Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC OPB MNDC MND FF
OLC MNSD MNDC

Preliminary Issues

Upon review of both Applications for Dispute Resolution the parties confirmed that the Tenants vacated the property by October 1, 2013, and the tenancy was over. Therefore, the Landlord was withdrawing her requests for Orders of Possession for cause and breach of an agreement and the Tenants withdrew their request for an Order to have the Landlord comply with the *Act.*

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlord and the Tenants.

The Landlord filed her initial application on November 6, 2013, and amended the application November 18, 2013, to obtain a Monetary Order for; damage to the unit, site, or property; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee from the Tenants for her application.

The Tenants filed seeking a Monetary Order for the return of double their security deposit.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Is the Landlord entitled to a Monetary Order pursuant to section 67 of the *Residential Tenancy Act*?
2. Are the Tenants entitled to a Monetary Order pursuant to section 67 of the *Residential Tenancy Act*?

Background and Evidence

It was undisputed that the parties executed a written tenancy agreement that commenced on September 1, 2013. The Tenants were required to pay rent of $800.00 on the first of each month, and the Tenants paid $800.00 as the security deposit ($400.00 paid August 7, 2013 plus $400.00 paid September 1, 2013). The tenancy agreement indicates the tenancy was for a fixed term ending August 31, 2014 and included a hand written term which states "Tenant can cancel with 30 days notice at anytime". No move in condition inspection report form was completed or signed.

The Landlord filed seeking to recover $325.00 for a damaged hand rail. The Tenants did not dispute this claim and confirmed the exterior handrail was damaged when they were moving into the unit September 1, 2013.

The Tenants testified that they were evicted by the Landlord and that eviction came in the form of an e-mail from the Landlord on September 23, 2013 at 7:16 a.m. In that e-mail the Landlord told them they were given two months notice to move out. The Tenants responded by e-mail September 23, 2013 at 3:30 p.m. agreeing to move out and informed the Landlord that they "will be ready to move by this month end or first week of October". It was undisputed that the parties only communicated by e-mail.

The Landlord affirmed that she sent the eviction e-mail and that she received the Tenant's responses, but argued that the Tenants did not provide her with 30 days written notice to end the tenancy. She stated that she resides in the upper floor of the house and she witnessed the Tenants moving out during the evening hours of September 30 and October 1, 2013. She did not initially provide dates and times for a move out inspection because she was not aware she had to until she contacted the *Residential Tenancy Branch.* After finding out the requirements she sent the Tenants an e-mail to request an inspection on October 31, 2013 or November 1, 2013, but the Tenants refused to attend stating that too much time had passed for an inspection to be completed.

The Landlord testified that she is also seeking two months lost rent totalling $1,600.00 (2 x $800.00) because she was not able to re-rent the unit due to the damaged hand railing. She argued that the railing was a safety railing and the property could not be occupied until such time as the railing was replaced. She pointed to her evidence which included a note from her contractor which indicates the hand rail could not be repaired due to the Tenants' failed attempts at repairing it; which meant she had to wait until her contractor could make a new custom moulded railing. The Landlord mentioned her

evidence and stated that it included a municipal inspection which states the occupancy permit would not be granted until the handrail was installed; therefore, she felt she could not re-rent the unit until the hand rail was replaced. She stated that she did not research options for a temporary hand rail and she did not advertise the rental unit until January, 2014, because she was out of town for the month of December 2013.

The Landlord argued that the tenancy did not end on October 1, 2013, because the Tenants remained in possession of the keys until October 8, 2013.

The Tenants disputed the Landlords claim for two months rent and argued that they agreed to vacate the unit based on the Landlord's eviction notice so they did not think they needed to provide 30 days notice. They informed the Landlord of the broken railing when they vacated the property and she told them to deal with her contractor. They contacted her contractor right away and when he did not respond within about two weeks they contacted the Landlord and she said she would handle the repair. A quote was received from the contractor on October 15, 2013 and the invoice for the work was not received until November 4, 2013. They said they could not return the keys right away because the Landlord was out of town. They returned the keys the same day the Landlord informed them she was back at her office and planned to meet her that evening at the rental unit but she did not attend as planned, as stated in their e-mail evidence.

The Landlord argued that contractors are hard to come by in their town and she wanted to stick with the contractor who did the original renovations. She confirmed that the estimate was received in mid October and the work was not completed until November 4, 2013. She said she did not seek a temporary measure and argued that a temporary fix would not be allowed because it was a safety hand rail. She confirmed that she had to cancel their planned meeting on October 8, 2013, due to another matter she had to attend to.
The Tenants filed for the return of double their security deposit because page three of their tenancy agreement stipulates:

> *3) If a landlord does not comply with subsection (1), the landlord*
> *a) may not make a claim against the security deposit or pet damage deposit; and*
> *b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both*

The Tenants argued that subsection (1) stipulates that the Landlord could only collect a security deposit that was half of the monthly rent and she collected a deposit of $800.00; an amount that was equal to a full month's rent. Also, she did not return the full deposit within the required fifteen day time period once the tenancy ended.

In closing, the Landlord stated that she was not aware of the *Act* when dealing with this tenancy. She argued that she did not receive the Tenants' forwarding address until October 21, 2013 and on that same day she sent a cheque for $400.00 as return of the

overpaid portion of the deposit. She held onto the remaining $400.00 deposit to claim against the damaged handrail.

