Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD MNDC FF

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution. The participatory hearing was held, by teleconference, on July 5, 2021. The Tenants applied for the following relief, pursuant to the *Residential Tenancy Act* (the "*Act*"):

- A monetary order for the return of the security deposit;
- A monetary order for compensation for loss or other money owed, pursuant to section 51 of the Act; and,
- Recovery of the cost of the filing fee.

The Landlord (and his wife) and the Tenants all attended the hearing and provided affirmed testimony. The Landlord acknowledged receipt of the Tenants' evidence package, including the application and Notice of Hearing. No issue was raised with respect to the service of that package.

The Tenants confirmed receiving the Landlord's evidence package towards the end of June 2020, and did not take issue with the service of that package. The Landlord stated that in addition to this package, they also sent a few documents by email around a week prior to the hearing, which the Tenants acknowledge getting. The Tenants stated they received and reviewed the email and attachments. The Tenants were willing and able to proceed to discuss all evidence they recieved. I find the Landlord sufficiently served the Tenants with their evidence for the purposes of this proceeding. All evidence submitted by both parties is admissible as all parties received and reviewed the evidence well in advance of the hearing. It does not appear there is any prejudice to either party in considering all evidence presented.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Are the Tenants entitled to an order that the Landlord return all or part of the security deposit?
2. Are the Tenants entitled to compensation for loss or money owed pursuant to section 51?
3. Are the Tenants entitled to recover the cost of the filing fee?

Background and Evidence

Both parties agree that the tenancy started on September 1, 2016, and ended on August 15, 2020, which is the date the Tenants moved out after receiving a 2-Month Notice to End Tenancy for Landlord's Use (the Notice). Both parties also agree that monthly rent was set at $1,100.00 at the start of the tenancy, but was $1,150.00 by the end. Rent was due on the first of the month. The parties also agreed that the Tenants paid a security deposit of $550.00 and that the Landlord still holds this amount. The Tenants stated that this rental unit is a basement suite, and the upper suite is rented out separately.

The Tenants stated that the Landlord never formally conducted a walk-through move-in or move-out inspection, nor did he complete a condition inspection report. The Landlord acknowledged that he did not complete a move-in or move-out condition inspection report. The Tenants stated that they sent their forwarding address in writing by mail to the Landlord on September 1, 2020. The Tenants provided a photo of this letter. The Landlord acknowledged getting this letter, with the forwarding address right around this time, but does not recall the exact date. The Landlord stated that he did not return the deposit because the Tenants damaged a few items. The Tenants are seeking double the security deposit because the Landlord kept their security deposit without any legal basis.

The Tenants are also seeking 12 months' compensation pursuant to section 51 of the Act because they feel the Landlord did not follow through with the stated purpose on the

Notice they issued. A copy of the Notice was provided into evidence, and the Landlord selected the following ground:

- The rental unit will be occupied by the Landlord or the Landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse).

More specifically, the Tenants stated that the Landlord mentioned to them, around the time the Notice was issued, that they were wanting the rental unit so that their daughter could move in. The Tenants stated that they received the Notice on June 28, 2020. The Tenants stated that they moved out as soon as they could, and left on August 15, 2020.

The Tenants feel that the Notice was issued in part because their relationship with the Landlord had started to deteriorate earlier in the year. The Tenants stated that the Landlord wanted to increase rent beyond what was allowable under the Act, and they had some negative interactions about growing their plants indoors, and the related moisture, utility usage, and potential damage. The Landlord stated that he was trying to be accommodating with the Tenants by allowing them to run a dehumidifier (which the Landlord paid for) so that they could grow plants inside. The Landlord stated that since utilities were included in rent, they had some discussions about the Tenants paying more to cover the costs of growing their plants indoors with the included utilities. The parties agree that around this time, the relationship started to degrade.

The Tenants stated that after they moved out, they regularly went back to the rental house (to the upper unit) to collect their mail from the occupants upstairs. The Tenants stated that they went back every couple of weeks, starting as soon as August 24, 2020. The Tenants stated they went back to collect their mail from the upstairs tenants again on September 3, 10, October 19, November 2, 17, 30, December 3, and January 14, 2021. The Tenants stated that, each time, they would ask what is happening with their old rental unit (the lower basement suite), and each time the upper tenants would say that no one has officially moved in on a full time basis. The Tenants stated that the people residing in the upper unit said they would only see the Landlord and his wife “periodically” for a few days at a time. The Tenants stated that they also spoke with the neighbour across the street, who told them that they had not seen anyone move into the basement suite, but the Tenants stated that they could not obtain any written statements from these individuals because they did not want to get involved.

