Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This matter was originally scheduled to be considered on April 09, 2013, in conjunction with Application for Dispute Resolution #A, which had been filed by the Landlord. Given the amount of evidence that was submitted by both parties and the number of issues in dispute, it was apparent that we would be unable to consider both Applications for Dispute Resolution in the time allotted for the hearing on April 09, 2013. I therefore severed the two matters.

The Landlord's Application for Dispute Resolution was considered at hearings on April 09, 2013 and May 30, 2013. The hearing on June 03, 2013 was convened to consider the merits of the Tenant's 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 all or part of his security deposit; and to recover the fee for filing an Application for Dispute Resolution.

There was insufficient time to conclude the hearing on June 03, 2013. The hearing was reconvened on July 04, 2013 and was concluded on that date. Both parties were represented at the hearing on June 03, 2013 and July 04, 2013. They were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

The Landlord submitted documents to the Residential Tenancy Branch on March 21, 2013, copies of which were served to the Tenant, by mail, on March 20, 2013. The Tenant acknowledged receipt of the Landlord's evidence and it was accepted as evidence for Application for Dispute Resolution #A and #B.

The Landlord submitted documents to the Residential Tenancy Branch on May 21, 2013. The Landlord stated that copies of these documents were served to the Tenant, by mail, on May 21, 2013. The Tenant acknowledged receipt of these documents and they were accepted as evidence for Application for Dispute Resolution #A and #B.

The Tenant submitted documents to the Residential Tenancy Branch on April 02, 2013, copies of which were served to the Landlord, by mail, on April 02, 2013. The Landlord stated that she received most of the Tenant's evidence, with the exception of a DVD, on April 03, 2013. The Landlord stated that she received the DVD on April 08, 2013. The evidence received by the Landlord was accepted as evidence for Application for Dispute Resolution #A and #B.

At the hearing on June 03, 2013 the Landlord stated that she did not receive any portion of section 10 in the Tenant's evidence package. At the hearing on June 03, 2013 the Tenant was given the opportunity to re-serve these documents. The Tenant stated that he mailed these documents to the Landlord on June 05, 2013. The Landlord acknowledged receipt of the documents, with the exception of item "D" and they were accepted as evidence for these proceedings.

At the hearing on June 03, 2013 the Landlord stated that she did not receive page 9 of section L in the Tenant's evidence package. At the hearing on June 03, 2013 the Tenant was given the opportunity to re-serve this document. The Tenant stated that he mailed these documents to the Landlord on June 05, 2013. The Landlord acknowledged receipt of the document and it was accepted as evidence for these proceedings.

At the hearing on June 03, 2013 the Landlord stated that she did not receive page 2 of section 9 in the Tenant's evidence package. At the hearing on June 03, 2013 the Tenant was given the opportunity to re-serve these documents. The Tenant stated that he did not re-serve this document and it was not, therefore, accepted as evidence for these proceedings

At the hearing on June 03, 2013 the Landlord stated that she did not receive pages 3A and 4A of section 7; page 3A of section 8; page 8 of section L in the Tenant's evidence package. Those pages were not included in the package submitted to the Residential Tenancy Branch by the Tenant and will not, therefore, be considered as evidence at these proceedings.

At the hearing on June 03, 2013 the Landlord stated that she did not receive page 5 of "S's lease". That page was not included in the package submitted to the Residential Tenancy Branch by the Tenant and will not, therefore, be considered as evidence at these proceedings.

At the hearing on June 03, 2013 the Landlord stated that she does not have a computer and cannot view the DVD that the Tenant submitted as evidence. The Landlord and the Tenant agree that the Tenant provided the Landlord with another copy of the DVD. The Landlord stated that she still is unable to view the content of the DVD and it was, therefore, not accepted as evidence for these proceedings.

The Tenant submitted documents to the Residential Tenancy Branch on June 18, 2013. As these documents were submitted after the start of the proceedings, they were not accepted as evidence for these proceedings.

