Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT FFT

Introduction

In this dispute, the tenants seek compensation under sections 43(5), 51, 67 and 72 of the *Residential Tenancy Act* (the "Act").

The tenants applied for dispute resolution on February 11, 2020 and a dispute resolution hearing was held, by way of telephone conference, on June 1, 2020. The tenants and one of the landlords attended the hearing, and they were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses. The parties did not raise any issues regarding the service of evidence.

I have only considered evidence that was submitted in compliance with the *Rules of Procedure,* to which I was referred, and which was relevant to the issues of this application. Further, only relevant testimony has been included in this Decision.

Issues

1. Are the tenants entitled to compensation for

    a. recovery of rent in the amount of $3,050.00 pursuant to section 43(5) of the Act, and

    b. an amount equal to twelve times the rent pursuant to section 51 of the Act?

2. Are the tenants entitled to recovery of the filing fee of $100.00?

Background and Evidence

The tenancy began on September 1, 2016 and ended on September 30, 2019. During the tenancy, the parties entered into three separate written tenancy agreements, each with the following fixed-term durations and monthly rent amounts: (1) September 1, 2016 to September 1, 2017, with monthly rent of $1,300.00; (2) September 1, 2017 to August 1, 2018, with monthly rent of $1,400.00; and, (3) August 1, 2018 to July 31, 2019, with monthly rent of $1,450.00. Copies of the three tenancy agreements were submitted into evidence. It should be noted that utilities and internet were, according to the tenants, included in the rent.

The tenants testified that the "notices" of rent increases comprised communication by way of verbal and text messages. In their application, the tenants argue that these rent increases were not in compliance with the Act, and they seek a total of $3,050.00, representing overpaid amounts from the initial rent of $1,300.00. A spreadsheet which itemized the amounts was submitted into evidence.

At or about the end of July 2019 the landlords issued a Two Month Notice to End Tenancy for Landlord's Use of Property, which indicated that the landlords or a close family member intended to occupy the rental unit. (While no copy of this notice was submitted into evidence, the parties agreed as to the content.)

The tenants moved out of the rental unit on September 30, 2019. After they moved out, and between September 30, 2019 to January 2020, the landlords "seemed not to use the suite for the reasons they said [they would]." When the tenants took evening walks, sometimes with friends who lived in the area, they noticed that the lights in the rental unit were never on. The rental unit "looked completely empty," and that when they went to collect their mail from the property, "there was no evidence of anyone living there." Apparently, the landlords' son was supposed to move into the rental unit. And, "four and a half months later," nobody appears to be living there.

When I asked the tenants about what they meant by "no evidence," they explained that when they got the mail, they could see through the window (the blinds were up) into the whole front of the rental unit, and that the rental unit was "completely empty." They admitted that they could not see into the rest of the rental unit, however. The last time they visited the rental unit and looked through the window was on January 7, 2020.

In his testimony, the landlord took issue with the tenants' entire application, remarking, "I feel very stabbed in the back." He continued, saying that he had always intended for

the rental unit to be available for family use or for his mother-in-law, who ended up not wanting to move into the rental unit. The landlord then testified that their 17-year-old son moved into the suite, and in response to the tenants' testimony about the lack of furnishings, explained "I don't know how much a 17-year-old should have." Moreover, he submitted that the only way that the tenants could have seen into the rental unit would have been if they had traversed the property through the back gate. Thus, he contended that the tenants were trespassing, which he found "troubling." (He now has to lock the back gate to prevent the now-former tenants from getting in.)

Submitted into evidence by the landlord was a copy of a secondary suite license from the municipality. The license, which confirms that the rental unit is intended for family use, was issued May 4, 2020. During their testimony, the tenants argued that they found the issue date to be rather suspect, given that it occurred after they filed for dispute resolution and not long before the arbitration hearing date.

Regarding the rental increases, the landlord testified that the tenants, by signing the last two of the three tenancy agreement, agreed in writing to the increases. He went on to explain that the rent increases were necessary to cover significant increases in utility costs from the female tenant being home full-time with a newborn.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Claim for recovery of the rent under section 43(5) of the Act

Sections 40 through 43 of the Act outline the procedure by which rent may be increased by a landlord.

