Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDCT, FF

Introduction

This hearing dealt with an Application by the Tenants for a monetary order for return of the security and pet damage deposits paid to the Landlords, for return of one half of a months' rent, and for the return of the filing fee for the Application, all pursuant to the *Residential Tenancy Act* (the "Act").

Both Landlords appeared at the hearing. Both Tenants were represented by the female Tenant at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

The parties agreed they had exchanged documentary evidence. I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

Preliminary Issue

I note that the Tenants submitted evidence, in the form of a written statement, the day before the hearing. Under the Rules of Procedure, section 3.14, the Tenants were required to submit all their evidence not less than 14 days before the hearing. I do not allow this written evidence, as it was submitted late. Nevertheless, the late evidence consisted of a script that the female Tenant was to read at the hearing, and the female Tenant provided significant oral testimony during the 80 minute hearing and was allowed to speak from these notes.

Issue(s) to be Decided

Has there been a breach of section 38 of the Act by the Landlords?

Are the Tenants entitled to return of half a month of rent?

Background and Evidence

This tenancy began on August 1, 2011, under a written tenancy agreement. The tenancy was initially for a one year fixed term, then continued on a month to month basis. The rent was established at the outset as $1,800.00 per month, payable on the first of the month. There was an addendum to the tenancy agreement which provided, among other terms, that the Tenants would be allowed to have pets in the rental unit.

The Tenants paid the Landlords a security deposit of $900.00 and a pet damage deposit of $900.00 on or about August 1, 2011.

An incoming condition inspection report was completed by the parties on or about July 31, 2011, at the outset of the tenancy.

On November 13, 2017, the Tenants sent the Landlords an email notifying them they were ending the tenancy effective on December 31, 2017. The Tenants also sent the Landlord this notice by mail and included their forwarding address to return the deposits to. In these notices they informed the Landlords they intended on vacating the rental unit on December 15, 2017. In the email notice to end tenancy, the Tenants used the acronym “TBC” after the December 15, 2017 date, which presumably means To Be Confirmed.

The Tenants also invited the Landlords to let them know if the Landlords planned on showing the rental unit to prospective new renters and they could work with their schedules.

On November 14, 2017 the Tenants sent the Landlords another email which explained they were confirming their plans in regard to vacating the rental unit, as reproduced below:

> “Below is the rough plan:
>
> 13 December Packing
> 14 December Loading

15 December Cleaning and Walkthrough Inspection with you (please confirm)

Ideally, I would like to make reservations for the ferry first thing in the morning of 16 December 2017"

[Reproduced as written.]

It is important to note that the rental unit is located on Vancouver Island and the Tenants were moving and relocating to another province which required a ferry trip, and the Landlords had to travel by ferry from another part of the province to the location of the rental unit.

According to both parties, following an exchange of emails regarding the utility bill and pro-rating of December rent there was a phone call on December 12, 2017, regarding the plans to meet for the outgoing condition inspection report. However, during the hearing the parties disagreed about the time that was scheduled for performing the outgoing condition inspection report. Both parties agreed that the outgoing condition inspection report was scheduled for December 15, 2017.

According to the Tenant the outgoing condition inspection report was supposed to be performed between 11:00 a.m. and 12:00 noon.

According to the Landlords the outgoing condition inspection report was supposed to be performed at 3:30 p.m.

On the morning of December 15, 2017, the Tenants texted the Landlords and stated they thought that waiting until 3:00 or 4:00 pm was, "… a little too much…", as they wanted to start their travels. They explained they would leave the keys for the rental unit and were going to go. They felt the rental unit was left clean and undamaged.

The Landlords replied by text in a matter of minutes and explained they were on the 1:00 pm ferry and that they had arranged with the female Tenant to meet between 3:30 and 4:00 pm. The Landlords sent a subsequent email to the Tenants informing them they could have someone represent them at the outgoing condition inspection report.

The Landlords explained they had to follow the obligations required of landlords under the Act.

The Tenants replied by text that the proposed timing did not work for them and they wanted to start their travels.

I note that prior to the scheduling of the outgoing condition inspection report, the Tenants and the Landlords also had some disagreement over the payment of the utilities for the last portion of the tenancy. When the Landlords suggested the Tenants pay a pro-rated amount for the utilities used to December 15, 2017, the Tenants replied they wanted a pro-rated refund of the rent for the balance of December and that would cover the utilities to December 15, 2017.

When the Landlords did not respond to this email, the Tenants followed up by sending the Landlords a further email saying if the Landlords did not want to pro-rate the December rent the Tenants would make alternate arrangements to have the condition inspection report done on December 31, 2017.

