Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This was a cross application hearing.

On September 16, 2014 the tenant applied requesting return of the double the security deposit; less a sum previously returned and to recover the filing fee costs from the landlord.

On March 23, 2015 the landlord applied claiming against the security deposit, compensation for damage or loss under the Act and to recover the filing fee cost from the male tenant.

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. I have considered all of the evidence and testimony provided.

Preliminary Matters

The landlord's claim has been amended to include damage to the rental unit, as set out in the details of the application. The landlord also has also set out a claim for loss of rent revenue.

The landlord has returned what he believes is the balance of the security deposit to the tenant.

The tenant's written submission states that his mother has authority to act as his agent.

Issue(s) to be Decided

Is the tenant entitled to return of double the $397.50 security deposit less $280.00 that was returned?

Is the landlord entitled to compensation in the sum of $845.00 for loss of September 2014 rent revenue?

Is the landlord entitled to compensation in the sum of $180.00 for damage to the rental unit?

Background and Evidence

The tenancy commenced on July 1, 2011 as a 1 year fixed-term. The tenancy continued on a month-to-month basis. The parties signed a tenancy agreement, an addendum (clause 34 to 37), another addendum (clause 1 – 7) and an "agreement for breaking the lease."

Clause 34 of the addendum required the tenant to accept the condition of the suite as it was. The clause indicated that the tenant would not have any further demand or complaint about the suite unless the complaint was recorded at the time of move-in on the addendum. There were no items listed in the clause. The clause also allowed the landlord to end the tenancy with seven days' notice should the tenant make complaints after the start of the tenancy. The landlord said that this clause formed the condition inspection report completed at the time of move-in. Later in the hearing the landlord said there was a move-in inspection report but he did not have a copy of that report with him during the hearing.

Clause 37 of the addendum stated that "nitpicking or complaining" about the suite by the tenant would be a breach of contract and the tenancy could then be terminated with one month's notice.

The "agreement for breaking the lease" required the tenant to forfeit the security deposit if he breached the lease. The agreement also required that the tenant could not file for arbitration requesting return of the deposit.

An August 21, 2014 letter issued by the landlord to the tenants was provided as evidence. The letter set out some issues related to pest control matters. The tenant had reported bed bugs; the landlord wrote, disputing the presence of bed bugs. The tenant was given 3 choices, one of which was:

> *"you can move out in 10 days, at the end of August 2014 and we will take care of your problem."*
>
> (Reproduced as written)

The letter asked the tenant to communicate with the landlord's agent by August 25, 2014.

The tenant met with the landlord's agent on August 26, 2014 and gave him a letter setting out his decision to accept the condition that he vacate the rental unit. The tenant accepted this condition contained in the landlord's letter as he understood the landlord would not alleviate the bed bug situation. A copy of the tenant's August 25, 2014 letter accepting the end of tenancy effective August 31, 2014 was supplied as evidence.

The tenant, his mother and the landlord's agent met at the rental unit on August 31, 2014 to complete a move-out condition inspection report. The tenant said when they were finished he took a photograph of the report. A copy of this photograph was supplied as evidence. The report was utilized for the move-out only and all items were marked as "OK". The tenant supplied his forwarding address on the report and he and

the agent signed the report. The tenant submits he made no agreement to allow any deduction from the deposit and the agent told him everything was “great”.

On August 31, 2014 the tenant gave the landlord a letter providing his forwarding address; a copy of this letter was supplied as evidence.

On September 20, 2014 the tenant received a cheque in the sum of $280.00; for the security deposit, less deductions the tenant said he did not agree to at the end of the tenancy.

The landlord said that when the tenant completed the inspection with the agent on August 31, 2014 he did sign agreeing to a deduction in the sum of $180.00. The copy of the inspection report submitted by the landlord was identical to that submitted by the tenant with several exceptions. The landlord’s copy included a notation at the lower left corner, next to the tenant’s signature:

“broken cabinet door, kitchen blind damage amt $180 agreed by”

(Reproduced as written)

The landlord’s copy of the inspection report also provided the unit number; the tenant’s did not. The landlord said the tenant must have taken the phot of the report before the inspection was fully completed.

The landlord submitted a September 11, 2014 note signed by his agent which references the absence of a pet in the unit and included the statement:

he had some damage.”

