Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, OLC, FF, O

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72; and
- an "other" remedy.

The tenants did not set out any remedy sought within the claim for an "other" remedy that was not encompassed in the enumerated claims.

All named parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The parties acknowledged service and consented to the admission of all evidence before me.

Issue(s) to be Decided

Are the tenants entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement? Are the tenants entitled to a monetary award for the return of a portion of their pet damage and security deposits? Are the tenants entitled to a monetary award equivalent to the amount of their pet damage and security deposits as a result of the landlord's failure to comply with the provisions of section 38 of the Act? Are the tenants entitled to an order requiring the landlord to comply with the Act, regulation or tenancy agreement? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and my findings around it are set out below.

This tenancy initially began 1 December 2013 and ended in spring 2014 (the "First Tenancy"). The First Tenancy was a fixed-term tenancy and was documented in writing. I was provided a copy of this agreement dated 19 November 2013. Monthly rent of $75.00 was due on the first of the month. At the beginning of the First Tenancy, the landlord collected a security deposit in the amount of $387.50 and a pet damage deposit in the amount of $50.00.

On or about 27 March 2014, the rental unit was inspected by municipal bylaw inspectors. The inspectors found that the rental unit was not in compliance with various rules regarding secondary suites and ordered certain modifications to bring the rental unit into compliance.

The landlord testified that she provided the tenants with a right of first refusal for the renovated unit. The parties agreed in principle to a second tenancy beginning on or about 12 July 2014 (the "Second Tenancy"). In or about April 2014, the parties agreed to enter into this Second Tenancy. There is no written tenancy agreement in respect of the Second Tenancy.

The tenant JM testified that the landlord had set out the scope of the required changes and the plans. The tenant JM testified that the tenants agreed to rent the unit based on the specific proposed changes. The tenant JM testified that they agreed to pay an increased amount for the tenancy: $800.00. The tenant CC testified that nothing was set in stone.

The tenant JM testified that the tenants were first alerted that the changes were not as agreed to one week before the commencement of the Second Tenancy. On 4 July 2014, the landlord wrote to the tenant CC:

> *The basement suite is coming along great. What is the day you and [the tenant JM] would be wanting to move back in? There has been a change in the layout. Unfortunately the window in the hallway did not go in as it was turning out too costly. We have had to change the living room/bedroom around for inspection purposes. …it is a good space. If you want to drop by anytime to view you can.*

The tenant CC replies:

> *Wow that sounds great. I'll speak with [tenant JM about everything. Move in day for us is the 12th/13th this month.*

The landlord testified that on 6 July 2014, the tenant CC came and viewed the rental unit. The landlord testified that the tenant CC told the landlord at this time that the layout was fine.

On 4 August 2014 the landlord emailed the tenant CC:

Thank you for the rent check. Just want to remind you the rent is now $800. We can start this Sept 1st. :)

On 4 August 2014, the tenant CC replied:

…With that said [tenant JM] and I believe that it isn't fair to charge us more in rent when you didn't follow the original layout you told us you were going to initially. Not only that but didn't even let us know when you decided to change direction. Normally that wouldn't be a problem but we had to find out the different direction you went with days before moving back in. That didn't give us much choice in the matter. Needless to say we aren't happy with the renovation as the layout is dysfunctional now. …

On 31 October 2014, the tenant CC wrote to the landlord:

…If you want to increase the rent we'll need to talk face to [face] about this as there's a few parameters that need to be met before we will even consider paying more. Since you're trying to increase the rent after ruining the layout and not offering any other benefits.

…

Not to mention luring us back after the renovations under false pretenses. Since you didn't follow through with the plans you put forward to us.

The tenant JM testified that the tenants never paid the increased amount of rent for this tenancy.

The tenant JM testified that the change diminished the value of the rental unit by $125.00 per month. In particular, the changes made caused the entrance to the rental unit to be through the tenants' bedroom. The tenants allege that this change resulted in a material breach of their tenancy agreement. The tenants submit that they would have not agreed to move into the rental unit had they known of the proposed layout. The tenants submit that they had to stay in the rental unit because they did not want to move again.

The tenant JM alleges that the landlord "blackmailed" the tenants. The tenant JM alleges that the landlord "harassed" the tenants. I reminded the tenants at the hearing that there were no monetary claims for these allegations before me. These allegations are not relevant for the purpose of the application.

On 27 November 2014, the tenants provided their notice to end the tenancy effective 31 December 2014. This letter also contained the tenants' forwarding address.

On 15 December 2015, the landlord texted the tenant CC:

Just wondering when will you be moving out… Pls let me know when you will be moving out.

The tenant CC replied:

As per our notice our final day is the 31st.

The tenant CC later texted:

Either way we will do end of suite inspection on the evening of the 30th this month.

On 30 December 2014, the parties conducted a condition move out inspection of the rental unit. The landlord testified that the rental unit was not clean. The landlord testified that the tenants did not give the keys back to the landlord this day. The landlord testified that late in January 2015, the landlord's son found the keys on the mantle. The landlord testified that the tenants said that they intended to return to finish cleaning.

