Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Pemberton Holmes Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNDC, MNR, MNSD, FF

Introduction

This was a hearing with respect to applications by the landlord and by the tenant. The hearing was conducted by conference call. The landlord applied for a monetary award for loss of rent and amounts for cleaning, a late fee and liquidated damages. The tenant applied for the return of his security deposit and claimed damages, including additional Hydro costs.

Issue(s) to be Decided

Is the landlord entitled to a monetary award and if so, in what amount?
Is the tenant entitled to the return of his security deposit?
Is the tenant entitled to a monetary award and if so, in what amount?

Background and Evidence

The rental unit is a strata title apartment in Victoria. The tenancy began on September 1, 2011 and the tenant paid a security deposit of $650.00 on August 9, 2011, however, the tenancy has proceeded since then by way of a series of fixed term agreements, each of which required the tenant to move out at the end of the term. The latest of these agreements was signed on July 12, 2013 and was for a term commencing September 1, 2013 and ending on August 31, 2014.

The landlord's representative testified that the tenant gave a written notice on November 25, 2013 improperly purporting to end the tenancy on December 31, 2013, before the end of the fixed term. The landlord claimed the following amounts in its application for dispute resolution:

- Rent $1,325.00
- Late fee: $25.00

- Liquidated damages $500.00
- Carpet shampoo $170.00

The tenant testified that the rental unit was heated by a hot water heating system and heat was included in the rent, but the system has not supplied heat since the tenancy began in September, 2011. The tenant testified that he notified the landlord of the lack of heat on a number of occasions, but the problem was never satisfactorily repaired. The tenant referred to e-mail communications with the landlord in February and March, 2013 when he reported that despite repair efforts the heat was still not adequate and the temperature in the unit hovered around 15 degrees without the use of supplementary electric heaters. In April 2013 the landlord told the tenant that:

> I can completely understand your frustration. I am not sure what we can do to assist you as this is a strata issue but please let us know if you do need us to communicate on your behalf.

According to the landlord repairs were made to the heating system in May 2013 and it was reported that the system was fixed. The tenant wrote to the landlord in June to convey thanks for support in rectifying the heating problem, however, in November the tenant found that the heat was still not functioning and he wrote the landlord on November 18th to report that the heat was not working, or was minimal at best. The tenant mentioned other problems with the rental unit, including mice and a mould issue and he requested that he be permitted to terminate his lease effective December 31st. The landlord replied by e-mail dated November 20, 2013. The message said in part that:

> I have sent your request to my general manager as she is the one who makes the call with these requests and it has been decided that we at Pemberton have done all we could have (save for the toilet seat where our handyman must have dropped the ball) to assist you in your requests, deal with the heat and the mice which are an unfortunate part of living waterfront.

The landlord concluded the message as follows:

> All in all (name of tenant), I can appreciate your frustration, but will not be able to waive your lease responsibilities. If it is still your desire to vacate for Dec. 31st, I will need something in writing. Please also let me know if you would like me to pull out my whip for the handyman who was supposed to return to fix the toilet seat, or if you would rather us wait till you vacate.

After he received the landlord's response, the tenant wrote to the landlord. In his letter dated November 25, 2013 he said:

> This is to inform you that I will be terminating my Tenancy Agreement and vacating (address of rental unit) as of December 31, 2013.
>
> The unit has been without heat since my original occupancy date of September 1, 2011. This has been brought to your attention over the past two years to rectify the situation.
>
> I have been heating the unit at my own expense through an electric fireplace. On February 26, 2013, I again brought this to your attention as my daughter and grandson were visiting.
>
> Despite various attempts at solving this problem, I feel that the responsibility continued to fall on my following up with yourselves and the building manager. This is unacceptable.
>
> I have contacted the BC Landlord and Tenancy Authority and they support my request to terminate the fixed lease. Under Section 45 (2), and (3) of the Landlord and Tenancy Act, you have not corrected the situation within a reasonable time after receiving my documented emails regarding the failure of the heat.
>
> This is a material breach of the contract of which I have upheld my end.

The landlord replied by letter dated November 30, 2013. In the letter the landlord said with respect to the heat: "We agree that this has been an on-going concern. I have traced the issue back to October 2012." In the letter the landlord referred to communications and events on February 26th when the issue was said to have been partially resolved. The landlord referred to an email from the tenant dated June 25th thanking the landlord for rectifying the heating issue. The landlord said that:

> When you advised us Nov. 18th that you planned on vacating, it was a surprise to us to hear that the heat was still a concern. We would have been prepared to provide you with portable heaters and an adjustment to your rent to compensate for the added hydro expense.
> With your formal letter dated Nov. 25th officiating your notice, you removed the ability for us to assist further.