On September 11, 2014 a “security deposit statement” was completed by the landlord’s staff member. This document was supplied as evidence and set out a total debt of $117.50 for repair of a cabinet door, closet hinge and kitchen blind. The statement also indicated that since the tenant gave notice to end the tenancy on August 25, 2014 he should be required to pay the liquidated penalty.

The landlord submitted a copy of a processed cheque dated September 19, 2014 for work completed in the sum of $169.00 to make the required repairs in the unit. The handyman signed a statement confirming he made the repairs and was paid.

The landlord said the building is 50 years old; the cabinet doors are 10 years old, the closet door 5 years and the blinds 5 years old. The tenant said that the door was at least 10 years old; the cabinets appeared to be original to the building and that the blinds were at least seven to eight years old and were tattered.

The landlord said that as the tenant failed to give proper notice ending the tenancy he should pay rent for September 2014. The tenant should have signed a mutual agreement to end the tenancy and he did not. The landlord did not agree to the tenant ending the tenancy when he did. When asked, the landlord said that his August 21, 2014 letter did not mean that the tenant could end the tenancy. The landlord did not supply any evidence of a search for new renters or provide information on when the unit was rented again. The landlord pointed out the agreement signed related to breaking the lease.

I asked the landlord about the writing contained on the September 11, 2014 security deposit statement as it appeared very similar to the notation made on the bottom left hand corner of the inspection report. The landlord said that his office staff member had not made the entry on the inspection report and that it was made by his agent when he completed the report with the tenant. The landlord also said that the tenant's copy of the inspection report was difficult to see. There was no explanation as to how the unit number appeared on the document after the inspection had been completed with the tenant.

The tenant said that they are quite concerned the notation was added to bottom of the report after the inspection and photograph were taken. The tenant took the photo when the inspection was completed and did not receive another copy of the report until he was served with the evidence for this hearing.

During the hearing it was pointed out to the landlord that a number of the terms contained in the tenancy documents contravened the legislation and, as a result they would be rendered unenforceable.

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 reasonable measures to mitigate their loss. Verification of loss would include submission of professional estimates of expected costs or other reasonable submissions that demonstrate costs were established through an independent party.

Section 23 of the Act requires a landlord complete a move-in condition inspection report. The details of the report requirements are set out in the Regulation. The landlord and tenant must sign the report and a copy must then be given to the tenant. There was no evidence before me of a move-in condition inspection report as required by the Act. The inspection report used at the end of the tenancy was absent any information of a move-in inspection having been completed.

Therefore, I find, on the balance of probabilities that a move-in condition inspection report was not completed. The Residential Tenancy Regulation, section 20, sets out the standard information that must be included in an inspection report. I have rejected the landlord's submission that clause 34 of the addendum met the standard requirements of a condition inspection set out in the Regulation as it contains none of the required information.

Section 6(3) of the Act provides:

> *3) A term of a tenancy agreement is not enforceable if*
> *(a) the term is inconsistent with this Act or the regulations,*
> *(b) the term is unconscionable, or*
> *(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

I find that clause 34 and 37 of the addendum are unenforceable in that they fail to comply with the legislation and are unconscionable. Even though the parties signed the addendum section 5 of the Act prohibits a party from contracting of the Act or Regulation. A tenant is allowed to bring forward issues that require repair and, in fact, a tenant is obligated to inform a landlord of deficiencies so that the landlord may meet his obligation to repair and maintain. Eviction must take place as set out in the legislation.

At the end of the tenancy section 38 of the Act requires the landlord to either make a claim against the deposit or return the deposit in full within 15 days of the day the tenancy ends or the day the written forwarding address is provided; whichever is latest. The landlord did send the tenant a portion of the deposit; that was received by the tenant on September 20, 2014.

I have then considered whether the landlord was entitled to retain any portion of the deposit. I have closely examined the evidence before me and find that the truth of the matter lies with the tenant's version of events. The tenant took a photograph of the inspection report so that he would have a record of the inspection. The tenant was not given a copy of that report within the required 15 days set out in the Regulation.

I have rejected the landlord's suggestion that the tenant took the photo during the inspection. Certainly the landlord's agent would not have agreed to the tenant taking a picture of an incomplete report. The report was completed; all boxes had been checked and the landlord's agent had signed the report indicating that all was "OK."

