Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the tenant: MNSD, CNR, OLC, MNDC, FF
For the landlord: MNSD, OPR, MNR, MNDC, 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"). Due to the length of the original hearing, it was necessary to adjourn the hearing to another date.

The tenants applied for a return of their security deposit, doubled, a monetary order for money owed or compensation for damage or loss, an order cancelling a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice"), for an order requiring the landlord to comply with the Act, and for recovery of the filing fee.

The landlord applied for authority to retain the tenant's security deposit, a monetary order for unpaid rent and for money owed or compensation for damage or loss, an order of possession for the rental unit due to unpaid rent, and for recovery of the filing fee.

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

At the outset of the original hearing, some issues were raised regarding service of the evidence; however, I have accepted all evidence submitted prior to the hearing on September 17, 2013, as I was convinced that both parties complied with the service provisions of the Dispute Resolution Rules of Procedure (Rules). I note that during both the original hearing and the adjourned hearing, neither party raised any further issues regarding evidence submissions received prior to the September 17, 2013, hearing.

I have reviewed the oral and written evidence of the parties before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Preliminary matter-

This hearing began on September 17, 2013, on the cross applications of the parties. Due to the length of the hearing on the tenants' application, the hearing was adjourned and scheduled to be reconvened on October 18, 2013 to deal with the landlord's application.

At the conclusion of the hearing on September 17, 2013, the parties were advised that the next hearing would simply be the conclusion of the original hearing began on September 17, 2013, and that the reconvened hearing was not a new hearing. To that end, the parties were specifically instructed that during the period of adjournment, no further evidence could be submitted, and if further or additional evidence was received, it would not be reviewed as it would not be timely submitted in accordance with Dispute Resolution Rules of Procedure 3.4, 3.5 or 4.1 in advance of the dispute resolution proceeding.

Despite these instructions, the landlord sent in 3 additional packages of documentary evidence during the period of adjournment.

At the beginning of the adjourned hearing, I informed both parties that although additional documentary evidence was submitted, I had neither read nor reviewed any further evidence and did not know the contents of any of the documents.

The landlord then inquired as to whether or not he could read or refer to these documents, and I responded that he could, so long as the documents were relevant to his application for dispute resolution, which was the purpose of the adjourned hearing. I informed the landlord that if the documents referred to any issues contained in the tenants' application for dispute resolution, that he would not be allowed to refer to them as the hearing on the tenants' application had been concluded.

I must note that the tenants stated that they sent in documentary evidence, in response to the landlords' documentary evidence; however, I informed the tenants that I also had not reviewed their documentary evidence as I had not reviewed the landlord's documentary evidence.

At the conclusion of the hearing, the landlord inquired of his rights to appeal my Decision, despite the fact he had yet to know the outcome. I informed the landlord generally of his right to file an application for review consideration, and under what grounds. I further informed the landlord of his right to judicial review in the Supreme Court of British Columbia. I also informed the landlord that a separate information page would be included with his Decision, telling the landlord of these rights, or providing online and contact information for the Residential Tenancy Branch ("RTB") to speak with a representative about any rights that he may have.

At this point, the landlord again brought up the subject of the documentary evidence sent in during the period of adjournment as he inquired as to whether or not he should

resubmit the evidence or where this evidence would be placed. It is my understanding that he asked this question for the purpose of his "appeal;" however, I am not certain of this. I also reaffirmed to the landlord the reason I was not considering the documentary evidence he submitted during the period of adjournment.

When asked, I informed the landlord that his evidence had been placed in the hearing file, unread, and that if he had further questions, he should use the contact information for the Residential Tenancy Branch contained in the separate information sheet included with this Decision.

*Preliminary matter #2-*As the tenancy was concluded prior to the original hearing on September 17, 2013, I have excluded from further consideration the tenants' request seeking cancellation of a Notice from the landlord seeking to end the tenancy and for an order requiring the landlord to comply with the Act. Similarly I have likewise excluded from further consideration the landlord's request for an order of possession for the rental unit as he has regained vacant possession.

Issue(s) to be Decided

1. Are the tenants entitled to a return of their security deposit, which has been double, further monetary compensation, and to recover the filing fee?
2. Is the landlord entitled to retain the tenants' security deposit, further monetary compensation and to recover the filing fee?

