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, 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 February 22, 2019 the Dispute Resolution Package was sent to the residence of the Tenant with the initials "Y.N.". This Tenant acknowledged receipt of these documents and she attended the hearing.

The Landlord stated that on February 22, 2019 the Dispute Resolution Package was sent to the residence of the Tenant Respondent with the initials "H.N.". Legal Counsel stated that she is representing the Tenant Respondents with the initials "Y.N." and "H.N." at these proceedings, although the Tenant Respondent with the initials "H.N." did not attend the hearing.

The Landlord stated that the Dispute Resolution Package was not served to the Tenant Respondent with the initials "F.N.". As this party was not served with notice of these proceedings in accordance with section 89(1) of the *Residential Tenancy Act (Act*), the Landlord's application for a monetary Order naming this party is dismissed.

The Tenant Applicants filed an Application for Dispute Resolution in which they applied for a monetary Order for money owed or compensation for damage or loss, for the

return of their security deposit, and to recover the fee for filing this Application for Dispute Resolution.

Legal Counsel for the Tenant Applicants stated that on April 24, 2019 the Dispute Resolution Package was served to the Landlord, via registered mail. The Landlord acknowledged receipt of these documents.

On February 19, 2019 the Landlord submitted 31 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was served to the Tenant Applicants, via registered mail, within a week of it being submitted to the Residential Tenancy Branch. Legal Counsel for the Tenant Applicants acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On April 06, 2019 the Landlord submitted 10 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was served to the Tenant Applicants, via registered mail, although he cannot recall the date of service. Legal Counsel for the Tenant Applicants acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

In April of 2017 the Tenant Applicants submitted 9 pages of evidence to the Residential Tenancy Branch. Legal Counsel for the Tenant Applicants stated that she does not know if this evidence was served to the Landlord. As the Tenant Applicants were not able to establish service of this evidence it was not accepted as evidence for these proceedings.

On May 16, 2019 the Tenant Applicants submitted 30 pages of evidence to the Residential Tenancy Branch. Legal Counsel for the Tenant Applicants stated that this evidence was served to the Landlord, via registered mail, on May 16, 2019. The Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On June 07, 2019 the Tenant Applicants submitted a written submission to the Residential Tenancy Branch. Legal Counsel for the Tenant Applicants stated that this was not intended to be relied upon as evidence and it was not, therefore, accepted as evidence for these proceedings.

The Landlord and Legal Counsel for the Tenant Applicants declared that no additional evidence was submitted to the Residential Tenancy Branch.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. All of the evidence accepted as evidence for these proceedings has been reviewed, but is only referenced in this written decision if it is directly relevant to my decision.

The Landlord and the Tenant in attendance at the hearing affirmed that they would provide the truth, the whole truth, and nothing but the truth at these proceedings.

Issue(s) to be Decided

Is the Landlord entitled to compensation for unpaid rent/lost revenue and the cost of utilities?
Are the Tenant Applicants entitled to compensation due to deficiencies with the rental unit?
Should the security deposit be retained by the Landlord or returned to the Tenant Applicants?

Background and Evidence

The Landlord and the Tenant in attendance at the hearing (hereinafter referred to as the Tenant) agree that:

- the Landlord and the Tenant entered into a written tenancy agreement;
- the tenancy agreement was for a fixed term that began on September 01, 2017 and was to end on August 31, 2018;
- the Tenant Applicants moved into the rental unit on August 24, 2017;
- the Tenant agreed to pay monthly rent of $2,950.00;
- a security deposit of $1,475.00 was paid; and
- the Tenant provided a forwarding address, via email, on May 02, 2019.

The Landlord is seeking compensation, in the amount of $8,850.00, for lost revenue. This claim is based on the undisputed evidence that in April of 2018 the Tenant Applicant with the initials “H.N.” gave notice to end the tenancy, effective May 31, 2018, and that the rental unit was vacated on May 17, 2018.

The Landlord and the Tenant agree that the Tenant Applicants did not pay rent for June, July, or August of 2018. The Landlord is seeking compensation for lost revenue for these months, as he submits he would have collected this income if the fixed term tenancy had not been ended prematurely.

The Landlord and the Tenant agree that in May of 2018 the Tenant asked for permission to sublet the rental unit.