I was provided with a lengthy, unedited video recording of the condition move out inspection. In the recording, the following quotes are notable:

- The landlord set out various items she viewed as requiring cleaning.
- Tenant CC in response: *I'll come back tomorrow morning…no problem*…
- Tenant CC also in response: *I'll get it done tonight.*
- Tenant JM: *If we get the cheque tonight, I don't mind coming back to do [the cleaning].*
- The parties then had a dispute about the timing of the return of the security deposit.

The landlord testified that she waited 31 December 2014, to see if the tenants would return to clean the rental unit. The landlord testified that she cleaned the rental unit on 1 January 2015. The landlord testified that her son began occupying the rental unit on 2 January 2015.

On 15 January 2015, the landlord mailed the full amount of the tenants' security deposit to the tenants. The tenants received this cheque 27 January 2015. The tenants have not attempted to negotiate this cheque as they believed that by doing so they would waive their right to compensation pursuant to subsection 38(6) of the Act.

The tenants submit that the tenancy ended 30 December 2014. The landlord submits that the tenancy ended 31 December 2014.

Analysis

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant vacates or abandons the rental unit.

The landlord submits the tenancy ended on the effective date of the tenants' notice: 31 December 2014. The tenants submit that the tenancy ended on the day the tenants vacated the rental unit: 30 December 2014.

Pursuant to subsection 35(1) of the Act, a condition move out inspections may occur:

(a) on or after the day the tenant ceases to occupy the rental unit, or
(b) on another mutually agreed day.

As the inspection may occur on a mutually agreed day, the date of the condition move out inspection is not necessarily determinative of the end of the tenancy.

On the evidence before me, the landlord was not in a position to know that the tenants had vacated the rental unit on 30 December 2014. In particular, the tenants never handed back the keys, told the landlord that they were vacating that day, or explicitly indicated that they considered possession to have returned to the landlord. The tenants further confused the situation by saying that they were going to return to the rental unit to clean at various points in the condition move out inspection. The best information available was that the tenancy ended 31 December 2014, the date set out in the tenants' notice and reiterated by text message on 15 December 2014. I find, on a balance of probabilities, that the tenancy ended 31 December 2014.

Section 38 of the Act sets out relevant rules dealing with security deposits:

(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
(a) the date the tenancy ends, and
(b) the date the landlord receives the tenant's forwarding address in writing,
the landlord must do one of the following:
(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

The *Interpretation Act*, RSBC 1996, c 238 sets out at subsection 25(5) that:

In the calculation of time … the first day must be excluded and the last day included.

Accordingly, the last day for the landlord to repay the tenants their security deposit was 15 January 2015.

I interpret "repay" within the context of paragraph 38(1)(c) of the Act, in the case of a cheque, to mean the later of:

(a) the date which the cheque was drawn;
(b) the date on which the cheque is negotiable (e.g. in the case of a postdated cheque); or
(c) the date on which the cheque is sent by mail.

There is no evidence before me that indicates that the cheque was postdated. The best evidence before me indicates that the cheque was sent to the tenants on 15 January 2015. On the basis of this evidence, I find that the landlord repaid the tenants their security deposit within fifteen days of the end of the tenancy. As such, the tenants are not entitled to compensation pursuant to subsection 38(6) of the Act and this portion of the tenants' claim is dismissed.

While the tenants are not entitled to subsection 38(6) compensation, the tenants are entitled to return of their security deposit. I order that the tenants are entitled to $437.50.

The landlord returned the tenants' security deposit to the tenants by way of cheque. It is possible that this cheque is now "stale dated". At the hearing the tenant JM indicated that she was going to attempt to negotiate the cheque. **If this cheque is negotiated the monetary order for the return of the deposit is null and void.**

The tenants claim for $500.00 in compensation for the reduced value of their tenancy as a result of the changes to the rental unit. The tenants submit that the change amounted to a material breach of the tenancy agreement.

Paragraph 65(1)(f) of the Act allows me to issue an order the reduce past or future rent by an amount equivalent to a reduction in the value of a tenancy agreement.

By the tenant CC's own admission nothing was "set in stone" for the purposes of the $800.00 rent: without agreement to fundamental terms of the contract there was no tenancy agreement formed. The tenants cannot have it both ways and insist in one breath that the rent amount was unsettled while in the next insist that the layout of the rental unit was both settled and a material term:

At the time of the early conversations in spring of 2014, the terms were uncertain. It is not necessary that I determine at what time the tenancy agreement was entered into, but I find, on the basis of the tenant CC's admission that the details of the tenancy agreement were uncertain, that the tenancy agreement formed no earlier than 6 July 2014 when the tenant CC viewed the rental unit. As such, I find that the landlord did not breach a term of the tenancy agreement as there was no term that specified the original proposed layout of the rental unit in the tenancy agreement. On this basis, I find, on balance of probabilities, that the value of the tenancy agreement was not reduced. The tenants' claim on this basis is dismissed.

As the tenants are in no better a position than they would have been had they simply cashed the landlord's cheque when they received it, I am exercising my discretion to refuse to award recovery of the filing fee from the landlord.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $437.50. The tenants are provided with a monetary order and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 subsection 9.1(1) of the Act.

Dated: August 25, 2015

Residential Tenancy Branch