Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNSD MNDC FF
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Introduction

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

The Landlords filed their application on November 08, 2013, seeking a Monetary Order for: damage to the unit, site or property; to keep all or part of the security deposit; 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 their application.

The Tenants filed their application on February 05, 2014, seeking a Monetary Order for: money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; for the return of their security deposit; for other reasons; and to recover the cost of the filing fee from the Landlords for their application.

Although both Landlords were present at the teleconference hearing, testimony was only provided by the male Landlord, J.H., on behalf of both Landlords.

The parties appeared at the teleconference hearing and gave affirmed testimony. The Landlords confirmed receipt of all of the evidence submitted by the Tenants. The Tenants testified that they did not receive photographs from the Landlords which were submitted in a second evidence package to the *Residential Tenancy Branch.* The Landlords confirmed that they did not serve the Tenants with copies of that photographic evidence.

Sections 3.1 and 4.1 of the *Residential Tenancy Branch Rules of Procedure* stipulate that the other party and the *Residential Tenancy Branch* must be served with copies of evidence a party wishes to rely upon. Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore, as the Tenants have not received copies of the Landlords' photographic evidence I find that that evidence cannot be considered in my decision. I did however consider the rest of the Landlords' evidence that had been served upon the Tenants.

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. Have the Landlords met the burden of proof to be granted a Monetary Order, pursuant to sections 67 and 7 of the *Residential Tenancy Act*?
2. Have the Tenants met the burden of proof to be granted a Monetary Order, pursuant to sections 67 and 7 of the *Residential Tenancy Act*?

Background and Evidence

It was undisputed that the parties executed a written tenancy agreement for a fixed term tenancy that commenced on October 1, 2012 and was set to end on September 30, 2013. The Tenants were required to pay rent of $950.00 on the first of each month and prior to the onset of the tenancy the Tenants paid $475.00 as the security deposit.

The Landlords testified that they are seeking $2,600.00 which is comprised of $200.00 for painting; $200.00 for carpet cleaning; $150.00 to remove an oil stain; $100.00 in incidental costs incurred in bringing their application forward; and $1,900.00 in lieu of two months notice to end their tenancy.

The Landlords argued that they first advertised the rental unit for $975.00 and that they negotiated a tenancy agreement with the Tenants at a lower rate of $950.00 with the understanding and verbal agreement that the rent would be increased by $50.00 for the next year. When the tenancy ended and the Tenants paid their October 1, 2012 rent the Landlords reminded the Tenants that the rent was to be increased by $50.00 because the tenancy had ended. The Tenants refused to pay the increased amount and told the Landlords they were required to give three months notice of a rent increase and that they could only increase the rent by the legislated amount. The Landlords stated that they had not presented the Tenants with a new written tenancy agreement for another fixed term period and after continued e-mail communications on October 4, 2013, the Tenants gave them late notice to end their tenancy effective on October 31, 2013. Both parties attended the move out inspection on October 30, 2013; during which the Tenants provided the Landlords with their forwarding address.

The Landlords argued that the tenancy agreement requires the Tenants provide them with two month notice to end the tenancy. In the absence of two months notice they are seeking $1,900.00 as compensation (2 x $950.00). The Landlords initially stated that they began to advertise the unit October 1, 2013, and then changed their testimony stating they did not advertise until after the Tenants had vacated on October 30, 2013, because they were concerned about prospective tenants not liking the unit because of the items the Tenants had on the patio. They started advertising the unit on the internet on November 1, 2013, for an increased rent amount of $1,025.00. On November 8, 2013, they signed a new tenancy agreement that began on November 15, 2013 for $1,025.00 per month.

The Landlords are also seeking $550.00 for damages and cleaning costs. The Landlords submitted that the Tenants left the rental unit with spots on the walls, where they had touched up the paint. The Landlords argued that the Tenants used the Landlords' paint, without their permission, and did not paint the walls properly, leaving the spots on the walls in every room. The Landlord did not provide receipts for their painting claim because they said they did the painting themselves with paint that was left in their laundry room.

The Landlords argued that the Tenants did not have the carpets professionally cleaned and did not remove an oil stain from the driveway, despite the Landlords' requests to have this done before the end of the tenancy. The Landlord said the carpets smelled of cat urine and feces. The Landlord did not submit receipts for these items because they performed the cleaning themselves.

The Landlords' claimed for incidental costs of $100.00. That claim was comprised of costs such as gas, evidence, and travel time to file their application for this dispute resolution. No receipts to support the claim for incidental costs were provided.

