several occasions and the Landlord was not there, nor has she ever seen the Landlord's car on the property.

Both Tenants stated that they went to the rental unit and spoke with an unknown male, who informed them that the Landlord was not living at the unit.

The Landlord stated that the male the Tenants spoke with would have been her roommate, whom she called as a witness.

The Witness for the Landlord stated that he lives in the rental unit and that the Landlord periodically stays in the unit with him. He stated that he recalls the Tenants coming to the door and he may have told the Tenants that the Landlord was not living there, as she was not in residence at the time of their attendance.

The Tenants submitted an internet advertisement in which the Landlord was advertising for a roommate for the rental unit. The advertisement clearly stipulates that the unit will be shared with the "owner" and one other roommate. The Landlord stated that she placed this advertisement because her current roommate is planning on moving.

Analysis

On the basis of the undisputed evidence, I find that the Tenants agreed that if the monthly charges of heat and electrical services exceed $325.00 per month the Tenants would pay 75% of the "amounts exceeding the limit". This is a very straightforward term. It requires the Landlord to prove the monthly heat and electrical charges (hydro and gas) for any given month exceed $325.00. In the event she is able to establish that the charges exceed $325.00, she is entitled to collect 75% of the excess charges.

Regardless of the fact the Landlord has opted to pay the hydro bill on an equal payment plan, I find that the Landlord has an obligation to prove the combined monthly gas and hydro charges exceed $325.00 before the Landlord can collect a monthly utility fee. I note that charges are the monthly usage charges, taxes, etc.

On the basis of the term of their tenancy agreement I find that the Tenants could expect to pay a utility fee during the winter, when hydro and gas costs are typically higher, and that the Tenants would expect not to pay a utility fee during the summer, when costs are lower. Although the Landlord may choose to pay the utility charges by virtue of an equal payment plan, it would be unfair to the Tenants to require them to pay a utility fee on the basis of the equal payment plan, as they could potentially pay more than they owe if, for example, they vacated the rental unit before the end of 12 month payment period.

I therefore find that in order to collect the utility fee outlined in the tenancy agreement, the Landlord has an obligation to produce bills that establish the combined gas and hydro charges for any given month exceed $325.00.

On the basis of the hydro bill dated October 18, 2016, in the amount of $164.80, and in the absence of any gas bill relating to this month, I find that the Landlord has failed to establish that the gas/hydro bills exceeded $325.00 for October of 2016. I therefore cannot conclude that the Tenants were obligated to pay any amount for hydro/gas for this month. As the Landlord has submitted insufficient evidence to establish that the gas/hydro bills for October of 2016 exceeded $325.00, I dismiss the Landlord's application for unpaid utilities from this month.

In the absence of any gas or hydro bills that establish the cost of gas and hydro in June, July, August, and September of 2016, I find that the Landlord has failed to establish that the gas/hydro bills exceeded $325.00 for any of those months. I therefore cannot conclude that the Tenants were obligated to pay any amount for hydro/gas for these months. As the Landlord has submitted insufficient evidence to establish that the gas/hydro bills for these months exceeded $325.00, I dismiss the Landlord's application for unpaid utilities from these months.

On the basis of the hydro bill dated October 20, 2015, in the amount of $117.00, and in the absence of any gas bill relating to this month, I find that the Landlord has failed to establish that the gas/hydro bills exceeded $325.00. I therefore cannot conclude that the Tenants were obligated to pay any amount for hydro/gas for this month.

On the basis of the hydro bill dated January 19, 2017, in the amount of $627.01, I find that the utility charges for that month exceed the $325.00 limit by at least $302.01, for which the Tenants were obligated to pay $226.50 (75%). As the gas bills were not submitted in evidence, I cannot calculate those costs. As the Landlord is not claiming compensation for unpaid utilities for January of 2017, I am not determining whether the Tenants owe money for this month.

On the basis of the hydro bill dated February 20, 2017, in the amount of $569.64, I find that the utility charges for that month exceed the $325.00 limit by at least $302.01, for which the Tenants were obligated to pay $244.64 (75%). As the gas bills were not submitted in evidence, I cannot calculate those costs. As the Landlord is not claiming compensation for unpaid utilities for February of 2017, I am not determining whether the Tenants owe money for this month.

On the basis of the hydro bill dated March 20, 2017, in the amount of $460.46, I find that the utility charges for that month exceed the $325.00 limit by at least $135.46, for which the Tenants were obligated to pay $101.59 (75%). As the gas bills were not submitted in evidence, I cannot calculate those costs. As the Landlord is not claiming compensation for unpaid utilities for March of 2017, I am not determining whether the Tenants are entitled to a refund of all or part of the utility fee they paid for this month. .

On the basis of the hydro bill dated April 19, 2017, in the amount of $395.29, I find that the utility charges for that month exceed the $325.00 limit by at least $70.29, for which the Tenants were obligated to pay $52.71 (75%). As the gas bills were not submitted in evidence, I cannot calculate those costs. As the Landlord is not claiming compensation for unpaid utilities for April of 2017, I am not determining whether the Tenants are entitled to a refund of all or part of the utility fee they paid for this month.

