Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD, MNDCT, FFT

Introduction:

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenants in which the Tenants applied for a monetary Order for money owed or compensation for damage or loss, for the return of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

The Tenant stated that on September 24, 2020 the Dispute Resolution Package and evidence the Tenant submitted to the Residential Tenancy Branch in September were sent to the Landlord, via registered mail. The Landlord acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

On January 05, 2020 the Landlord submitted evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that this evidence was served to the Tenants, via email, on January 05, 2020.

Rule 3.15 of the Residential Tenancy Branch Rules of Procedure required the Landlord to ensure her evidence was received by the Tenants no less than seven days before the hearing. I find that the evidence she served on January 05, 2020 does not comply with the timelines established by the Rules of Procedure, as that was only two days prior to the hearing date.

The Tenant acknowledged receiving the Landlord's evidence but has had limited time to consider it, given that it was received two days prior to the hearing. The Tenant stated that he does not want an adjournment to provide him with more time to consider the evidence, as he does not wish to delay these proceedings any longer. He argued that the Landlord's evidence should not be accepted because the Landlord made no effort to comply with the timelines for serving evidence.

The Agent for the Landlord stated that the Landlord's evidence was not provided prior to January 05, 2020 because the Landlord was not aware there were timelines for serving evidence and the Landlord "did not get around to it". When asked why the Landlord did not "get around to it", the Agent for the Landlord stated that the dealings with the Tenant have been contentious and they did not wish to spoil the remainder of 2020 by responding to his claims.

When late evidence is submitted, I must consider rule 3.17 of the Residential Tenancy Branch Rules of Procedure. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. I find that accepting this late evidence would be highly unfair to the Tenants, as they have had limited time to consider it.

Rule 3.17 sets out that I may consider "late" evidence if the party submitting the evidence can establish that it is new and relevant evidence. I find that some of the evidence submitted by the Landlord is not relevant to the issues in dispute. I find that the evidence that is relevant to the issues can be introduced by the way of testimony. I therefore find that failing to accept the evidence will not unreasonably prejudice the Landlord.

I find that the Landlord provided no reasonable explanation for not serving her evidence in accordance with the established timelines. I find that the explanation that the Landlord "did not get around to it" and she did not wish to spoil the remainder of 2020 by responding to these claims is simply not grounds to accept this late evidence.

The Landlord's documentary evidence was not accepted as evidence for these proceedings; however, the Landlord was given the opportunity to relevant testimony regarding her evidence.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

Preliminary Matter

The Landlord and the Tenant agree that this tenancy was the subject of a dispute resolution proceeding on August 07, 2020. They agree that on August 07, 2020 a Residential Tenancy Branch Arbitrator dismissed the Tenants' application for a monetary Order, without leave to reapply.

The Agent for the Landlord submits that the Tenants did not have the right to file this Application for Dispute Resolution because a Residential Tenancy Branch Arbitrator dismissed the August 07, 2020 Application for Dispute Resolution, without leave to reapply.

The Agent for the Landlord provided the file number for the August 07, 2020 proceeding, which appears on the first page of this decision.

I have read the August 07, 2020 decision. There is nothing in that decision that suggests that Arbitrator considered an application to recover the security deposit or an application for compensation pursuant to section 51 of the *Residential Tenancy Act (Act) .* As that Arbitrator did not consider either of those applications, I find that he did not dismiss those applications, without leave to reapply.

As there is no evidence to show that a Residential Tenancy Branch Arbitrator has previously considered the Tenants' application to recover the security deposit or the application for compensation pursuant to section 51 of the *Act,* which are the subject of these proceedings, I find that I am able to consider those claims.

I note that it would have been premature for the Tenants to make these claims in their first Application for Dispute Resolution.

Issue(s) to be Decided:

Are the Tenants entitled to the return of security deposit?
Are the Tenants entitled to compensation pursuant to section 51 of the *Act?*

Background and Evidence:

The Landlord and the Tenant agree that:

- The tenancy began on March 01, 2015;
- The Tenants lived in the upper level of this residential complex;
- There is a suite in the lower level of the complex;
- $2,100.00 was due by the first day of each month, $1,900.00 of which was for rent and $200.00 of which was for utilities;
- A security deposit of $900.00 was paid;
- On July 04, 2020 the Tenants were served with a Two Month Notice to End Tenancy for Landlord's Use;
- The Two Month Notice to End Tenancy for Landlord's Use declared that the tenancy was ending because the unit would be occupied by the Landlord, the Landlord's spouse, or a close family member of those individuals;

- The Two Month Notice to End Tenancy for Landlord's Use declared that the unit must be vacated by September 01, 2020;
- The Tenants disputed the Two Month Notice to End Tenancy for Landlord's Use;
- The Tenants provided a forwarding address, by text message, on August 14, 2020;
- The Tenants did not authorize the Landlord to retain any portion of the security deposit;
- the Landlord did not file an Application for Dispute Resolution claiming against the security deposit; and
- on August 26, 2020 the Landlord returned $500.00 of the Tenants' security deposit.

The Tenant stated that the rental unit was vacated on July 20, 2020. The Agent for the Landlord stated that she is not certain when the unit was vacated, but it was vacated sometime in July of 2020.

The Tenants are seeking compensation, pursuant to section 51 of the *Residential Tenancy Act (Act)*, because the Landlord did not move into the rental unit.