The landlord said he could not see the lower left corner of the tenant's copy of the report, but I disagree that it was indiscernible. I could see that the tenant's copy was absent any notation in that area or the report. Further, the tenant's copy did not have the unit number included and that portion of the report was clearly visible. This leads me to find, on the balance of probabilities, that the report was altered after the inspection had been completed and the photograph of the report taken by the tenant.

I have given the September 11, 2014 letter signed by the landlord's agent no weight. The landlord was free to bring the agent to the hearing so that the tenant's agent could question him on the apparent change in his assessment of the unit. The note does not list any detailed description of what the damage might have entailed. I prefer to rely upon the report issued on August 31, 2014 as the more accurate record of the state of the unit.

I have considered Section 37 of the Act, which requires a tenant to leave the rental unit reasonably clean and free from damage, outside of normal wear and tear. Residential Tenancy Branch (RTB) policy suggests that reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant. I find this to be a reasonable stance.

RTB policy (#40) suggests that in a claim for damage to the unit caused by a tenant the arbitrator may consider the useful life of a building element and the age of the item. Landlords should provide evidence showing the age of the item at the time of replacement and the cost of the replacement building item. That evidence may be in the form of work orders, invoices or other documentary evidence. If an arbitrator finds that a landlord makes repairs to a rental unit due to damage caused by the tenant, the arbitrator may consider the age of the item at the time of replacement and the useful

life of the item when calculating the tenant's responsibility for the cost or replacement. At best the landlord was able to estimate the age of items claimed and no evidence confirming the age of any fixtures was supplied.

The landlord has made a claim for a hinge, which I find is more likely an original fixture that required maintenance and I dismiss that cost. There was no evidence before me to the contrary.

In relation to the cabinet, in the absence of evidence setting out the age of that fixture I find it is likely the cabinets are original to the unit and beyond the useful life suggested by policy of 25 years.

Blinds have a suggested life span of 10 years. In the absence of evidence that the blinds were just 5 years old, taking into account the tenant's estimate of up to eight years, I find that the age of the blinds is not proven and that the claim for replacement is dismissed.

Section 20 of the Act prohibits the landlord from imposing any term that allows the landlord to automatically keep a deposit at the end of a tenancy. Therefore, I find that the "agreement for breaking the lease" is unenforceable as it required the tenant to forfeit the deposit. Further, the fixed term ended in 2012 and the tenancy converted to a month-to-month term. Any liquidated damages clause would then have ceased at the time the fixed term ended. Further, I question the validity of the agreement given the forfeiture of the deposit.

In relation to the end of the tenancy, I find pursuant to section 44(f) of the Act, that the tenancy ended effective August 31, 2014. This is the day the tenant vacated, after accepting the landlord's offer that he could do so. I have rejected the landlord's submission that his letter to the tenant dated August 21, 2014 was not meant as an offer to end the tenancy. That letter clearly set out the tenant's right to choose to end the tenancy. Therefore, I find that when the tenant notified the landlord's agent on August 26, 2014 that he would move, the tenant provided sufficient notice that he was mutually agreeing to the term set out by the landlord in his August 21, 2014 letter. Therefore, I find that the landlord's claim for loss of September 2014 rent is dismissed.

Section 38(1) of the Act determines that the landlord must, within 15 days after the later of the date the tenancy ends and the date the landlord received the tenant's forwarding address in writing, repay the deposit or make an application for dispute resolution claiming against the deposit. If the landlord does not make a claim against the deposit paid, section 38(6) of the Act determines that a landlord must pay the tenant double the amount of security deposit.

The landlord did not return all of the security deposit, as required by the Act. I have found that the tenant did not sign at the end of the tenancy allowing deductions from the deposit. Therefore, when the landlord retained a portion of the deposit and returned only $280.00 I find that he breached section 38 of the Act. The landlord did not submit a claim against the deposit until almost seven months after the tenancy ended.

Therefore, I find, pursuant to section 38(6) of the Act, that the tenant is entitled to return of double the $397.50 security deposit; less $280.00 previously returned.

As the tenant's application has merit I find the tenant is entitled to recover the $50.00 filing fee from the landlord.

The tenant claimed $785.00; the balance of $10.00 is dismissed.

The landlord's claim is dismissed.

Based on these determinations I grant the tenant a monetary Order for the balance of $565.00**.** 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.

Conclusion

The tenant is entitled to return of double the security deposit less the sum previously returned by the landlord.

The landlord's claim is dismissed.

This decision is final and binding 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: April 15, 2015

Residential Tenancy Branch