Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MND, MNSD, FF

Introduction
This hearing dealt with two related application. File 805042 is the tenants' application for a monetary order. Tile 809405 is the landlords' application for a monetary order and an order allowing retention of the security deposit in partial satisfaction of the claim. Both parties appeared and had an opportunity to be heard. As the parties and circumstances are the same on both applications, one decision will be rendered for both.

In the hearing the tenant said they had amended their claim and increased it to $16,561.98. Although I had received notification that the tenants had paid an additional $50.00 filing fee because their claim was now more $5000.00 there was not a copy of an amended application for dispute resolution on the file. I asked the tenant to file a copy of the amendment after the hearing, which she did. It appears that the tenants had not amended the original application; they had merely filed an e-mail addressed to "whom it may concern" listing additional claims.

Issue(s) to be Decided
- Are the landlords entitled to a monetary order and, if so, in what amount?
- Are the tenants entitled to a monetary order and, if so, in what amount?

Background and Evidence
This tenancy commenced September 15, 2011 as a six-month fixed term tenancy that would continue as a month-to-month tenancy on the expiry of the term. The monthly rent of $1500.00 was due on the first day of the month. The tenants paid $1500.00 as a deposit. The landlord said it was $750.00 security deposit and $750.00 pet damage deposit; the tenant said the tenancy agreement showed $1500.00 as security deposit and nothing for pet damage deposit. A new tenancy agreement was signed on May 1, 2012 continuing the tenancy as a month-to-month tenancy, on the same terms and conditions as the previous agreement.

The rental unit is a log home located in a rural area near Lumby. There is a main floor and a walk out basement. The basement is unfinished except for one bedroom.

The landlord testified that a move-in inspection was conducted, move-in condition inspection report completed, and a copy of the report was given to the tenants. A copy was not submitted as part of their evidence package because it had been damaged in a flood at their new home. The tenant testified that although they had tried to arrange for a move-in inspection none was ever conducted.

On March 21, 2013 the landlords served the tenants with a 2 Month Notice to End Tenancy for Landlord's Use. The notice stated that the landlords intended to move into the rental unit. The effective date of the notice was stated as July 1.

The landlord testified that at the time their intention was to sell their home in Burns Lake, where they had moved for work from Lumby, and move back to Lumby. They then discovered that the market in Burns Lake was poor and this would not be a good time to sell, so they decided they should stay in Burns Lake. She testified that at the beginning of May she had a conversation with the tenants offering to continue their tenancy but by then the tenants had committed to moving to Dawson Creek. The tenant testified they did have a conversation in May but only about the June rent, not about continuing the tenancy.

The landlords did send the tenants an e-mail on May 21 that stated they were thinking about listing the home for sale. Instead the landlords decided to re-rent the house. They made an oral agreement with a family on Vancouver Island to rent the unit as of July 1 at a monthly rent of $1500.00. The new tenants did not see the rental unit before agreeing to rent it.

There was a move-out inspection on June 28. The landlord testified that the main level of the house was in satisfactory condition. The landlord testified that based on the advice they had received from the Residential Tenancy Branch their goal was to get the tenants out as quickly as possible so they agreed to return the security deposit and pet damage deposit to the tenants. The tenant acknowledged receipt of the full security deposit by registered mail within 15 days.

As it turned out the basement was not in very good condition because of damage caused by cats. The smell of cat urine intensified over the next few days to the point where it was difficult to be in the house. There was also pet damage to the covering on a portion of the deck.

When the new tenants saw the property they refused to move in. The landlords accepted their decision and agreed to pay them the costs of one month's storage and the change of address fee at Canada Post, a total of $224.00.

The landlords made an insurance claim. The adjuster's report describes in some detail the situation in the basement and estimates the costs of remediation and repairs at $20,290.35. The landlords took the cash settlement of $5000.00, the maximum payable under their policy, and paid a $1000.00 deductible to receive it. The landlords are going to do the remediation and repair themselves. They expect they will be able to do them at a lower cost than an insurance company. As the repairs have not been completed, they do not know what the actual cost will be. The landlords' claim is for the $1000.00 deductible.

The tenant does not dispute the adjuster's description but says the basement was like that when they moved in. She testified that after they took possession of the house the smell of cat urine was very apparent. She tried to wash the floor and discovered that the concrete was not sealed. They were never able to get rid of the cat smell.

The landlord testified that they had two dogs and two cats and that the cats were not allowed downstairs. The tenant testified that the landlord had four dogs and three cats and there was evidence that the cats did go downstairs.

The tenant testified that they have two indoor/outdoor cats and three small dogs. The cat litter box was kept downstairs but the cats did not spend much time in the basement.

Both parties filed numerous letters from friends and neighbours. Some of the letters filed on behalf of the landlord say they saw the house before the tenants moved in and all of these say the house was in good condition. All of the letters filed on behalf of the landlord describe a basement that smelled of cat urine after the tenants moved out. Some of the letters filed on behalf of the tenants say they saw the house when the tenants moved in and they all describe a basement that smelled of cat urine.

