Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by the tenant, the landlord and the landlord's agent.

As a preliminary matter, the landlord raised the issue of jurisdiction. The landlord submits that the residential property has been used as a vacation rental property and therefore is exempt from jurisdiction of the Residential Tenancy Branch pursuant to Section 4(3) of the *Residential Tenancy Act (Act).*

The landlord submits that this property is a vacation rental for the following reasons: the home is advertised as a vacation rental; the home is fully furnished with household goods including but not limited to such items as linens; cutlery; and kitchen equipment; rent is paid for by credit card; utilities are included in the rent amount; the tenants are not allowed to move furniture around; there is no obligation to clean the unit; the unit was not provided for exclusive use as the landlord stored some items in the property; and that he used forms provided from "VRBO" (a website for vacation rentals).

The landlord's agent testified that the tenant had indicated to her that while she had been living in Dubai she had returned to British Columbia every year for a couple of months and that the tenant's mother lived nearby. The landlord also testified that the tenant's husband was travelling for his work and that in October 2011 the tenant identified she would be returning to Dubai.

The tenant testified that this was not a vacation and that, in fact, the reason she was trying to end the tenancy in October 2011, in part, was because they had not been able to rent the property they owned in Dubai to a renter and there was a possibility that she would have to return to that country. I also note the tenant's current address, several months after the end of the tenancy, is in the same community as the dispute address.

Section 4 of the *Act* states that "living accommodation occupied as vacation or travel accommodation" is exempt from the *Act*. In addition Residential Tenancy Policy Guideline 27 states that the *Act* applies to summer cottages and winter chalets that are rented other than on a vacation or travel basis and provides the example that a winter chalet rented for a fixed term of one year is not rented on a vacation basis.

Based on the requirement in this Section that the unit be "occupied" for the purpose of vacation or travel accommodation and despite the landlord's testimony as to how the property has been rented in the past, I find I must only consider the current arrangement and agreement to determine if the exemption applies.

In addition, as it is the landlord who is submitting that the exemption should apply the burden is on the landlord to provide sufficient evidence to establish the unit was occupied as a vacation or travel accommodation. While I accept, as the tenant did not dispute the landlord's agent's statement, that she had, in the past, returned to British Columbia for a couple of months each year, I find this has no relevance on the case before me as it does not speak to the used of this residential property at the time of this agreement.

In relation to this specific agreement the evidence before indicates the following:

1. Advertised as a vacation rental – I find the form of advertisement may indicate the landlord's intent to rent as a vacation rental but it is not pertinent to the question of the purpose and use of the property once an agreement is entered into;
2. The home is fully furnished including household goods – There is nothing under the *Act* that prevents a landlord from fully furnishing a rental unit, as defined under the *Act*, with any or all of the items the landlord indicates are provided at this property and therefore I find this is not an indicator of the reasons for occupation of this unit;
3. Rent is paid by credit card – There is nothing under the *Act* that prevents a landlord from requiring or preventing a tenant from paying rent by credit card and I therefore find this is not an indicator of the reasons for occupation of this unit;
4. Utilities are included in the rent – The *Act* only requires a notation in a tenancy agreement of what services or facilities are included in the rent and it requires a landlord to reduce rent by a comparable drop in the value if they decide to no longer provide that service or facility. As such, I find the inclusion of utilities in the rent is not indicator this unit as a vacation rental;

5. Tenants are not allowed to move furniture around – while this is not an enforceable term in a tenancy agreement, I find the landlord has failed to show how this indicates the tenants occupied the unit as a travel or vacation rental;
6. There is no obligation to clean the unit – On page 9 of the landlord's documentary evidence the landlord provides to the tenant an email dated July 29, 2011 further explaining some of the terms of the agreement in which he states "....and the only reason I would have to require you to vacate prior to July 31st 2012 would be if you violated the terms of the lease such as not paying the rent on time and as scheduled or for failure to properly maintain the house and keep it in a clean condition." Additionally, in an email dated August 4, 2011 on page 15 of the landlord's evidence the landlord states "....Any cleaning services that you might want to contract through [on site property manager] can be discussed with her. This text indicates that cleaning was not part of the agreement between the parties. As such, I find the issue of cleaning does not provide evidence of occupation as a travel or vacation rental;
7. The unit was not provided for exclusive use – the *Act* does not prohibit a landlord from using part of any rental property to store anything as such, I find this provision does not provide an indicator as to the use of the rental unit;
8. The landlord used forms from VRBO – while the landlord has used forms for an Application for Tenancy and a Residential Tenancy Agreement there is no indication on the forms themselves as to their origin, however there is not a prescribed tenancy agreement form provided under the *Act* and the only requirement is that the agreement be in writing. I also note the landlord used a Condition Inspection Report to record the condition of the residential property at the start of the tenancy. This form is provided by the Residential Tenancy Branch. For these reasons, I find the specific form used or its origin is not an indicator as to the tenants occupation of the unit.

As I have found the indicators suggested by the landlord that this agreement was for a travel or vacation rental are not applicable and since the landlord has provided no substantiated or corroborated evidence as to the tenant's use or occupation of the rental unit as a vacation or travel unit; the tenant still resides in the community; and in consideration of Policy Guideline 27, I find the landlord has failed to establish this agreement is exempted from the *Act* and I accept jurisdiction on the matters put forward in the tenant's Application.

