



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the “Act”).

The landlord applied for authority to retain the tenants’ remaining security deposit, a monetary order for money owed or compensation for damage or loss, and for recovery of the filing fee.

The tenants applied for a return of the balance of their security deposit and for recovery of the filing fee.

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.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally, refer to documentary evidence timely submitted prior to the hearing, and make submissions to me.

I have reviewed the oral and documentary evidence before me that met the requirements of the Residential Tenancy Branch Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Issue(s) to be Decided

1. Is the landlord entitled to retain the tenants’ remaining security deposit, to a monetary order and to recover the filing fee?

2. Are the tenants entitled to a monetary order for the balance of their security deposit and to recover the filing fee?

Background and Evidence

The undisputed evidence shows that this 1 year, fixed term tenancy began on July 1, 2012, that it actually ended on March 1, 2013, when the tenants vacated the rental unit, monthly rent was \$1450, and the tenants paid a security deposit of \$725 and a pet damage deposit of \$350.

The rental unit was the upper suite of a rental home; the landlord also rented the lower suite to other tenants.

The parties agreed that the landlord has returned \$625 of the two deposits to the tenants and retained the amount of \$450, which is the amount of the landlord's monetary claim listed in her application for dispute resolution.

The parties each submitted documentary evidence.

The landlord's relevant documentary evidence included a communication with the lower tenants inquiring as to whether they would like to move to the rental unit, the upper suite, after receiving the tenants' notice to vacate, an advertisement from a free online site, email communication with prospective tenants, and emails between the parties.

The tenants' relevant documentary evidence included a copy of the tenancy agreement, email and text message communication between the parties, email and text message communication between the tenants and prospective tenants, notice of a forwarding address, and communication between the parties regarding unpaid utilities.

Landlord's application-

The landlord's monetary claim is in the amount of \$450, comprised of \$200 for unpaid utilities and \$250 for a lease break fee.

Unpaid utilities-The landlord testified that the parties entered into a verbal agreement that she would retain \$200 from the tenants' security deposit to cover any balance remaining for the utilities for which the tenants were obligated to pay during the tenancy.

The landlord stated that she is no longer requesting \$200, as she has now received the bills showing the actual amounts owed, those charges being \$89.72 for the water bill and \$66.85 for the Hydro bill. The landlord submitted copies of the two bills with a breakdown as to the tenants' charges.

Lease break fee-The landlord stated that she received the tenants' notice on January 14, 2013 of their intent to vacate the rental unit by 12:00 noon on March 1, 2013. The landlord submitted that she is entitled to the amount of \$250 as per a term in the tenancy agreement as the tenants ended the tenancy prior to the end of the fixed term. More specifically the clause states as follows: "There will be a charge of \$250.00 if this lease is broken prior to the 1 year."

The landlord further submitted that it was necessary to charge this amount as she was busy and a lot of her time would be spent for advertising, interviewing potential tenants, and showing the rental unit. The landlord contended that she discussed this clause with the tenants at the time the tenancy agreement was signed.

Tenants' response-The tenants submitted that they were of the understanding that the \$250 charge was the landlord's cost in re-renting; however the tenants stated that the landlord informed them that she would not charge the tenants this amount if the tenants did most of the work in re-renting. The tenants submitted that this was the case, as they posted the advertisements, received the potential tenants' information and references to deliver to the landlord, and showed the rental unit multiple times. As a result of the tenants' efforts to re-rent the rental unit, the rental unit was successfully re-rented so that the landlord did not suffer a loss of rent revenue.

The tenants said that the landlord came over only once after they gave notice for a showing.

The tenants admitted that they verbally agreed that the landlord could retain \$200 for unpaid utilities which were not known on the last day of the tenancy.

In counter response, the landlord stated that she attended the rental unit four times for showings.

Tenants' application-The tenants' monetary claim is \$570, comprised of \$250 in the way of a dispute of the lease break fee, \$200 for the unpaid utilities as held by the landlord, and \$120 for overpayment of oil usage charges during the tenancy.

