Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

FINAL DECISION

Dispute Codes: **MND, MNSD, MNDC, SS, RR, FF**

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has requested compensation for damage to the rental unit, loss of rental income, to retain the security deposit and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

The tenants applied requesting compensation in the form of a rent reduction for repairs, services or facilities agreed upon but not provided, compensation for damage or loss under the Act, return of the pet and security deposits and to recover the filing fee cost.

Both parties were present at the initial and final hearing. At the start of the first 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. I have considered all of the relevant testimony and evidence.

At the reconvened hearing I reminded the parties that they continued to provide affirmed testimony.

Preliminary Matters

Each party made rebuttal evidence submissions and served the other. That evidence was given to the Residential Tenancy Branch and was reviewed during and after the 2nd hearing.

Background and Evidence

The fixed-term tenancy agreement commenced on October 1, 2012 and was to end on May 31, 2013. Rent was $800.00 per month, due on the 1st day of each month. A security deposit of $400.00 and pet deposit in the sum of $200.00 was paid on September 15, 2012.

A copy of the tenancy agreement supplied as evidence included a clause, which reads, in part:

"If the tenant ends the fixed term tenancy, or in breach of the Residential Tenancy Act or a material term of this Agreement…the tenant will pay to the landlord the sum of $450.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant…."

The rental unit is a house on a rural property outside of Kamloops. The landlord had wanted a fixed-term tenancy as it can be difficult to rent rural properties during the winter months. The tenants chose an 8 month fixed-term. The tenants moved into the home on October 28, 2012.

The tenants have made the following claim:

Return of rent from October to December 2012	$2,400.00
Home inspection cost	$492.80
Return of security deposit	$400.00
Return of pet deposit	$200.00
TOTAL	$3,492.80

The landlord has made the following claim:

Loss of rent revenue January to March 2013	$2,400.00
Hydro costs January to March 2013	$300.00
Liquidated damages	$450.00
Wall repairs	$448.00
TOTAL	$3,598.00

A September 23, 2012 move-in condition inspection report was completed and signed by the parties; a notation was made that a closet door was broken. No other deficiencies were noted at the time of move-in. The same report was used to complete the move-out inspection that occurred on December 30, 2013. That report indicated that the patio door lock was cracked and that holes were left where a curtain rod had been installed in a bathroom, family room and dining area. The female tenant signed the move-out report as disagreeing with the report; no other deficiencies were noted. A copy of the report was supplied as evidence.

The tenants said that when they first viewed the home it smelled of mildew, but the landlord had indicated there was not a mould issue. The tenants proceeded to rent the home and did not raise this issue with the landlord again until mid-December.

On November 1, 2012 the tenants sent the landlord a message telling her that 2 plug-ins in the kitchen did not work; the landlord immediately responded asking which ones were not working. The tenants indicated that it was the plug-in under a cabinet and one

on the right side of the stove. The landlord then responded saying she would look at them when she came to the home; with the tenant responding that was “so sweet…thanks.”

On November 28, 2013 the tenants sent the landlord another message telling her that the patio door lock was malfunctioning and that the home could not be secured. The tenants also asked about the electrical repair. The landlord said she would be out to the property on the weekend and would check the electrical issue at that time. She asked the tenants to use a board, to block the patio door from being opened. The tenants responded, thanking the landlord. During the hearing the tenants said that the use of the board was insufficient to secure the home.

The landlord said that there was no indication the repairs were serious; the tenants had not expressed any concerns with her plan to go to the house over the weekend. When the landlord attended the home on Saturday, December 1 she had a friend with her, who was familiar with maintenance and repair. He tried to fix the plug and said it would be best to hire an electrician. The patio door was taken apart and the tenants showed no concern with the efforts made or the need to use the board to secure the door.

On December 3, the landlord called the electrician and asked them to set up access with the tenants. The landlord also began making calls in an attempt to locate a new lock for the patio door.

On December 11, 2012 the tenants sent the landlord another message indicating they were now concerned with their health and wellbeing and that the house was not fit for occupancy. The tenants had been in the attic and found what they believed were leaks and toxic black mould and that the kitchen plugs had become “dangerous electrical issues.”

The landlord supplied a copy of a December 11 text message sent at 8:56 a.m. indicating she was making arrangements in relation to the electrician and roof and that the tenants would hear from the electrician. At 9:06 a.m. the tenants replied that someone could access the attic in the afternoon or any time the next day. The tenants then travelled into Kamloops to meet with the landlord, at which time they showed her photos of the attic. By the time the tenants returned to the home a roofer had been to the residence to complete an initial inspection of the roof.

