Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has requested compensation for loss of rent revenue, to retain the security deposit and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

The tenants applied requesting return of double the security deposit and filing fee costs.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral evidence and to make submissions during the hearing.

Preliminary Matter

At the start of the hearing the parties confirmed reaccepts of each others' applications.

The tenants indicated that they wished to reduce their claim from $3,900.00 to $1600.00.

The landlord stated that he had amended his application increasing the sum of compensation from $1,000.00 to $2,600.00. The amended application was mailed to the tenants on January 15, 2014 using the tenant's service address. The landlord provided a tracking number for the registered mail. The tenants said they did not receive the amended application.

Section 90 of the Act determines that registered mail is deemed served on the 5th day after mailing. Receipt of registered mail is also rebuttable. As the landlord provided

affirmed testimony of service and indicated he had the tracking number, I determined that hearing could be adjourned, to allow service of the amended application. The tenants considered an adjournment and chose to allow the landlord's application to be amended, increasing the claim to $2,600.00. Therefore, the landlord's application was amended and the hearing proceeded.

The landlord has applied to retain the security deposit; however, the tenants have confirmed that $1,000.00 of the deposit has been returned. The landlord did not dispute that $300.00 of the security deposit was retained.

Issue(s) to be Decided

Are the tenants entitled to return of double the security deposit in the sum of $2,600.00; less $1,000.00 previously received?

Is the landord entitled to compensation in the sum of $2,600.00 for loss of December 2013 rent revenue?

Is either party entitled to filing fee costs?

Background and Evidence

There was no dispute that that on October 28, 2013 the parties signed a fixed-term tenancy agreement that was to commence on December 1, 2013 and terminate on November 30, 2014. Rent was $2,600.00 per month; a security deposit in the sum of $1,300.00 was paid on October 28, 2013.

On October 30, 2013 the tenants informed the landlord that they would not take possession of the rental unit. The tenants thought they had sold their home, but the sale did not succeed. There was no dispute that on November 6, 2013 the tenants sent the landlord an email, confirming they would not move into the unit. A copy of a letter signed and dated November 6, 2013, was supplied as evidence. This letter provided the tenants forwarding address and requested return of the security deposit in full.

The tenants confirmed that on December 7, 2013 the landord returned $3,585.00; this represented what the tenants believed was return of December 2013 rent paid and $1,000.00 of the $1,300.00 security deposit. This was not disputed by the landlord; although the landlord said there had been verbal agreement that $300.00 could be retained from the deposit.

On November 10, 2013 the landlord emailed the tenants apologizing for the wait, and indicated that he had 2 parties interested in renting and once an agreement was signed he would send the refund. The landlord thanked the tenants for their patience and asked for time to handle the situation. On November 5, 2013 the tenants had sent the landlord written notice and asked if he received the cancellation. The landlord responded that he had received the letter and needed time to handle the matter.

The landlord provided copies of advertising that was completed as soon as the tenants had given verbal notice they would not move into the unit. The landlord used 2 popular web sites and was able to rent the unit effective February 1, 2014. The landlord has applied for compensation of loss of December 2013 rent revenue in the sum of $2,600.00.

The tenants said that at the time they signed the tenancy agreement the landlord had yet to complete purchase of the unit; that did not take place unit November 28, 2013. The tenants confirmed that they had applied for dispute resolution; indicating their belief that jurisdiction of the Residential Tenancy Act applies. The tenants also suggested that the tenancy agreement was invalid.

The landlord submitted that he believed the matter had been solved and it was not until after payment was made to the tenants that he received their notice of hearing. The landlord then submitted an application for dispute resolution.

Analysis

Section 16 of the Act provides:

> ***Start of rights and obligations under tenancy agreement***
>
> ***16*** *The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.*

Therefore, as the parties signed the tenancy agreement on October 28, 2013, I find that the rights and obligations of both commenced on that date.

Section 45 of the Act sets out how a fixed term tenancy may be ended. Fixed terms are meant to give both parties a set term during which the landlord may end the tenancy only for very limited reasons. A tenant may end a fixed term tenancy, in accordance with section 45(3) of the Act, which provides:

> *(3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.*

There was no evidence before me that the landlord had failed to comply with a material term of the tenancy and there was also no indication of a signed mutual agreement to end the tenancy. Therefore, I find that the tenants ended the tenancy in breach of the Act; the failure of a sale of a home does not allow a tenant to avoid their obligations.

Section 52 of the Act provides:

Form and content of a notice to end tenancy

> ***52*** *In order to be effective, a notice to end a tenancy must be in writing and must*
>
> *(a) be signed and dated by the landlord or tenant giving the notice,*
> *(b) give the address of the rental unit,*
> *(c) state the effective date of the notice,*
> *(d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy, and*
> *(e) when given by a landlord, be in the approved form.*

The tenants did give the landlord a signed written request for return of the deposit; however, there was no evidence before me of any written, signed notice ending the tenancy. The tenants wish to exercise the rights provided by the legislation; however, I find that they had based their application, at least in part, on their non-compliance with the legislation.

I have considered the end date of the tenancy and find, pursuant to section 44(f) of the Act that the tenancy ended on December 7, 2013; the date by which the tenants had received a refund of December 2013 rent paid and $1,000 of the $1,300.00 security deposit.

When making a claim for loss of rent revenue Residential Tenancy Branch (RTB) policy suggests that a landlord put the tenant on notice that a claim will be made. The landlord had believed the matter was settled, but once he received notice of the tenant's claim; after returning money to the tenants; he then submitted an application within a reasonable period of time. Policy suggests that the landlord may claim compensation that will put him in the same position as if a breach of the agreement had not occurred; which I find takes a reasonable stance.

A landlord must also mitigate the loss; which I find occurred, by the landlord quickly advertising the unit. Copies of some of the ads were supplied as evidence.

Therefore, as the tenants breached the Act by failing to carry out their obligations under the Act, and, as the landlord has mitigated the loss claimed, I find that the landlord is entitled to compensation in the sum of $2,600.00 for the loss of December 2013 rent revenue. The unit was not rented until February 1, 2014, resulting in a loss to the landlord.

In relation to the security deposit; the only time a landlord may retain a deposit is at the end of a tenancy, with the written agreement of the tenants. Section 38(1) of the Act determines that the landlord must, within fifteen days after the later of the date the tenancy ends and the date the landlord received the tenant's forwarding address in

writing, repay the deposit or make an application for dispute resolution claiming against the deposit. If the landlord does not make a claim against the deposit paid, section 38(6) of the Act determines that a landlord must pay the tenant double the amount of security deposit.

The landlord received the tenant's written forwarding address on November 6, 2013; he was required to return the deposit within fifteen days of December 7, 2013. The landlord applied claiming against the deposit on January 3, 2014. The landlord returned only a portion of the deposit and retained a sum he believed had been agreed to by the tenants. Therefore, in the absence of written agreement, allowing the landlord to retain a portion of the deposit, I find that the tenants are entitled to return of double the $1,300.00 security deposit; $2,600.00; less $1,000.00 previously returned by the landlord.

As each application has merit the filing fee are set off against the other.

The amount owed to the landlord is reduced by the sum owed to the tenants.

Based on these determinations I grant the landlord a monetary Order for the balance of $1,600.00**.** In the event that the tenants do not comply with this Order, it may be served on the tenants, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

Conclusion

The landlord is entitled to compensation for loss of rent revenue.

The tenants are entitled to double the security deposit less the sum previously returned.

The filing fees are set off against the other.

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: February 18, 2014

Residential Tenancy Branch