While both parties provided substantial evidence and testimony regarding issues throughout the tenancy, I have only considered the evidence and testimony provided that is relevant to the specific financial claims made by the tenant.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to a monetary order for double the amount of the security deposit; for compensation for damage or loss under the *Act*, regulation or tenancy agreement and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 67, and 72 of the *Act.*

Background and Evidence

Both parties provided copies of an Application for Tenancy and a Residential Tenancy Agreement. The tenancy began on August 16, 2011 and while the tenancy agreement does not specifically stipulate the end date of the tenancy it does provide rent amounts for August 2011 to July 2012 and notes that "any extension of the lease term for August 2012 only shall be....." From these statements I note the tenancy was for a fixed term ending on July 31, 2012.
The tenant testified the security deposit originally paid was $2,300.00 but that during the tenancy the landlord applied half of this amount to rent and the balance remaining was $1,150.00. The landlord did not dispute this testimony.

The parties agree the tenancy ended on March 31, 2012. The tenancy ended after the parties signed a "Lease Surrender and Termination Agreement" that stipulates the following:

1. The tenant will restore the paint in the den to the original colours;
2. Returning all furniture to their original positions at the commencement of the lease;
3. Observing all provisions of clause 5 of the tenancy agreement (this includes no damage; no charges incurred due to contraband; all debris rubbish and discards in containers and all dishes cleaned; all keys left in the house; all charges are paid; no linens or furnishings lost or damaged; and
4. Vacating the property by 10:00 a.m. March 31, 2012.

The agreement goes on to say the landlord will retain $150.00 for cleaning and the cost of repainting the den should the tenant fail to comply with point 1 above. The agreement is signed by both parties on March 22, 2012.

The landlord provided in his evidence a copy of an email dated April 8, 2012 from the tenant in which she provided the landlord with her forwarding address. The landlord

also provided a letter from him to the tenant dated April 13, 2012 advising the tenant of the following deductions he was retaining $860.43 from the deposit:

1. Painting - $280.00 (includes painting the den $200.00 and touch up above fireplace in living room $50.00 plus HST $30.00)
2. Cleaning - $200.00
3. Missing items plus HST ($26.83) - $250.43
4. Damage to furniture - $130.00

The parties agree the landlord provided a cheque to the tenant in the amount of $289.57. The tenant seeks double the security deposit less the amount already provided to her from the landlord on April 13, 2012. The landlord testified that he did not file an Application for Dispute Resolution within 15 days because he did not believe that this tenancy fell under the *Act* and felt there was therefore no obligation to do so.

The landlord also submits that even if the tenancy falls under the *Act,* the tenant failed to provide her forwarding address to the landlord in a manner allowed under Section 88 of the *Act,* because she provided it via email and not by leaving a copy with the landlord or his agent in person; sending it through ordinary or registered mail; by leaving it in a mailbox or mail slot at the address the landlord conducts business; by attaching it to a door or other conspicuous place at the address where the landlord conducts business or by fax. As such, the landlord submits the 15 day rule under Section 38(1) does not apply.

The tenant also seeks compensation for the difference in the amount of rent she would have paid and the amount of rent the sub-tenants she had secured to sublease the rental unit for the months of April to July 2012 if the landlord had accepted them as sub-tenants. The tenant seeks $1,552.00 as the amount lost.

Analysis

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit less any mutually agreed upon amounts or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

I accept the landlord's position that he did not receive the tenants forwarding address in accordance with service provisions outlined in Section 88 of the *Act* (and as noted

above). I also accept the parties had communicated substantially via email during the tenancy, and that the landlord did return, by registered mail, what he determined was owed to the tenant within 9 days of receipt of the email.

Section 71(2)(c) states I made order that a document not served in accordance with Section 88 or 89 is sufficiently given or served for the purposes of this *Act*. For the reasons noted above I order the landlord was sufficiently given the tenant's forwarding address on April 4, 2012.

As a result, I also find the landlord had until April 19, 2012 to either return the security deposit less mutually agreed upon amounts or file an Application for Dispute Resolution to claim against the security deposit. I find the landlord failed to comply with this requirement of Section 38(1) and the tenant is entitled to double the amount of the security deposit held at the end of the tenancy.

Because the parties had signed an agreement allowing the landlord to deduct $150.00 for cleaning and an amount for repainting the den if the tenant failed to by the end of the tenancy, I find at the end of the tenancy the security deposit total would be reduced by these amounts.

From the evidence submitted by the landlord the cleaning actually cost $200.00, however this was not the amount agreed upon in the termination agreement and as such, I find the landlord can only deduct $150.00 for cleaning. Further and despite the landlord's deduction of $280.00 for painting, the receipt provided into evidence for painting shows the cost of painting the den was $200.00 plus HST, as such, I find the landlord can only deduct $224.00.

As such, I find that at the end of the tenancy the balance of the security deposit, accounting for the agreed deductions, was $775.00. This is calculated as follows: $2,300.00 originally paid - $1,150.00 contributed to rent during the tenancy - $150.00 agreed upon cleaning - $224.00 painting of the den.

The landlord remains at liberty to file his own Application for Dispute Resolution seeking any additional costs or damages for cleaning and painting or any other loss or damage resulting from the tenancy.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;

2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

In relation to the tenant's claim for losses resulting from the landlord's refusal to accept sub-tenants, I find the tenant did not pay any rent for that period of time and so she suffered absolutely no loss and the tenant's claim is based on monies she would have received over and above what the tenancy agreement said she owed the landlord for rent for the months of April to July 2012 and therefore I find there is not a violation of the *Act*, regulation or tenancy agreement on the part of the landlord. I dismiss this portion of the tenant's claim.

Conclusion

I find the tenant is entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **$1,260.43** comprised of $1,550.00 double the amount of the security deposit at the end of the tenancy less $289.57 already returned. As the tenant was only partially successful in her application I dismiss her claim to recover the $50.00 fee paid by the tenant for this application.

This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) and be 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: August 02, 2012.

Residential Tenancy Branch