DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This hearing was scheduled in response to the tenant's Application for Dispute Resolution, in which the tenant has requested compensation for damage and loss and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing.

Preliminary Matters

The landlord received the tenant's tabbed evidence binder on June 28, 2010, and stated she had ample time to review the package. This evidence was submitted late to the Residential Tenancy Branch; however, I have reviewed the evidence and referenced it in arriving at my decision.

As the tenant's Application and attachment clearly indicated a claim requesting return of the deposit paid, I have amended the Application to include a request for return of the deposit.

Issue(s) to be Decided

Is the tenant entitled to compensation for damages or loss in the sum of $2,700.00?

Is the tenant entitled to return of the deposit paid?

Is the tenant entitled to filing fee costs?

Background and Evidence

At the start of the hearing the parties agreed to the following facts:

- This was a fixed-term tenancy that commenced on February 1, 2010 and was to end on January 30, 2011;
- The tenancy agreement was signed by the tenant on February 7, 2010;
- The tenant moved in on February 15, 2010;
- Rent was $1,500.00, due on the first day of each month;
- A deposit in the sum of $750.00 was paid on February 6, 2010;
- At the start of the tenancy the tenant paid first and last month's rent;
- On March 19, 2010 the landlord received a letter from the tenant's counsel providing a service address for the tenant, giving Notice ending the tenancy effective April 30, 2010 and a copy of the tenant's March 19, 2010, Application for dispute resolution;
- That the tenant vacated the property on March 24, 2010; and
- That the deposit has not been returned to the tenant.

On March 15, 2010, the landlord entered the rental unit to complete a condition inspection report; however the tenant had not yet moved out of the unit. A move-in condition inspection was not completed on the day the tenant vacated the rental unit.

The tenant is claiming the following compensation:

Cleaning and labour costs for cleaning	200.00
Extra time required in relation to moving the piano	300.00
Replace broken coffee table	500.00
Moving expenses	1,500.00
	2,700.00

The tenant has requested an Order that the breaches of the Residential Tenancy Act by the landlord constitute a fundamental breach of the fixed term agreement; thus rendering the term unenforceable. The tenant's submission also requests, in the alternative of an Order cancelling the fixed term agreement, that the landlord's failure to advise the tenant of the work to be completed on the residential property constituted a misrepresentation and should end the tenancy.

When the tenant first viewed the rental unit it was vacant and required cleaning. When the tenant moved in she found the rental unit dirty and that carpet remnants had been left in the unit. The tenant spent several hours cleaning the fridge, floors, carpets and balcony.

On February 16, 2010, the tenant delivered the landlord a note to her mail slot which indicated that on February 15 the tenant had found an excessive amount of dust, hair, carpet installation leftovers and empty condom wrappers in the laundry room. The note also asked the landlord to remove a piano from the rental unit by February 20, 2010, the date the tenant's belongings were to be delivered. The landlord did not receive this note as the tenant had been provided an incorrect service address on the tenancy agreement signed by the parties.

The tenant submitted photographs of the rental unit at the end of the tenancy; no photographs of the unit at the start of the tenancy were provided; other than those indicating some damages recorded by the tenant.

The landlord disputed the tenant's claim that the unit was dirty at the start of the tenancy, but did apologize for the presence of carpet remnants, as the carpet had just been installed and the landlord had not had time to vacuum prior to the tenant taking possession.

The landlord told the tenant the piano would be moved by February 18, 2010. On February 18, 2010, just after noon, the landlord returned a telephone call to the tenant and told her that 2 people would like to view the piano later that afternoon and that one of these individuals would remove the piano. The tenant was out of town and could not meet with the landlord; the piano was not removed. The landlord was then away for the weekend of February 20th.

On February 20, 2010, the tenant's belongings arrived at the rental unit. The piano was in the hallway, blocking access, so the tenant had the mover take the piano to the parkade. The property management company would not allow the piano to remain there and the landlord's storage unit was full of belongings, with no room for the piano.

The tenant's witness provided affirmed testimony that he works as a sub-contractor to the moving company and moved the tenant's belongings on February 20, 2010. He assessed the piano to be an apartment sized unit, which they moved to the parkade before they could unload the tenant's belongings. The agent for the moving company spent approximately twenty minutes moving the piano to the parkade and loading it in his truck. A hand-written receipt was provided to the tenant, indicating that $200.00 had been paid to remove the piano. The mover's agent was intended to give the piano to charity, but currently has possession of the piano in his garage.

The tenant is claiming the cost of having the piano removed and additional costs for time spent dealing with the removal of the piano.

The landlord believed that the tenant had understood the piano would be removed by February 18, 2010, and that the tenant's refusal to allow entry on February 18, 2010, to have the piano removed, resulted in the delay. Subsequently the landlord wrote the tenant to inform her that the piano would be removed on March 10. The tenant then told the landlord that the piano was gone and, presumably, given to charity.

The landlord attended at the rental unit on March 15, 2010; during which time the tenant claims the landlord kicked her coffee table and broke the leg. The tenant submitted a receipt from 2006, establishing the cost of the table which she has not been able to repair.

