



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the landlord: MND, MNR, MNSD, FF
For the tenants: MNSD, MNDC, FF

Introduction

This hearing was re-convened as the result of the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the "Act").

The landlord is seeking a monetary order for damage to the rental unit and unpaid rent, for authority to retain the tenants' security deposit, and for recovery of the filing fee.

The tenant is seeking a monetary order for a return of her security deposit, a monetary order for money owed or compensation for damage or loss, and for recovery of the filing fee.

The original hearing, which was convened to deal with the landlord's application, was set for May 8, 2012. At that hearing, the tenant requested an adjournment as she was out of town on a family holiday. Additionally the tenant stated she would be filing her own application for dispute resolution. The landlord agreed to the request.

The tenant filed her application for dispute resolution and the two files were set to be heard on June 26, 2012. At that hearing, the landlord said that he had not received the tenant's application or evidence and was not prepared to go forward on the hearing. The landlord stated that the tenant used an old address for service of the documents. I note that the tenant used the address listed by the landlord on his application for dispute resolution. The hearing was adjourned to July 19, 2012.

At the July 19, 2012 hearing, the landlord stated that his girlfriend, who was also a witness, had possession of all his evidentiary documents and failed to have the documents present. The landlord requested an adjournment. The tenant agreed. The hearing was adjourned to the present date.

At this hearing the parties appeared, the hearing process was explained and they were given an opportunity to ask questions about the hearing process.

At the outset of the hearing, each party confirmed that they had received the other party's evidence. Neither party raised any issues regarding service of the application or the evidence.

Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally and to refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

The parties submitted a significant amount of testimony and evidence. I have reviewed all testimony and other evidence and 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 landlord entitled to retain the tenants' security deposit, a monetary order and to recover the filing fee?
2. Are the tenants entitled to a monetary order, including a return of their security deposit, and to recover the filing fee?

Background and Evidence

As to the start date of the tenancy, I received conflicting testimony. The landlord said that the tenancy started on November 1, 2011, and the tenant said that it started on November 5, 2011. I note that the tenancy agreement states that the tenancy was for a fixed term of 6 months, but the tenancy start and end dates were left blank.

The parties agreed that the tenancy was for a fixed term of 6 months, that monthly rent was \$3950.00 and that the tenants paid a security deposit of \$1975.00 on or about October 11, 2011.

Landlord's application-

The landlord applied for a monetary order for \$2889.00, consisting of \$364.00 for unpaid utilities, loss of revenue for 2 weeks' rent of \$1975.00, damage to the washer/dryer unit and barbeque grill for \$500.00 and the filing fee of \$50.00.

The tenant agreed that she owed the utilities as she approved the same on the condition inspection report.

The landlord's relevant evidence included his copy of the condition inspection report and the tenancy agreement.

The landlord said that the tenancy was to end on April 30, 2012; however the tenants moved out early and he did not receive rent for the time period of April 15-30.

In explanation, the landlord said that the tenants requested permission to sublease the home, which he denied. The tenants however leased the house to another party for the month of March only and then that the tenants paid rent for the first half of April.

According to the landlord, the tenant agreed that the security deposit would be retained by the landlord as payment for the balance of April.

The landlord said that the tenants damaged the washing machine and the barbeque grill. When questioned, the landlord acknowledged not having provided receipts for the repair of either item.

Tenant's response-

The tenant testified that she vacated the rental unit as the landlord failed to provide the necessary repairs, leading to her notice, via email on January 9, 2012, to the landlord that she was ending the tenancy on February 29, 2012.

The tenant said that she asked permission from the landlord to sublease the home and he unreasonably refused. The end of the tenancy was February 29, 2012 as listed on the condition inspection report.

The tenant said she attempted to find a new tenant to move into the rental unit by advertising and preparing the home and found a suitable tenant; however, the landlord unreasonably delayed in returning to town, causing the potential tenants to accept another home due to the uncertainty.

The tenant denied agreeing to allow the landlord to retain the security deposit as compensation for the balance of April and that it was due to the landlord's actions that no suitable tenant was found.

The tenant said that the washing machine/dryer was a problem from the beginning of the tenancy, which is one of the reasons she was forced to move. Additionally the barbeque grill was used by the tenants on 2 occasions, the first time requiring extensive cleaning by the tenant and the 2nd time, the grill worked.

Tenant's application-

The tenant's monetary claim is in the amount of \$4188.00, comprised of her security deposit less the utilities in the amount of \$1611.00; \$527.00 for the period of time from November 1-5 2011 she could not move in and use the rental unit, due to the landlord's delay in cleaning and completing house repairs; \$200.00 for the housecleaner as the tenant had to finish cleaning the house; \$50.00 for a hedge trim and \$50.00 for a fence move. The remaining request is for loss of use of the home.