Section 40 permits rent increase where a tenancy agreement contains a term which allows a landlord to increase rent where there are additional occupants. There is no such term in the tenancy agreement in this case. Section 41 simply states that a landlord must not increase rent except in accordance with these sections of the Act. Section 42 of the Act states as follows:

> 42 (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:

(a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first payable for the rental unit;

(b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.

(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.

(3) A notice of a rent increase must be in the approved form.

(4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

Section 43 of the Act states as follows:

43 (1) A landlord may impose a rent increase only up to the amount

(a) calculated in accordance with the regulations,

(b) ordered by the director on an application under subsection (3), or

(c) agreed to by the tenant in writing.

(2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.

(3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.

(4) [Repealed 2006-35-66.]

(5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.

Section D of the *Residential Tenancy Policy Guideline 30* provides clarification on rent increases that occur when fixed-term tenancy agreements are renewed (as is the case here), and states as follows:

> A landlord and tenant may agree to renew a fixed term tenancy agreement with or without changes, for another fixed term. If a tenancy does not end at the end of the fixed term, and if the parties do not enter into a new tenancy agreement, the tenancy automatically continues as a month-to-month tenancy on the same terms. Rent can only be increased between fixed-term tenancy agreements with the same tenant if the notice and timing requirements for rent Increases are met.

Section H of the guideline further states:

> A rent increase between fixed term tenancy agreements with the same tenant for the same unit is subject to the rent increase provisions of the Legislation, including requirements for timing and notice. To raise the rent above the maximum annual allowable amount, the landlord must have either the tenant's written agreement or an order from an arbitrator. If the tenant agrees to an additional rent increase, the landlord must issue a Notice of Rent Increase along with a copy of the tenant's signed agreement to the additional amount. The tenant must be given three full months' notice of the increase.

In this case, the landlords failed to comply with the timing and notice requirements under the Act. They did not use the required form, nor did they provide the required minimum three months' notice. Verbal and text message "notifications" are insufficient. Nor is having the tenants sign the subsequent tenancy agreements sufficient.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenants have met the onus of proving their claim that the landlords increased the rent in breach of the Act. Therefore, as the landlords collected a rent increase that did not comply with Part 3 of the Act the tenants are entitled to recover the increased amounts totalling $3,050.00.

Claim for compensation under section 51 of the Act

Here, the tenants seek compensation under section 51 of the Act, which states:

> (1) 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.
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> (1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.
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> (1.2) If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.
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> (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
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> (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
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> (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
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> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or

(c) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

The two-month notice indicated that the landlord or a close family member of the landlord would occupy the rental unit. The tenants testified that in the period between when they moved out to January 2020, the rental unit appeared to never have any lights on, which to the tenants suggested that the rental unit remained empty and unoccupied. Further, they testified that when they looked through the window into the front of the rental unit, the interior was devoid of anything. In rebuttal, the landlord testified that his 17-year-old son resided (or resides) in the rental unit, and, that the absence of any furnishings in the front of the rental unit does not prove the rental unit is unoccupied.

When two parties to a dispute provide equally reasonable accounts of events related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In this case, I find that the tenants have failed to provide any evidence – over and above their testimony – that the landlords did not accomplish the purpose for ending the tenancy, namely, that the landlords or their close family member intended to occupy the rental unit.

Certainly, a rental unit with no lights on may very well indicate an absence of anyone living there, but there would need to be a lengthy, almost daily observation of such a rental unit for this to be convincing evidence. Several evening walks over a period of three to four months is inconclusive. Further, an absence of furniture or furnishings does not necessarily mean that the rental unit is unoccupied. It is, of course, often suggestive that the rental unit is empty, but in the absence of photographic evidence, it is not determinative of such. More so when a landlord disputes a tenants' claim such as this.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenants have not met the onus of proving their claim for compensation under section 51 of the Act. This aspect of their application is dismissed without leave to reapply.

Claim for recovery of filing fee

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee.

As the tenants were successful in respect of their claim for an illegal rent increase, I grant their claim for reimbursement of the filing fee in the amount of $100.00, for a total monetary award of $3,150.00.

Conclusion

I grant the tenants a monetary order in the amount of $3,150.00, which may be served on the landlords. Should the landlords fail to pay the tenants the amount awarded, the tenants must serve a copy of the order on the landlords and may then file the order in the Provincial Court of British Columbia (Small Claims Court) for enforcement and collection.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: June 2, 2020

Residential Tenancy Branch