As to the claim for \$250 and \$200, for the reasons stated above, the tenants disagreed that the landlord is entitled to these sums retained from their security deposit and are requesting the return of these sums.

As to the overpayment of oil usage charges, the tenants contended that all utilities were to be split equally between the upper tenants, themselves, and the tenants in the lower suite of the rental home.

According to the tenants, they discovered through conversations with the landlord that they have been paying more than their equal split for oil usage, in the amount of \$15 per month since the tenancy began.

The tenants also argued that a full tank of oil had not been used during the tenancy.

Landlord's response-The landlord agreed that the tenants were to pay 50% of the oil charges pursuant to the tenancy agreement; however, there was an inadvertent overcharge to the tenants of \$7.50 per month as the tenants paid \$15 per month more than the lower tenants. The landlord explained that as the upper suite was larger than the lower suit, she thought the upper tenants should pay more.

Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or tenancy agreement, the claiming party, both parties in this case, has to prove, with a balance of probabilities, four different elements pursuant to sections 7 and 67 of the Act:

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 reasonable measures to mitigate their loss.

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

Landlord's application-

Unpaid utilities-I find the landlord submitted sufficient evidence that the tenants owed the amount of \$156.57 for unpaid utilities, comprised of \$89.72 for water usage and \$66.85 for Hydro usage. I therefore find the landlord is entitled to monetary compensation in this amount and that the tenants are entitled to a return of the balance, in the amount of \$43.43.

Lease break fee-The tenancy agreement states that the tenants will automatically be charged \$250 if the lease is broken prior to the end of the 1 year fixed term, which was the case here; however I find the landlord submitted insufficient evidence that she is entitled to the sum of \$250.

Under Section 6 of the Act, a term in the tenancy agreement is not enforceable if the term is inconsistent with this Act or the regulations or the term is not expressed in a manner that clearly communicates the rights and obligations under it.

In reading this clause, I find this clause acts as a penalty as it provides for an automatic fee in the event a term in the tenancy agreement is broken. I do not find that a lease break fee is an allowable fee under the Act and is therefore not enforceable. I also find the landlord submitted insufficient evidence that this term was clearly communicated to the tenants by the language used in the landlord's written tenancy agreement.

I therefore dismiss the landlord's monetary claim for \$250 and I order that it be returned to the tenants.

I also decline to award the landlord recovery of her filing fee as it was not necessary to file an application for dispute resolution for unpaid utilities as she retained \$200 from the tenants' security deposit per mutual agreement and as I have dismissed her monetary claim for a lease break fee of \$250.

Tenants' application-

Oil usage-I find the evidence shows that the tenants overpaid for oil usage as they were contractually obligated to pay half of all utilities, yet paid more than this percentage for oil usage. The tenants paid \$15 per month more than the lower tenants and I therefore find they overpaid \$7.50 per month, half of the \$15 overpaid each month.

I therefore find the tenants are entitled to monetary compensation for oil usage overcharge in the amount of \$60 (8 months of the tenancy x \$7.50 per month)

Unpaid utilities-I also find that the tenants are entitled to reimbursement of \$43.43 for water and Hydro usage (\$200 held by the landlord, less \$89.72 for water and 66.85 for Hydro usage).

I find merit with the tenants' application and I award them recovery of their filing fee of \$50.

I therefore find that the tenants have proven an entitlement to a monetary award of \$403.43, comprised of \$250 held by the landlord from their security deposit for a lease break fee for which I have ordered that it be returned by the landlord, oil usage overcharge of \$60, balance of the \$200 retained from their security deposit in the amount of \$43.43 for water and Hydro usage, and the filing fee of \$50.

Conclusion

The landlord is entitled to retain \$156.57 from the tenants' security deposit for unpaid utilities.

The tenants are granted a monetary award of \$403.43.

I therefore grant the tenants a final, legally binding monetary order pursuant to section 67 of the Act in the amount of \$403.43, which I have enclosed with the tenants' Decision.

Should the landlord fail to pay the tenants this amount without delay after being served the order, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court. The landlord is advised that costs of such enforcement may be recoverable from the landlord.

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: June 18, 2013

Residential Tenancy Branch