The Tenants testified that their fixed term tenancy ended September 30, 2013, and reverted to a month to month tenancy because the tenancy agreement did not require them to vacate the unit at the end of the fixed term. They argued that they were entitled to end their tenancy with less than thirty days notice because the Landlord breached a material term of their tenancy by trying to force them to pay an illegal rent increase and then by harassing them after they refused to pay the increase. The Tenants submitted that they did not feel safe; they were fearful of the Landlords' dog that was always loose on the property.

The Tenants stated that they did not seek a remedy through dispute resolution sooner because they did not want to endure increased harassment from the Landlords for the duration of their tenancy. The Tenants indicated that they waited a few months after moving out before filing their claim because they did not want to have to deal with the stress of the situation during the Christmas season.

The Tenants argued that they should not have to pay the Landlords money "in lieu of two month's notice" because the Landlords were able to re-rent the unit in November

2013 and began collecting rent right away. They submitted that if the Landlords were awarded this claim they would be being paid double the rent.

The Tenants disputed all the damages and cleaning claimed by the Landlords and argued that a proper move in condition inspection report form was never completed. The male Tenant denied having knowledge that the rental unit was brand new and stated that he has knowledge that the house was built in May 2012. The female Tenant testified and confirmed that they signed the tenancy agreement and addendum which states the rental unit was brand new. They pointed to the photos provided in their evidence and stated that photos 1 and 2 were taken October 15, 2013, and the rest were on October 30, 2013. They indicated that these photos are proof of the condition they left the rental unit in, at the end of the tenancy.

The Tenants argued that the amounts claimed by the Landlords are simply made up numbers as there were no receipts provided by the Landlords to support their claims. When the Landlord did his impromptu inspection of the property on October 5, 2013, he told them that they needed to fill all the nail holes and paint them. He gave them permission to use the paint that was in the common area laundry room at that inspection. They did as instructed, filled all picture holes, and painted the patches using the Landlords' paint. It is not their fault that the Landlords' paint did not match the other colored paint exactly. They pointed out that the Landlords stated that they did the painting themselves and that they used the existing paint. Therefore, they argued that the Landlords did not incur a cost.

The Tenants testified that they cleaned the entire carpet, from wall to wall. They said that their cat was well trained, never urinated or left feces on the carpet, and always used the liter box. The Landlords did not provide evidence to prove the Landlords did any cleaning themselves and there is no evidence that they had it professionally cleaned.

The Tenants confirmed that the oil stain was located on their side of the carport but argued that it could have been caused by some other vehicle that may have parked in their spot while they were away during the day. They said they wanted to appease the Landlords so, as a friendly jester; they attempted to remove the oil stain with a product they brought home from the female Tenant's place of work. Unfortunately that product did not remove the stain completely. They are of the opinion that the driveway is a common area which is required to be cleaned by the Landlords, as stipulated in their tenancy agreement.

The Tenants stated they were seeking $3,100.00 for their claim which is comprised of $950.00 as double their security deposit (2 x $475.00); $100.00 incidental expenses; and $2,000.00 emotional damages due to harassment.

The Tenants submitted that they are entitled to the return of double their security deposit because the Landlords failed to return their deposit within 15 days of the tenancy ending on October 30, 2013. The claim for incidental expenses is comprised of

costs, gas and travel expenses, incurred to compile and serve their application and evidence.

The Tenants testified that they are seeking $2,000.00 ($1,000.00 each) for emotional damages resulting from harassment from Landlords and for the loss of quiet enjoyment for the last month of their tenancy. They argued that the claim is composed of various interactions with the Landlords including: threatened eviction if we did not pay the illegal rent increase; an unnecessary inspection scheduled without written notice and done October 5, 2013, the day after they gave their notice; the Landlords forcing themselves inside the unit insisting that the Tenants sign a letter; name calling; numerous interruptions caused by the Landlords approaching them when they are attempting to leave for work; insulting comments from the Landlords about their patio furniture; the Landlords insistence that they remove their patio furniture; caused unnecessary noise; and made threats to call the police or evict the male Tenant sooner. The Tenants said that in addition to the aforementioned, once they gave their notice the Landlords changed the following rules of their tenancy: they could no longer park outside the gate; only the female Tenant's car could be parked on the driveway; and they could not have an overnight guest. The Tenants acted in a manner to defend their home while having to endure the Landlord's comments about their possessions being dirty and unsightly.