At the hearing on July 04, 2013 the Landlord stated that she was missing additional pages of the Tenant's evidence. Rather than adjourning the matter yet again to have these documents re-served, I ensured that both parties were in possession of documents referred to at the hearing and which I relied upon to make this decision. The Tenant did not refer to any documents during the hearing that the Landlord was not in possession of.

Issue(s) to be Decided

Is the Tenant entitled to compensation for loss of rent from the summer; to compensation for being unable to use the swimming pool; and to the return of all or part of his security deposit?

Background and Evidence

The Landlord and the Tenant agree that this rental unit is a 4 bedroom, 2,500 square foot single family dwelling; that the tenancy began on February 06, 2012; that they signed a fixed term tenancy agreement, the fixed term of which ended on February 05, 2013; that for the first three months of this tenancy the Tenant was obligated to pay $2,500.00 in rent; that for the remainder of the tenancy the Tenant was obligated to pay monthly rent of $2,700.00; that rent was due by the sixth day of each month; that the Tenant paid a security deposit of $1,350.00; that a condition inspection report was completed on February 06, 2012; that the parties mutually agreed to end the tenancy on January 05, 2013; that a condition inspection report was completed on January 05, 2013; that the Landlord wrote down the Tenant's forwarding address when it was provided to her on January 05, 2013; that the Landlord did not have written permission to retain a specific amount of money from the Tenant's security deposit; and that the Landlord has not returned any portion of the security deposit.

The Tenant claimed compensation, in the amount of $4,500.00, in compensation for lost revenue for the period between July 10, 2012 and August 28, 2012.

The Landlord and the Tenant agree that they discussed the Tenant's desire to sublet the rental unit when he was going to be out of the country in the summer of 2012 and that the Landlord agreed that the rental unit could be sublet during that period. The parties created an addendum to their tenancy agreement, which was signed by both parties, which outlines the responsibilities of each party if the property is sublet. I specifically note that the terms in the addendum do not specify that the Landlord must approve the Tenant's selection of a new tenant.

The Landlord and the Tenant agree that the Tenant entered into an agreement to sublet the rental unit to a third party for the period between July 10, 2012 and August 28, 2012.

The parties agree that the third party intended to occupy the rental unit with his spouse, a nanny, and six children. They agree that the Landlord informed the Tenant that she did not wish this person to occupy the rental unit as there were too many people in his family unit. The Tenant stated that the Landlord informed him that she would evict the Tenant and this third party if the third party moved into the rental unit. The Landlord denies telling the Tenant or his agent that anyone would be evicted if the third party moved in.

The Tenant contends that the documents in section F1 of the Landlord's evidence package corroborates his testimony that the Landlord threatened to evict him and the third party. In those documents the Landlord wrote that she had contacted the Residential Tenancy Branch and learned that she could evict the Tenant and the third party. Although it is not specifically stated, it is apparent the Landlord believes she could evict the Tenant and the third party if the third party moved into the rental unit. It is also evident that she discussed the sublet with the third party.

The Tenant stated that he had collected $3,000.00 in rent and a security deposit of $1,500.00 for the sublet; that when he told the third party that the Landlord had concerns about the sublet they asked for their money back; that he attempted to discuss it with the Landlord on several occasions but she refused to discuss it with him; and that he returned the third party's money because he did not want anyone to be evicted

The Landlord and the Tenant agree that an outdoor swimming pool was provided with this rental unit and that the tenancy agreement required him to maintain the water level in the pool, to maintain the proper pH level in the pool, and to keep the pool clean. The Tenant stated that he did not attempt to use the pool prior to May, due to inclement weather. He stated that when he started to clean the pool in May of 2012 he determined the heater was not working; that when he informed the Landlord that the heater was not working she told him that he did not need to heat the pool, as the sun would heat it during June, July, and August; that the Landlord never told him the heater simply needed to be reconnected; that the heater was never functional during the tenancy; and that a pool maintenance person told him the heater was not connected and was not functioning.

