Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This hearing was convened in response to cross applications.

On January 29, 2014 the Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss; to keep all or part of the security deposit; and to recover the fee for filing an Application for Dispute Resolution.

The Landlord stated that on, or about, January 29, 2014 the Landlord's Application for Dispute Resolution, the Notice of Hearing, and documents the Landlord wishes to rely upon as evidence were sent to the Tenant, via registered mail. The male Tenant stated that these documents were received sometime in late January or early February of 2014. As they were received by the Tenant, they were accepted as evidence for these proceedings.

On April 09, 2014 the Tenant filed an Application for Dispute Resolution, in which the Tenant applied to recover the security deposit and to recover the fee for filing an Application for Dispute Resolution.

The male Tenant stated that the Tenant's Application for Dispute Resolution, the Notice of Hearing, and documents the Tenant wishes to rely upon as evidence were sent to the Tenant, via registered mail, although he cannot recall the date of service. The Landlord stated that these documents were received, although he cannot recall when they were received. As they were received by the Landlord, they were accepted as evidence for these proceedings.

On May 07, 2014 the Tenant submitted an affidavit to the Residential Tenancy Branch, which was personally served to the Landlord on May 07, 2014. The Landlord acknowledged receipt of the affidavit and it was accepted as evidence for these proceedings.

Both parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided

Is the Landlord entitled to compensation for unpaid rent/loss of revenue, and should the security deposit be returned to the Tenant or retained by the Landlord?

Background and Evidence

The Landlord and the Tenant agree that they signed a tenancy agreement on December 12, 2013, a copy of which was submitted in evidence. The tenancy agreement stipulates that the tenancy will begin on January 01, 2014 and that rent of $1,200.00 will be due by the first day of each month.

The Landlord and the Tenant agree that the Tenant paid a security deposit of $600.00 on December 12, 2013, which is still being held by the Landlord. The parties agree that on, or about, January 14, 2014 legal counsel for the Tenant sent a letter to the Landlord, in which she requested that the security deposit be returned to the Tenant at her offices. The parties agree that this was the first time the Landlord was provided with a forwarding address for the Tenant.

The Landlord stated that when this tenancy was discussed the Tenant was advised that they would be responsible for the hydro costs of the entire residential complex, which includes two rental units, only one of which would be occupied by the Tenant. He stated that the Tenant was advised that there was only one hydro meter for the entire complex.

The Landlord stated that the tenancy agreement specifies that the Tenant's rent was reduced in compensation for the Tenant paying the hydro and gas bills. Section 17(e) of the agreement reads: "landlord has compensated tenant by lower rent of $150.00 (per month) for tenant paying B.C. Hydro and Fortis gas bills".

The male Tenant stated that the Landlord told him the rent would be reduced from $1,350.00 to $1,200.00 per month if they agreed to pay the hydro costs. He stated that they understood this to mean that they would pay hydro expenses for their unit and they did not understand that they would pay hydro expenses for the entire unit. He stated that they were not told there was only hydro meter for the entire unit until after the tenancy agreement was signed.

The Tenant submitted an affidavit from the male Tenant's mother, who stated that she was present when the tenancy agreement was signed. She stated that the Landlord and the Tenant discussed the cost of hydro but the Landlord never mentioned that the Tenant was required to pay hydro costs for the other suite in the complex.

The male Tenant stated that when he contacted BC Hydro for the purposes of opening an account he was advised that there was only one hydro meter for the entire residential complex. He stated that the issue was discussed with the Landlord on December 15, 2013, at which time the Landlord confirmed there was only one hydro meter for the entire complex.

The male Tenant stated that on December 15, 2013 the Landlord was informed the Tenant did not feel comfortable paying the hydro costs of the second suite, at which point the Landlord agreed to destroy the original tenancy agreement and they could discuss other payment options. The male Tenant stated that the Landlord was informed that they would consider the other payment options offered and they would let the Landlord know if they were going to agree to either option. The male Tenant stated that they received a copy of the tenancy agreement from the Landlord on, or about, December 19, 2013, at which point the Tenant realized the Landlord had not destroyed the agreement.