In closing, the Landlords confirmed that they discussed raising the rent with the Tenants but did not do so until October 1, 2013. After they received the Tenants' notice they requested that the Tenants remove their patio items so the area would not look unappealing to prospective tenants. They requested the Tenants sign the letter but did not force their way into the rental unit; they did request the male Tenant not to park his vehicle on the driveway because it leaked oil; they did request that he not park his vehicle in the laneway; and did request that they not have too many guests. The Landlords deny telling the Tenants that they could not have overnight guests and they did not threaten the Tenants.

The Tenants summarized their claim stating that the last month of their tenancy was the worst month ever in their five year relationship. Their tenancy went well from the start until the fixed term ended and the Landlord wanted to increase their rent. Then their tenancy became a disaster because of the Landlords' actions, which is why they should be entitled to compensation.

Analysis

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*.

Landlords' application

Section 44(3) of the Act stipulates that if on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that

date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 45 (1) provides that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Section 5 of the Act stipulates that landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect.

In this case the fixed term tenancy ended September 30, 2013, and did not require the Tenants to vacate the unit. No new tenancy agreement was signed; therefore, this tenancy reverted to a month to month tenancy beginning October 1, 2013, pursuant to section 44(3) of the Act. On October 4, 2013, the Tenants served notice to end their tenancy effective October 31, 2013, which is less than thirty days notice as required pursuant to section 45 (1) of the Act.

Section 45 (3) of the Act states that 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.

When ending a tenancy pursuant to Section 45(3) of the Act, a tenant must provide the landlord written notice of the decision to end the tenancy indicating the breach, give the landlord a reasonable period for the landlord to correct the problem, and if need be make an application for dispute resolution.

When determining if a tenant has ended the tenancy in accordance with Section 45(3) the Arbitrator will determine if the term was material, if the breach was serious enough to end the tenancy, and if the tenant exercised all available options beforehand, such as communicating directly with the landlord and applying for dispute resolution.

Based on the above, and after careful review of the evidence before me, I find the Tenants provided insufficient evidence to prove their situation met all the requirements to end this tenancy in accordance with section 45(3) of the Act. I make this finding in part because there was conflicting evidence to prove which date the Landlord requested the additional rent, September 1st or October 1, 2013. If it was not until October 1, 2013, then giving notice to end their tenancy on October 4, 2013, did not provide the Landlord a reasonable amount of time to respond to their concerns. Furthermore, the Tenants did not pay an increased amount of rent, and they did not apply for dispute resolution to have the matter of an additional rent increase resolved.

Based on the above I find the Tenants provided insufficient evidence that they met all the requirements of section 45(3) of the Act, to end this tenancy with less than one months notice. Therefore, the Tenants were required to provide a full month's notice in accordance with Section 45(1) of the Act. Accordingly, the Tenants ended their tenancy in breach of the Act as they only provided less than thirty days notice.

The Landlords have sought $1,900.00, for short notice to end the tenancy. They also referred to this claim as being "in lieu of two months notice", as written in their tenancy agreement. Requiring two months notice to end a tenancy is in breach of section 45(1) of the Act, and is therefore, not enforceable.

As per the Landlords' submission they did not begin advertising the unit until November 1, 2013, for a higher amount of rent. The unit was re-rented as of November 15, 2013, for $1,025.00. The Landlords argued that they could not show the rental unit due to its condition or with the Tenants' possessions on the patio; however, there is insufficient evidence to support that argument.

Based on the foregoing I find the Landlords provided insufficient evidence to prove that they did what was reasonable to minimize their loss, as required under section 7 of the Act. I make this finding in part because the Landlords delayed over three weeks before advertising the unit, and rather than advertising the unit for the same amount of rent, they increased the rent to try to profit more from this situation, instead of taking steps to re-rent the unit as soon as possible to reduce any potential losses. Accordingly, I dismiss the Landlords' claim for $1,900.00 in lieu of two months notice, without leave to reapply.

Section 21 of the Regulation stipulates that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The tenancy agreement addendum, signed by both Tenants and the Landlord stipulates the following at paragraph 1:

> *However, we hereby undertake full responsibility to take care of any damage occur to the "Brand New suite", to repair/replace and leave the suite in absolute clean condition as is now at the end of our lease of one year.*

Notwithstanding the Tenants' argument that a move-in condition inspection report form was not completed or signed at move in, I accept the evidence before me that the Tenants viewed the suite, prior to agreeing to rent it, and then signed the tenancy agreement and addendum which acknowledges that the rental suite was brand new. Accordingly, I find the unit was in new condition at the onset of this tenancy.