The Tenants confirmed that they provided their forwarding address on October 21, 2013, and have received and cashed the October 21, 2013 cheque for $400.00.

The Landlord submitted documentary evidence which indicates two payments were made to the Tenant as partial refunds of the security deposit as follows:

1) **October 21, 2013 Cheque # 0139 for $400.00; and**
2) **November 08, 2013, Cheque # 0142 for $75.00.**

Analysis

I have carefully considered the foregoing, the documentary evidence as presented in the hearing; and on a balance of probabilities I find as follows:

The Tenants did not dispute the Landlord's claim of $325.00 for the damaged handrail. Accordingly, I award the Landlord compensation for the handrail in the amount of **$325.00.**

Section 71 (2) (c) of the Act provides that the Director may make an Order that a document not served in accordance with section 88 or 89 of the Act, is sufficiently given or served for purposes of this Act.

Upon reviewing the foregoing and the documentary evidence before me I find the parties established that e-mails were an acceptable form of written communication between them. I make this finding in part because e-mail was the primary method of communication between the parties and each party acted upon communications sent to the other by e-mail. Accordingly, I find e-mail to be an acceptable form of service in this matter, pursuant to section 71(2)(c) of the Act.

Section 6(3) of the Act stipulates that a term of a tenancy agreement is not enforceable if: the term is inconsistent with this Act or the regulation; the term is unconscionable; or the term is not expressed in a manner that clearly communicates the rights and obligations under it.

The parties entered into a written tenancy agreement that stipulates the tenancy was for a fixed term ending August 31, 2014 but also included a written term which states "Tenant can cancel with 30 days notice at anytime".

Based on the above, I find the term of the tenancy agreement to be conflicting and therefore this tenancy reverted to a periodic, month to month tenancy.

Section 44 (3) of the Act provides that a tenancy ends if the landlord and tenant agree in writing to end the tenancy.

Upon review of the September 23, 2013 e-mails I find the Landlord informed the Tenants that she wanted the tenancy to end and the Tenants agreed to end the tenancy effective no later than the first week of October 2013. The Landlord had full knowledge that the Tenants accepted her request and she witnessed them move their possessions out of the unit as she resided directly above them.

Based on the above, and despite the keys not being returned until October 8, 2013, I find this tenancy ended October 1, 2013, by mutual agreement, in accordance with section 44(3) of the Act. Therefore, the Tenants had no legal obligation to the tenancy agreement or Landlord after October 1, 2013.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement;
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation;
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Only when the applicant has met the burden of proof for all four criteria will an award be granted for damage or loss.

In this case the Landlord has the burden to prove the Tenant breached the Act in a manner that caused her to suffer a loss of two month's rent, as claimed. The Landlord argued that the unit could not be occupied until the handrail was replaced, as it was required for safety reasons.

Upon review of the evidence before I find the Landlord submitted insufficient evidence to prove her claim for lost rent. I make this finding in part because: (1) the delay was contributed to by the Landlord's choice that only her contractor could do the work; (2) no evidence was provided to prove that a temporary handrail could not be used in the interim; (3) there was no evidence that included a municipal inspection that stated the occupancy permit would not be granted until the handrail was installed, as stated by the Landlord (4) the Landlord made no effort to advertise or re-rent the unit before January 2014; and (5) there is evidence that the Landlord was out of town during the period of loss claimed. Accordingly, I find the Landlord did not do what was reasonable to mitigate her loss, and the claim for lost rent is hereby dismissed, without leave to reapply.

The Landlord has been partially successful with their application; therefore I award partial recovery of the $50.00 filing fee in the amount of **$25.00.**

The evidence supports that this tenancy ended October 1, 2013; the Landlord received the Tenants' forwarding address on October 21, 2013; the Landlord collected an amount equal to a full month's rent as the security deposit, in breach of the Act and the tenancy agreement; and the Landlord did not complete a move in or move out condition inspection report form.

When a landlord fails to properly complete a condition inspection report, the landlord's claim against the security deposit for damage to the property is extinguished, pursuant to sections 24 and 36 of the Act. Because the landlord in this case did not carry out move-in or move-out inspections or complete condition inspection reports, she lost her right to claim the security deposit for damage to the property and was required to return the full deposit amount in accordance with Section 38 of the Act, as follows:

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest.

In this case the Landlord was required to return the Tenant's $800.00 security deposit in full no later than November 5, 2013. The Landlord returned $400.00 to the Tenants on October 21, 2013, keeping $400.00.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit.

Based on the aforementioned I find the Tenants have met the burden of proof to establish their claim and I award them double their security deposit plus interest in the amount of **$1,600.00** (2 x $800.00 + $0.00 interest).

Monetary Order – I find that these claims meet the criteria under section 72(2)(b) of the *Act* to be offset against the other as follows:

Tenants' Award	$1,600.00
LESS: October 21, 2013 partial payment	-400.00
LESS: November 9, 2013 Cheque # 0142	-75.00
LESS: Landlords Award ($325.00 + $25.00)	-350.00
Offset amount due to the Tenants	**$ 775.00**

Conclusion

The Tenants have been awarded a Monetary Order in the amount of ~~**$850.00**~~ **$775.00.** This Order is legally binding and must be served upon the Landlord. In the event that the Landlord does not comply with this Order it may be 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: February 20, 2014
AMENDED: March 27, 2014

Residential Tenancy Branch