Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, FF, SS

Introduction

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

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- an order to be allowed to serve documents or evidence in a different way than required by the *Act* pursuant to section 71; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that he received a copy of the landlord's dispute resolution hearing package handed to a relative of his after October 17, 2012, at the forwarding address he had left with the landlord for the return of his security deposit. He confirmed that he received this package early in November 2012, upon returning to this country, after an extended period abroad. I am satisfied that the tenant received the landlord's dispute resolution hearing package and that the parties exchanged written and photographic evidence with one another in advance of this hearing.

As the parties agreed that the tenant was served with the landlord's dispute resolution package, the landlord withdrew her application for a substituted service order. At the hearing, the landlord also requested an increase in the monetary award she was seeking from the $1,425.00, identified on her original application to $1,743.80, the amount identified in her Monetary Order Worksheet. Although I have considered the items listed on her Monetary Order Worksheet, I advised the landlord that her failure to amend her application for dispute resolution prior to this hearing limited her potential eligibility for a monetary award to the $1,425.00 requested in her original application for dispute resolution.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, damage and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, miscellaneous letters, e-mails, invoices, receipts and estimates, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around each are set out below.

This tenancy began as a fixed term tenancy that commenced on January 1, 2012. Although the term of the fixed term Residential Tenancy Agreement (the Agreement) entered into written evidence was to be "Nine MONTHS", the end date for the tenancy was identified in that Agreement as August 31, 2012, a period of eight months. At the hearing, the landlord testified that she believed the end date for the Agreement was August 15, 2012. According to the terms of the Agreement, "the tenancy may continue on a month-to-month basis or another fixed length of time."

The tenant gave oral and written evidence that the parties entered into an oral agreement that enabled the tenancy to continue for an additional month until September 30, 2012, when he vacated the rental unit. He maintained that he originally intended to vacate the premises before September 1, 2012, but the landlord was having difficulty selling the property and agreed to let him remain in the rental unit for one additional month, at which time the tenancy was to end.

The landlord testified that there was no agreement between the parties that the tenancy would necessarily end by September 30, 2012. She said that she was uncertain when or if the tenant was going to end this tenancy by that date until she received a September 14, 2012 email from the tenant, in which he advised her that he would be ending the tenancy by the end of September 2012.

Monthly rent was set at $1,550.00, payable in advance on the first of each month. The landlord continues to hold the tenant's $775.00 security deposit paid on August 15, 2011. The parties agreed that they conducted a joint move-in condition inspection on August 26, 2011, and that the landlord provided the tenant with a copy of the report of that inspection shortly thereafter.

A joint move-out condition inspection of the premises occurred on September 30, 2012 between the landlord and the tenant's representative. The landlord did not dispute the tenant's claim that she added items to the report that she prepared regarding that inspection after she conducted her joint inspection with the tenant's representative. She said that this occurred in two stages, as some of the tenant's belongings remained in the rental unit at the time of the initial inspection. She testified that she returned after the tenant's belongings were removed and noted additional damage which she brought to the attention of the tenant's representative. The tenant's representative refused to sign the joint move-out condition inspection report. The landlord and her witness testified that the landlord continued to find damage to the rental unit after she met with the tenant's representative the second time. The landlord added these damaged items to her claim for a monetary award, despite failing to note them on her move-out condition inspection report.

In support of the landlord's application for a monetary award, the landlord entered into written evidence the following items in her Monetary Order Worksheet:

Item	**Amount**
Unpaid Rent (1/2 month –October 2012)	$775.00
Repairs/Painting/Cleaning	300.00
Verbal Quote for replacement of outdoor garden and grass	200.00
Professional Carpet Cleaning	212.40
Verbal Quote to Repair Damaged Stove Top	150.00
Repair Fan in Washroom	106.40
Total of Above Items	**$1,743.80**

The landlord testified that the rental unit was newly painted before the tenant took occupancy of the rental unit, as she had originally planned to sell the property rather than seek a tenant.

The tenant noted that there many notations in the joint move-in condition inspection report to confirm that there was already some damage to the rental unit when he commenced his tenancy. He cited marks on walls, stains on carpets and linoleum, stains on walls, some of which noted that painting was required. The following repairs were listed as required at the start of the tenancy in the joint move-in condition inspection report:

Paint behind TV + some touch up in both bedrooms to be done.

Analysis – Landlord's Application for Unpaid Rent or Loss of Rent

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. There is undisputed evidence that the tenant did not pay any rent for October 2012.

As outlined above, both the terms of the initial written Agreement and the arrangement reached between the parties for the period from September 1 until September 30, 2012, are very confusing. Although the parties maintained that they entered into some type of continuation of the tenancy after the initial Agreement ended, this is not at all clear. The emails they submitted into written evidence was similarly confusing, as they could be interpreted as either an oral agreement to create an additional one-month fixed term tenancy agreement or an extension of the tenancy for an unspecified month-to-month basis.