Background and Evidence

I heard undisputed evidence that this tenancy began in June 2013, that the monthly rent obligation of the tenants was $2500, and that the tenants paid a security deposit and a pet damage deposit of $1250 each.

The tenants said that they moved into the rental unit on June 4 and the landlord contended that the tenants moved into the rental unit on June 2.

There is no written tenancy agreement signed by both parties or move-in and move-out condition inspection report.

It must be noted that the rental unit is a single family dwelling.

Tenants' application-

The tenants' monetary claim is $5000, comprised of reimbursement of rent for June 2013, in the amount of $2500, and a request for absolution for rent for August of $2500.

Rent for June 2013-

In support of their claim that they should be refunded rent for June, the tenants submitted that although they were not in the rental unit for the full month, the landlord showed up at the rental unit at least 23 days, as he had a large amount of his belongings in the garage, and had ongoing projects at the rental home.

The tenants submitted that the landlord requested that the tenants move the brace in the sliding glass door, in order that the landlord could use the lower level bedroom and bathroom when he, the landlord, was on the property working.

The tenants contended that the landlord kept his garage sale items in their garage and in their driveway, and that strangers would show up at their front door asking if items were for sale.

The tenants contended that one day when tenant JA exited the shower, the landlord was in the backyard, causing a shock.

Additionally, the tenant contended that the rental unit was not in good shape to start with, and that the landlord either did not make the repairs or delayed in making the repairs. One repair of note was the heater in the swimming pool, which was not working until June 29, 2013. The liner was not replaced until June 27, according to the tenants.

The tenants further contended that the landlord did not provide a tenancy agreement, despite many requests from the tenants to do so, and that the promises of the landlord to make repairs and clean the rental unit went unfulfilled.

The tenants submitted that the landlord finally presented a blank, out of date tenancy agreement.

The tenants also submitted that the landlord refused to conduct a move-in inspection or supply a report.

The tenants submitted that due all the above, they were not given quiet enjoyment of the rental unit.

In response, the landlord submitted that the rental unit was advertised as a 3 bedroom, 3 bathroom, 4000 square foot home and that the tenants did not have exclusive use of the garage.

The landlord said that it was his plan to fix up the home, but was told by the tenants on June 10 that they would take over the repair of the swimming pool.

The landlord testified that the bottom level of the home was for his own use, and that he made as special effort to clean out the garage.

I must note that the landlord moments afterward said that the tenants did have full use of the downstairs level.

In rebuttal to the landlord's testimony, the tenants referred to their evidence, which shows that the rental unit was for "exclusive use of the home," further pointing out that there is no separation between the upper and lower levels of the home. The tenants contended that their 3rd bathroom was in the lower level, and that they were shocked when they saw the amount of the landlord's items in the garage.

The tenants said that the landlord informed them that he likes to sell his items out of the home, but that he would remove them from the garage. The tenants contended that it was only on June 23 that they received exclusive use of the home and that they only agreed to take over the repair of the pool so that they could have some privacy.

In further response, the landlord said that he spent $1500 in fixing up the heater and chimney and that the only reason he attended the rental unit was to ensure that the chimney worked or to pick up something from the garage.

Absolved of rent for August 2013-

The tenants submitted that although July was a fairly problem free month at the rental unit, they started asking the landlord to come over in the last 4-5 days of July, to discuss the payment of the utility bills and to discuss other issues, such as giving a notice to end the tenancy. The tenants stated that the landlord kept promising to come over to the rental unit, but that the landlord in turn kept cancelling the appointment, particularly the one on July 31.

On August 1, 2013, according to the tenants, the landlord showed up and said that he knew that the tenants had bought a house and asked about the rent for September, as tenancy was for a four month, fixed term.

The tenants said that they believed the landlord would keep their deposits, as this is what the landlord muttered when he walked away.

According to the tenants, the landlord failed to show up on August 5 with the utility bills as promised, and the same happened on August 6, 2013, when the landlord showed up with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities after the tenant had waited all day until 3:30 when he had to leave for an appointment.

According to the tenants, the landlord said that he would have photographers come over to take pictures of the meters, but instead some people showed up posing as potential buyers and took pictures of tenant JA and JA's car. The tenants also submitted that the next day, these same people showed up at JA's parents' home, at which time the police told the tenants to pack up and move out of the home.

In response the landlord submitted that the tenants were not trying to have him attend the rental unit in July, and that he showed up on August as promised. In explanation,

the landlord said that he did receive an email from the tenants to come over and collect rent, and that he did on August 1.