When making a claim for damages under a tenancy agreement or the *Act,* the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

I find that the Landlord has submitted insufficient evidence to establish that the Tenants left personal items on the residential property, with the exception of the pool pieces. In reaching this conclusion I was heavily influenced by the absence of evidence that corroborates the Landlord's submission that the items were abandoned by the Tenants or refutes the Tenants' submission that they were abandoned by the occupants of another suite on the residential property.

Although the Tenants' acknowledge that the abandoned property was not left in the occupant's private yard, I find their submission that the occupants left it on their side of the property because there was in sufficient room in their small yard is entirely possible. In the absence of evidence, such as a photograph, that causes me to conclude that it was left in a location that the occupants could not access, I cannot conclude that the property was abandoned by the Tenants.

On the basis of the testimony of the female Tenant and the documentary evidence submitted by the Tenants, I find that the Tenants paid a third party to remove unwanted items from the rental unit. I find that this evidence corroborates the Tenants claim that the items removed by the Landlord did not belong to them. I find it unlikely that the Tenants would not have removed all of their unwanted items, given they took the time and effort to remove some of them.

In adjudicating the claim for disposal costs I placed no weight on the Landlord's submission that the occupants of the separate suite vacated their suite at the end of April of 2017, as there was no evidence to support that testimony and it was disputed by the Tenants.

As the Landlord has failed to establish that the majority of items she disposed of belonged to the Tenants, I dismiss her claim for disposal costs.

On the basis of the undisputed evidence, I find that the Tenants did leave some pool pieces in the yard, which take up no more than 4'x4'x4'. Given that this is a relatively small amount of property I find that it would not have significantly increased the disposal costs incurred by the Landlord and I decline to award any compensation for disposing of that property.

As the Landlord has failed to establish a monetary claim, I dismiss her application to retain the Tenants' security deposit.

I find that the Landlord has failed to establish the merit of her Application for Dispute Resolution and I therefore dismiss her application to recover the fee for filing this Application for Dispute Resolution.

On the basis of the undisputed evidence I find that the Tenants were served with a Two Month Notice to End the Tenancy for Landlord's Use of Property, which declared that the tenancy was ending because it was to be occupied by the Landlord or a close family member of the Landlord.

I find that there is insufficient evidence to establish that the Landlord did not move into the rental unit on July 01, 2017 and that she periodically resides in the unit, as the Landlord testified. In reaching this conclusion I was heavily influenced by the testimony of the Witness for the Landlord, who stated that the Landlord periodically resides with him in the rental unit.

In concluding that the Landlord is periodically living in the rental unit I was heavily influenced by the internet advertisement that was submitted in evidence by the Tenants, in which the Landlord is seeking a person to share the rental unit with the "owner". I find that this advertisement corroborates the Landlord's testimony that she is periodically living in the rental unit and sharing it with a roommate.

In adjudicating the Tenants' claim I have placed little weight on the Tenants' submission that the Witness for the Landlord told them the Landlord did not live in the rental unit. Although the Witness for the Landlord stated he does not specifically recall making that statement but he provided a plausible explanation for that statement, which was that the Landlord was not in residence at the time of his attendance.

I note that the Tenants' submission that the Witness for the Landlord told them the Landlord did not live in the rental unit is different than the information provided in the Tenants' written submission of December 06, 2017. In that submission the female Tenant declared that the Witness told her that the Landlord may be back at Christmas. I find that this information from the Witness, if true, corroborates the Landlord's submission that she periodically stays at the rental unit.

In the written submission of December 06, 2017 the female Tenant declared that a neighbour told her the Landlord has "visited" in July and that the Landlord's father was "visiting". I find that this information from the neighbour, if true, corroborates the Landlord's submission that she and her father periodically stay at the rental unit.

In adjudicating the Tenants' claim I have placed little weight on the reference in the written submission of December 06, 2017, in which the female Tenant declares that a neighbour told her a couple from Montreal was staying in the rental unit. In the absence of evidence that establishes the Landlord did not have the right to occupy the rental unit at the same time as this couple, I find that it does not refute the Landlord's submission that she periodically occupied the unit.

In adjudicating the Tenants' claim I have placed little weight on the female Tenant's testimony that she has gone to the rental unit on several occasions and the Landlord was not there and has never seen the Landlord's car on the property. While I accept that testimony is true, it does not refute the Landlord's submission that she occupies the rental unit on a periodic basis.

Section 51(2)(a) of the *Act* stipulates that if steps were not taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice or the rental unit was not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice, the Landlord must pay the Tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

As the Tenants have submitted insufficient evidence to establish that the Landlord is not occupying the rental unit, I find that they are not entitled to compensation pursuant to section 51(2)(a) of the *Act.* I therefore dismiss the Tenants' claim for such compensation.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or file an Application for Dispute Resolution claiming against the deposits. As this tenancy ended on June 30, 2017, the Landlord received a forwarding address, in writing, on June 30, 2017, and the Landlord filed his Application for Dispute Resolution on July 14, 2017, I find that the Landlord complied with section 38 of the *Act.*

As the Landlord did not establish a right to retain any portion of the security deposit, I find that the entire deposit of $500.00 must be returned to the Tenants.

Conclusion

The Landlord's Application for Dispute Resolution is dismissed, without leave to reapply.

The Tenants have established a right to the return of their $500.00 security deposit and I grant the Tenants a monetary Order in that amount. In the event the Landlord does not voluntarily 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.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: January 10, 2018

Residential Tenancy Branch