On December 12, the landlord told the tenants that the electrical company would be calling and that the roofer would have a better assessment of repair by the next morning. As the patio door was an older model the landlord was going to have to order a part.

The tenants sent another message received by the landlord on December 13, 2012 saying they would be hiring a professional home inspector as their insurance company would not provide insurance, given the state of the home. The tenants had sent pictures to the insurance company and, as a result, a letter dated December 17, 2012 was

issued by the insurance company. A copy of the letter supplied as evidence indicated that the insurer could not quote for content and liability insurance because of “the state of the roof, rotting wood, leak marks and other issues.”

At 4 p.m. on December 13, 2012 the landlord again replied to the tenants and said that the roofer had been in the attic and that he felt it was not a big issue and could commence work the next week; the roofers phone number was supplied to the tenants. At this point the tenants told the landlord that they would need to meet with her and discuss matters before anything was done. The tenants said that the house should not have been rented and that the insurance company did not understand why the tenants were still in the house. The tenants described the residence as “the house from hell.”

On December 14, 2012 the landlord’s manager at her place of work received a call from the tenants who said if the landlord wanted a copy of the home report she would need to pay $500.00; the landlord called the tenants and asked them to meet her at work to discuss the report; they met on December 17, 2013 when they reviewed the contents of the report. There was a dispute as to whether the tenants would supply the landlord with a copy of the report; the tenants said the landlord wanted their original; the landlord said the tenants refused to allow her to copy the report. On this date the tenants told the landlord they wanted to end the tenancy; the landlord requested written notice.

A copy of the home inspection report completed on December 12, 2012, supplied as evidence, confirmed that the patio door lock was not working and that electrical outlets appeared to be ungrounded. Comments were made in relation to items including: the gutters needing cleaning, visible growth in the fireplace, a bathroom sink leak, dripping faucets, visible arcing at a circuit breaker, black staining on attic sheathing, roof beyond its design-life with leaks and the dryer was noisy. The tenants confirmed that the report did not indicate the presence of mould.

The tenants confirmed that on December 20, 2013 the electrical repairs were fully completed; the landlord supplied an invoice issued by the electrical company on that date. Later on December 20 the tenants sent the landlord a text saying they would move out and a registered letter was also sent giving written notice. The landlord scheduled a move-out inspection for December 30, 2013 at which point the tenants vacated.

The tenants’ letter giving notice ending the tenancy indicated they did not feel safe or secure in the home. The tenants alleged that the landlord breached a material term of the tenancy by failing to maintain the home, failing to make repairs and emergency repairs and that a current phone list for emergency repairs had not been provided. The tenants said they did not repair the patio door lock as they would have suffered financial hardship.

The notice ending the tenancy indicated that the tenants had been denied insurance due to the poor state of the home. The notice also contained complaints about items such as missing locks on windows, wood rot, leaks, possible mould, a poor water

management system and deficient plumbing infrastructure. The letter went on to say that the inspector had initially discovered mould growth.

The tenants submitted a copy of the invoice for the home inspection and have claimed this cost.

The tenants alleged that the female tenant's asthma worsened during their time in the home and that her use of an inhaler increased, as did her dosage. The tenants said the landlord knew this was an issue, yet repairs were not made. The landlord said that the tenants did not present her with evidence that their health was in danger. The tenants supplied a copy of a January 23, 2013 diagnostic imaging requisition for the female tenant, ordered on her report of worsening asthma.

The landlord responded that by November 28, 2012 the tenants had reported 2 repair issues:

- the kitchen plug-ins, and
- the patio door lock.

The landlord had attempted to have the electrician contact the tenants and she had been completing research on the purchase of a lock for the door. The day the landlord became aware of the roof issues she had a roofer attend and it was determined that mould was not a problem. The roof repair was delayed, at the tenant's request.

The tenants said they were not given a date the roof repair would commence, only that it would be the following week, and they were concerned about the use of power and the possible disruption to their pet and health during repair. The landlord said that she offered to compensate the tenants for any electricity usage and that the tenants did not need to be concerned about the repair as the roofer did not need to enter the home.

On December 20, 2013 the landlord ordered a part for the patio door lock; a copy of this order was supplied as evidence. The tenants said this was proof that the landord had failed to make the lock repair in a timely fashion.

The landlord decided to repair the roof after the tenants vacated. A letter from the roofer was supplied, which outlined contact with the landlord and his recommendation agreeing, that since the tenants had decided on December 17 they would move, the roof repair could wait, as it was not an emergency repair. The new roof was installed in early March 2013.

The landlord supplied copies of 2 estimates for wall repair, including removal of plastic screw anchors, patching and painting. The landlord has claimed compensation for the cost of these repairs needed as the result of the tenants installing curtain rods that had to be removed.

