Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, FFL / MNSDS-DR, FFT

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlords' application for:

- authorization to retain all of the security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for damage to the rental unit and compensation for loss under the Act, regulation or tenancy agreement in the amount of $1,350 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenants' application for:

- the return of $950 of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

All parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issue – Service

The landlords testified, and the tenants confirmed, that the landlords served the tenants with the notice of dispute resolution package and supporting documentary evidence.

The tenants testified that they served their documentary evidence in response to the landlords' application on the landlords by registered mail on February 4, 2021. They provided a Canada Post tracking number (reproduced on the cover of this decision) confirming this mailing. The landlords testified that they did not receive this package until February 15, 2022, three days before the hearing. The Canada Post tracking number shows that a notice of pickup card was left on February 9, 2022, but that the landlords did not pick the package up until February 15, 2022. The landlords testified that they did not see the February 9, 2022 when they checked their mailbox on February 12 or 13, 2022. They testified they saw a card on February 15, 2022, and immediately picked up the evidence package.

The act permits service by registered mail. the tenants sent their documentary evidence by registered mail to the landlords' address for service within the required time frame. I cannot say whether or not the landlords overlooked the notice card in their mailbox on May 9, 2022. I find that the tenants have complied with their obligations under the Act. However, I appreciate that the landlords may not have had sufficient time to review the tenants' documentary evidence. At the hearing, I advised the landlords that as the tenants have complied with the Act, I would not be excluding their documentary evidence.

I asked if the landlords would be seeking an adjournment of this hearing so they could have sufficient time to review the tenants' documentary evidence. The landlords stated that they did not want an adjournment and would like to proceed with the hearing.

Additionally, the landlords testified that the tenants did not serve them with their notice of dispute resolution proceeding form. The tenants testified that they served the landlords these forms by email. Such an email was not submitted into evidence. I make no finding on this point, as the tenants' application is a mirror of the landlords' application. In both, the landlords must prove their entitlement to retain the security deposit. As such, I find that the landlords have had sufficient time to prepare to make this argument.

Preliminary Issue – Additions To The Tenants' Claim

In a written submission which accompanied their documentary evidence, the tenants advanced to claim of $5,000 for "compensation damage". At the hearing the tenant AA testified that he had spent over 150 hours preparing for this application and he wanted to be compensated for that time spent, among other things. The tenants did not make an amendment to his application to include such a claim in advance of the hearing.

In order to add a monetary claim to an application after it has been made, a party must file an amendment form in advance of the hearing, unless that amendment could be reasonably anticipated by the opposing party in advance of the hearing. I do not find that a claim of the tenants' nature could have been reasonably anticipated by the landlords prior to the hearing. As such I declined to allow the tenants to amend their application to include such a monetary claim.

In their written submissions the tenants have also sought to recover $20 in mailing fees and expenses. Despite there not having amended their application to recover this amount, I will address it in this decision. The act does not include a provision which permits parties to recover their disbursements (which include mailing fees) from the other party. The Act only allows a party to recover the cost of their filing fee. As such, I declined to order that the landlords compensate the tenants for any disbursements they have incurred, aside from the filing fee, which I will address at the end of this decision.

Preliminary Issue – Partial Settlement

At the hearing, the parties agreed to settle the issue of compensation to the landlords for damage to the rental unit. The parties agreed that the landlords may retain $75 of the security deposit in full satisfaction of any amount incurred by the landlords to repair the rental unit following the end of the tenancy.

The parties agreed that the remaining issue, whether the landlords are entitled to compensation for loss of income caused by the tenants failing to give one months' notice prior to the end of the tenancy, would be determined by me.

The balance of this decision will address that issue, and the issue of the filing fees.

Issues to be Decided

Are the landlords entitled to:

1) a monetary order for $975;
2) recover the filing fee;
3) retain the security deposit in partial satisfaction of the monetary order made?

Are the tenants entitled to:

1) the return of the security deposit; and
2) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written, fixed term tenancy agreement starting April 1, 2020 and ending July 31, 2021. Monthly rent was $1950 and was payable on the first of each month. The tenants paid the landlords a security deposit of $975, which the landlords continue to hold in trust for the tenants.

The tenancy agreement included a term that states:

> At the end of this time the tenancy is ended on the tenant must vacate the rental unit. This requirement is only permitted in circumstances prescribed in section 13.1 of the Residential Tenancy Regulations, or if this is a sublease agreement as defined in the Act.
>
> (the "**Vacate Clause**")

The landlords testified that in late June, 2021, he they and the tenants engaged in an email conversation regarding renewing the tenancy agreement. However no such

agreement was entered into. On July 6, 2021, tenant AA emailed landlord PS advising him that the tenants would be vacating the rental unit at the end of the month.