> Based on the above, we find you responsible for the balance of your lease to the end of its term August 31, 2014 or sooner if a new tenant has been obtained. You are also responsible for the liquidated damages fee of $500.
> Please note that we began re-advertising your unit Nov. 27th in an effort to mitigate damages as per the Residential Tenancy Act.

The tenant moved out of the rental unit on December 31st. According to the landlord, in mid-January the heating problem was repaired by clearing a blockage in the heat pipes.

In addition to its claim for loss of revenue and liquidated damages, the landlord claimed that the tenant did not shampoo the carpets when he moved out. The landlord claimed that this was a requirement of the lease and claimed payment of the sum of $170.00 for carpet cleaning.

The tenant said that he did not clean the carpets and should not have to pay for the cost of carpet cleaning because, in the week before he moved out the landlord had several rooms in the rental unit painted. The painters did not clean up after their work, leaving drywall dust everywhere throughout the rental unit. The tenant also submitted photographs of grease stains on the carpets that were left by the heating company who had been in the suite working on the heating system. The landlord's representative responded to the tenant's evidence on this point by referring to some photographs that she said showed stains on the carpet that were caused by the tenant.

Analysis

The landlord has taken the position that the tenant was not entitled to end the fixed term tenancy before the end of the term and is therefore liable for loss of revenue and liquidated damages. The landlord submitted that the tenant did not give the landlord a reasonable opportunity to correct the heating problem. The landlord referred to the tenant's e-mail sent on June 25, 2013, thanking the landlord for its support in rectifying his heating problem. The landlord's representative said that the landlord was not notified that there was still a problem until the tenant gave notice in November that he was moving out without giving the landlord an opportunity to address the problem.

Section 45(3) of the *Residential Tenancy 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.

I do not agree with the landlord's contention that the tenant ended the tenancy before the landlord was afforded an opportunity to rectify the problem. The heating problem was an issue for several years and the landlord's initial response was to advise the tenant that it was a strata issue, inferring that it was not the landlord's problem.

When the tenant sent an e-mail to the landlord on November 18, 2013 advising the landlord of the continuing lack of heat, I find that this constituted written notice to the landlord of a breach of a material term of the tenancy agreement, namely the provision of an adequate supply of heat. The tenant did not give notice to end the tenancy at this juncture and the landlord did not respond by taking any steps to rectify the problem, or advising that it would take steps or investigate the problem; instead the landlord's representative replied on November 20th stating that: "…it has been decided that we at Pemberton have done all we could have … to assist you in your requests, deal with the heat and the mice which are an unfortunate part of living waterfront." It was only after the landlord stated its position that it had been decided that the landlord has done all that it could have, and by inference, that it would not do anything further to deal with the heating problem that the tenant then responded by giving formal notice ending his tenancy. I find that the tenant was not obliged, after this refusal, to give the landlord more time or to make further entreaties before giving notice as he did on November 25, 2013. I find that the landlord's letter dated November 30th was an ineffective attempt to alter the position that it stated to the tenant on November 20, 2013.

I find that the landlord did breach a material term of the tenancy and by stating in writing that it had no intention to do anything further, thereby entitled the tenant to accept the breach and end the fixed term tenancy, as he did.

The tenant moved out at the end of December pursuant to his properly given notice and the landlord's application for loss of revenue, liquidated damages and a late fee is dismissed without leave to reapply. With respect to the claim for carpet cleaning, the tenant's photographs show that there was extensive carpet soiling due repair efforts and I accept the tenant's evidence that he was left with dust and dirt throughout the rental unit just before the end of the tenancy, after painting. I find that these matters would have required that the carpets be cleaned. I find that the tenant should not be responsible for carpet cleaning in these circumstances. The landlord's application for carpet cleaning is denied.

The tenant has applied for the return of his security deposit in the amount of $650.00. He requested payment of $50.00 per month for the winter months of November, December and January, for three years to compensate him for his additional hydro costs to heat the rental unit during the tenancy. I find this claim to be reasonable, but only for 8 months, since the tenant moved out December 31st, 2013. I note that the landlord suggested, after the fact, that it would have been prepared to give the tenant an adjustment in rent to compensate for the added hydro expense, but it never made such an offer during the tenancy. I award the landlord the sum of $400.00 for his added hydro costs during the tenancy. The tenant is not entitled to recover his costs to provide photographic evidence. He is entitled to recover the $50.00 filing fee for his application. The total award to the tenant is therefore the sum of $1,100.00.

Conclusion

The landlord's application is dismissed without leave to reapply. I grant the tenant an order under section 67 in the amount of $1,100.00. This order may be registered in the Small Claims 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 Section 9.1(1) of the *Residential Tenancy Act*.

May 26, 2014

Residential Tenancy Branch