Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MND, MNSD, FF, O

Introduction

This hearing was convened in response to cross applications.

On November 13, 2012 the Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss; for a monetary Order for damage; to keep all or part of the security deposit; and to recover the fee for filing the Landlord's Application for Dispute Resolution.

On October 18, 2012 the Tenant filed an Application for Dispute Resolution, in which the Tenant applied for a monetary Order for money owed or compensation for damage or loss; for the return of the security deposit; to recover the fee for filing the Tenant's Application for Dispute Resolution; and for "other".

The Landlord submitted documents to the Residential Tenancy Branch, copies of which were served to the Tenant. The Tenant acknowledged receipt of the Landlord's evidence and it was accepted as evidence for these proceedings. The Tenant submitted documents to the Residential Tenancy Branch, copies of which were served to the Landlord. The Landlord acknowledged receipt of the Tenant's evidence and it was accepted as evidence for these proceedings.

During the hearing I was unable to find a document, in which the Tenant outlined the details of their financial claims. The Landlord indicated that she was also unable to locate this particular document. The Tenant was directed to resubmit this particular document to the Residential Tenancy Branch and to reserve it to the Landlord. The Tenant did resubmit the subject document to the Residential Tenancy Branch on December 05, 2012 and I was subsequently able to locate this document in documents previously submitted by the Tenant. **The Landlord acknowledged receiving this document from the Landlord on XXXXX.**

The hearing on December 05, 2012 was adjourned as there was insufficient time to conclude the hearing on that date. **The hearing was reconvened on XXXXXX and was concluded on that date.**

Both parties were represented at both hearings. They were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit; is the Landlord entitled to compensation for advertising costs incurred as a result of the tenancy ending; is the Tenant entitled to compensation for loss of the quiet enjoyment of the rental unit; did the tenancy end in accordance with the *Residential Tenancy Act (Act)*; and is either party entitled to recover their cost of filing an Application for Dispute Resolution.?

Background and Evidence

The Landlord and the Tenant agree that they entered into a fixed term tenancy agreement, the fixed term of which was to run from June 01, 2012 to May 30, 2013. The parties agree that the Tenant was required to pay monthly rent of $1,600.00 by the first day of each month and that the Tenant paid a security deposit of $800.00.

The Landlord and the Tenant agree that the Landlord came to the rental unit on June 01, 2012 for the purposes of inspecting the rental unit; that the Tenant was not willing to inspect the rental unit at that time; that they met on September 03, 2012, at which time a condition inspection report was completed; that the Tenant did not sign the condition inspection report that was completed on September 03, 2012; and that the Landlord did not provide the Tenant with a copy of the condition inspection report.

The Landlord and the Tenant agree that on September 09, 2012 the Tenant provided the Landlord with written notice of their intent to end the tenancy on October 31, 2012. The female Tenant stated that the keys to the rental unit and a note, on which the Tenant provided a forwarding address, were left in the rental unit on October 03, 2012. The Landlord acknowledged locating the note that was left in the rental unit.

The Landlord and the Tenant agree that the Landlord did not schedule a time for the rental unit to be inspected at the end of the tenancy; that the Tenant did not authorize the Landlord to retain any portion of the security deposit; and that the Landlord not return any portion of the security deposit.

The Landlord has claimed compensation of $409.00 for advertising costs. The Landlord submitted a receipt from the Times Colonist, in the amount of $460.99, which she stated is the amount she intended to claim. The Landlord stated she incurred these costs for advertising the rental unit as a result of the Tenant ending the tenancy. The Tenant argued that the Landlord could have advertised the rental unit on a popular website without incurring any costs.

The Landlord and the Tenant agree that there is an addendum to the tenancy agreement, which was submitted in evidence, which requires the Tenant to “pay for professional carpet cleaning at the end of their tenancy”. The Landlord is seeking compensation for the cost of cleaning the carpets, as the Tenant did not pay to have them cleaned at the end of the tenancy.

The female Tenant stated that a friend cleaned all the carpets in the rental unit on September 27, 2012; that the friend cleans houses for financial compensation; and that the carpets were not dirty at the end of the tenancy. The Tenant submitted photographs of the carpets being cleaned.

The Landlord argued that the person cleaning the carpets is not a “professional” carpet cleaner; that the Tenant did not provide the Landlord with a receipt to show that they paid to have the carpet cleaned; that the carpets in two bedrooms and on two sets of stairs were not cleaned; that she did not clean the carpets prior to the new tenants moving into the rental unit; and that she intends to clean the carpets in December when the new tenants are away. The Landlord did not submit photographs that show that the carpets required cleaning.

The Landlord is seeking compensation, in the amount of $100.00, to repair damaged walls. The Landlord stated that there was a dent in the wall that occurred when a door handle came into contact with the wall; that the Tenant inserted two drywall plugs into the wall; and that the Tenant damaged the corners of the drywall in several locations. The Landlord stated that she observed this damage prior to the new tenant occupying the rental unit but she did not photograph the damage until after the new tenant moved into the rental unit.