The Landlord stated that the request to sublet was denied because strata bylaws prohibit rentals for periods of less than six months. He stated that he only had permission from the strata to rent the unit until August 31, 2018. He stated that he did not discuss the request to sublet with the strata, as he considered the bylaws to be very clear. The Landlord submitted strata documents that corroborate this testimony.

Legal Counsel for the Tenant Applicants argued that the bylaws did not prohibit a sublet, as that would have been a continuation of the existing tenancy. She argued that the Landlord should have mitigated his lost revenue by discussing the sublet request with the strata to determine if a sublet would have been permitted.

The Landlord and the Tenant agree that strata bylaws allow owners to rent a unit to family members. Legal Counsel for the Tenant Applicants argued that the Landlord's mother could have moved into the rental unit once it was vacated by the Tenant. The Landlord stated that his mother planned to move into the rental unit in September of 2018 but she was not prepared to move into the unit at an earlier date.

Legal Counsel for the Tenant Applicants argued that the bylaws did not prohibit short term rentals, as the Tenant was permitted to move into the rental unit on August 24, 2017, which was one week prior to the official start of the tenancy. She argued that this was a short term tenancy, which indicates that short term tenancies were permitted.

The Landlord is claiming compensation for hydro usage that exceeds "historical norms". The Landlord and the Tenant agree that:

- heat, hot water, and electricity was included in the rent;
- there is a term in the tenancy agreement, which was submitted in evidence, that declares these services are "not to exceed reasonable levels of usage calculated monthly & based on averages from 2015 & 2016"; and
- the levels of uasge from 2015 and 2016 were not discussed with the Tenant.

The Tenant Applicants are seeking compensation, in the amount of $10,848.00 because there were a variety of deficiencies with the rental unit. The Tenant Applicants are claiming compensation, in part, because window/door screens were not provided with the rental unit. The Landlord and the Tenant agree that screens were never promised to the Tenant as a term of the tenancy agreement and they were not in place at the start of the tenancy.

The Tenant Applicants are claiming compensation, in part, because they believe the hot water tank was too small. The Landlord stated that the unit has a 125 liter tank and that he thinks this is the typical size for a rental unit of this size, but he is not certain. Legal Counsel for the Tenant Applicants stated that the Tenant does not know the typical size of a water tank for a rental unit of this size but the Tenant believes it is too small because they ran out of hot water after one shower.

The Tenant Applicants are claiming compensation, in part, because they believe one of the Applicants developed a skin allergy from the mattress provided with the unit. The Tenant submits that her daughter's skin allergy began in December of 2017; that she did not have a skin allergy before the tenancy began or after it ended; and that during the tenancy she experienced three outbreaks.

The Landlord stated that an impenetrable mattress cover was provided with the mattress and that the mattress was new at the start of the tenancy.

The Tenant Applicants are claiming compensation, in part, because a baseboard heater in the master bedroom stopped working during the tenancy. The Landlord and the Tenant agree that:

- the problem with the heater was reported to the Landlord on November 07, 2017;
- the Landlord unsuccessfully attempted to repair the heater on November 09, 2017;
- the Landlord provided the Tenant with a space heater on November 14, 2017; and
- the baseboard heater was not repaired prior to the unit begin vacated.

The Landlord stated that he intended to have an electrician install a new baseboard heater but he did not do so. The Tenant submits that the space heater provided was noisy and inadequate.

The Tenant Applicants are claiming compensation, in part, because the Tenant's daughter was unable to practice her guitar, which the Tenant mistakenly referred to as a "gita". At the hearing Legal Counsel for the Tenant Applicants withdrew this portion of the claim.

Analysis

On the basis of the undisputed evidence I find that the Landlord and the Tenant with the initials “Y.N.” entered into a fixed term tenancy agreement, the fixed term of which ended on August 31, 2018. On the basis of the undisputed evidence I find that this Tenant agreed to pay monthly rent of $2,950.00 for the duration of the fixed term tenancy.

As the evidence does not establish that the other two parties named in these proceedings entered into a tenancy agreement with the Landlord, I dismiss the Landlord’s and the Tenants’ application for a monetary Order naming the Tenant with the initials “H.N.” or “F.N.”.