The landlord submitted that he presented the tenants a tenancy agreement, which was not signed.

I note that both parties submitted copies of their respective proposed tenancy agreements.
The landlord contended that he found it suspicious that tenant JA's car was parked down the street and that he had pictures taken of the tenant's mother's house as she might be a "scammer."

In rebuttal to the landlord's testimony, the tenants submitted that the landlord knew well in advance of August 1, 2013, that they were vacating the rental unit as of the end of August, and that he waited all day on July 31 for the landlord to come over, but that he failed to do so.

The tenants further contended that there was no firm start date of the tenancy, and that a full month's notice was given at any rate, even though the landlord refused to accept their notice to end the tenancy when he attended the rental unit.

Tenant JA confirmed that she witnessed tenant BA attempt to hand the landlord their notice to end the tenancy, and that he refused to accept it.

The tenant said it was hard to pay the landlord rent for August when he said he would keep their two deposits.

The tenants submitted that the landlord was provided their written forwarding address on August 8, on their amended application for dispute resolution, and in an email and registered mail on August 19 as the landlord refused to accept it otherwise.

The tenants' relevant documentary evidence included a copy of a cheque in the amount of $218.13 made payable to the landlord for a payment of utilities, and proof that the cheque was mailed on August 8, a copy of the cheque for $5000, for rent for June and the security deposit and pet damage deposit of $1250 each, pictures of the state of the rental unit at the beginning of the tenancy, an email from the landlord with an attached handwritten note purporting to be a tenancy agreement, a CD containing visual evidence of the state of the rental unit and proof that registered mail was being sent to the landlord, a copy of the listing for the rental unit, showing an availability for a long or short term lease, and copies of the extensive email communication between the parties.

Landlord's application-

The landlords' monetary claim is $6865.94, comprised of unpaid rent for August for $2500, unpaid rent for September 2013 for $2500, unpaid utilities from June 2 to

September 30 for $1257.43, pool maintenance and security patrol for September 30, in the amount of $508.51,and the filing fee of $100.00.

The landlord's relevant documentary evidence included an "Index" of evidence, a written summary in support of his application and in response to the tenants' application, a breakdown of the claimed unpaid utilities, including meter readings and diagrams of the meters when read, copies of the email communication between the parties, a notice to the landlord from the tenants on a pre-printed form, dated July 30, 2013, notifying the landlord that the tenants were vacating the rental unit effective August 31, 2013, with handwritten remarks from the landlord regarding service of the document, an email to tenant JA's mother confirming receipt of a 4 month tenancy agreement, which I note is the handwritten tenancy agreement previously referred to in this Decision, a copy of a letter from a security company giving a quote to patrol the residential property, a quote from a pool maintenance company, and a copy of a response to an advertisement of the rental unit, dated August 23, 2013.

Rent for August 2013-

In support of his application, the landlord claimed that he waited for 6 days in August, and when he did not receive rent, he issued the tenants a 10 Day Notice to end the tenancy.

In response, the tenants submitted that they intended to pay the August rent on August 1 and to discuss the end of tenancy, but when the landlord said he would keep $2500 for the two deposits, they declined to pay.

Rent for September 2013-

The landlord contended that he was entitled to rent for September as he did not receive the tenants' official written notice that they were ending the tenancy until it was received via registered mail on August 20. The landlord supplied several sections of a guideline to illustrate his contention that proper service of the notice was not made by the tenants. The landlord contended that the parties entered into a 4 month tenancy agreement and that the tenants were obligated to pay rent through September 30.

In response to my question, the landlord agreed that he received the August 1 email notice from the tenants, but that he did not open the email until August 7. The landlord stated that this was the first "real" notice.

In response to my question, the landlord said he did not advertise the rental unit due to the lack of what he termed a proper notice from the tenants, although he said that one ad was put in the paper in mid August.

In response, the tenants submitted that leading up to the August rent, they attempted to meet with the landlord prior to August 1, but that he refused to come over to the rental unit. The tenant submitted that the landlord refused to accept the notice when he did

attend the rental unit on August 1, and therefore he was compelled to sent notice in an email and finally through registered mail.

Unpaid utilities-

The landlord agreed that he has received $218.13 from the tenants. The landlord said that he has actually paid substantially more as he pays all utility bills in advance as he rents out several properties.