The Landlord stated that the Notice was not issued in bad faith, but rather because they no longer wished to rent this unit out, long term and wanted it for their own use. The Landlord stated that, historically, they have always used this rental unit as an “owner’s

suite" which close family members could use for a variety of reasons. The Landlord stated that his parents used to use this rental unit as a place to stay during the winter months. The Landlord explained that his parents used to live in Calgary and would fly out to be in Victoria for a few months a year during the winter, which is how this suite was used for many years. The Landlord stated that his parents passed away and due to a change in life circumstances, he decided to rent out the property to the Tenants named on this application starting in 2016. The Landlord stated that this was only ever meant to be a temporary measure until they could figure out how to use the unit long term. The Landlord thought this was mutually acceptable since the Tenants just needed a place to live while one of the Tenant's finished school.

The Landlord stated that the Tenants ended up renting the unit for 4 years. However, going forward, the Landlord wants to use the suite for "family use." More specifically, the Landlord stated that his daughter was supposed to be coming home and needing a place to quarantine for 14 days in early August 2020, but since the Tenants didn't move out until August 15, 2020, his daughter didn't use the space. The Landlord indicated that his daughter only needed the space for a couple of weeks, when she returned home from being overseas, but their bigger picture plan was to have a space they could stay in when they, as owners and Landlords, come to visit Victoria. The Landlord stated that he and his wife come to Victoria from the Mainland once per month, for 4-5 days. The Landlord stated that he and his wife enjoy Victoria and want this space for themselves as they come and go for both personal and business reasons.

The Landlord stated that he and his wife started coming and staying in the rental unit as soon as late August 2020, and continue to use the suite in the same way to this day. The Landlord stated that the suite was partially furnished the whole time, so it is an easy place to come and stay or to use as living accommodation when they are in Victoria.

Analysis

A party that makes an application for monetary compensation against another party, pursuant to section 38(1) of the Act, has the burden to prove their claim.

Section 38(1) of the *Act* requires a landlord to repay the security deposit or make an application for dispute resolution within 15 days after receipt of a tenant's forwarding address in writing or the end of the tenancy, whichever is later. When a landlord fails to do one of these two things, section 38(6) of the *Act* confirms the tenant is entitled to the return of double the security deposit.

The undisputed evidence shows that the Tenants moved out of the rental unit on August 15, 2020. I find this reflects the end of the tenancy. The Landlord confirmed that he got the Tenant's forwarding address in writing, via mail, but could not recall when. Pursuant to section 88 and 90 of the Act, I find the Landlord is deemed served with the Tenant's forwarding address in writing on September 6, 2020, the fifth day after its mailing.

Pursuant to section 38(1) of the Act, the Landlord had 15 days from receipt of the forwarding address in writing (until September 21, 2020) to either repay the security deposit (in full) to the Tenants or make a claim against it by filing an application for dispute resolution. The Landlord did neither and I find the Landlord breached section 38(1) of the Act.

Accordingly, as per section 38(6)(b) of the Act, I find the Tenants are entitled to recover double the amount of the security deposit ($550.00 x 2).

Next, I turn to the Tenant's request to obtain 12 months' worth of rent as compensation based on the Notice, pursuant to section 51 of the Act. I note the following portion of the Policy Guideline #50 – Compensation for Ending a Tenancy:

> *ADDITIONAL COMPENSATION FOR ENDING TENANCY FOR LANDLORD'S USE OR FOR RENVOATIONS AND REPAIRS*
>
> *A tenant may apply for an order for compensation under section 51(2) of the RTA if a landlord who ended their tenancy under section 49 of the RTA has not:*
>
> > *• accomplished the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice to end tenancy, or*
> > *• used the rental unit for that stated purpose for at least six months beginning within a reasonable period after the effective date of the notice (except for demolition).*
>
> *A tenant may apply for an order for compensation under section 51.4(4) of the RTA if the landlord obtained an order to end the tenancy for renovations and repairs under section 49.2 of the RTA, and the landlord did not:*
>
> > *• accomplish the renovations and repairs within a reasonable period after the effective date of the order ending the tenancy.*

> *The onus is on the landlord to prove that they accomplished the purpose for ending the tenancy under sections 49 or 49.2 of the RTA or that they used the rental unit for its stated purpose under sections 49(6)(c) to (f). If this is not established, the amount of compensation is 12 times the monthly rent that the tenant was required to pay before the tenancy ended.*
>
> *Under sections 51(3) and 51.4(5) of the RTA, a landlord may only be excused from these requirements in extenuating circumstances.*

As noted above, the onus is on the Landlord to demonstrate that they accomplished the stated purpose for ending the tenancy, as laid out on the Notice. The Notice was issued and received by the Tenants on June 28, 2020. The Landlord selected the following ground:

- The rental unit will be occupied by the Landlord or the Landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse).