On March 15, 2010, the landlord attempted to inspect the rental unit while the tenant's belongings were present in the unit. The landlord removed her shoes at the entrance, as new carpets had been installed. The parties dispute whether the landlord put her shoes back on or not. The landlord stated she was bare foot, and did not kick the table. The tenant stated the landlord put her shoes back on, as the tenant objected to the landlord walking in her bare feet, due to warts and fungus on the landlord's feet.

The tenant was given written notice by the property management company of the building that inspections of the balconies were to occur on March 15, 2010, in preparation for exterior rehabilitation of the balconies. The landlord denied any prior knowledge of this work but did submit a copy of the annual general meeting (AGM) minutes dated January 29, 2010, which indicated that a balcony membrane project would be discussed at the February 17, 2010, meeting. The copy of the minutes

showed that the balcony project was part of item (k)(i.) Minute items beyond (k)(i), to (n) were not submitted as evidence; outside of part of a paragraph just prior to item (n). The landlord stated she had neglected to read this document prior to renting the unit to the tenant. This project was approved, resulting in the March 15, 2010, notices of inspection.

When the tenant became aware of the nature of the project, she researched the requirements and found that the work would take place throughout the summer of 2010, and would involve disruption. On March 19, 2010, the tenant, via her legal counsel, gave written notice ending her tenancy effective April 30, 2010. The tenant would not have moved into the rental unit if she had known the balcony project had been planned.

The tenant submitted receipts for moving expenses incurred as the result of her ending the tenancy. The tenant did not discuss the matter with the landlord, other than the inspection planned on March 15, 2010, at which time the landlord had told her there was nothing that could be done. The tenant moved due to the impending disruptions the balcony project would cause and due to the landlord's failure to disclose the possibility of this project during the term of the tenancy. The tenant submitted that the failure of the landlord to disclose the project during the tenancy negotiations formed an intentional withholding of information from the tenant.

The tenant provided photographs of the exterior of the rental unit building dated June 10, 2010. The photographs show workers on a scaffold outside of a balcony, several balconies covered in plastic sheathing and a fenced work area.

On April 2, 2010, the landlord issued the tenant a 10 Day Notice ending the tenancy for unpaid rent owed on April 1, 2010. The landlord took possession of the rental unit on April 15, 2010, as she entered the unit and found the tenant's belongings had been removed. The landlord had not obtained a writ of possession. The landlord had the building manager assist her with entry, as the locks to the unit had been changed by the tenant.

The landlord submitted a copy of a move-out condition inspection completed on April 20, 2010, in the absence of the tenant. The report indicated that the tenant abandoned the unit.

The landlord wrote the tenant a note explaining why the deposit would not be returned. The landlord acknowledged receipt of the tenant's forwarding address on March 15, 2010, and has not made a claim against the deposit paid.

Analysis

A party that makes an application for monetary compensation against another party has the burden of proving their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation is the reason the party making the application incurred damages or loss;
3. Verification of the amount of the loss; and,

4. That the party making the application did whatever was reasonable to minimize the damage or loss.

The landlord failed to ensure a move-in condition inspection was completed, as required by section 23 of the Act. The tenant moved in and cleaned the rental unit; the landlord claims to have cleaned the unit prior to the tenant taking possession. In the absence of any verification that the rental unit was not clean at the start of the tenancy and due to the disputed testimony in relation to the cleaning required, I find that the tenant has, on the balance of probabilities, proven that the rental unit required only minor cleaning, as indicated in her February 16, 2010, letter to the landlord. Therefore, I find that tenant is entitled to a nominal amount for cleaning costs in the sum of $20.00.

In relation to the tenant's claim for costs incurred for the piano, I find that the tenant's expenditure of $200.00 was made as the result of the landlord's failure to provide the tenant with vacant possession of the rental unit. However, I also find that the tenant, despite being given short notice of possible removal of the piano on February 18, 2010, failed to mitigate the loss she is now claiming as the tenant refused the landlord entry to the rental unit on that date.

The tenant could have given the landlord permission to enter the unit for the purpose of removing the piano, but failed to do so, as she was three hours away. The tenant chose not to return to the rental unit and no arrangement was made to allow the landlord entry on that date. The tenant offered to let the landlord remove the piano the next day or on the morning of February 20, 2010.

I find that both parties are at fault; the landlord for failing to give adequate prior notice for removal of the piano, as required under section 29 of the Act; and the tenant for her failure to allow the landlord entry on February 18, thus failing to mitigate the claim she is now making. The tenant was within her rights to refuse entry by the landlord, but I find that the tenant has claimed compensation for a loss that she was in a position to possibly minimize, as required by section 7 of the Act.

I find that the failure of the landlord to arrange pick-up of the piano on February 19 or the morning of February 20, 2010, left the tenant with a situation where she was forced to remove the piano. However, I am not convinced that the tenant had the right to have the piano removed from the property. I find that the tenant was inconvenienced and was not provided vacant possession of the rental unit and as a result of the landlord's failure to remove the piano, pursuant to section 62(3) of the Act, that the tenant is entitled to nominal compensation in the sum of $50.00. The tenant had the option of keeping the piano and seeking a remedy requesting compensation due to the loss of use of space in her rental until the time landlord removed the piano.