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 Tenant did not comply with section 45(2) of the *Act* when she ended this fixed term tenancy on a date that was earlier than the end date specified in the tenancy agreement. In some circumstances I would find that the Tenant would be required to compensate the Landlord for losses the Landlord experienced as a result of the Tenant’s non-compliance with the *Act,* pursuant to section 67 of the *Act.*

In adjudicating this matter I have considered section 34(1) of the *Act,* which prohibits a tenant from subletting a rental unit unless the landlord consents to the sublet, in writing. On the basis of the undisputed evidence I find that the Tenant did not have the right to sublet the unit, as she did not have permission from the Landlord to do so.

In adjudicating this matter I have considered section 34(2) of the *Act,* which prohibits a landlord from unreasonably withholding consent if a fixed term tenancy agreement has 6 months or more remaining in the term. As there was less than 6 months remaining in this fixed term, I find that the Landlord was not legally obligated to agree to the sublet.

In adjudicating this matter I have considered section 7(2) of the *Act,* which requires a landlord who claims compensation for damage or loss that results from the other party’s non-compliance with the *Act* must do whatever is reasonable to minimize damage or loss.

In determining whether the Landlord properly mitigated his losses I have placed no weight on the Tenant's submission that the Landlord's mother could have moved into the rental unit once it was vacated by the Tenant. I have placed no weight on this submission as there is no evidence that the Landlord's mother was prepared to move into the rental unit prior to August 31, 2018.

In determining whether the Landlord properly mitigated his losses I have placed no weight on the Tenant's submission that the fact the Tenant was permitted to move into the rental unit on August 24, 2017, which was one week prior to the official start of the tenancy, establishes that short term rentals were allowed. Landlords and tenants often agree to an early move-in date, for which the tenant agrees to pay pro-rated rent. When that occurs, I find that the parties have simply agreed, sometimes verbally, to amend the start date of the tenancy. I do not find that it establishes the parties have entered into two separate tenancy agreements.

I find that the Landlord failed to properly mitigate his losses when he failed to consider the Tenant's request to sublet the unit for three months. Had the Landlord agreed to consider this request and had the Tenant been able to find a suitable person to sublet the rental unit until August 30, 2018, I find it highly likely that the Landlord would have received rent for June, July, and August of 2018.

In determining that the Landlord did not properly mitigate his losses when he failed to consider the Tenant's request to sublet the unit for three months, I have considered the Landlord's submission that he did not agree to the sublet because strata bylaws prohibited rentals for periods of less than six months and that he only had permission from the strata to rent the unit until August 31, 2018. While I accept that strata bylaws prevented the Landlord from entering into a <u>new</u> tenancy agreement, I do not find that they prevented the Landlord from agreeing to a sublet that ended prior to August 31, 2018. I find that the bylaws did not prevent the Landlord from agreeing to a sublet that ended prior to August 31, 2018, as a sublet is <u>not</u> a new tenancy.

In adjudicating this matter I was guided by Residential Tenancy Branch Policy Guideline #19, with which I concur. This guideline explains that when a rental unit is sublet, <u>the original tenancy agreement remains in place between the original tenant and the landlord</u>, and the original tenant and the sub-tenant enter into a new agreement. Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to

move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant.

As I have concluded that the Landlord did not properly mitigate his lost revenue, I dismiss his claim for compensation for lost revenue for June, July, and August of 2018.

The court held in Derby Holdings Ltd. V. Walcorp Investments Ltd. 1986, 47 Sask R. 70 and Coronet Realty Development Ltd. And Aztec Properties Company Ltd. V. Swift, (1982) 36 A.R. 193, that where there is ambiguity in the terms of an agreement prepared by a landlord, the contra proferentem rule applies and the agreement must be interpreted in favour of the tenant.

I find the contra proferentem rule applies in regards to the term in the tenancy agreement relating to hydro payments. I find that the term in the tenancy agreement that declares these services are "not to exceed reasonable levels of usage calculated monthly & based on averages from 2015 & 2016" is ambiguous, as the Tenant was not provided information regarding the average usage from 2015 and 2016. As the term is ambigous, I find it is not enforceable. I therefore dismiss the Landlord's claim for compensation for hydro that "exceeded historical norms".

As the Landlord has failed to establish a claim against the Tenant's security deposit, I dismiss his application to retain the Tenant's security deposit and I order that the deposit be returned, in full, to the Tenant.