The landlords acted quickly to market the rental unit. They posted advertisements on Facebook marketplace and Craigslist. They received over 20 unique inquiries in response to these advertisements. However, all of the interested callers wanted to rent the rental unit for September 1, 2021. The landlords wanted to rent it out sooner. Eventually they secured a new tenant for August 15, 2021.

The landlords seek compensation from the tenants equal to half a month rent, as they argue the tenants did not provide 30 days' notice of their intention to vacate as they say the tenants were required to do, at the end of the tenancy.

The tenants do not dispute any of this. Rather they argue that because the tenancy agreement contains the Vacate Clause, they are not required to give any notice under the Act. In support of this assertion, they included in their written submissions an excerpt from what they identified as the Residential Tenancy Act which states:

> Effective December 11, 2017, fixed term tenancy agreements can no longer include a clause requiring a tenant to move out at the end of the term unless: the tenancy agreement is a sublease agreement; or the tendency is a fixed term tenancy in circumstances prescribed in section 13.1 of the Residential Tenancy Regulation. If a fixed term tenancy agreement has a legal "vacate clause", the tenant can move at the end of the term without giving the landlord notice.

This excerpt is not from the Act. Rather, I understand it to an except from the Residential Tenancy Brach website at the following address: https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/ending-a-tenancy/tenant-notice.

Analysis

The basis for the tenants' argument can be found in the Act and in the Residential Tenancy Regulation (the "**Regulation**").

Section 44(1)(b) of the Act states:

> **How a tenancy ends**
> 44(1) A tenancy ends only if one or more of the following applies:
> […]
> (b)the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97(2)(a.1), requires the tenant to vacate the rental unit at the end of the term;

Section 97(2)(a.1) of the Act states:

> **Power to make regulations**
> 97(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
>
> […]
>
> (a.1) prescribing the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term;

Section 13.1(2) of the Regulation states:

> **Fixed term tenancy — circumstances when tenant must vacate at end of term**
> 13.1(2) For the purposes of section 97 (2) (a.1) of the Act [*prescribing circumstances when landlord may include term requiring tenant to vacate*], the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that
>
> (a)the landlord is an individual, and
>
> (b)that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

The tenancy agreement signed by the parties indicated it was for a fixed term and included the “Vacate Clause”. Such a clause is allowed pursuant to section 13.1(2) of the Regulation.

As such, per section 44(1)(b) of the Act, the tenancy ended by operation of the Vacate Clause on July 31, 2021. The Act does not require a tenant to give notice of their intention to end the tenancy as of this date. The Vacate Clause serves as notice to both parties that the tenancy will end at the end of the fixed term set out in the tenancy agreement.

For added clarity, the Act does not require that a tenant give notice to end a tenancy agreement if there is a Vacate Clause, given that section 44(1)(a)(i) states a tenant may end a tenancy by giving notice pursuant to section 45 of the Act. If a tenant were required to give notice to end a tenancy when the tenancy agreement contained a Vacate Clause, then section 44(1)(b) would be redundant, as the section 44(1)(a)(i) would cover the circumstance of a fixed-term tenancy where the landlord has indicated that they or a close family member intends in good faith to move into the rental unit at the end of the fixed-term.

It does not make sense to interpret the Act so that sections of it are redundant or meaningless.

As such, I do not find that the tenants were required to give any notice that they would be vacating the rental unit at the end of the fixed term.

Accordingly, the tenants did not breach the Act by vacating the rental unit on July 31, 2021, having notified the landlords of their intention to do so on July 6, 2021.

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, Regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

As there has been no breach of the Act, Regulation, or tenancy agreement, and such a breach is a prerequisite of any award of damages against the tenants, the landlords are not entitled to any compensation for loss of rental income.

As the landlords have not been successful in this application, they are not entitled to recover their filing fee.

The landlords have no right to retain the security deposit. As such, they must return it (less the amount the parties agreed the landlords could retain, as set out above).

As the tenants have been successful in their application, they are entitled to recover their filing fee from the landlords.

Conclusion

Pursuant to sections 65 and 72 of the Act, I order that the landlords pay the tenants $1,000, representing the following:

Description	Amount
Return of security deposit	$975.00
Filing fee	$100.00
Settlement amount	-$75.00

Total	**$1,000.00**

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: February 22, 2022

Residential Tenancy Branch