The female Tenant stated that the drywall plugs and the damage from the door handle were there at the start of the tenancy. She stated that the corners of the drywall were not damaged during their tenancy and she speculates this damage occurred when the new tenant moved into the rental unit.

The Landlord did not submit a copy of the inspection report she completed on September 03, 2012. She did submit a copy of an email from the Tenant, dated September 04, 2012, in which the Tenant declared that there were “marks on the walls throughout the house”.

The Landlord is seeking compensation, in the amount of $100.00, to replace a large amount of black plastic that was left on the residential property. The female Tenant stated that they were cleaning the yard and outbuilding shortly after moving into the rental unit and that they sent an email to the Landlord on June 14, 2012, in which they asked the Landlord what she wished done with property in the storage area. She stated that the Landlord did not respond to the email until June 26, 2012, by which time the plastic had been discarded.

The Landlord is seeking compensation, in the amount of $200.00, to replace a peach tree that she estimates was fifteen years old. The Landlord stated that the peach tree had developed “peach leaf curl” but that it did not need to be severely pruned. The Landlord submitted a receipt to show that she paid $69.27 to replace the tree; she seeking $60.00 for the 4 hours it took to purchase and replace the tree; and she is seeking $75.00 for “loss or productivity” for the time it will take for this tree to produce fruit.

The Landlord and the Tenant agree that the Tenant informed the Landlord that the tree was infested with caterpillars and that the Tenant believed it should “be cut back to about 3 feet”. The parties agree that the Landlord did not give the Tenant permission to cut the tree and that the Tenant did severely prune the tree. A photograph of the pruned tree was submitted in evidence.

The Landlord contends that the tree did not need to be severely pruned, even if the peach tree was infested with caterpillars. The Landlord submitted an email from an individual who appears to be experienced with fruit trees, in which the author declares that peaches seldom, if ever, suffer insect damage. The Landlord also submitted documentation on peach leaf curl, which outlines that the problem can be rectified with fungicide.

At the hearing the Landlord withdrew the claim for replacing a door mat.

The Landlord is seeking compensation, in the amount of $60.00, to remove a shelf that the Tenant attached to a kitchen ledge. The Landlord stated that she has not yet removed the shelf but she estimates that it will take her approximately 4 hours to remove the shelf, to repair the screw holes, and the repaint the original ledge. The male Tenant stated that the shelf is only attached with two screws and that it will take approximately one hour to remove the shelf and repair the ledge.

Analysis

On the basis of the undisputed evidence, I find that the Landlord and Tenant entered into a fixed term tenancy agreement, the fixed term of which ended on May 30, 2013; that on September 09, 2012 the Tenant provided the Landlord with written notice of their intent to vacate the rental unit on October 31, 2012; and that the Tenant returned the keys to the rental unit on October 03, 2012.

Section 44(1)(a) of the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act.* Although the Tenant did provide written notice to end the tenancy, I find that the notice was not served in accordance with section 45 of the *Act*, as this section does not permit a tenant to end a fixed term tenancy date that is earlier than the date specified in the tenancy agreement as the end of the tenancy,

As the Tenant did not provide notice in accordance with section 45 and there is no evidence shows that the Landlord gave proper notice to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(a) of the *Act.*

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. As there is no evidence that the tenancy agreement required the Tenant to vacate at the end of the fixed term, I find that the tenancy did not end pursuant to section 44(1)(b) of the *Act.*

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. As there is no evidence that the parties agreed in writing to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(c) of the *Act.*

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. I find that this tenancy ended when the Tenant vacated the rental unit and returned the key on October 03, 2012.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. A tenancy agreement is frustrated where, without the fault of either party, the contract becomes incapable of being performed because an unforeseeable event, such as a flood or a fire, has radically changed the circumstances of the agreement and the agreement cannot be fulfilled. That is not the situation in this tenancy and I therefore find that this tenancy did not end pursuant to section 44(1)(e) of the *Act.*

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act.*

As the Tenant ended this fixed term tenancy in a manner that does not comply with section 45 of the *Act,* I find that the Landlord is entitled to recover costs associated to the early end of the tenancy. In these circumstances, the Landlord incurred advertising costs of $460.99 that would not have been incurred if the tenancy had not ended. I therefore find that the Landlord has established that she is entitled to recover the full amount of her claim for advertising, which is $409.00. I have not awarded the actual amount paid for advertising, as the Landlord did not provide the Tenant with adequate notice of her intent to claim more than $409.00.

In determining this matter, I placed little weight on the argument that the Landlord could have avoided advertising costs by advertising on internet sites that are free. I find that it

was reasonable for the Landlord to make every effort to find a new Tenant, which includes advertising in a newspaper.

When making a claim for damages under a tenancy agreement or the *Act,* the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that a damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

Section 6(3) of the *Act* stipulates that a term in a tenancy agreement is not enforceable if it is inconsistent with the *Act*. I find that requiring a Tenant to pay to have carpets cleaned by a professional is inconsistent with section 37 of the *Act* and is, therefore, unenforceable. Section 37 of the *Act* requires a tenant to leave a rental unit in reasonably clean condition. To require a tenant to pay for a carpet to be cleaned when they have the ability to clean the carpet in an alternate manner is, in my view, grossly unfair to the tenant.