In response, the tenants submitted that they would gladly pay the utilities and had attempted to arrange with the landlord for a payment, with the only proviso being that they wanted to see a copy of the bills, not an estimate.

The tenants stated that the first notice of any amount for unpaid utilities was listed on the 10 Day Notice, at which time they paid the $218.13 listed on the Notice.

At the conclusion of both parties' submissions, all parties agreed that the tenants would owe the amount of $710 in utilities.

Pool maintenance and security-

The landlord stated that he hired one company to perform these duties and that the actual cost was $450. The landlord contended that the tenants owed this amount as the tenancy was to be through the end of September, so that it was necessary to hire someone to look after the pool in that month.

In response, the tenants submitted that the landlord informed them that prior to the tenancy, the pool had not been opened for 2 years, so they questioned by they should be responsible for any pool maintenance. The tenants also questioned why the pool was left open for September, when the rental unit was vacant.

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, which falls in sections 7 and 67, or tenancy agreement, the claiming party, both parties in this case, has to prove, with a balance of probabilities, four different elements:

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 claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

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

Tenants' application-

Rent for June 2013-

In reviewing the evidence, I was convinced that the rental unit comprised the entire home, which included the downstairs portion, the lower bedroom and bathroom, and the garage as there was no properly completed tenancy agreement to state otherwise and the advertised listing mentioned the entire home. I also find that the tenants submitted sufficient evidence, along with the lack of dispute from the landlord, that the landlord frequently attended the residential property with unannounced visits to collect items he used to conduct another business of buying and selling goods, or at least on 23 separate days.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

Additionally Guideline 6 states that a breach of a tenant's right to quiet enjoyment occurs with frequent and ongoing interference by the landlord, such as entering the rental premises frequently, or without notice or permission.

As I have found that the landlord made frequent unannounced visits to the rental unit during the month of June, I find the tenants have proven that the landlord has substantially interfered with the tenants' right to quiet enjoyment, most particularly their right to privacy and exclusive possession of the rental unit.

Residential Tenancy Policy Guideline 6 states: "in determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed."

I note that the loss of quiet enjoyment was from the landlord's frequent and ongoing entries into the rental unit in June and, while I do not find that the tenants are entitled to full reimbursement of rent for June, I find it reasonable to award the tenants $800 for the devaluation of the tenancy for June 2013.

I have not awarded the tenants compensation for a devaluation of the tenancy due to the state of the rental unit, as I was not convinced that the tenants did not have full use of the rental unit, other than for the devaluation as noted above.

Absolved of rent for August 2013-

Under section 26 of the Act, a tenant is required to pay rent in accordance with the terms of the tenancy agreement and is not permitted to withhold rent without the legal right to do so. A legal right may include the landlord's consent for deduction; authorization from a dispute resolution officer or expenditures incurred to make an "emergency repair", as defined by the Act. As the tenants have not submitted evidence under Sec. 33 of the Act that any alleged repairs were necessary for the health and safety reasons or that there were any emergency repairs which were urgent, they have not met this criteria. I further find that the tenants had use and possession of the rental unit for the month of August and apprehension of the landlord not returning the security deposit and pet damage deposit is not a reason to withhold rent.

I therefore find that the tenants owed rent for the month of August 2013, and did not pay. As such I decline to award the tenants' request to be absolved of having to pay rent for August 2013.

Security deposit and pet damage deposit –

In the case before me, I find the tenancy ended on August 31, 2013, when the tenants vacated the rental unit and provided their written forwarding address through their notice to the landlord they were ending their tenancy. There was much dispute as to when this notice was delivered to the landlord, which will be evaluated when considering the landlord's application; however the landlord had the tenants' address at least by August 7, 2013, when he said that the tenants' notice to vacate was taped to his door, as the landlord did not dispute that he received the document that day.

When a landlord fails to properly complete a condition inspection report, as is the case here, the landlord's claim against the security deposit for damage to the property is extinguished. In this case, the landlord applied to keep the pet and security deposits in partial compensation of monetary claims for unpaid rent, lost revenue for September and for unpaid utilities. As the landlord's claim was for other issues apart from damage to the rental unit, I find that the landlord complied with the requirement under section 38 to make an application to keep the security deposit. The tenants are therefore not entitled to double recovery of the deposit, and I dismiss that portion of the tenants' application.

