Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR MNSD FF
MNSD FF

Preliminary Issues

Upon review of the Landlord's application for dispute resolution the Landlord confirmed their intent on seeking money owed or compensation for damage or loss under the act regulation or tenancy agreement, by writing *"...she didn't give proper notice she would also be responsible for April's rent...".*

Based on the aforementioned I find the Landlord had an oversight or made a clerical error in not selecting the box *for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement* when completing the application, as she clearing indicated his intention of seeking to recover the payment for April. Therefore, I amend the Landlord's application, pursuant to section 64(3)(c) of the Act.

Upon review of the Tenant's application for dispute resolution the Landlord confirmed their intent on seeking money owed or compensation for damage or loss under the act regulation or tenancy agreement, by writing *"Tenant is seeking monetary order of double damage deposit of $845.00 refund & cost of gas to travel to and from...".*

Based on the aforementioned I find the Tenant had an oversight or made a clerical error in not selecting the box *for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement* when completing the application, as she clearing indicated her intention of seeking to obtain compensation as listed above. Therefore, I amend the Tenant's application, pursuant to section 64(3)(c) of the Act.

Introduction

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

The Landlord filed her application on April 17, 2014, seeking to obtain a Monetary Order for unpaid rent or utilities, money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, to keep the security deposit, and to recover the cost of the filing fee from the Tenant for her application.

The Tenant filed her application on May 22, 2014, seeking to obtain a Monetary Order for the return of her security deposit, 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 Landlord for her application.

The parties appeared at the scheduled teleconference hearing 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.

The Landlord confirmed receipt of the Tenant's evidence which was sent to her registered mail on May 27, 2014. The Tenant testified that the Landlord's evidence was not received at her forwarding address until Friday July 11, 2014 and was subsequently forwarded to her and received by her on July 16, 2014. The Landlord's evidence had not been received on the *Residential Tenancy Branch (RTB)* file prior to the start of this proceeding. The Landlord affirmed that she did not send her evidence to the RTB via fax until July 16, 2014, because she had to contact former tenants to obtain letters of reference.

Sections 3.5 and 4.5 of the *Residential Tenancy Branch Rules of Procedure* stipulates that all evidence must be received by the *Residential Tenancy Branch* and must be served on the respondent and applicant as soon as possible, and at least (5) days before the dispute resolution proceeding as those days are defined in the Definitions part of the *Rules of Procedure.*

Considering evidence that has not been received by the *Residential Tenancy Branch* or served on the other party in accordance with the *Residential Tenancy Branch Rules of Procedure* would create prejudice and constitute a breach of the principles of natural justice. Therefore, as the Landlord has not served their evidence in accordance with the *Residential Tenancy Branch Rules of Procedure* I find that pursuant to section 11.5 of the *Residential Tenancy Branch Rules of Procedure,* the Landlord's documentary evidence will not be considered in my decision. I did however consider the Landlord's testimony.

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. Has the Landlord proven entitlement to a Monetary Order?
2. Has the Tenant proven entitlement to a Monetary Order?

Background and Evidence

It was undisputed that the parties mutually agreed to enter into a tenancy agreement that was to begin March 1, 2014, which was contingent on the property representing the photographs that the Landlord had posted in her online advertisement and came with a flat screen television and a microwave.

The Landlord testified that she had agreed to rent the property to the Tenant, sight unseen, and accepted an e-mail transfer payment of $1,267.50 which included $845.00 for March 2014 rent plus $422.50 as the security deposit. She argued that rent was supposed to be $895.00 and noted that the Tenant had short paid the security deposit by $75.00.

The Landlord submitted that she had conversations with the Tenant during which she informed the Tenant that “city people” do not like the property as they are not used to living in the country. The Landlord stated that she had offered to rent the property to the Tenant for a one month rental, on two separate occasions, with the condition that the Landlord would continue to show the unit to prospective tenants. She said the Tenant did not want the continued disruptions so she agreed to rent the property for two months.

The Landlord stated that she had not arranged a move in inspection with the Tenant and noted that the rental property was located in the country, on a working farm. She said she had told the Tenant how to locate the front door and told the Tenant could move in whenever she arrived. The Tenant arrived on March 3, 2014 and on March 4, 2014 the Tenant complained about the cleanliness of the unit, the smell of smoke inside the unit, and about bugs in a light fixture. On March 6, 2014 the Tenant sent an e-mail stating she would be ending her tenancy at the end of March, to which the Landlord responded advising the Tenant she was required to give a proper one month notice as required by the *Residential Tenancy Act*. As a result of the short notice the Landlord was not able to re-rent the unit until May 1st so she is seeking to recover April lost rent of $895.00.

The Tenant testified that despite the Landlord’s refusal to communicate by e-mail, as stated in the Landlord’s advertisements and provided in the Tenant’s evidence, the Tenant attempted to confirm their telephone conversations and agreements in e-mails whenever possible. Those e-mails are provided in her documentary evidence and support that she entered into an agreement to rent the property for one month on the condition that the property resembled the photographs posted in the Landlord’s advertisements.

The Tenant submitted that the Landlord told her rent was $845.00 and that she was allowed to bring her pet, which is why she sent the email transfer for $1,267.50; which was the March rent of $845.00 plus the security deposit of $422.50. The Tenant noted that the Landlord accepted this payment without a response so there was no indication that the amount was not as they had agreed. The Tenant confirmed that she had had

verbal discussions with the Landlord about a possible two month tenancy but had only agreed on a one month tenancy, as supported by the e-mails she provided in her evidence.