I find that the Landlord has submitted insufficient evidence to establish that the carpet in any area of the house was not left in reasonably clean condition. In reaching this conclusion I was influenced, in part, by the absence of evidence, such as a photograph, that shows the carpets required cleaning. I was further influenced by the photographs of the carpet submitted by the Tenant, which shows the carpets being cleaned and which show the carpet is reasonably clean.

I find that the Landlord has submitted insufficient evidence to establish that the dent from the door knob and the drywall plugs did not exist prior to the start of this tenancy. In reaching this conclusion I was influenced, in part, by the absence of the condition inspection report that the Landlord completed on September 03, 2012 which may have established the condition of the walls at the start of the tenancy. In reaching this conclusion I was further influenced by the email, dated September 04, 2012, which corroborates the Tenant's claim that the walls were damaged prior to the start of the tenancy. I therefore dismiss the Landlord's claim for repairing these areas of the wall(s).

I find that the Landlord has submitted insufficient evidence to establish that the corners of the drywall were damaged during the tenancy. In reaching this conclusion I was influenced, in part, by the absence of photographs that were taken prior to new tenants moving into the rental unit, which could have established that the corners were damaged at the end of the tenancy. In the absence of evidence that corroborates the Landlord's testimony that the corners were damaged at the end of the tenancy or that refutes the Tenant's position that they were not damaged at the end of the tenancy, I find that I am unable to conclude that they were damaged at the end of the tenancy. I therefore dismiss the Landlord's claim for repairing these corners.

I find that the Tenant acted reasonably when they discarded black plastic that was left on the residential property. I find that the Tenant reasonably concluded that they could discard the plastic because the Landlord had left the plastic at the rental unit without discussing the value of the plastic; that many people would not consider a quantity of plastic to be valuable; and that the Landlord did not promptly respond to their request about how to dispose of property in the storage area. Section 7(2) requires a landlord who claims compensation for damage or loss to do whatever is reasonable to minimize the damage or loss. In my view the Landlord had an obligation to mitigate the loss by responding to the Tenant's email of June 14, 2012 in a timelier manner. I therefore dismiss the Landlord's claim for compensation for the black plastic that was discarded.

Residential Tenancy Branch Policy Guidelines specify that changes to the rental unit and/or residential property not explicitly consented to by the landlord must be returned to the original condition; that if the tenant does not return the rental unit and/or residential property to its original condition before vacating, the landlord may return the rental unit and/or residential property to its original condition and claim the costs against the tenant; that unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate; and that the landlord is generally responsible for major projects, such as tree cutting, pruning and insect control. I concur with these guidelines.

As the Tenant did not have the Landlord's consent to cut the peach tree, I find that the Tenant must compensate the Landlord for cutting the peach tree. In reaching this conclusion I was heavily influenced by the absence of evidence that shows that the peach tree would not have survived if it had not been severely pruned. I find that the Landlord's claim of $200.00 is reasonable, which includes the cost of the tree, compensation for the time it took to purchase and plant the tree; and compensation for the time it will take for the tree to reach maturity.

I find that the Tenant failed to comply with section 37(2) of the *Act* when the Tenant failed to remove the shelf that the Tenant attached to a ledge in the kitchen. As neither the Landlord nor the Tenant removed the shelf, I have placed little weight on their estimates of the time it will take to remove the shelf. On the basis of the photograph submitted in evidence, I find it reasonable to conclude that it will take approximately two hours to remove the shelf and repair the ledge, and I award the Landlord $40.00 in compensation for her time.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or make an application for dispute resolution claiming against the deposits. In the circumstances before me, I find that the Landlord failed to comply with section 38(1) of the *Act,* as the Landlord has not repaid the security deposit an she did not file an Application for Dispute Resolution until more than 15 days after October 03, 2012, which is the date I have determined was the end of the tenancy.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Ac*t, the Landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(1) of the *Act,* I find that the Landlord must pay the Tenant double the security deposit that was paid.

I find that the Landlord's application has merit and I find that the Landlord is entitled to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

I find that the Tenant's application has merit and I find that the Landlord is entitled to recover the filing fee from the Landlord for the cost of this Application for Dispute Resolution.

Conclusion

I find that the Landlord has established a monetary claim, in the amount of $699.00, which is comprised of $409.00 for advertising, $240.00 for damages to the rental unit, and $50.00 in compensation for the filing the Landlord's Application for Dispute Resolution.

I find that the Tenant has established a monetary claim, in the amount of $1,600.00, which is comprised of double the security deposit and $50.00 in compensation for the filing fee paid for the Tenant's Application for Dispute Resolution.

After offsetting the two monetary claims, I find that the Landlord must pay $0000 to the Tenant and I grant the Tenant a monetary Order for this amount. In the event the Landlord does not comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court 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: December 06, 2012.

Residential Tenancy Branch