The landlord testified that after everything blew up at the end of June she and her husband decided that she would move into the rental unit and her husband would move there after he finishes his current contract. In the hearing the landlord testified that she was in the process of packing and moving and expected to be at the rental unit by the end of August.

The tenant testified that her husband has been working in Dawson Creek since September of 2012. They had planned to save their money and buy a property in the Armstrong area. After they were served with the notice to end tenancy they looked for agricultural property in the Okanagan but were unable to find one that met all their requirements so they decided they would move everyone and everything to Dawson

Creek. This was a very expensive move and the tenants claim all costs associated with this move.

When the tenants added to their claim in August they added a claim for loss of use of a portion of the rental unit based upon the fact that the landlords had kept some of their belongings in the basement and some of the outbuildings throughout the tenancy. The tenant testified they had a verbal agreement that the landlords would remove everything by October 15, 2011. The landlord testified they had a verbal agreement that these items could stay in the unit. In support of their claim the tenants submitted a recording of a voice message left by the female landlord in which she refers to the rental unit as their house. The balance of the message talks about the date for the move-out inspection and what will happen if the tenants do not participate.

Analysis

With respect to the landlords' claim for the deductible, on any claim for damage or loss the party making the claim must prove, on a balance of probabilities:

- that the damage or loss exists;
- that the damage or loss is attributable solely to the actions or inaction of the other party; and,
- the genuine monetary costs associated with rectifying the damage.

To put the issue in its simplest terms, the question is whose cats caused the damage to the basement? Both parties had cats; both parties say it was not their cats that caused the damage; both parties have witness statements saying the basement did or did not smell of cat urine at the start of this tenancy; both parties agree that the basement was a mess at the end of the tenancy. The evidence does not establish, on a balance of probabilities, that the basement was undamaged at the start of this tenancy and that the tenants' cats are the only possible cause of this damage. The same is true of the evidence relating to the deck. Accordingly, the landlords' claim for the insurance deductible is dismissed.

Section 49 of the *Residential Tenancy Act* allows a landlord to end a tenancy on two months notice to a tenant if a landlord or a close family member of the landlord (as defined by the Act) intends to occupy the rental unit.

Section 51(1) provides that any tenant who receives such a notice is entitled to one month of free rent. The tenants received this compensation because they did not pay the June rent, as provided for by the legislation.

This is the only compensation for moving that is allowed by the legislation. Accordingly, all the tenants' claims for the expenses associated with their move are dismissed.

A landlord is not entitled to compensation from a tenant for the costs of moving into the rental unit after they have given the tenant notice to end tenancy because they intend to move into the rental unit. Accordingly, the landlords' claims for moving expenses are also dismissed.

The landlords' claims for any payments made to their prospective tenants and loss of rental income are dismissed for the same reason. They had ended this tenancy because they said they were going to move into the rental unit. If they had wanted to rent the unit to someone else, they would have had to end this tenancy by a different method.

The *Residential Tenancy Act* provides additional compensation to tenants in situations where the landlord does not follow through on the reason given for ending the tenancy. Section 51(2) states that if:

(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or

(b) the rental unit is not used for that stated purpose for at lest 6 months beginning within a reasonable period after the effective date of the notice,

the landlord must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

Although the landlords went through many gyrations between when they gave the notice to end tenancy and the date of the hearing, none of which involved moving into the rental unit, at the hearing the landlord testified that she will be moved into the rental unit by September 1. Given the distances involved I find that two months is a reasonable period of time in which to accomplish the stated purpose for the notice to end tenancy. The tenants' claim for damages equal to two months rent is dismissed with leave to re-apply if the tenants are subsequently able to provide proof that the landlords never moved into the rental unit or, if they did move in, did not stay there for at least six months.

The tenants did not follow the proper procedure for amending an application for dispute resolution; however, in the interest of resolving the dispute between the landlords and the tenants, I will deal with the substance of the tenants' claim for loss of use. The only evidence as to whether the agreement was that the landlords could leave some of their belongings in the rental unit or that the landlords were to have all of their possession out within the first month or so of the tenancy is the conflicting oral testimony of the parties. There is no record of the tenants doing anything to enforce an agreement that the items

were to be removed such as sending a letter or e-mail, negotiating an addendum to the new tenancy agreement, or making an application to the Residential Tenancy Branch for an order that the landlords' comply with the terms of the tenancy agreement. The voice message filed by the tenants is not helpful. Not only was it made shortly before the end of this tenancy, the context of the message relates to the move-out inspection. The tenants have not established this claim on a balance of probabilities and it is dismissed.

The tenants claimed the cost of preparing and serving their evidence. The *Residential Tenancy Act* does not allow an arbitrator to award any party damages for the cost of preparing and serving evidence or participating in a hearing. This claim is dismissed.

As neither party was successful on their respective applications, no order will be made with respect to the filing fee paid by each party.

Conclusion

The tenants' claim for section 51(2) damages is dismissed with leave to re-apply. All other claims by the landlords and the tenants are dismissed.

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: September 18, 2013

Residential Tenancy Branch