The Tenant testified that upon her arrival she found that the unit smelled of smoke and appeared not to have been cleaned for some time, as supported by the photographs she provided in evidence. She attempted to contact the Landlord upon her arrival but was not able to reach her until the next day. She tried to have the Landlord conduct an inspection but she declined to do so. The Tenant said the Landlord told her the smoke smell was temporary and instructed her to open the windows, which was worse because when the windows were open all she could smell was the open manure pit that was located directly in front of her rental unit.

The Tenant argued that the rental property looked nothing like the pictures that were posted on the internet. She stated that she was never told about the open manure pit that was located directly out front of her unit and she was told by the Landlord that there would be a flat screen television and microwave in the unit. When she arrived she found a very old large television and no microwave. When she questioned the Landlord about the missing microwave and the television, the Landlord claimed she did not know why those items were not in the unit.

The Tenant submitted that after dealing with the condition of the unit for a few days, she informed the Landlord that she would be leaving at the end of the month. She confirmed her notice by e-mail on March 6, 2014. The Tenant said she vacated the property and requested that the Landlord conduct a move out inspection on March 20, 2014, during which the Landlord signed the letter indicating the unit was left clean and undamaged and the Tenant provided the Landlord with her forwarding address.

The Tenant stated that shortly after sending her notice to end tenancy the Landlord contacted her to ask if she would be willing to move out on one days notice as the Landlord had someone who was looking to rent immediately. Shortly afterwards the Landlord had showed the unit to another prospective tenant, which led the Tenant to question why the unit was not re-rented for April.

The Tenant has sought the return of double her security deposit plus $171.25 in travel costs incurred to relocate to the rental property. She argued that she would not have incurred those costs if she had known the true condition of the rental property.

Upon review of the Landlord's advertisements provided in the Tenant's evidence, the Landlord submitted that her advertisements display photographs of the property that were taken in the summer months. She indicated they have been renting this property for over 25 years but that she continues to update the pictures in her advertisements. The Landlord stated that they want people to see the property before they rent it to them but this Tenant insisted she was a farm girl. She argued that she had told the Tenant that the property looked awful this time of year, just coming through the winter months, but the Tenant still wanted to take the rental, sight unseen.

Analysis

The *Residential Tenancy Act* defines a "**tenancy agreement**" as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

Section 91 of the Act stipulates that except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia. Common law has established that oral contracts and/or agreements are enforceable.

Based on the above, I find that this verbal tenancy agreement is recognized and enforceable under the *Residential Tenancy Act*. That being said, the terms of this agreement relating to the rent amount and length of the tenancy are in dispute.

In the case of verbal testimony when one party submits their version of events, in support of their claim, and the other party disputes that version, it is incumbent on the party making the claim to provide sufficient evidence to corroborate their version of events. In the absence of any evidence to support their version of events or to doubt the credibility of the parties, the party making the claim would fail to meet this burden.

The undisputed evidence was that the parties mutually agreed that the Tenant would send an email money transfer for March 2014 rent plus the security deposit. On February 19, 2014 the Tenant sent the email money transfer in the amount of $1,267.50 which was $845.00 rent plus $422.50 as the security deposit. In the absence of any proof of a response from the Landlord indicating those amounts were incorrect, I accept the Tenant's submission that $845.00 rent and $422.50 security deposit were the agreed upon amounts pertaining to this tenancy.

Notwithstanding the Landlord's submission that she allegedly told the Tenant that the property looks awful this time of year coming through the winter months, I find that the parties had established a condition precedent to this tenancy which included that the rental property looked like the photographs included in the Landlord's online advertisements, and came with a flat screen television and a microwave.

I find that the Tenant relied on the representations made by the Landlord that the property represented the photographs despite some messy areas that would normally result from a winter or spring thaw. I accept the Tenant's submission that the Landlord failed to inform her that there was an open manure pit directly out front of the rental unit, did not have a flat screen television or microwave, and that the rental unit had not been thoroughly cleaned for some time and therefore, the property was not as displayed in the photographs.

The Tenant had paid the rent and the security deposit to the Landlord and for all intents and purposes, was ready, willing and able to perform under the tenancy agreement. The same could not be said of the Landlord here, as she clearly did not deliver the

rental property in the condition as displayed in the photographs and as previously discussed.

Based on the above, I find that the Landlord breached the tenancy agreement by failing to provide that which was bargained for; that is, a clean rental unit with a flat screen television, a microwave, which was located on property as represented in the photographs provided in the Landlord's advertisements.

Therefore, I find that the Tenant was entitled to repudiate the tenancy agreement at the end of March 2014, due to the unsatisfied condition precedent. As a result, I dismiss the Application of the Landlord in its entirety, without leave to reapply.

Section 44 of the Act provides that a tenancy ends when the tenant vacates the property and the landlord regains possession.

In this case, the undisputed evidence supports the tenancy ended March 20, 2014, in accordance with section 44 of the Act, and that the Tenant provided the Landlord with her forwarding address on March 20, 2014.

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 Landlord was required to return the Tenant's security deposit in full or file for dispute resolution no later than April 5, 2014. The Landlord did not file her online application for Dispute Resolution until April 17, 2014, twelve days after the required timeframe.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that 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 Tenant has met the burden of proof to establish her claim and I award her double her security deposit plus interest in the amount of **$845.00** (2 x $422.50 + $0.00 interest).

In response to the Tenant's claim for $171.25 in travel costs, in the absence of receipts to prove the actual costs incurred, I find the Tenant submitted insufficient evidence to support this claim. Accordingly, the claim for travel costs is dismissed, without leave to reapply.

The Tenant has succeeded with her application therefore I award recovery of the **$50.00** filing fee.

Conclusion

I HEREBY DISMISS the Landlord's claim, without leave to reapply.

The Tenant has been awarded a Monetary Order for **$895.00** ($845.00 + $50.00). 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: July 22, 2014

Residential Tenancy Branch