The landlord has claimed the cost of hydro incurred during the period of time the unit was vacant. A copy of the January 2013 bill was supplied as evidence of costs.

The landlord supplied a copy of a January 10, 2013 letter from her insurer, confirming that the dwelling was insurable and that a policy was currently in place. The insurer indicated they would not have declined tenant insurance for that dwelling, unless the tenants had previous claims or other barriers to insurability. The tenants confirmed that they did not attempt to obtain insurance via the landlord's insurer; this had been suggested to them by the landlord.

Once the tenants gave notice the landlord began to advertise the home on several popular web sites and in the local newspaper. Copies of advertisements were supplied as evidence. Effective April 1, 2013 the home was rented. The new occupant obtained insurance from the same company that had declined the tenants; no evidence of work completed was requested by the insurer.

The landlord has claimed the loss of rent revenue from January to March, 2013, inclusive. The landlord reiterated that locating tenants in the winter months for this rural property would not be easy and that despite efforts using the internet and local newspaper it took the balance of the winter months to locate a new occupant.

The landlord has claimed $450.00 in liquidated damages as set out as a term of the tenancy agreement; a pre-estimate of the cost of re-renting the unit.

Each party submitted photographs of the home, in support of their applications. The tenants suggested that exterior photographs supplied by the landlord did not reveal the true state of the home.

At the conclusion of the hearing the tenant's advocate suggested that, in her opinion the landlord was a slumlord.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

In order to find that the notice given by the tenants, terminating the fixed-term tenancy agreement, complied with the Act I must consider their submission that the landlord has beached a material term of the tenancy.

Section 45(3) of the Act provides:

> *(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.

Residential Tenancy policy suggests that to end a tenancy based on the breach of a material term the party alleging a breach must inform the other party in writing:

- That a problem exists and they believe it is a breach of a material term of the tenancy agreement;
- That the problem must be fixed by a deadline included in the letter and that the deadline must be reasonable; and
- That if the problem is not fixed by the deadline the party will end the tenancy.

As the tenants have alleged a beach of a material term by the landlord, the tenants have the burden of proving this occurred. From the evidence before me I find that the tenants have failed to meet this requirement.

The first notice given to the landlord in relation to the kitchen plug-ins was innocuous and a simple request made on November 1, 2013. The report of the broken patio lock was also made, on November 28, 2013, without any indication that the tenants considered this a breach of a material term of the tenancy. It was not until December 11, 2013; that the tenants indicated that they were dissatisfied; when they sent a text message alleging the electrical issues were dangerous, that the lock needing fixing and that there were leaks in the roof. The tenants further alleged a mould issue which was not proven; the home inspection did not indicate any mould was present.

On December 11, 2012 the tenants asked that repairs be immediately made and, while the landlord had known about the electrical problem and door lock for some time; the tenants did not indicate they would end the tenancy. The tenants did allege the home was now unfit for occupancy; however there was no evidence before me that indicated this was the case. The home inspection report supplied was not completed and shared with the landlord until December 17, 2013, at which point the tenants had already decided they would vacate.

There is no dispute that the electrical plug-ins remained unrepaired from November 1 to December 20, 2012; but in the absence of any indication, prior to December 11, that this was considered a breach of a material term of the tenancy, I find that the delay fails to support an early end of the fixed-term agreement. I find that the tenant's submission that they could not afford to repair the patio door lock lacked weight; they would have been able to make this repair, as provided by section 33 of the Act and not have suffered any financial hardship, as their rent would have been reduced by the amount equivalent to the repair cost.

There was no evidence before me that suggested at any time up to December 17, 2013, that the landlord was aware of electrical repairs that would be needed, beyond the

kitchen plug-ins. Once informed of the need for additional repairs she almost immediately had the electrical repairs completed; yet the tenants ended the tenancy without meeting the standard suggested by what I find is reasonable policy. Also, once the landlord became aware of the state of the roof she immediately had a roofer attend at the home and was prepared to have the roof replaced the next week.

There was no evidence before me that the required roof repairs were classed as an emergency; no major leak was evident. Further, the landlord attempted to immediately arrange the repair, which the tenants asked be delayed. The landlord was well within her rights to carry on with the repair, but as it was not an emergency, faced with the tenant's wish to leave the unit and their concerns in relation to the roof repair, she chose to delay the repair. I find this was a reasonable decision on the part of the landlord.

In relation to the claim that the tenants could not obtain insurance, they have supplied evidence of rejection based on their own submissions to the insurer they approached. The tenants did not attempt to mitigate by requesting coverage by the landlord's company; a suggestion that had been made by the landlord. The landlord has submitted evidence showing that the company that rejected the tenants insured the new occupant effective April 1, 2013. Further, on January 10, 2013 the landlord's insurer confirmed they would have offered insurance to insurable tenants. Therefore, I find that the failure to obtain insurance falls to the tenants, not the landlord.

