



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNETC, MNSD

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution, made on May 27, 2021 (the "Application"). The Tenant applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage or compensation;
- a monetary order for compensation relating to a Two Month Notice to End Tenancy for Landlord's Use of the Property; and
- an order granting the return of the Tenant's security deposit.

The hearing was scheduled for 1:30pm on November 26, 2021 as a teleconference hearing. The Tenant attended the hearing at the appointed date and time. No one appeared for the Landlords. The conference call line remained open and was monitored for 30 minutes before the call ended. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. During the hearing, I also confirmed from the online teleconference system that the Tenant and I were the only persons who had called into this teleconference.

The Tenant testified the Application and documentary evidence package was served to the Landlords by registered mail on June 12, 2021. The Tenant stated that she served the packages to the Landlords' address for service as indicated on the Two Month Notice to End Tenancy the Tenant had received by the Landlords. The Tenant provided a copy of the tracking report which confirms the mailings took place on June 12, 2021.

The Canada Post tracking report also indicates that the Landlords refused the delivery, therefore, the packages were returned to the Tenant. The Tenant provided a picture of each returned envelope in support. Based on the oral and written submissions of the Applicant, and in accordance with sections 89 and 90 of the *Act*, I find that the

Landlords are deemed to have been served with the Application and documentary evidence on June 17, 2021, the fifth day after their registered mailings. The Landlords did not submit documentary evidence in response to the Application.

The Tenant was given an 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. Is the Tenant entitled to monetary compensation for damage or compensation, pursuant to Section 67 of the *Act*?
2. Is the Tenant entitled to compensation in relation to a Two Month Notice to End Tenancy for Landlord's Use, pursuant to Section 51 of the *Act*?
3. Is the Tenant entitled to the return of her security deposit, pursuant to Section 38 of the *Act*?

Background and Evidence

The Tenant testified that the tenancy started on April 1, 2014. Near the end of the tenancy, the Tenant paid rent in the amount of \$2,334.64 to the Landlords, which was due on the first day of each month. The Tenant stated that she paid a security deposit in the amount of \$950.00, which the Landlords continue to hold. The Tenant stated the tenancy ended on October 31, 2020 in compliance with a Two Month Notice to End Tenancy for Landlord's Use of the Property dated August 4, 2020 (the "Two Month Notice").

The Tenant is claiming that the Landlords served her a Notice of Rent Increase dated January 7, 2020 which was meant to take effect on April 1, 2020. The Tenant provided a copy of the Notice of Rent Increase which increased the rent from \$2,275.47 to \$2,334.64, representing a \$59.17 increase each month. The Tenant stated that the rent increase took effect during the Provincial rent ban on rent increases. The Tenant stated that she paid the rent increase, however, she is seeking reimbursement of the rent increase from April 1, 2020 to September 2020 in the amount of \$295.85.

The Tenant is also claiming for the return of her security deposit. The Tenant stated that she provided her forwarding address to the Landlords at the end of the tenancy on

October 31, 2020. The Tenant stated that she also emailed her forwarding to the Landlords on December 12, 2020. The Tenant stated that the Landlords replied to her email on January 4, 2021. The Tenant provided a copy of the email exchange in support. The Landlords' response states in part:

"... I will give you your security deposit soon (Tenant) I don't have money right now. Still vacant. I know you need money more than I do. But just be patient."

The Tenant stated that the Landlords have not yet returned her security deposit. The Tenant stated that she did not consent to the Landlords keeping any amount of her deposit.

Lastly, the Tenant is claiming for compensation equivalent to 12 times the amount of the monthly rent as the Landlords have not accomplished the stated purpose of the Two Month Notice. The Tenant provided a copy of the Two Month Notice and also a letter from the Landlords' Lawyer dated August 4, 2020 which indicates that the Landlords require vacant possession of the rental unit on or before October 31, 2020 as their son intends to occupy the rental unit.

The Tenant stated that she complied with the Two Month Notice and vacated the rental unit on October 31, 2020. The Tenant stated that she was contact by several neighbours in January 2021 who indicated to the Tenant that the Landlords' son has not moved into the rental unit and that it remains vacant. The Tenant provided witness statements from the neighbours in support.

The Tenant stated that the email received by the Landlords on January 4, 2021 also indicates that the rental unit remains vacant. The Tenant stated that she attended the rental unit on January 5, 2021 to retrieve some mail and met with the Landlord R.M. who was pleased to show the Tenant all the improvements he had made to the rental unit. The Tenant stated that the rental unit was completely vacant and that no one had moved in.

Lastly, the Tenant provided an advertisement for the rental unit as being available to rent as of May 1, 2021. The Tenant provided a copy of the advertisement which states that there was an open house for viewing on April 1, 2021 for the rental unit which was being re-rented for \$3,500.00. The Tenant stated that the pictures in the advertisement shows the improvements made by the Landlords and also demonstrates that the rental unit was vacant during the time of the pictures being taken, whereas, it should have been occupied by the Landlords' son.

Analysis

Based on the oral testimony and documentary evidence, and on a balance of probabilities, I find:

Rent Increase

The COVID-19 provincial state of emergency declared under the Emergency Program Act that Annual rent increase notices with an effective date after March 30, 2020 and before January 1, 2022 are canceled.