The Landlords seek $550.00 for damages and cleaning costs, ($200 painting; $200 carpet cleaning; $150 carport oil stain removal). The Landlords did not provide receipts or reports indicating when and how the work was completed. The Tenants disputed the claims arguing that the Landlords did not do this work and have not incurred any costs.

In this instance, I find the Landlords have provided insufficient evidence to prove or verify the value of their loss or damages claimed. The Landlords failed to provide invoices or receipts for the work which was done. When work, such as cleaning and carpet cleaning, is performed by themselves, I would expect to see receipts for cleaning products used. If a claim is based on estimates of what they thought it would cost, I would expect to see a third party provide these estimates. For example, the Landlords claimed $200.00 to clean the carpet, yet there is no evidence, such as a quote from a carpet cleaning company, or proof they rented a cleaner, to support this amount. These were, simply put, guesses made by the Landlords.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails. In this case, the Landlords have the burden to prove they suffered a loss. Accordingly, I dismiss the Landlords' claims for damages, without leave to reapply.

In regards to incidental expenses (gas, submit evidences, travel) for bringing the Landlords' application forward, I find that the Landlords' have chosen to incur these costs that cannot be assumed by the Tenants. Costs incurred in compiling evidence or gas used to travel to deliver such documents are costs of doing business, and are not costs denominated, or named, by the *Residential Tenancy Act*. Accordingly, I dismiss the Landlords' claim for incidental costs, without leave to reapply.

The Landlords have not been successful with their application; therefore I decline to award recovery of their filing fee and I order the Landlords to return the Tenants' security deposit of $475.00 plus interest of $0.00 forthwith.

Tenants' application

As noted above I found that the parties viewed the suite and signed documents acknowledging that the unit was brand new. I accept that this constitutes an inspection and proof of the condition of the unit in accordance with section 21 of the Regulations. A move out condition inspection was done on October 30, 2013, the same date the report was signed.

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 or make application for dispute resolution claiming against the security deposit.

In this case the undisputed evidence was the tenancy ended October 30, 2013, and the Tenants provided the Landlords with their forwarding address on October 30, 2013. Therefore, the Landlords were required to return the Tenants' security deposit in full or file for dispute resolution no later than November 14, 2013. The Landlords filed their Application for Dispute Resolution on November 08, 2013, within the required timeframe.

Based on the above, I find that the Landlords complied with Section 38(1) of the *Act* and therefore, the Landlords are not 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 and pet deposit and the landlord must pay the tenant double the security deposit. Accordingly, I dismiss the Tenants' claim for double the return of their security deposit, without leave to reapply.

In regards to incidental expenses (stationary supplies, gas, travel, evidence submission) for bringing the Tenants' application forward, I find that the Tenants have chosen to incur these costs that cannot be assumed by the Landlords. Costs incurred in compiling evidence or gas used to travel to deliver such documents are costs of doing business, and are not costs denominated, or named, by the *Residential Tenancy Act*. Accordingly, I dismiss the Tenants' claim for incidental costs, without leave to reapply.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Section 28 of the Act provides that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

> (a) reasonable privacy;
>
> (b) freedom from unreasonable disturbance;
>
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

The Tenants seek $2,000.00 for harassment and loss of quiet enjoyment during the last month of their tenancy, a claim which is disputed by the Landlords. I find it undeniable that the relationship between these parties became contentious and at times confrontational, especially once the Tenants refused to pay an increased amount of rent and once they gave their notice to end their tenancy. That being said, the evidence before me, which included e-mails and letters written by the Landlords, does not amount to harassment.

The undisputed testimony was that the Landlords attempted to change the Tenants' use of their patio, the terms regarding guests, and where the Tenants parked once the Tenants refused to pay the increased rent and handed in their notice. Therefore, I accept that there was a minor disruption to the Tenants' quiet enjoyment during the last 26 days of their tenancy. Accordingly, I award the Tenants loss of quiet enjoyment, calculated at 15% of 26 days of rent calculated at the daily rent of $30.65, for the amount of **$119.50**.

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

Conclusion

I HEREBY DISMISS the Landlords' application, without leave to reapply.

The Tenants have been issued a Monetary Order in the amount of **$619.50** ($119.50 + $25.00 + $475.00 for the return of their deposit). This Order is legally binding and must be served upon the Landlords. In the event that the Landlords do 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: March 3, 2014

Residential Tenancy Branch