Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MND, MNDC, MNSD and FF
Tenants: MNSD and FF

This hearing convened on applications by both the landlord and the tenants.

By application of December 8, 2011, the landlord seeks a Monetary Order for damage to the rental unit, damage or loss under the legislation or rental agreement, recovery of the the filing fee and authorization to retain the security deposit in set off against the balance owed.

By application prior application made on November 3, 2011, the tenants seek a Monetary Order for return of her security deposit and recovery of her filing fee for this proceeding.

Issue(s) to be Decided

The landlord's application requires a decision on whether the landlord is entitled to a monetary award for the damages claimed and authorization to retain the security deposit.

The tenant's application requires a decision on whether she is entitled to return of her security deposit and whether the amount must be doubled.

Background and Evidence

This tenancy began on July 1, 2009 and end on September 30, 2011. Rent was xxxx per month and the landlord holds a security deposit of $900 paid on May 1, 2010.

As a matter of note, this tenancy was the subject of a hearing on September 28, 2011 on the landlord's application made on June 27, 2011 for the unpaid rent, recovery of the

filing fee, and authorization to retain the security deposit in set off against the balance. That application was dismissed with leave to reapply due to defects the service of documents to the tenants, giving way to the present application.

As to the present hearing, the parties agree and evidence submitted shows that the tenant wrote to the landlord on December 14, 2010 in which she said she proposed to confirm the landlord's advice to her in November 2010 that she was no longer welcome in the rental unit and should find new accommodation. She stated that she had found new accommodation for January 1, 2011 and would be moving as the landlord requested, and asked for return of her security deposit and post dated cheques. A copy of page 1 of a rental agreement with another landlord made on December 6, 2010 to commence January 1, 2011 was submitted into evidence.

The landlord replied on December 21, 2010 reminding the tenant of the obligation to fulfill the fixed term agreement and cautioning that she would enforce the agreement. The note referred the tenant's letter as untruthful and fabricated.

Counsel for the tenant found concern that the letter was printed in a different hand than the signature and in the one-week delay in the response. However, the landlord is not facile in English and it is probable that she would have consulted her daughter or a friend who assisted her in the composition and printing of the letter, perhaps accounting for the different hand and delay.

In support of the landlord's version of events, her daughter gave evidence that because the tenant had complained of drafts around the window, she had an installer come to examine that and other windows in the house and give an estimate. According to the landlord's daughter and verified by the installer, the intention was to replace the windows at the end of the tenancy as it would take some time for the windows to arrive.

There was some dissention noted by all in attendance: the landlord's daughter, the tenant, her boyfriend, the window installer. The landlord's family members and the installer recalled no communication with the tenant that would indicate she was told to leave.

The tenant and her boyfriend testified to the contrary; that there was a clear message to the tenant that they wished her to leave.

The tenant's calendar submitted into evidence, had two notations to the effect the landlord wanted to end the tenancy. An entry on November 10, 2010 noted the visit, and stated the landlord's daughter told her the sooner she moved the better. Another

entry on November 25, 2010 stated, “She came again & asked me to move out if I can find a place shall give a letter.” On December 19, 2010, a period between the tenant’s notice and the landlord’s response, there is a note that the “son-in-law came to check” although there is no comment as to content of the visit.

A neighbour of the landlord and the tenant for whom the tenant did housekeeping gave evidence that the tenant had been out-of-sorts in the period preceding the end of the tenancy and he was of the belief that there may have been escalating tension with the tenancy.

Counsel for the tenant submitted that, by the comments said to have been made by the landlord and her daughter, the landlord had repudiated the rental agreement under the common law of contract and it became unenforceable thereafter. He submitted a precedent, *Norfolk v. Aikens*, CanLII 245 (BCCA) supporting the proposition that if one party to a contract repudiates it, the other may accept the repudiation, releasing both parties.

In the alternative, the tenant’s counsel invoked promissory estoppel, citing the Supreme Court of Canada in in *Maracle v. Traveller’s Indemnity Co. Of Canada,* holding that the landlord had by “by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on.” Counsel submits that the landlord expressed an intention to end the tenancy prior to its agreed conclusion and cannot, having given direction to the tenant to vacate, invoke a penalty against her for doing so.”