According to the testimony during the hearing this last email prompted the phone call to between the parties to arrange for the time to perform the outgoing condition inspection report.

On December 18, 2017, the Landlords sent the Tenants an email which informed the Tenants the Landlords were sending the Tenants a form entitled “Final Opportunity to Schedule a Condition Inspection Report”. The Landlords provided a copy via the email and also by registered mail. The Landlords had scheduled the Final Opportunity on December 27, 2017.

The Tenants replied by email on December 18, and state that they do not understand what the Landlords are doing. The Tenants are clearly upset in the email. They are upset that the Landlords were contacting them again about the outgoing condition inspection report. In the email the Tenants continue to refer to an offset for the balance of December rent and utilities.

The Tenants also refer to the Landlord performing renovations in the rental unit following December 15, 2017. According to the evidence the parties had arranged for the Landlords to have someone come in and measure for carpets in the rental unit; however, it is unclear what renovations the Landlords had contemplated for the latter part of December. Nevertheless, the Landlords’ refusal to prorate the rent for December was an issue for the Tenants and they were upset about this issue. They inform the Landlords that they are not sending someone for the outgoing condition inspection report, and they feel the Landlords are taking advantage of them since they moved across the country. They feel they left the home in good shape and were good Tenants. They state in the email, “We are not interested in nickeling and diming… <u>If needed be keep the entire damage deposit and please don’t write to us again.”</u>

[Reproduced as written.]

On December 28, 2017, the Landlords wrote another email to the Tenants explaining they had performed the condition inspection report and were providing a copy to the Tenants. The Landlords explained they had found damages to the rental unit and requested the Tenants' position on this.

The Tenants replied to the Landlord, "… please please keep the money and do not contact us again. Please be respectful of our wishes."

[Reproduced as written.]

I note that at the outset of the hearing before me on September 7, 2018, the appearing Tenant testified that the Tenants had not signed over any portion of the deposits to the Landlords.

The Tenants explain they are very upset and do not feel their pets caused any damage to the rental unit. They allege the floor was damaged due to a dishwasher and not the Tenants or their pets. They allege the Landlords are taking advantage of them. The Tenants chastise the Landlords and suggest the Landlords should be embarrassed for the way they are treating the Tenants. The Tenants again tell the Landlords not to contact them. The Tenants state they want no further interactions with the Landlords.

The day following this, the Tenants write an email and explain they had a night to sleep on this situation and have changed their minds. They are requesting the Landlords return the deposits. The Tenants state they wish to resolve this with the Residential Tenancy Branch.

On February 12, 2018, the Tenants filed this Application this hearing was scheduled.

On February 15, 2018, the Tenants sent a copy of their Application and evidence to the employer of the male Landlord. In a cover letter the Tenants question the ethics of the male Landlord, and suggest he is greedy and acting contrary to the law and state they have substantiated that the male Landlord owes the Tenants $2,741.93. I further note the Tenants want the male Landlords' employer to serve the Landlords with their Application and evidence and suggest this is required by provincial law. I note the male Landlord is a police officer and the male Tenant is a member of the Canadian Armed Forces.

The Tenants breached section 89 of the Act by serving their application and documents in this manner. There is no provision in the Act that allows service of a document on a party by sending a copy to the employer of the party. This might be ordered if a party applies for substituted service; however, this is not the case here. I find this action was more likely meant to embarrass or intimidate the male Tenant, and was very inappropriate. Nevertheless, the Tenants did accept this service and attended the hearing and provided evidence on their behalf.

Analysis

Based on the above, the evidence and testimony, and on a balance of probabilities, I make the following findings.

I dismiss the Application of the Tenants in its entirety, without leave to reapply, for the following reasons.

The Act contains comprehensive provisions on dealing with security and pet damage deposits. I find the Landlords acted in accordance with the Act and that the Tenants have failed to prove the Landlords breached any portion of the Act in handling the deposits or the December rent.

In fact, I find it was the Tenants who breached the Act and are not entitled to the return of the deposits or any other monetary compensation. I find the Tenants failed to follow the Act in regard to the outgoing condition inspection report.

I find from the evidence that the parties agreed to conduct the outgoing condition inspection report on December 15, 2017.

The Tenants' position is that they were supposed to meet at 11:00 am on December 15, while the Landlords state the time was to be between 3:30 and 4:00 pm.

I find on a balance of probabilities it is more likely the parties arranged to meet at 3:30 to 4:00 pm on December 15, 2018, as submitted by the Landlords. I find that it is more likely that the male Tenant decided to leave the rental unit on his own schedule, rather than wait for the Landlords to attend for the condition inspection report. I base this finding in part on the text messages that were exchanged between the parties on December 15, 2017. For example, the Tenants text the Landlord at 11:46 a.m. and say:

> "… the cleaners are all done …in all on honesty we went out out to part in good term. But waiting till 3 or 4 PM is little too much I want to start journey before traffic starts."
>
> [Reproduced as written.]