In response to the claim for compensation pursuant to section 51 of the *Act*, the Agent for the Landlord declared that:

- When the Two Month Notice to End Tenancy for Landlord's Use was served to the Tenant, the Landlord was living in a home she owned in a nearby community;
- When the Two Month Notice to End Tenancy for Landlord's Use was served to the Tenant, the Landlord
- The Landlord planned to renovate the rental unit while she was living in it;
- After the Tenants vacated the rental unit the Landlord decided to sell the unit;
- The Landlord never moved into the unit;
- The unit was sold in October of 2020;
- There were no extenuating circumstances that prevented the Landlord from moving into the unit after it was vacated by the Tenants;
- They decided to leave the rental unit empty after a Residential Tenancy Branch Arbitrator dismissed the Tenants' previously mentioned Application for Dispute Resolution;
- Once the Arbitrator dismissed the Tenants' previous Application for Dispute Resolution, the Landlord assumed the Tenants would have "no recourse against us";
- The Landlord did not understand that the Tenants could apply for compensation if they did not move into the unit; and
- As a result of the Landlord's misunderstanding, the Agent for the Landlord is requesting leniency.

Analysis:

On the basis of the undisputed evidence, I find that this tenancy began on March 01, 2015 and that it ended when the unit was vacated, which was sometime in July of 2020.

On the basis of the undisputed evidence, I find the Landlord received a forwarding address in writing for the Tenants, via text message, on August 14, 2020.

In determining that the Landlord received the Tenants' forwarding address in writing when she received the aforementioned text message, I was guided, in part, by the definition provided by the Black's Law Dictionary Sixth Edition, which defines "writing" as "handwriting, typewriting, printing, photostating, and every other means of recording any tangible thing in any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof". I find that a text message meets the definition of written as defined by Black's Law Dictionary.

Section 6 of the *Electronics Transactions Act* stipulates that a requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is accessible by the other person in a manner usable for subsequent reference, and capable of being retained by the other person in a manner usable for subsequent reference. As text messages are capable of being retained and used for further reference, I find that a text message can be used by a tenant to provide a landlord with a forwarding address pursuant to section 6 of the *Electronics Transactions Act.*

Section 88 of the *Residential Tenancy Act (Act)* specifies a variety of ways that documents, other than documents referred to in section 89 of the *Act,* must be served. Service by text message is not one of methods of serving documents included in section 88 of the *Act*.

Section 71(2)(c) of the *Act* authorizes me to conclude that a document not given or served in accordance with section 88 or 89 of the *Act* is sufficiently given or served for purposes of this *Act*. As the Landlord acknowledged receiving the text message in which the Tenants provided a forwarding address, I find that the Landlord was sufficiently served with the Tenants' forwarding address.

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 failed to comply with section 38(1) of the *Act*, as the Landlord has not repaid the full security deposit or filed an Application for Dispute Resolution claiming against the deposit, and more than 15 days has passed since the tenancy ended and the forwarding address was received.

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 not comply with section 38(1) of the *Act,* I find that the Landlord must pay the Tenant double the security deposit, which is $1,800.00.

On the basis of the undisputed evidence, I find that the Tenants were served with a Two Month Notice to End Tenancy, pursuant to section 49 of the *Act*, that required them to vacate the rental unit by September 01, 2020. On the basis of the undisputed evidence, I find that the Notice declared that the Landlord, or a close family member of the Landlord intended, in good faith, to occupy the rental unit.

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 twelve times the monthly rent payable under the tenancy agreement.

On the basis of the undisputed testimony of the Agent for the Landlord, I find that nether the Landlord nor a close family member of the Landlord moved into the rental unit after the unit was vacated by the Tenants, and that the residential property was sold in October of 2020. As such, I find that the Landlord is subject to the penalty established by section 51(2)(a) of the *Act*. I therefore grant the Tenant compensation of $22,800.00 (12 X $1,900.00). The Tenant is not entitled to the equivalent of twelve times any monthly utility payment, which in these circumstances was $200.00 per month.

Section 51(3) of the *Act* permits me to excuse the Landlord from paying the penalty imposed by section 51(2) of the *Act* if I believe extenuating circumstances prevented the landlord from accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or 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.

Residential Tenancy Branch Policy Guideline #50 provides the following examples of extenuating circumstances that would excuse a landlord from paying the penalty imposed by section 51(2) of the *Act*:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before moving in.
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
- A tenant exercised their right of first refusal but didn't notify the landlord of any further change of address or contact information after they moved out.

Residential Tenancy Branch Policy Guideline #50 provides the following examples of extenuating circumstances that would likely not excuse a landlord from paying the penalty imposed by section 51(2) of the *Act*:

- A landlord ends a tenancy to occupy a rental unit and they change their mind.
- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for renovations

The evidence before me is that the Landlord decided not to move into the rental unit after a Residential Tenancy Branch Arbitrator dismissed the Tenants' previously filed Application for Dispute Resolution, because she did not believe the Tenants had any recourse. I do not find this to be sufficient reason to excuse the Landlord from paying the penalty imposed by Section 51(2) of the *Act*.

I find that the Tenants' Application for Dispute Resolution has merit and that the Tenants are entitled to recover the fee paid to file this Application.

Conclusion:

The Tenants have established a monetary claim of $24,700.00, which includes double the security deposit ($1,800.00), $22,800.00 pursuant to section 51 of the *Act*, and $100.00 as compensation for the cost of filing this Application for Dispute Resolution.

The monetary claim must be reduced by the $500.00 the Landlord returned to the Tenants in August of 2020.

I therefore grant the Tenants a monetary Order for $24,200.00 and I am issuing a monetary Order in that amount. In the event that the Landlord does not voluntarily comply with this Order, it may be 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 08, 2021

Residential Tenancy Branch