The tenant submitted a significant amount of documentary evidence, including a completed condition inspection report, the tenancy agreement, email and text communication between the parties, and photographs of the rental unit and of texts between the parties, primarily in the time period of November 2011.

I must note that the tenant's condition inspection report and the landlord's condition inspection report were vastly different. The landlord said his condition inspection report was handed to him by the tenant and the tenant said she filled out the condition inspection report in detail on November 11, 2011 and at the end of the tenancy. The landlord has not signed that document.

The landlord confirmed that he provided neither the tenancy agreement nor the condition inspection report as he was a new landlord and due to the tenant providing the same.

In support of her application, the tenant reiterated that she did not agree that the landlord could retain her security deposit as the landlord unreasonably withheld permission to sublet, that he delayed in ensuring a new tenant was in place by not returning to town as promised and that she took all reasonable measures to ensure that the rental unit was re-rented.

Additionally, the tenant submitted that she was unable to move into the rental unit on November 1, 2011, as the landlord did not have the rental unit ready, as shown by her text message. Despite the rental unit not being ready by November 5, 2011, she had to move in as the movers were already lined up to move in.

The tenant said that the landlord still delayed in completing the repairs and renovations in a timely manner, causing the tenant to hire a professional cleaner for the sake of her family, which included young children.

The tenant submitted that she gave her notice to end the tenancy before the end of the fixed term as the landlord refused to fix the washing machine or other necessary repairs. Another point of contention for the tenant was the hot tub, which remained a danger for her children as the landlord failed to drain it and remove it.

The tenant said that at Christmas time the tenants decided to move out as the landlord refused to address the problems and gave notice in early January 2012.

The tenant said that the tenancy was entered into on a casual basis and that she was told by the landlord multiple times that if she did not like the house, she should move. The tenant contended that she was told by the landlord that he would not hold her to the terms of the fixed term.

The tenant said that it was necessary to hire local labour to remove the fencing and trim the hedge as the landlord never attended to these issues.

Landlord's response- The landlord said that the parties were in agreement that the tenants would move into the rental unit a few days after the first of November, as he would need to complete work and the tenants were not yet ready to move in.

The tenant spent 2 hours going through the house prior to accepting the tenancy and expressed that she was satisfied with the condition. The landlord denied the issues complained of by the tenant, as the tenant was meticulous in examining the premises at the start of the tenancy and no issues were brought to his attention.

The landlord hired a cleaner, who spent 7 hours cleaning the premises.

The landlord denied that the yard needed any work, as it was the "dead of winter" and nothing was growing and the hedge did not need trimming. As to the fencing, the landlord said that a new fence was to be installed and when the tenant asked that he move it, he did so.

The landlord alleged that the tenant ended the tenancy due to personal hardship and not due to the condition of the house.

Analysis

In a claim for damage or loss under the Act or tenancy agreement, the claiming party, both parties in this case, has to prove, upon a balance of probabilities, four different elements:

First, proof that the damage or loss exists, **second**, that the damage or loss occurred due to the actions or neglect of the respondent in violation of the Act or agreement, **third**, verification of the actual loss or damage claimed and **fourth**, proof that the party took all reasonable measures to mitigate their loss.

Where the claiming party has not met all four elements, the burden of proof has not been met and the claim fails.

Landlord's application-

I accept that email and text messaging was the preferred method of communication between the parties, as demonstrated by the tenant's evidence. I also accept that the landlord did not provide the tenants with his mailing address, as there was no evidence of the same, the landlord's application lists the dispute address as his address and the documentary evidence shows the tenant requested such address, with no evidence of a response.

Although the Act does not recognize email transmission or text messaging as acceptable methods of delivery of documents, I order that the delivery of the tenant's forwarding address, notice to end their tenancy through the January 9, 2012 email and other emails to the landlord, sufficiently served, pursuant to section 71 of the Act.

Loss of revenue for April 15-30, 2012-Although the tenancy agreement is left blank as to the start and end date of the tenancy, I find the evidence demonstrates that the parties intended that the first day of the tenancy was to be November 1, 2011, and the last date of the tenancy was to be April 30, 2012. I therefore find the tenancy was for a 6 month, fixed term, starting on November 1, 2011, and ending on April 30, 2012.

Under Section 45 (2) of the Residential Tenancy Act, among other requirements, a tenant may not end a fixed term earlier than the end of the fixed term, which in this case was April 30, 2012. I accept that the tenants provided insufficient notice and ended the tenancy early, in breach of this section of the Act.

