Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This matter dealt with an application by the Landlords for compensation for a loss of rental income, to recover the filing fee for this proceeding and to keep the Tenants' security deposit in partial payment of those amounts.

At the beginning of the hearing, the Landlords admitted that they served the Tenants late with their evidence package however the Tenants waived the late service. The Tenants admitted that they did not serve the Landlords with a 3 page document which contained written submissions and as a result, that document is excluded from evidence however the Tenants were permitted to make those submissions orally.

Issue(s) to be Decided

1. Are the Landlords entitled to compensation for a loss of rental income and if so, how much?
2. Are the Landlords entitled to keep the Tenants' security deposit?

Background and Evidence

This month-to-month tenancy started on August 15, 2011. The Tenants moved out on October 3, 2011, removed the last of their belongings on October 4, 2011 and returned the keys to the Landlords on October 13, 2011. Rent was $1,400.00 per month payable in advance on the 1st calendar day of each month. The Tenants paid a security deposit of $700.00 at the beginning of the tenancy. The rental unit is a suite on the upper floor of a house. There is also a suite on the lower floor that is rented to another tenant.

The Landlords said the Tenants did not provide them with advance written notice that they were moving out. Instead, the Landlords said they received a text message from the Tenants on October 3, 2011 stating that they had moved out and would be returning to the property the following day to remove a trampoline and some articles from the carport. The Landlords said approximately a week later, the Tenants provided them with the keys to the rental unit and a letter containing their forwarding address. The Landlords said the Tenants put a stop payment on their rent cheque for October 2011

and they were unable to re-rent the rental unit until November 1, 2011. Consequently, the Landlords claimed they lost rental income for October 2011.

The Tenants said that when the viewed the rental unit (prior to moving in), they could detect an odour and noticed doors and windows had been opened and some air fresheners put out. The Tenants said the Landlords advised them that the smell was from some carpeting they had just removed which had been damaged by the previous tenants' pets and that it should dissipate within a few days. The Tenants said that after they moved in and the windows and doors were closed that the smell got very strong. The Tenants said they discovered that the smell was coming through the vents and plumbing apertures from the lower suite and was the result of that tenant having smoked in the unit for a prolonged period of time and from pet urine and feces. The Tenants said they reported this to one of the Landlords (L.B.) a few days after they moved in and he admitted to them that the other tenant had smoked inside the unit for a number of years and that one of her dogs had recently been ill and soiled the carpets. The Tenants said L.B. advised them that he would put stripping around a common laundry room door to try to block the smell and would get the other tenant to clean her carpets.

The Tenants said the smell subsided for a few days after the carpets were cleaned but then returned again. The Tenants said they contacted the Landlords again on September 4, 2011 about the strong smell and claimed they told the Landlords they had to fix the problem because the odour was unbearable. The Tenants said at this time, L.B. advised them that in order to rectify the problem, the lower suite would have to be completely renovated, that the Landlords did not have the funds to do so and as a result, the Tenants would have to decide whether they would stay or not. The Tenants said as a result of this discussion, they anticipated problems and sent the Landlords an e-mail on September 15, 2011 confirming their discussions. The Tenants said the Landlord, E.L. replied to this e-mail by saying that she was working on it and would respond when she and her spouse returned from a vacation in a few weeks time. The Tenants said that given the conflicting information from the Landlords, they were unsure what the Landlords' intended to do if anything to address the odour. The Tenants said they also believed the problem might persist because the tenant of the lower unit continued to smoke inside (although she was not supposed to) and confined 3 pets inside for 9 hours each day.

The Tenants said they contacted a cleaning company, an agent of which attended the rental unit and provided a written statement of his observations on September 20, 2011. The deponent claimed that he observed orange stained blinds in the lower suite from nicotine build up and could detect a very strong odour of cigarette smoke and urine coming though the laundry room door and air ducts as well as through a slightly opened window of the lower suite. The Tenants said they researched the effects of exposure to second hand smoke and urine odours and as a result of that believed that it was not a healthy environment in which to expose themselves and their children. As a result, the Tenants said they moved to the first available accommodations they could find.

The Tenants also claimed that they asked the Landlords in their text message of October 4, 2011 to advise them where they should leave the keys to the rental unit and the Landlords did not respond until October 11, 2011. The Tenants said they went to drop off the keys as instructed (to E.L.'s workplace) on October 12, 2011 but her office was closed and as a result, they dropped them off the following day.

The Landlords argued that there was no evidence that the smell in the rental unit was a health hazard or should have relieved the Tenants of the obligation to give notice. The Landlords also argued that the witness statement provided by the Tenant's cleaner indicated that he did not believe the ammonia from pet urine was harmful and that the smell could be addressed by cleaning and sanitizing the carpet, cleaning the air ducts and replacing the furnace filter. The Landlords further argued that L.B. sent the Tenants an e-mail on September 16, 2011 advising them that he would get a quote for new carpets and curtains in the lower suite. The Landlords said it was their intention to replace the carpets in the lower suite in October 2011 despite the Tenants' complaints because they were in the process of updating the property and advised the Tenants of this when the viewed the property (which the Tenants denied).

The Landlords said they believed the smell in the rental unit (when the Tenants viewed the property) was from the carpeting that had recently been removed and they reasonably believed that the smell would dissipate. The Landlords said the Tenants were advised that the tenant of the lower suite had dogs and smoked but that she was advised as of June that she could no longer smoke inside. The Landlords said they also addressed the Tenants' concerns in a timely manner and noted that they replaced the carpeting in the lower suite in mid-October, 2011.