The Landlord stated that sometime during late April or early May she informed the Tenant that the heater for the pool had been disconnected; that the heater is disconnected during the winter months as that is how the pool in winterized; that the heater is functional; that she told the Tenant it would be very expensive to heat the pool but that she would reconnect the heater if he wished; that he never asked her to reconnect the heater; and that the heater was not reconnected during the tenancy.

The Landlord contends that it was the Tenant's responsibility to heat the pool if he wanted it warmer than the ambient temperature, which would normally be between 70 and 80 degrees. The Tenant argued that the pool temperature should be between 80 and 90 degrees and that this particular pool did not get direct sunlight so was not warm enough to swim in.

The Landlord submitted documents from a pool service and supply company, which show that on the Tenant had the pool maintained on June 13, 2012, June 27, 2012, July 11, 2012, July 17, 2012, July 23, 2012, July 30, 2012, August 07, 2012, August 13, 2012, and August 20, 2012. I note that there is nothing on these invoices that indicates the pool is not functional.

The Landlord submitted documents from a pool service and supply company that show she had the pool maintained on November 28, 2012; that she had the pool cleaned on May 07, 2012; that she had the pump repaired in November of 2011; that she had the pump repaired and made functional on June 04, 2012; that the pool and the pump were in good working order on May 08, 2013; and that on May 08, 2013 the heater was "currently disconnected".

The Landlord and the Tenant agree that the Tenant was asked to maintain the water level in the pool with a hose. The Landlord stated that the hose should simply be trickling and the Tenant could not recall the amount of water being added to the pool on a regular basis. The Tenant contends that the added water rendered the pool unsafe as it altered the chemical balance of the pool.

The Tenant submitted a copy of an email from a pool service and supply company, which is not the company that regularly maintained the pool, in which the technician stated that he believed the pool was leaking. The Tenant submitted no evidence to corroborate his testimony that regularly adding water to the pool rendered the pool unusable. The Landlord stated that she does not believe the pool is leaking and that water is regularly added to compensate for evaporation.

Analysis

Section 34(1) of the *Residential Tenancy Act (Act*) stipulates that a tenant must not sublet a rental unit unless the landlord provides written consent. I find that the addendum to the tenancy agreement that outlines the responsibilities of the Landlord and the responsibilities of the Tenant if the rental unit is sublet constitutes written consent to sublet the unit, for the purposes of section 34(1) of the *Act*. In determining this matter I was influenced, to some degree, by the undisputed evidence that the parties had also verbally agreed that the Tenant could sublet the rental unit.

With this written consent, I am not satisfied that the Landlord had the right to prevent the Tenant from subletting the rental unit to the family unit of 7. Even if one does not accept that the addendum serves as written consent, the Landlord may not have had the right to withhold consent to sublet, as she was subject to the limitations of section 34(2) of the *Act*, which stipulates that a landlord cannot unreasonably withhold consent to sublet a rental unit if the tenant has a fixed term tenancy agreement for a term of more than six months.

In these circumstances, the Tenant simply accepted the decision of the Landlord and he cancelled the sublet. I cannot conclude that the Tenant was obligated to accept the decision of the Landlord. Section 7(2) of the *Act* stipulates that a tenant who is seeking compensation for a loss that results from a landlord's non-compliance with the *Act* must do whatever is reasonable to minimize the loss. I find that if he disagreed with the decision of the Landlord he should have mitigated his potential loss by filing an Application for Dispute Resolution.

In the event the Tenant believed that the Landlord was unreasonably withholding her consent to sublet the rental unit to a family unit of 7 people, he should have filed an Application for Dispute Resolution seeking the right to sublet the unit. In the event that he was successful with that application, the sublet would have proceeded and he would not have lost revenue for the period between July 10, 2012 and August 28, 2012. In the event he was not successful with the application, the Landlord would not have been liable for any lost revenue the Tenant experienced. I specifically note that I am not rendering a decision on whether the decision to withhold consent was reasonable, as that matter is not before me.