The parties dispute the circumstances of the March 15, 2010, visit by the landlord, during which the tenant claims the landlord kicked her coffee table. I find, on the balance of probabilities, that the tenant has failed to prove that the landlord breached the Act and that this portion of the claim is dismissed.

In relation to the tenant's claim for moving costs as a result of the impending balcony project, I find that the tenant failed to give the landlord any opportunity to provide a possible solution to the prospect of disruption that might be caused to the tenant during the period of the balcony project, as required by section 7 of the Act. The tenant did not engage in any discussion with the landlord requesting consideration, compensation or a mutual agreement to end the tenancy. Four days after becoming aware of the balcony

project, prior to any work commencing, the tenant gave the landlord written notice that she was terminating her fixed term tenancy.

I find that the tenant ended the tenancy based on her expectation that the value of her tenancy would be severely reduced as the result of the balcony project, combined with her assertion that she would not have moved in had she been informed of the possibility of the project.

I find the landlord's initial testimony that she did not know of this project until February 18, 2010, obviously incorrect, as the landlord submitted a set of AGM meeting minutes, given to the landlord dated January 29, 2010, which clearly indicated that the project was proposed. The landlord's failure to read this document prior to renting the unit was an error that resulted in the tenant accepting a tenancy, in the absence of any knowledge of the possibility of this project.

Section 27 of the Act requires a landlord to protect a tenant's right to freedom from unreasonable disturbance that is within the control of the landlord. I have found that when establishing the tenancy the landlord did withhold information from the tenant that the balcony project might proceed. However, the tenant's decision to immediately give notice ending the fixed term tenancy, without any attempt to mitigate and negotiate a solution with the landlord leads me to find that the decision to end the tenancy was premature, at the least.

Section 45 of the Act, states, in part:

> *(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*
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> > *(a) is not earlier than one month after the date the landlord receives the notice,*
> > *(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*
> > *(c) 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.*
>
> *(3) 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.*

I cannot find that the landlord breached a material term of the tenancy. The tenant may have had a potential future claim in relation to a loss of quiet enjoyment, but I find that the tenant's sudden decision to give notice and move out, failed to provide an opportunity for a negotiated solution, or, in the absence of a solution, a claim by the tenant for loss of quiet enjoyment based upon evidence of a loss. The tenant moved out prior to the project commencing; in the expectation that she would experience a loss.

I find that the tenant could not end the fixed term tenancy based upon her claim in this Application. The landlord did fail to provide the tenant with information that the balcony project was likely, but the tenant has failed to prove that the balcony project rendered

the rental unit uninhabitable during the term of her tenancy. I have based this decision on Residential Tenancy Branch policy which suggests:

> *A landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises* ***uninhabitable*** *for that tenant and withheld that information in establishing the tenancy.*
> (Emphasis added)

Therefore, in the absence of evidence proving that the rental unit was rendered uninhabitable, I dismiss the tenant's claim for moving costs.

In relation to the deposit paid by the tenant, I find that the landlord had the tenant's forwarding address on March 15, 2010. I find that the tenancy ended on April 15, 2010; the date the landlord took possession of the rental unit.

Section 38(1) of the Act provides:

> ***38*** *(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of*
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> *(a) the date the tenancy ends, and*
> *(b) the date the landlord receives the tenant's forwarding address in writing,*
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> *the landlord must do one of the following:*
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> *(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;*
> *(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit*

Section 38(6) of the Act provides:

> *(6) If a landlord does not comply with subsection (1), the landlord*
>
> *(a) may not make a claim against the security deposit or any pet damage deposit, and*
> *(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.*

As the landlord did not return the deposit within fifteen days of April 15, 2010 and did not make an Application claiming against the deposit, I find that the landlord must return double the deposit paid to the tenant. No interest has accrued on the deposit.

I find that the tenant's Application has merit, and I find that the tenant is entitled to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

Therefore, the tenant is entitled to the following:

	Claimed	Accepted
Charge for removing piano	200.00	50.00
Extra time required in relation to moving the piano	300.00	0
Replace broken coffee table	500.00	0
Moving expenses	1,500.00	0
Deposit	750.00	1,500.00
Filing fee	50.00	50.00
Total:	3,500.00	1,620.00

Conclusion

I find that the tenant has established a monetary claim, in the amount of $1,620.00, which is comprised of compensation in the sum of $70.00, double the $750.00 deposit paid and the $50.00 filing fee paid by the tenant for this Application for Dispute Resolution and I grant the tenant a monetary Order in that amount**.**

In the event that the landlord does not comply with this Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The balance of the tenant's claim for compensation is dismissed.

This tenancy ended on April 15, 2010.

The tenant has not proven cause for ending the fixed term tenancy.

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 06, 2010.

Dispute Resolution Officer