I note the following relevant portions of *Policy Guideline #2A - Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member:*

> ***Occupying the Rental Unit***
>
> *Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that "occupy" means "to occupy for a residential purpose." (See for example: Schuld v. Niu, 2019 BCSC 949) The result is that a landlord can end a tenancy under sections 49(3), (4) or (5) if they or their close family member, or a purchaser or their close family member, intend in good faith to use the rental unit as living accommodation or as part of their living space.*
>
> ***Vacant possession***
>
> *Other definitions of "occupy" such as "to hold and keep for use" (for example, to hold in vacant possession) are inconsistent with the intent of section 49, and in*

> *the context of section 51(2) which – except in extenuating circumstances – requires a landlord who has ended a tenancy to occupy a rental unit to use it for that purpose (**see Section E**). Since vacant possession is the absence of any use at all, the landlord would fail to meet this obligation. The result is that section 49 does not allow a landlord to end a tenancy to occupy the rental unit and then leave it vacant and unused.*

I note the tenancy ended on August 15, 2020. The Tenants are not asserting that the Landlord has breached the basis for the Notice by re-renting the unit to someone else. Rather, it appears the Tenants are arguing that the Landlord or close family member has failed to sufficiently occupy the rental unit, and move in. The Tenants brought up that the Landlord made it seem that their daughter was going to move in. This was noted in an email from the Landlord to the Tenants in the month before the Notice was issued. The Landlord indicated this was one of a few reasons they wanted to take the space back for “Landlord use”. However, the Landlord stated the daughter would have only needed the unit for a couple of weeks to quarantine after coming back to Canada.

I acknowledge that the Tenants were expecting the Landlord’s daughter to move-in. However, the main issue I must consider is whether or not the Landlord, or a close family member occupied the rental unit for a period of 6 months, beginning within a reasonable period of time after the tenancy ended. In other words, the Landlord could satisfy the requirements of the Notice either by occupying the unit himself, or having his daughter occupy the unit.

After reviewing the submissions and evidence, it is clear that one of the key issues that must be determined is whether or not the manner in which the Landlord used the property after the tenancy ended is sufficient to consider the rental unit as being “occupied” by the Landlord. This occupancy and use must also start within a reasonable period of time, and for continue for at least 6 months in duration.

The Tenants do not feel the manner in which the Landlord has used the rental unit sufficiently satisfies the requirements of the Notice. The Tenants do not feel that coming to the rental unit periodically meets the requirements under the Act for “occupying" the space.

I note this was a partially furnished rental unit, and that most of the essential furnishings were in place in order to facilitate occupancy in a residential manner both for the Tenants themselves, and after this tenancy ended, when the Landlord started to use it periodically.

The Landlord does not dispute that he and his wife only used the rental unit "periodically", as characterized in the email from the Tenant living upstairs. I accept that the Landlord and his wife came to the rental unit approximately once a month, for 4-5 days, as he has asserted. This is not inconsistent with the statement from the upstairs tenant and there is insufficient evidence from the Tenants to indicate the actual usage pattern was materially different from this. Generally, I note the Landlord spends most of his time on the Mainland where he and his wife live and work. However, it also appears the Landlord and his wife regularly come to Victoria to stay a few days per month. It appears the Landlord and his wife continue to use the rental unit as a part-time residence when they come to visit Victoria and have been doing so since the tenancy ended in August 2020.

I note that Policy Guideline 2A specifies that a landlord can end a tenancy under the grounds selected by the Landlord on the Notice as long as they use and occupy the rental unit as living accommodation or as part of their living space. I find there is sufficient evidence and testimony to show that the Landlord has regularly and periodically used the rental unit as "living accommodation" beginning soon after the tenancy ended, regardless of whether or not the use was periodic and part-time. I note that Policy Guideline 2A also specifies that holding a unit in vacant possession is inconsistent with the intent of this part of the Act and would not satisfy the occupancy requirements. However, this unit is not held in vacant possession, as it contains the Landlord's furnishings, and is periodically used by them for residential purposes and as living accommodation when they are in town, around once per month for 4-5 days at a time.

Overall, I find the Landlord has provided sufficient evidence and testimony to demonstrate that he fulfilled the stated purpose on the Notice. As such, I dismiss the Tenants' application for 12 month's compensation.

Further, section 72 of the *Act* gives me authority to order the repayment of a fee for an application for dispute resolution. Since the Tenants were partially successful in this hearing, I also order the Landlord to repay the $100.00 fee the Tenants paid to make the application for dispute resolution.

In summary, I find the Tenants are entitled to $1,100.00 for the Landlord's breach of section 38 of the Act, plus $100.00 for the filing fee, which equates to a monetary order in their favour in the amount of $1,200.00.

Conclusion

The Tenants' application for 12 months' compensation is hereby dismissed, without leave.

The Tenant is granted a monetary order pursuant to Section 38 and 67 in the amount of $1,200.00. This order must be served on the Landlord. If the Landlord fails to comply with this order the Tenant may file the order in the Provincial Court (Small Claims) and be 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 *Residential Tenancy Act*.

Dated: July 8, 2021

Residential Tenancy Branch