When there is conflicting evidence with respect to the terms of an oral agreement between parties as occurred in this case, the most definitive statement regarding the terms is usually the Agreement signed by the parties. However, in this case, the Agreement itself is also confusing as it calls for the establishment of a nine month tenancy to extend over the eight-month period from January 1, 2012 until August 31, 2012.

"*Contra Proferentem*" is a rule courts use when interpreting contracts. In plain English it means that if there is an ambiguous clause in a contract it will be interpreted against the party responsible for drafting the clause. In a 2010 written decision of the B.C. Supreme Court (*Horne Coupar v. Velletta & Company, 2010 BCSC 483*), the Honourable Justice Romilly explained why this legal principle is applied against the party responsible for including an ambiguous term in a contract.

Contra proferentem is a rule of contractual interpretation which provides that an ambiguous term will be construed against the party responsible for its inclusion in the contract. This interpretation will therefore favour the party who did not draft the term presumably because that party is not responsible for the ambiguity therein and should not be made to suffer for it. This rule endeavours to encourage the drafter to be as clear as possible when crafting an agreement upon which the parties will rely. This rule also encourages a party drafting a contract to turn their mind to foreseeable contingencies as failure to do so will result in terms being construed against them. That there is ambiguity in the contract is a requisite of the application of this rule, however, once ambiguity is established, the rule is fairly straightforward in application…

In this case, the rule of *contra proferentem* calls into question whether the Agreement called for this tenancy to end on August 31, 2012 or September 30, 2012. If the latter, which would be the case if the Agreement called for a nine-month tenancy agreement, then the arrangements made by the parties by email for a joint move-out condition inspection on September 30, 2012 were in line with the original terms of the Agreement to have a nine-month fixed term tenancy for these rental premises. Viewed in this context, the tenant's emails in mid-September 2012 provided confirmation that the tenancy was to end on September 30, 2012, after the completion of the nine-month tenancy.

Despite the above ambiguity in the term of the initial fixed tenancy, the Agreement does not call for an end to the tenancy at the expiration of the Agreement, by which time the tenant had to vacate the premises. The tenant confirmed at the hearing that the only notices to end this tenancy that he issued to the landlord were by way of emails he sent from abroad confirming that he would not be remaining in the rental unit after September 30, 2012. Even in a fixed term tenancy ending on the termination date of the fixed term, a tenant must still provide written notice to end the tenancy unless there is a provision in the Agreement that specifies that the tenant must vacate the premises by that date. With no written notice having been issued by the tenant to the landlord before September 1, 2012, I find that the landlord could reasonably have expected this tenancy to convert to a periodic tenancy as of October 1, 2012.

Section 45(1) of the *Act* requires a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for October 2012, the tenant would have needed to provide his notice to end this tenancy before September 1, 2012. Section 52 of the *Act* requires that a tenant provide this notice in writing.

Since that did not occur, I find that the tenant did not comply with the provisions of section 45(1) of the *Act* and the requirement under section 52 of the *Act* that a notice to end tenancy must be in writing. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

In this case, the landlord testified that she commenced her efforts to re-rent the premises through three different on-line rental websites in mid-August 2012. She provided no written evidence to confirm her efforts to re-rent the premises. She testified that she discontinued trying to re-rent the premises by the end of August 2012, as she was uncertain as to whether the tenant truly intended to end his tenancy by the end of September 2012. The landlord received the tenant's email on September 14, 2012,

confirming that he intended to yield vacant possession of the premises to the landlord by September 30, 2012. However, the landlord testified that she did not resume her efforts to try to re-rent the premises again until mid- October 2012, six weeks later. She said that she was successful in re-renting the premises to another tenant who took possession of the rental unit as of November 1, 2012, for the same $1,550.00 in monthly rent. She said that she could not show the premises to any prospective tenants until after the premises were cleaned and repaired. Her witness, the woman who she retained to clean, repair and paint the rental unit, testified that she did not commence that process until October 8, 2012. She did so after viewing the premises with the landlord on September 30, 2012, at which time she provided the landlord with a quote for the work she was to undertake.

Based on the evidence provided, I find significant gaps in the landlord's efforts to re-rent the premises and thus to mitigate the tenant's losses for unpaid rent for October 2012. The landlord testified that between late August 2012 and mid-October 2012, she made no effort to locate a new tenant. While I accept the landlord's explanation as to why she discontinued advertising the availability of the rental unit in late August 2012, by September 14, 2012, she was clearly aware that the tenant intended to vacate the rental unit by September 30, 2012. By September 14, 2012, she had not inspected the premises and would not have known that repairs were necessary and would have to be undertaken before she could show the rental unit to prospective renters. Once she did view the rental unit on September 30, 2012, she demonstrated no haste in having the premises cleaned, repaired and painted, waiting as she did until October 8, 2012 to commence this process through her witnesses' cleaning company. I also find that at least some of the work undertaken appears to have been to repair or refurbish parts of the rental unit that needed this repair and refurbishment prior to the commencement of this tenancy.