The tenants provided no evidence that they made the landlord aware of legitimate health concerns during the tenancy or, that if the state of the home was causing deterioration in health, of any report indicating the home should not be occupied. The medical evidence supplied was dated well after the tenancy ended and had little value, as it was based on self-reporting by the tenant.

The balance of issues referenced in the home inspection report were brought to the landlord's attention on December 17, 2012 and once she was aware of the extent of electrical repair required and the roof repair, she took immediate steps to arrange repairs. The other items contained in the home inspection were not of any importance, as the tenants vacated the home and had not given the landlord any reasonable notice or period of time to respond.

It would have been expected that the tenants meet the requirements of policy by giving the landlord an indication that a failure to make repairs in a reasonable period of time would result in further action by the tenants. The tenants were also free to submit an application for dispute resolution requesting repairs be made, but rather than take that step they very quickly informed the landlord they would terminate their fixed-term tenancy agreement.

In the absence of reasonable cause, I find that the tenant's did not have the right to end the tenancy and did so in breach of the Act.

In the absence of a loss of anything but 2 malfunctioning plug-ins and a broken patio door lock, I find that the tenants did not suffer a loss equivalent to the full amount of rent paid and that their claim for compensation is dismissed.

The tenants chose to obtain a home inspection report without the prior approval of the landlord. That report did not support the tenant's claim that any serious roof leak was present or any mould was present and was used to support the unsubstantiated claim that the home was uninhabitable. Therefore, I dismiss the claim for the cost of the home inspection report.

I find, based on the evidence of advertising and the landlord's application made within days of the end of the tenancy, that the landord is entitled to compensation for the loss of rent revenue from January to March, 2013, inclusive in the sum of $2,400.00. The landlord mitigated her claim by advertising and attempting to find an occupant during a time of year that the tenants would have understood would present challenges. There was no evidence before me that the tenants took any steps to assist the landlord in locating a new occupant or a sublet.

In relation to the claim for painting, a tenant is allowed to make a reasonable number of holes in walls to hang art or other objects. There was no evidence before me that the tenants made an unreasonable number of holes; therefore, I find that the claim for wall repair is dismissed.

In relation to the claim for liquidated damages, I have considered Residential Tenancy Branch policy which suggests that liquidated damages must be a genuine pre-estimate of the loss at the time the contract is entered into; otherwise the clause may be found to constitute a penalty and, as a result, be found unenforceable.

Policy suggests that an arbitrator should determine if a clause is a penalty clause or a liquidated damages clause by considering whether the sum is a penalty. The sum can be found to be a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. Policy also suggests that generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

I find that the amount of liquidated damages in the sum of $450.00 was a genuine and reasonable pre-estimate of the costs the landlord could face if the tenants breached the Act by ending the tenancy early. The landlord had to advertise the unit over a period of several months and to cover the cost of hydro while the home was vacant. Therefore, I find that the landlord is entitled to liquidated damages as claimed.

As the landlord is entitled to liquidated damages I find that the hydro costs have been covered as part of those damages and that the separate claim for hydro is dismissed.

The landlord applied claiming against the deposits within fifteen days. However, there was no claim before me in relation to any damage caused by a pet, as allowed by section 38(7) of the Act. When there is no claim for damage caused by a pet, section

38 of the Act requires a landlord to return that deposit within fifteen days of receiving the written forwarding address, or the pet deposit must be doubled.

There was no dispute that the landlord received the written forwarding address at the end of the tenancy and that the pet deposit was not returned; therefore I find that the landlord is holding a pet deposit in the sum of $400.00.

Therefore, I find that the landlord is entitled to compensation in the sum of $2,400.00 for the loss of rent revenue from January to March, 2013, inclusive; $450.00 in liquidated damages; less the deposits held, in the sum of $800.00. The balance of the landlord's claim is dismissed.

As the landlord's claim has merit I find that the landlord is entitled to the $50.00 filing fee.

Based on these determinations I grant the landlord a monetary Order for the balance off $2,100.00**.** In the event that the tenants do not comply with this Order, it may be served on the tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The tenant's claim is dismissed.

Conclusion

The landlord is entitled to compensation for liquidated damages and loss of rent revenue.

The landlord may retain the doubled pet deposit and the security deposit totaling $800.00.

The balance of the landlord's claim is dismissed.

The tenant's claim is dismissed.

This decision is final and binding on the parties, unless 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: May 24, 2013

Residential Tenancy Branch