The Tenant is claiming for reimbursement of the rent increase from April 1, 2020 to September 2020 in the amount of \$295.85 which took effect during the rent freeze. I accept that the Landlords served the Tenant with the Notice of Rent Increase dated January 7, 2020 which was meant to take effect on April 1, 2020. I find that the rent increase took effect during the Covid-19 state of emergency and therefore is cancelled in accordance with the Emergency Program Act. I find that the Tenant's rent should have remained \$2,275.47 rather than increasing to \$2,334.64. As such, I find that the Tenant is entitled to compensation in the amount of **\$295.85**.

Security Deposit

Section 38(1) of the *Act* requires a landlord to repay deposits or make a claim against them by filing an application for dispute resolution within 15 days after receiving a tenant's forwarding address in writing or the end of the tenancy, whichever is later. When a landlord fails to comply with section 38(1) of the *Act*, and does not have authority under sections 38(3) or 38(4) of the *Act* to withhold any deposits, section 38(6) stipulates that a tenant is entitled to receive double the amount of the security deposit. These mandatory provisions are intended to discourage landlords from arbitrarily retaining deposits.

In this case, I accept that the Tenant vacated the rental unit on October 31, 2020. The Tenant stated that she provided the Landlords with her forwarding address on that same date. I find that the Tenant did not provide sufficient evidence to demonstrate that the Landlords were served on October 31, 2020. However, the Tenant stated that she re-sent her forwarding address to the Landlord by email on December 12, 2020. While e-mail is not an accepted mode of service pursuant to Section 88 of the *Act*, I am satisfied based on the Landlords' responding email to the Tenant that the Landlords were in

receipt of the Tenant's forwarding address as of January 4, 2021 pursuant to Section 71 of the *Act*.

As there is no evidence before me that that the Landlords were entitled to retain any portion of the security deposit under sections 38(3) or 38(4) of the *Act*, I find pursuant to section 38(1) of the *Act*, that the Landlords had until January 19, 2021 to repay the deposit or make an application for dispute resolution. The Landlords did neither.

In light of the above, and pursuant to section 38(6) of the *Act*, I find the Tenant is entitled to an award of double the amount of the security deposit paid to the Landlord (\$950.00 x 2 = **\$1,900.00**).

Compensation in relation to Two Month Notice

According to Section 51(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.

(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.

(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.

(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

(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
(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.

(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

- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
- (b) 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.

According to the Residential Policy Guideline 2A requires the Landlord to Act in good faith;

In *Gichuru v Palmar Properties Ltd.*, 2011 BCSC 827 the BC Supreme Court found that good faith requires an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy. When the issue of a dishonest motive or purpose for ending the tenancy is raised, the onus is on the landlord to establish they are acting in good faith: *Aarti Investments Ltd. v. Baumann*, 2019 BCCA 165.

If a landlord gives a notice to end tenancy to occupy the rental unit, but their intention is to re-rent the unit for higher rent without living there for a duration of at least 6 months, the landlord would not be acting in good faith. The onus is on the landlord to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no dishonest motive.

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.”

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.

The landlord, close family member or purchaser intending to live in the rental unit must live there for a duration of at least 6 months to meet the requirement under

section 51(2). Under section 51(3) of the RTA, a landlord may only be excused from these requirements in extenuating circumstances.

The Tenant is claiming for compensation equivalent to 12 times the amount of the monthly rent as the Landlords have not accomplished the stated purpose of the Two Month Notice. I accept based on the Two Month Notice and the Landlords' Lawyer's letter dated August 4, 2020 that the Landlords require vacant possession of the rental unit on or before October 31, 2020 as their son intends to occupy the rental unit. I accept that the Tenant complied with the Two Month Notice and vacated the rental unit on October 31, 2020.

In this case, the onus is on the Landlord to demonstrate that they have accomplished the stated purpose of the Notice, unless they had an extenuating circumstance which prevented them from doing so. As no one attended the hearing for the Landlords, I accept the Tenant's undisputed testimony and evidence. I find that the Tenant provided sufficient evidence to demonstrate that the Landlord did not accomplish the stated purpose of the Two Month Notice. I find that the statements from the neighbours, the email from the Landlords stating the rental unit remains vacant, the Tenant's observations during her visit to the rental unit, and the Landlords' subsequent rental unit advertisement for rent all indicate that the Landlords' son did not occupy the rental unit for at least 6 months.

Based on the above I find that the Tenant is entitled to compensation equivalent to twelve times the amount of the monthly rent. After having found that the Landlords were not permitted to raise the rent on April 1, 2020, I find that the amount of rent owed should have been \$2,275.47. As such I find the Tenant is entitled to compensation in the amount of $(\$2,275.47 \times 12 = \mathbf{\$27,305.64})$ in compensation from the Landlords, pursuant to section 51(2) of the Act.

As a result of the above and pursuant to section 67 of the Act, the Tenant is therefore entitled to a Monetary Order in the amount of \$29,501.49.

Conclusion

The Tenant's Application is successful. The Landlords failed to abide by the COVID-19 provincial state of emergency declared under the Emergency Program Act relating to the freeze on Annual rent increases and have also breached Section 38 and 49 of the Act. Pursuant to section 38, 51 and 67 of the Act, I grant the Tenant a Monetary Order in the amount of \$29,501.49.

The Tenant is provided with this Order in the above terms and the Landlords must be served with this Order as soon as possible. Should the Landlords fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial 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 *Residential Tenancy Act*.

Dated: December 17, 2021

Residential Tenancy Branch