Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC, OLC, RP, LAT, RR, FF

Introduction

This hearing dealt with an application by the tenants for an order setting aside a notice to end this tenancy, a monetary order, an order compelling the landlord to comply with the Act and perform repairs, an order authorizing the tenants to padlock a gate, an order limiting the landlord's access to the rental unit and an order permitting the tenants to reduce their rent.

The hearing was held over 2 days. The first hearing held on October 27, 2011 addressed all claims save the monetary claim. The second hearing addressed the monetary claim and the landlord's oral request for an order of possession. Both parties participated on both dates of the conference call hearing.

After the October 27 hearing, the landlord submitted additional evidence to the Residential Tenancy Office and to the tenants. At the hearing, the tenants stated that upon receiving the evidence, they contacted the Residential Tenancy Office, asked whether additional evidence could be submitted and were told that no further evidence could be submitted. They claim that they did not look at the landlord's additional evidence because they did not believe that it would be considered. Much of the landlord's evidence in the supplementary package was a narrative response to the tenant's claims. At the hearing, the landlord agreed that she could orally provide that response and that the evidence would not need to be considered as she strenuously objected to an adjournment.

Issues to be Decided

Are the tenants entitled to a monetary order as claimed?
Is the landlord entitled to an order of possession?

Background and Evidence

The tenants seek a monetary order compensating them for loss of quiet enjoyment during the tenancy, loss of heat during the tenancy and recovery of what they have characterized as an overpayment of utilities.

The rental unit is an independent suite in a home which is occupied by the landlord. The tenancy agreement provides that the tenants are responsible to pay $150.00 each month for utilities. In my decision dated October 28, 2011, I upheld a notice to end tenancy and declared that the tenancy would end on November 30, 2011. The tenants argued that because their utility payments were designed to be averaged over the course of the full year of the fixed term tenancy and because they did not occupy the unit during the winter months in which utility costs would have been greater. The tenants suggested that $50.00 per month would have been a more reasonable amount to pay. They further argued that the term was unconscionable as the portion of the residence which the landlord occupies is significantly larger than the rental unit and claimed that they were paying for the bulk of utility costs. The landlord disputed that the tenants were paying most of the utility costs and argued that because there were two occupants in the rental unit whereas she lived alone in the rest of the residence, they would consume more utilities than her.

At the October 27 hearing, the tenants advised that the in floor heating was not working and in my decision of October 28, I directed the landlord to take whatever steps were necessary to ensure that it began working again. The tenants testified that the system was not operational from October 22 to November 2. The landlord stated that she did not receive notice that it was not functioning until October 24 and claimed that it was restored on October 31 when a repairman attended the rental unit. The tenants seek compensation for the period in which they were without the use of in floor heating.

The tenants seek compensation for having been charged a per diem rate to move into the rental unit early and claim that the landlord acted unlawfully by having received rent from the previous tenant for that period and charging them for the same period. The landlord had no response to this claim.

The tenants claim that they lost exclusive use of the area in which they kept their plants and seek compensation for that loss. The landlord maintained that the area was common area.

The tenants claimed that the landlord had continually harassed them throughout the tenancy in a number of ways. She asked them not to keep their windows open, she asked them to pay an additional amount for utilities when she objected to them running

fans continually, her agent said he smelled drugs in their unit, she asked them to sign a mutual agreement to end tenancy, she failed to install a light bulb in an outdoor area, she put low fences on the lawn which the tenants claimed damaged their car, she complained that they had too many plants and she made other accusations which the tenants claimed were false. They stated that the landlord intimidated and bullied them throughout the tenancy. The landlord denied having intimidated or bullied them and claimed that her complaints were justified.

Analysis

The tenants seek an order severing or changing the term of the tenancy agreement whereby they are obligated to pay $150.00 per month for utilities. In order to sever or change a term of the tenancy agreement, the tenants must prove that the term is unconscionable, meaning that it is oppressive or grossly unfair. I do not find this to be the case. The provision in the addendum to the tenancy agreement specifies that the tenants' payment covers not just hydro and natural gas, but water, sewerage and garbage removal. I find that the tenants have not proven that the amount they agreed to pay is excessive or unfair. Although it may be true that some of the actual utility costs would be higher during the winter, it may also be the case that other utility costs such as water used for their plants would be significantly higher during growing season. On the evidence before me, it is impossible to determine whether and to what extent any utilities would vary significantly during the winter. For this reason, I find that altering this term of the tenancy agreement is unwarranted.

At the second hearing the landlord made a request under section 55 of the legislation for an order of possession. Under the provisions of section 55, upon the request of a landlord, I must issue an order of possession when I have upheld a notice to end tenancy. Accordingly, I so order. The tenants must be served with the order of possession. Should the tenants fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

Turning to the question of the use of in floor heating, I find that the landlord had a contractual obligation to continue to provide the same heating system which was in place at the beginning of the tenancy regardless of whether there were alternate sources of heat. I find it unlikely that the heating system broke down of its own accord giving the fact that it stopped working as the tension between the parties escalated. The tenants claim that the heat stopped working on October 22 and was not restored until November 3. The landlord claimed that it was not until October 24 that she

received notice that the in floor heating was no operational and she claimed to have had it repaired on October 31. I find that the tenants are entitled to compensation for the period of time in which the in floor heating was not functional. I find that the tenants advised the landlord of the issue on October 24 and in the absence of evidence showing that it was repaired prior to November 3, I find that it was non-functional until that date. I find that the tenants not only lost quiet enjoyment of the unit during this time, but that they did not receive the full benefit of their utility payments. I find that $125.00 will adequately compensate them and I award them this sum.

There is no legal principle or provision under the Act which prevents a landlord who has received possession of a property prior to the end of a term for which rent is fully paid from charging new tenants for occupying a unit during the same period. The tenants were free to delay moving into the rental unit if they felt it unfair, but chose instead to pay for the privilege of moving into the unit early. No compensation is warranted.

In my decision of October 28, I found that the tenants did not have exclusive use of the area in which they kept their plants. In light of that finding, I find that they cannot be compensated for not having exclusive use of that area.

With respect to the allegations that the landlord intimidated and bullied the tenants, it is clear to me that the relationship between the parties was a poor one. However, the deterioration of this relationship was not due solely to the landlord's actions, but also that of the tenants. While some of the landlord's demands may have been unreasonable, I am unable to find that her actions were unreasonable to an extent that compensation is warranted.

I note that the parties agreed that the landlord currently holds post-dated cheques for the balance of the fixed term. The landlord is directed to return these cheques to the tenants when they have surrendered possession of the rental unit.

As the tenants have been partially successful, I find it appropriate to award them a portion of the filing fee paid to bring their application. I award the tenants $15.00.

Conclusion

The tenants are awarded $140.00. The landlord is granted an order of possession.

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: November 22, 2011

Residential Tenancy Branch