There is no suggestion from the Tenants in this text that the Landlords are late for the alleged 11:00 am meeting time. This text just sets out that the Tenants do not want to wait until 3 or 4 PM.

Given the tone of the male Tenant's correspondence throughout their dealings with the Landlords, I find it would have been more likely the Tenants would have mentioned that the Landlords are now arriving late, and not at 11:00, had that been the case.

The Landlords reply immediately by text to the Tenants and state:

> "I spoke to [female Tenant] the other day and we made an appointment for 330 to 4 o'clock for the inspection for today."
>
> [Reproduced as written.]

The female Landlord also confirmed during the hearing that when she listened to the conversation between the male Landlord and the female Tenant to arrange the time for the condition inspection report, the agreed upon time was 3:30 to 4:00 pm.

I also found that the Tenants' evidence often lacked credibility, due to inconsistencies. For example, the female Tenant testified during the hearing that at no time did the Tenants agree that the Landlords could keep the deposits. This is contradictory to the two written instances (as reproduced above), where the Tenants tell the Landlords to keep the deposits.

Therefore, I prefer the evidence of the Landlords that they arranged with the female Tenant to meet at 3:30 pm to 4:00 pm on December 15, 2017 to perform the outgoing condition inspection report.

In any evert, because the Tenants told the Landlords in writing the Landlords could keep the deposits they were precluded from then claiming for the return of the deposits. This is explained in section 38(4) of the Act:

> **38(4)** A landlord may retain an amount from a security deposit or a pet damage deposit if,

> (a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant…

I find the Tenants are not able to provide the Landlords with written permission to keep the deposits, and then to change their minds and make a claim against the deposits.

I also find that the Tenants extinguished any right to claim against the deposits by failing to participate in the outgoing condition inspection report. The Landlords did everything they were required to do in accordance with the Act, when handling the outgoing condition inspection report.

I find the Tenants failed to wait for the first scheduled opportunity to participate in the outgoing inspection, and were given a second opportunity in writing to have someone attend for the condition inspection report on their behalf.

It appears the Tenants did not fully understand their obligations under the Act. They failed to read over the Notice of Final Opportunity to Schedule a Condition Inspection, as it clearly explains their rights and obligations.

I note that performing incoming and outgoing condition inspection reports are important steps in the Act. Section 35 of the Act explains the obligations of the parties for the outgoing condition inspection report:

> **35.** The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
>
> (a) **on or after the day the tenant ceases to occupy the rental unit**, or
>
> (b) **on another mutually agreed day**.
>
> (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
>
> (3) The landlord must complete a condition inspection report in accordance with the regulations.
>
> (4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(5) **The landlord may make the inspection and complete and sign the report without the tenant if**

(a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or

(b) the tenant has abandoned the rental unit.

[Emphasis added.]

Furthermore, section 36 of the Act explains:

36 (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, **is extinguished if**

(a) the landlord complied with section 35 (2) *[2 opportunities for inspection]*, and

(b) **the tenant has not participated on either occasion**.

For the above reasons I find the Tenants signed over the deposits to the Landlords in writing. Furthermore, they could not change their minds and claim against the deposits in any event, as they extinguished their rights to the deposits by failing to participate in the outgoing condition inspection report.

As for the Tenants' claim for return of half of December 2017 rent, I dismiss that claim as well. It is clear from the written evidence that the Tenants gave a notice to end the tenancy on December 31, 2017. The Landlords are entitled to rent for the entire month of December. I find it was the Tenants who decided to leave on December 15, 2017, and there is nothing under the Act that required the Landlords to return any rent for December 2017.

The Landlords simply used the opportunity to do some work in the rental unit prior to re-renting it. They did not force the Tenants to leave on the 15th of December. It is clear it was the Tenants who wanted to leave that day. I find they are not entitled to any portion of the December rent.

I also note when tenants are claiming for the return of the security deposit, the condition of the rental unit at the end of the tenancy is really not an issue. Rather, a tenant must prove the landlord breached section 38 of the Act. Here, I find the Tenants have failed to prove any breach of the Act by the Landlords.

Conclusion

I dismiss the Tenants' Application without leave to reapply. I find the Landlords acted in accordance with the Act and the Tenants extinguished their right to return of the deposits. I further find the Tenants are not entitled to the return of any portion of December rent.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: September 14, 2018

Residential Tenancy Branch