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. On the basis of the undisputed evidence I find that the Landlord did not receive the Tenant's forwarding address, in writing, until May 02, 2019. As the Landlord filed his Application for Dispute Resolution on February 19, 2019, I find that the Landlord filed his Application for Dispute Resolution before the deadline established by section 38(1) of the *Act*.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord

did comply with section 38(1) of the *Act,* I cannot conclude that the Landlord is required to pay the Tenant double the security deposit.

Sections 24 and 36 of the *Act* stipulate that the Landlord's right to claim against the security deposit or pet damage deposit for damage to the residential property is extinguished if the landlord does not comply with portions of sections 23 and 35 of the *Act*. As the Landlord's claims relate to lost revenue and excessive utility consumption, rather than damage to the residential property, I find that the Landlord's right to file a claim against the security deposit or pet damage deposit would not be extinguished even if the Landlord failed to comply with sections 23 and 35 of the *Act.*

Section 32(1) of the *Act* requires landlords to provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

I find that no evidence was submitted that established window/door screens are required by law or that they are necessary for suitable occupation of the rental unit. I therefore find that the Landlord was not obligated by the *Act* to provide screens. As there is no evidence that the Landlord promised to provide screens as a term of the tenancy, I find that the Landlord was not obligated by the tenancy agreement to provide screens. As there is no evidence the Landlord was obligated to provide screens, I find that the Tenant is not entitled to compensation for being without screens.

I find that no evidence was submitted that established a 145 liter hot water tank does not meet the standards required by law or that a larger tank is necessary for suitable occupation of the rental unit. I therefore find that the Landlord was not obligated by the *Act* to provide a larger hot water tank. As there is no evidence that the Landlord promised to provide a larger hot water tank as a term of the tenancy, I find that the Landlord was not obligated by the tenancy agreement to provide a larger tank. As there is no evidence the Landlord was obligated to provide a larger tank, I find that the Tenant is not entitled to compensation on the basis of the size of the hot water tank.

I find that the Tenant Applicants submitted insufficient evidence to establish that the skin allergy the Tenant's daughter developed was the result of the mattress provided with the tenancy. In reaching this conclusion I was heavily influenced by the absence of any medical evidence to support this submission. I find that there are numerous reasons why an individual would develop a skin allergy and that it is mere speculation that the allergy was related to the mattress. Although I accept the Tenant's evidence that the

allergic reaction did not occur prior to the start of the tenancy and it did not reoccur after the tenancy ended, I find that could be related to an environmental trigger that is entirely unrelated to the rental unit. As the Tenant has failed to establish that her daughter's allergy was related to a mattress provided with the rental unit, I find that the Tenant is not entitled to compensation as a result of the allergic reaction.

On the basis of the undisputed evidence I find that the Tenant was without any source of heat in the master bedroom between November 07, 2017 and November 14, 2017 and that she had to heat that room with a space heater between November 14, 2017 and May 17, 2018.

I find that the Landlord had an obligation, pursuant to section 32(1) of the *Act*, to provide a heat source in the master bedroom. Although the Tenant was without a heat source in that room for one week, I find that the Landlord complied with his obligation to provide a heat source on November 14, 2017 when he provided the Tenant with a space heater. I accept the Tenant's submission that the space heater was noisy, as I am aware that space heaters are typically noisier than baseboard heaters. I do not accept that the space heater was inadequate, as I am not aware that space heaters are less efficient than baseboard heaters and no evidence was submitted to corroborate this submission. I find that the inconvenience of being without a heat source for one week and for having to subsequently live with a noisy space heater is a minor breach of the Tenant's right to the quiet enjoyment of the rental unit, for which she is entitled to compensation of $50.00.

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

I find that the Tenant Applicant's Application for Dispute Resolution has merit and that the Tenant is entitled to recover the fee for filing an Application for Dispute Resolution.

Conclusion

The Tenant has established a monetary claim, in the amount of $1,625.00, which includes a refund of the $1,475.00 security deposit, $50.00 in compensation for the issue with heat in the master bedroom, and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution.

Based on these determinations I grant the Tenant a monetary Order for the $1,625.00. 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: June 11, 2019

Residential Tenancy Branch