Due to the significant delays in taking action to mitigate the tenant's losses, I find that the landlord has not discharged her responsibilities under section 7(2) of the *Act* to mitigate the tenant's loss of rent for October 2012. In coming to this decision, I have also given consideration to the confusing terms of the Agreement and the landlord's failure to clarify the terms of any extension by way of an oral agreement that may or may not have been necessary beyond August 31, 2012 that allowed this tenancy to continue. For the above reasons, I dismiss the landlord's application for unpaid rent or loss of rent for October 2012 without leave to reapply.

Analysis – Remainder of Landlord's Application

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay

compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

I have given careful consideration to the joint move-in condition inspection report and the move-out condition inspection report prepared by the landlord. I find that there are many references to deficiencies in the condition of the rental unit when the tenant first occupied the rental unit. Some of these items may have deteriorated during the term of this tenancy. I find that the landlord has failed to demonstrate that much of this damage exceeded that which could be expected through normal wear and tear.

During the hearing, the tenant agreed that some of the items listed in the landlord's application or a monetary award were damaged during the course of his tenancy. For example, the tenant did admit that the towel rack was damaged during his tenancy. He also confirmed that two large marks/holes on a corner of the living room wall were damaged when furniture was being removed from the rental unit at the end of this tenancy. Although he admitted that some of the grass outside his rental unit died where he had placed planters, he observed that the ground and soil had not been damaged and grass would grow back the following summer if reseeded. Based on the evidence submitted by the landlord, it was difficult to identify an accurate estimate of the cost of repairing the above items. Although by no means an exact estimate of this damage, I allow a monetary award in the landlord's favour of $200.00 to repair damage that occurred and general cleaning that was required arising out of this tenancy. This amount is to include all of the items listed above (i.e., towel rack repair, living room wall damage, reseeding of grass), plus the allowable portion of the general repair and cleaning bill submitted by the tenant's witness.

The parties presented two different sets of evidence with respect to the extent of professional carpet cleaning required by the landlord at the end of this tenancy. The tenant testified that he retained a professional carpet cleaning company that steam cleaned his carpets on September 29, 2012. He entered into written evidence a copy of the receipt for this carpet cleaning. He maintained that the $224.00 carpet cleaning claim submitted by the landlord was unnecessary and represented a duplication of the carpet cleaning he had already undertaken. The landlord and her witness testified that the carpets were not steam cleaned at the end of this tenancy and were not wet on the

day after their alleged cleaning. The witness was particularly emphatic that no steam cleaning could have been done on this rental unit.

Based on my consideration of the move-in and move-out condition inspection reports, the photographic evidence submitted by the landlord, and the testimony of the parties, I find that much of the landlord's claim for professional steam cleaning of the carpets appears to have resulted from the landlord's efforts to remove stains and repair damage that was in place before this tenancy began. I give little weight to the landlord's claim that the carpets would still have been wet had they been professionally steam cleaned on September 29, 2012. Since the tenant was responsible for at least part of the damage to the rental unit that required some additional cleaning of carpets, I allow the landlord to recover $100.00 of her carpet cleaning expenses from the tenant.

I dismiss the landlord's claim for the repair of the bathroom fan as I do not find that she has demonstrated that the tenant was responsible for this damage beyond reasonable wear and tear that would occur over time. She identified no specific act of negligence or damage caused to the fan by the tenant's actions. Rather she maintained that since the fan was working before the tenant moved in and was not working when he left that he should be held responsible. I find little merit to her claim and dismiss her claim for damage to the fan without leave to reapply.

I also find that the landlord is not entitled to a monetary claim for damage for items that she failed to include in her move-out report (e.g.. stovetop). In addition, a number of the landlord's claims were based on estimates for work that has not yet been completed (e.g., landscaping; repair of damage to stovetop). As the premises have been re-rented for the same monthly rental as was being paid by the tenant, I find insufficient evidence to demonstrate that the landlord has encountered actual losses for these items where no costs have yet been incurred by the landlord.

As the landlord has been partially successful in her application, I allow her to recover one-half of her $50.00 filing fee from the tenant.

I allow the landlord to recover the above-noted monetary awards from the tenant by retaining a total of $325.00 from the tenant's security deposit. I order the landlord to return the remaining $450.00 of the tenant's security deposit plus applicable interest to the tenant forthwith. No interest is payable over this period. I dismiss the remainder of the landlord's application without leave to reapply.

Conclusion

I issue a monetary Order in the tenant's favour in the amount of $450.00, under the following terms, which allows the landlord to recover a monetary award for damage arising out of this tenancy and part of his filing fee, and to retain a portion of the tenant's security deposit:

Item	**Amount**
Repairs/Painting/Cleaning	$200.00
Professional Carpet Cleaning	100.00
Less Security Deposit	-775.00
Recovery of ½ of Filing Fee	25.00
Total Monetary Order	**($450.00)**

The tenant is provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I dismiss the remainder of the landlord's application for a monetary award without leave to reapply.

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: January 21, 2013

Residential Tenancy Branch