However, an applicant for a monetary claim is required to take reasonable measures to mitigate their loss, which is step four of their burden of proof of a loss.

In a claim for loss of revenue, I find reasonable measures to include advertising the rental unit as expeditiously as possible, or by using other marketing tools available so that the rental unit does not remain empty.

In the case before me, I find the landlord submitted insufficient evidence that he took reasonable measures to mitigate his loss. In reaching this conclusion, I was influenced by the landlord's failure to submit any evidence of his efforts to re-rent the rental unit, such as copies of the advertisements.

Without such proof, I cannot conclude that the landlord took reasonable measures to mitigate his loss for April 15-30, 2012.

I therefore dismiss his claim for loss of revenue for April of \$1975.00, without leave to reapply

Washer repair- I find the landlord submitted insufficient evidence that the actions or negligence of the tenants caused damage to the washing machine and barbeque grill or proof that he suffered a loss and I therefore dismiss his claim for \$500.00, without leave to reapply.

Unpaid utilities- I find the tenant previously agreed that she owed this amount and I therefore find the landlord has established a monetary claim for \$364.00.

Filing fee- I decline to award the landlord recovery of his filing fee as I have dismissed his claim for loss of revenue and damage to the washing machine and barbeque grill and as I find it was not necessary to file a claim for the unpaid utilities as the tenant agreed to pay the same at the end of the tenancy.

Tenants' application-

Security deposit return- When a landlord fails to properly complete a condition inspection report, the landlord's claim against the security deposit for damage to the property is extinguished. In this case, the landlord applied to keep the security deposit in partial compensation of monetary claims for damage to the property as well as for potential lost revenue for April. As the landlord's claim was not only for damage to the property, I find that the landlord complied with the requirement under section 38 to make an application to keep the deposit within 15 days of the end of the tenancy.

However, as I have found that the landlord has established a monetary claim in an amount less than the security deposit, I find the tenants are now entitled to receive the

balance of their security deposit, after the landlord has deducted the amount of \$364.00, for unpaid utilities, in the amount of \$1611.00.

Balance of the tenant's monetary claim-I find that the remaining claims of the tenant are related to her contention that the landlord failed to provide a rental unit in a condition as required under the Act and due to this she suffered a diminished value of the tenancy.

Section 32 of the *Act* provides that a landlord must provide and maintain a residential property in a state of decoration and repair that complies with health, safety and housing standards required by law and is suitable for occupation by a tenant when considering the age, character and location of the rental unit.

In reviewing the tenant's evidence, I accept that the landlord failed to provide the rental unit in the condition as required under the Act. In reaching this conclusion I was particularly influenced by the text messages to the landlord on a consistent basis, alerting him to her requests, particularly at the beginning of the tenancy.

However, as an applicant requesting monetary compensation, the tenant is likewise held to the same burden of proof as the landlord.

In this case, I find the tenants submitted insufficient evidence of their efforts to minimize their loss.

In reaching this conclusion, I reviewed the tenants' January 9, 2012, emailed notice to end the tenancy to be devoid of any reason for ending the tenancy early, such as the alleged condition or lack of repair.

Additionally, the tenant failed to diligently pursue any issues she may have had with the condition of the rental unit such as in the form of dispute resolution prior to ending her tenancy, which I find would be a reasonable attempt made to minimize her loss.

I cannot accept that waiting until well after the landlord has made an application for dispute resolution seeking a monetary order is conclusive proof of the tenant making efforts to minimize her loss.

Due to this, I find the tenant failed to meet step 4 of her burden of proof and I therefore dismiss her claim for \$527.00 for the period of time from November 1-5 2011, \$200.00 for the housecleaner, \$50.00 for a hedge trim and \$50.00 for a fence move and loss of use of the home.

Filing fee- I find the tenant's application contained some merit and I therefore award her recovery of the filing fee of \$50.00.

Conclusion

For the reasons set out above, I find the landlord has established a monetary claim of \$364.00 for unpaid utilities, which I have offset from the tenant's security deposit in establishing her monetary claim.

For the reasons set out above, I find the tenant has established a monetary claim of \$1661.00, comprised of the balance of her security deposit in the amount of \$1611.00 and recovery of the filing fee of \$50.00.

As I have previously offset the landlord's monetary claim with the tenants' security deposit, I therefore grant the tenants a final, legally binding monetary order in the amount of \$1661.00, which I have enclosed with the tenants' Decision.

Should the landlord fail to pay the tenants this amount without delay, the order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement 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: August 31, 2012.

Residential Tenancy Branch