The Landlord stated that when he spoke with the Tenant on December 15, 2013 he reiterated that there was only one hydro meter for the complex and that the average monthly hydro cost would be approximately $150.00. He stated the he never offered to destroy the tenancy agreement; that he never indicated he would consider other payment options; and that he gave the Tenant a copy of the tenancy agreement on December 15, 2013.

The male Tenant stated that on December 20, 2013 or December 21, 2013 the Landlord was informed, by telephone, that the Tenant did not wish to move into the rental unit. The Landlord stated that this conversation occurred on December 20, 2013, at which time the Landlord informed the Tenant that he required written notice.

The Landlord and the Tenant agree that the Tenant never provided the Landlord with written notice of their intent to not move into the rental unit. The Landlord stated that when the Tenant did not move into the rental unit on January 01, 2014 he advertised the rental unit and, on January 06, 2014, located a new tenant for February 01, 2014.

The Landlord and the Tenant agree that no rent was paid for January. The Landlord is seeking compensation, in the amount of $1,200.00, for unpaid rent for January of 2014.

Analysis

The undisputed evidence is that the Landlord and the Tenant entered into a written tenancy agreement on December 12, 2013 for a tenancy that was to begin on January 01, 2014.

Section 6(b) of the *Residential Tenancy Act (Act)* stipulates that a term in a tenancy agreement is not enforceable if the term is unconscionable. Residential Tenancy

Branch Policy Guidelines suggest that a term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable. I concur with this guideline.

While I accept that the Landlord understood that one of the terms of the tenancy agreement required the Tenant to pay for hydro expenses for this entire residential complex, I am not convinced that the Tenant agreed to this term. In reaching this conclusion I was influenced by the male Tenant's testimony that they did not understand that they would be required to pay hydro expenses for a rental unit they did not occupy.

I find that the male Tenant's testimony is corroborated by the affidavit submitted by the his mother, who declared that she was present when the rental unit was viewed on December 12, 2013; that she was present when the hydro bills were discussed; and she did not hear the Landlord tell the Tenants that they would have to pay the hydro bill for the entire unit.

The undisputed evidence is that the Tenant contacted the Landlord again on December 15, 2013 at which point they discussed the fact that there was only one hydro meter for the entire residential complex. I find that this conversation lends credibility to the Tenant's testimony that they had not previously been informed there was only one meter, given that there would be no need to discuss this issue if it had been made clear to the Tenant on December 12, 2013.

I found the Landlord's testimony that he told the Tenant there was only one hydro meter for the entire unit on December 12, 2013, to be less reliable, as there is no evidence to corroborate that testimony.

In determining this matter I considered section 17(e) of the tenancy agreement, which declares that the rent has been decreased by $150.00 per month because the Tenant is paying B.C. Hydro and Fortis gas charges. I specifically note that this does not specify that the hydro and gas charges will be for the entire residential complex. Given that this is an unusual term in a tenancy agreement that could be considered unconscionable, I find that the Landlord had an obligation to make this term perfectly clear in the tenancy agreement, in accordance with section 6(3)(c) of the *Act.*

I find it grossly unfair that the Tenant would be required to pay for utility costs of another unit when the Tenant did not have control over how the utilities were used in the other unit. As there is insufficient evidence to show that the Tenant understood and agreed to this term of the tenancy agreement, I find it was unenforceable.

I note that this one unenforceable term of the tenancy agreement did not invalidate the entire tenancy agreement. Had this tenancy continued and I had been asked to determine the terms of the tenancy agreement, it is highly likely that I would have simply determined that the rent would be $1,350.00 per month, including hydro and gas. This point is largely irrelevant in these circumstances, as the tenancy did not proceed.