Analysis

In invoking the doctrines of repudiation and estoppel, counsel for the tenant has cited section 91 of the *Residential Tenancy Act* in support of the application of the common law of contract in this matter.

However, section 91 of the *Act* states that the common law applies, “Except as modified or varied under this Act…..”

Sections 44 through 49.1 provide a very detailed prescription as to how a tenancy ends in British Columbia. Section 44(b) and section 45(2) both specify that a tenant can give notice to end a fixed term tenancy agreement only for an end of tenancy date that is no earlier than the end of tenancy date specified in the rental agreement. Therefore, I must

find that the tenant was in breach of the contract by her notice given on December 14, 2010.

I would further note that if there was irrefutable proof that the landlord expressed her verbal intent to breach the fixed term, the tenant had refuge in all of the provisions of section 44 of the Act which states that:

1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 *[tenant's notice]*;

(ii) section 46 *[landlord's notice: non-payment of rent]*;

(iii) section 47 *[landlord's notice: cause]*;

(iv) section 48 *[landlord's notice: end of employment]*;

(v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii) section 50 *[tenant may end tenancy early]*;

In the absence of a proper notice served on the prescribed form, the tenant had no legal obligation to search for new accommodation, and there was at the very least, an element of personal preference involved in her decision. Otherwise, the tenant could have awaited, or insisted on proper notice or even written verification of the landlord's wish to end the tenancy, and then contested or acquiesced to the notice at her pleasure.

I have no doubt that both parties to the agreement were feeling discomfort with the arrangement, but must find that the tenant breached the agreement and is responsible for consequent losses by the landlord.

Having so concluded, I am somewhat in a dilemma over the fact that it took the landlord five months to find a new tenant in North Vancouver, which must be one of the most desirable residential communities in Canada.

The landlord has submitted copies of Craigslist postings offering the rental units from February 11, 2011 to May 7, 2011 advertising the unit at a rent ranging from $1,100 per month to 1,200 per month. It would appear that one such posting asking $2,100 was a quickly corrected typographical error.

In addition, the landlord submits invoices from the North Shore News for January 19, 2011 through June 2011 for which she seeks compensation. I find some delay between the tenant's notice and the landlord's start of advertising to minimize her loss.

One of her witnesses stated that, as the landlord is a senior woman living alone upstairs from the rental unit, it was of paramount importance to her to find the best possible tenants. She stated that, while many prospective tenants looked at the rental unit, a number were rejected by the landlord as unsuitable.

Section 7(2) of the *Act* obliges a party making a claim for loss or damage due to the other's non-compliance with the legislation or rental agreement to do whatever is reasonable to minimize the loss.

I find, on the fact of the long vacancy and on the balance of probabilities, and the evidence of the landlord's witness that she was quite discriminating in finding new tenants, that the landlord's search for ideal tenants was beyond reasonable.

I further find that, while comments made to the tenant regarding the landlord's desire did not justify the tenant's breach of the fixed term agreement, I believe there is some substance to the tenant's perception that the landlord wished to end the tenancy.

Therefore, while I find that the landlord is entitled to an award for loss of rent, I limit the award to two and one half month's loss of rent equaling $3,125. For the same rason, I award one half of the advertising costs, supported by paid receipts in the amount of ($58.22 x 5 = $291.10) which, one-half of which is divided by 2 is equal to $145.55.

I further find that the landlord is entitled to recover the filing fee for this proceeding from the tenant.

In addition, as authorized under section 72 of the Act, I find that the landlord may retain the security deposit of $625.

I find that the landlord breached the legislation by failing to return the tenant's post dated cheques and award the tenant's cancellation fees of $75.

As both parties have breached the *Act*, I make no award of filing fees.

Thus, I find that accounts balance as follows:

Award to landlord		
Advertising cost	145.55	
Total award to landlord	$3,270.55	$3,270.55
Tenant's credits		
Security deposit (No interest due)	$625.00	
Cost of cancelling unreturned cheques	75.00	
Total of tenant's credits	$700.00	- 700.00
TOTAL Monetary Order to landlord for remainder		**$2,570.55**

Conclusion

In addition to authorization to retain the security deposit in set off, the landlord's copy of this decision is accompanied by a Monetary Order, enforceable through the Provincial Court of British Columbia, for **$2,570.55,** for service on the tenant.

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