As the Tenant failed to mitigate the lost revenue he experienced between July 10, 2012 and August 28, 2012, I dismiss his application for compensation for lost revenue for that period.

In determining this matter I have placed no weight on the Tenant's position that the Landlord told him he would be evicted if the rental unit was sublet to the third party. On the basis of the document located at F1 in the Landlord's evidence package, I am satisfied that the Landlord believed she could end the tenancies of the third party and the Tenant if the rental unit was sublet to this third party. Even if the Landlord did express this opinion to the Tenant, this did not absolve the Tenant from the obligation of ensuring the information was accurate before he acted upon it.

On the basis of the undisputed evidence, I find that the pool heater was not working during the tenancy. In the absence of evidence that shows the heater was broken, I accept the Landlord's testimony that it was simply disconnected. In reaching this conclusion I was heavily influenced by the absence of evidence from a qualified technician that shows the heater was inoperable even if it had been connected and by the document from the pool service and supply company that corroborates the Landlord's testimony that the pool was inspected on May 08, 2013, at which time it was determined that the heater was not currently connected.

I was further influenced by the document the Landlord submitted in evidence from the pool service and supply company, which indicates that the heater should be bypassed during the winter or during periods when the pool will not be used during extended periods. In my view, this corroborates the Landlord's testimony that the heater was simply disconnected.

In determining this claim, I find the version of events provided by the Landlord to be credible, as it is logical that there would be significant costs to heating a pool and that she would have suggested that the Tenant heat the pool with solar energy. In the absence of evidence that corroborates the Tenant's testimony that he asked to have the heater reconnected, I cannot conclude that he made this request. I therefore find that it is possible that the heater was not connected because the Tenant agreed it would be too costly and he did not ask to have the heater connected.

While I accept that the pool was not heated during the tenancy, I cannot conclude that the absence of heat rendered the pool unusable. It is my understanding that many pools are not heated during the summer months and that they are simply heated by the sun. I therefore cannot conclude that the Tenant is entitled to compensation because the pool was not heated.

I find that the Tenant submitted insufficient evidence to establish that the pool could not be used because the chemical balance of the water could not be properly maintained. In reaching this conclusion I was influenced by the absence of evidence from a pool technician that indicates the chemical balance of the pool was unsafe. I was also heavily influenced by the documents from the pool service and supply company that regularly maintained the pool for the Tenant during the summer of 2012, in which the technician reports no concerns about the chemical balance of the pool. Finally, I was influenced by the document from the pool service and supply company, dated May 08, 2013, which indicates the pool is in good working order. As the Tenant has failed to establish the pool could not be used because of a chemical imbalance, I cannot conclude that the Tenant is entitled to compensation because the pool was not usable.

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. As this tenancy ended on January 05, 2013, at which time the Landlord received the Tenant's forwarding address and recorded it on behalf of the Tenant, and the Landlord filed an Application for Dispute Resolution on January 16, 2013, in which she applied to retain all or part of the security deposit, I find that the Landlord complied with section 38(1) of the *Act*. As the Landlord complied with section 38(1) of the *Act*, the Tenant is not entitled to the return of double his security deposit.

As the Landlord has been previously authorized to retain $33.60 of the security deposit, I find that the Tenant is entitled to the return of the remaining $1,316.40.

With the exception of the return of the security deposit, I find that the Tenant's application has been without merit and I dismiss the Tenant's claim to recover the fee for filing this Application for Dispute Resolution. In reaching this conclusion I was heavily influenced by the fact that I would have ordered the Landlord to refund the outstanding security deposit at the conclusion of the hearing on May 30, 2013, and the Tenant did not need to file an Application for Dispute Resolution to recover his deposit.

Conclusion

The Tenant is entitled to a monetary Order in the amount $1,316.40. In the event that 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: July 05, 2013

Residential Tenancy Branch