Analysis

Under section 45(1) of the Act, a Tenant of a month-to-month tenancy must give one full, calendar month's notice in writing that they are ending the tenancy. If a tenant ends a tenancy earlier, they may have to compensate a landlord for a loss of rental income that he or she incurs as a result. Consequently, if the Tenants intended to end the tenancy on September 30, 2011, they were required under the Act to give the Landlords written notice of this no later than August 31, 2011.

An exception to this rule, is set out under s. 45(3) of the Act which states that "if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant has given written notice of the failure, the tenant may end the tenancy without further notice to the Landlord." A remedy may also be available to a party at common law where they have been induced to enter into an agreement due to a misrepresentation made by the other party.

In this case, there is no dispute that the Tenants did not give the Landlords one month advance written notice that they were ending the tenancy but instead gave written notice on October 3, 2011, after they had already vacated. The Tenants argued however, that based on their interactions with the Landlords over a 5 week period, they did not believe that the Landlords were going to take the steps necessary to get rid of the strong smell coming from the lower suite. The Tenants also argued that had they known the truth about the source of the smell they detected when viewing the property, they never would have rented the rental unit. The Landlords argued that they addressed the Tenants' concerns in a timely manner and were prepared to take further steps however the Tenants moved out before they could do so. The Landlords also argued that there was no evidence that the odours in question were a health hazard.

I find that there was a strong odour of stale cigarette smoke and pet urine in the rental unit from the outset of the tenancy and that the Tenants brought this to the attention of the Landlords on a number of occasions. Although there was no evidence that the odour in the rental unit was a health hazard, I find that it was strong enough that it significantly interfered with the Tenants' use and enjoyment of their home and rendered the rental unit unfit for occupation. The Landlords provided witness statements from the tenant of the lower suite and a contractor (who installed flooring upstairs for 2 days) who gave evidence that they believed the odour in the rental unit was not that bad. However, where the evidence of the Parties on this issue is concerned, I prefer the evidence of the Tenants. In particular, the Landlords admitted that while the flooring in the rental unit was being replaced, the doors and windows were open for ventilation. The Tenants gave similar evidence that the smell only became noticeable when the door and windows were closed. I am also persuaded that it was a financial hardship for the Tenants to have to incur expenses to move again after only 2 months, that it was a desirable location for their family and that for these reasons they would not have moved had the smell in the rental unit not been so strong.

I also find that the Landlords took some steps to try to stop the odour but that they were inadequate because the smell was so pervasive and required (*at a minimum*) that the carpeting in the lower suite be removed. I find that the Landlords advised the Tenants that they were not willing to incur expenses to renovate the suite and that the Tenants might have to consider moving out. The Landlord, E.L., claimed that she also told the Tenants at the beginning of the tenancy that she would be replacing the carpeting in the lower suite within a few months, however, the Tenants denied this and in the absence of any reliable, corroborating evidence, I find that there is insufficient evidence to conclude that that this discussion occurred. Furthermore, I find that this assertion contradicts the statements made by the Landlord, B.L., only 3 weeks later that the Landlords did not intend to make any renovations to the lower suite.

I further find that the Landlords' response to the Tenants on September 16, 2011 that they would try to "put together a plan" and "get a quote" on their return from holidays was inadequate and non-committal. I find that the Tenants were justifiably frustrated in receiving this correspondence because it left them uncertain as to whether the Landlords would do anything. I find that the Landlords' failure to take adequate steps to

address the strong odour in the rental unit during the first 5 weeks of the tenancy and their failure to provide the Tenants with any indication that they actually would do something thereafter reasonably led the Tenants to believe that nothing would be done to address the problem. In the circumstances, I find that the Landlords' failure to address the strong odour in the rental unit constituted a breach of s. 32(1) of the Act and a material breach of the tenancy agreement which entitled the Tenants to end the tenancy without further notice to the Landlords.

The Tenants also argued that had the Landlords told them the truth about the source of the odour they never would have entered into the tenancy agreement. However, having concluded that the Tenants were entitled under s. 45(3) of the Act to end the tenancy without giving notice, I find that it is unnecessary to decide if the Landlords made a material misrepresentation to the Tenants that would entitle them to rescind the tenancy agreement.

The Tenants vacated the rental unit and gave their written notice to the Landlords on October 3, 2011 but they did not remove all of their belongings from the rental unit until October 4, 2011. The Landlords also claimed that the Tenants did not return the keys to the rental unit until October 13, 2011. The Tenants claimed that they asked the Landlords on October 4, 2011 for instructions as to where to leave the keys but that the Landlords did not respond until October 11, 2011.

Section 37(2)(b) of the Act says that "*at the end of a tenancy the tenant must give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property*." This means that the Tenants were required to return the keys to the Landlords on October 3 or 4, 2011. However, I also find that the Tenants' failure to do so does not mean that the tenancy did not end until the Tenants dropped off the keys. The Tenants clearly advised the Landlords on October 3, 2011 that the tenancy had ended. Had it been necessary for the Landlords to change the locks on October 3, 2011 due to the Tenants' failure to return the keys, then they would have been entitled to those expenses but not to occupation rent.

As a result, I find that the Tenants are liable for pro-rated rent for 4 days in the amount of **$180.65**. As the Landlords have had minimal success in this matter, I find that it would not be an appropriate case to order the Tenants to bear the cost of the filing fee paid by the Landlords for this proceeding and that part of their application is dismissed without leave to reapply.

I order the Landlords pursuant to s. 38(4) of the Act to keep $180.65 of the Tenants' security deposit in full satisfaction of the monetary award and further order the Landlords to return the balance of the security deposit in the amount of $519.35 to the Tenants.

Conclusion

The Landlords' application is granted in part. A Monetary Order in the amount of **$519.35** has been issued to the Tenants and a copy of it must be served on the Landlords. If the amount is not paid by the Landlords, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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: January 23, 2012.

Residential Tenancy Branch