However I find the tenants are still entitled to recover their security deposit, to be dealt with after consideration of the landlord's application.

Pet damage deposit-

Pursuant to section 38 (7) of the Act, a pet damage deposit may be used only for damage caused by a pet.

As the landlord's claim in his application was for unpaid rent, loss of rent revenue, unpaid utilities, and for pool maintenance, and not for damage caused by a pet, I

therefore find that the landlord possessed no such right to make a claim against the pet damage deposit and was required to return the tenants' pet damage deposit within 15 days of August 31, 2013, the last day of the tenancy; the landlord failed to do so.

Therefore pursuant to section 38(6)(b), the landlord must pay the tenants double the amount of the pet damage deposit of $1250, or $2500 and I award the tenants this amount.

Landlord's application-

August rent-

As I have found that the tenants owed rent for August 2013, I award the landlord monetary compensation in the amount of $2500.

September rent-

I do not find that the handwritten note from the landlord, signed by him and JA's mother, to be a tenancy agreement complying with section 13 of the Act as to form and content; as such, I find that this tenancy agreement was on a month to month basis and was not for a fixed term.

As to the issue of loss of revenue, Section 45 (1) of the Act requires a tenant to give written notice to end the tenancy that is not earlier than one month after the date the landlord receives the notice and is at least the day before the day in the month that rent is payable under the tenancy agreement. In other words, one clear calendar month before the next rent payment is due is required in giving written notice to end the tenancy.

In the case before me, I accept the evidence of the tenants that they intended on giving the landlord notice of their intent to vacate on or before July 31, 2013 as they had previously discussed, and that he failed to attend the rental unit on that date. I accept the tenants' evidence, as I found the landlord's testimony to be contradictory and therefore unreliable, when at first he stated that the rental unit did not include the garage or the downstairs bathroom and bedroom, and then later he admitted that it did include this area. As well, the landlord claims that the notice from the landlord was taped to his door on August 7, yet his handwritten notations on the document itself changed the dates of the notice and were confusing to interpret. The landlord claims that the only valid notice he received from the tenants was the one sent via registered mail on August 20, 2013.

I also accept tenant BA's statement that the landlord refused to accept their written notice on August 1, 2013, when he did attend the rental unit, as confirmed by tenant JA, who was observing from an upper level.

Due to the above, I find that the tenants served the landlord their notice to vacate, effective August 31, 2013, at least by August 1, 2013.

In this instance, I find the landlord failed to submit sufficient evidence that they took reasonable steps to mitigate their loss of unpaid rent for September 2013. I reached this conclusion due to the landlord's failure to submit any evidence of their attempts to advertise the rental unit, and I was therefore unable to examine the form, content and frequency of the advertisements.

As I find the landlord submitted insufficient evidence that he has met step 4 of his burden of proof, I dismiss his monetary claim for loss of rent revenue for September in the amount of $2500.

Unpaid utilities-

As the parties agreed that the tenants owed $710, I award the landlord the amount of $491.87 ($710-$218.13 previously paid by the tenants)

Pool maintenance and security patrol-

The landlord has presented no basis for awarding him for this amount, as the landlord did not provide evidence that the tenants have violated the Act or that they were responsible for these costs during the tenancy.

The dispute resolution process allows an applicant to claim for compensation or loss as the result of a breach of Act and not for costs incurred to conduct a landlord's business. Therefore, I find that I do not have authority to award the landlord pool maintenance and security patrol fees, as they are costs which are not named by the *Residential Tenancy Act.*

As I have found merit with both parties' applications, I find they should both bear the costs of their own filing fee.

Conclusion

For the reasons stated above, the tenants have been awarded monetary compensation in the amount of $4550, comprised of $800 for loss of quiet enjoyment of the rental unit, $1250 for a return of their security deposit, and double the amount of their pet damage deposit of $1250, for a total of $2500.

For the reasons stated above, the landlord has been awarded monetary compensation $2991.87, comprised of unpaid rent for August for $2500, and unpaid utilities in the amount of $491.87.

I deduct, or set off, the landlord's monetary award of $2991.87 from the tenants' monetary award of $4550, and grant the tenants a final, legally binding monetary order

for the balance due, pursuant to section 67 of the Act, in the amount of $1558.13, 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 are 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* and is being mailed to both parties.

Dated: November 4, 2013

Residential Tenancy Branch