When two parties enter into a tenancy agreement they are bound to comply with all enforceable terms of the tenancy agreement unless they mutually agree to amend or delete a term in the agreement. When one party argues that a term in the tenancy agreement has been changed or altered, or the entire agreement has been abandoned, the burden of proving that the agreement has been altered rests with the party who is alleging the amendment.

I find that the Tenant has submitted insufficient evidence to show that the Landlord agreed to destroy or abandon the tenancy agreement. I therefore find that the Tenant was required to comply with all enforceable terms of the tenancy agreement, including the obligation to pay rent when rent is due, until the tenancy was ended. In determining this matter I was heavily influenced by the absence of evidence that corroborates the Tenant's testimony that the Landlord agreed to destroy the original tenancy agreement or that refutes the Landlord's testimony that he did not agree to destroy the tenancy agreement.

Section 44(1)(a) of the *Act* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act.* The evidence shows that neither party gave proper written notice to end this tenancy in accordance with these sections and I therefore find that the tenancy did not end pursuant to section 44(1)(a) of the *Act.*

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. As there is no evidence that this was a fixed term tenancy, I find that the tenancy did not end pursuant to section 44(1)(b) of the *Act.*

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. As there is no evidence that the parties agreed in writing to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(c) of the *Act.*

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. I find that it is reasonable to conclude that the Tenant abandoned the rental unit when they did not move into the rental unit on January 01, 2014. I therefore find that this tenancy ended on January 01, 2014 pursuant to section 44(1)(d) of the *Act*.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. I find there is insufficient evidence to conclude that this tenancy agreement was frustrated and that the tenancy did not end pursuant to section 44(1)(e) of the *Act.*

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act.*

I find that the Tenant failed to comply with section 45 of the *Act* when the failed to provide the Landlord with written notice of their intent to end the tenancy on a date that is not earlier than one month after the date the Landlord received the notice and is the day before the date that rent is due.

As the Tenant had not ended the tenancy in accordance with section 45 of the *Act* prior to January 01, 2014, I find that the Tenant was obligated to pay the $1,200.00 in rent that was due on January 01, 2014. I therefore grant the Landlord's claim of $1,200.00 for unpaid rent for January.

I find that the Landlord acted reasonably when the Landlord waited until January 01, 2014 to advertise the rental unit. I find that the Tenant's failure to comply with section 45 of the *Act* prevented the Landlord from entering into a new tenancy agreement with another occupant for January 01, 2014, as the Landlord did not know, with reasonable certainty, that the Tenant would not move into the rental unit on January 01, 2014. In the absence of written notice, the Tenant could have moved into the unit on January 01, 2014 and the Landlord would have been unable to meet the terms of his agreement with a "new" tenant.

Section 38(1) of the *Residential Tenancy Act (Act)* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or make an application for dispute resolution claiming against the deposits.

On the basis of the undisputed evidence, I find that the Tenant received a forwarding address for the Tenant from legal counsel on, or about January 14, 2014. As the Landlord filed an Application for Dispute Resolution seeking to retain the security deposit on January 29, 2014, I find that the Landlord complied with section 38(1) of the *Act.*

I find that the Landlord's Application for Dispute Resolution has merit and that the Landlord is entitled to recover the fee for filing an Application for Dispute Resolution.

In the event that the Landlord did not establish that he had the right to retain the security deposit, I would have ordered that the deposit be returned to the Tenant. I therefore find that the Tenant did not need to file an Application for Dispute Resolution and that the Tenant is not, therefore, entitled to recover the fee for filing an Application for Disputed Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of $1,250.00, which is comprised of $1,200.00 in unpaid rent and $50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution. Pursuant to section 72(2) of

the *Act*, I authorize the Landlord to retain the security deposit of $600.00 in partial satisfaction of this monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the amount $650.00. In the event that the Tenant does not comply with this Order, it may be served on the Tenant, 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: May 14, 2014

Residential Tenancy Branch