Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding REMAX KELOWNA PROPERTY MANAGEMENT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNDC, MNR, MNSD, FF

Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, for a monetary Order for unpaid rent, to keep all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

When a landlord files an Application for Dispute Resolution in which the landlord has applied for a monetary Order, the landlord has the burden of proving that each tenant was served with the Application for Dispute Resolution in accordance with section 89(1) of the *Residential Tenancy Act (Act).*

Section 89(1) of the *Act* stipulates, in part, that a landlord must serve a tenant with an Application for Dispute Resolution in one of the following ways:

(a) by leaving a copy with the person;

(c) by sending a copy by registered mail to the address at which the person resides;

(d) by sending a copy by registered mail to a forwarding address provided by the tenant; or

(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

There is no evidence that either Respondent was personally served with the Application for Dispute Resolution or Notice of Hearing and I therefore find that neither Respondent was served in accordance with section 89(1)(a) of the *Act*.

The Agent for the Landlord stated that on September 10, 2015 the Application for Dispute Resolution and the Notice of Hearing were served to the Respondents by registered mail. He stated that the documents were placed in one envelope that was addressed to both Respondents, which was mailed to the Respondents' service address that is noted on the Application for Dispute Resolution. The Landlord submitted Canada Post documentation that corroborates this statement.

The Agent for the Landlord stated that the package that was mailed on September 10, 2015 was returned to the sender by Canada Post. He stated that he subsequently contacted the male Respondent via email and that he provided the male Respondent with copies of the Application for Dispute Resolution and the Notice of Hearing via email.

The male Respondent stated that he received the Application for Dispute Resolution and the Notice of Hearing, although he does not recall how he received the documents. He stated that he did not show the documents to the female Respondent because she was not a party to the tenancy agreement.

With the consent of both parties I searched the Canada Post tracking number for the package that was mailed on September 10, 2015. The Canada Post website indicates that the package was returned to the sender because "recipient not located at address provided".

On the basis of the information on the Canada Post website I find that the package mailed on September 10, 2015 was not delivered to the Respondents by Canada Post.

Even if the package had been delivered to the service address for the Respondents and had simply been unclaimed, I would have been unable to determine which of the Respondents had been served with the package in accordance with section 89(1)(d) of the *Act.* To properly serve both Respondents via registered mail the Landlord was required to send one package to each Respondent in an envelope that was addressed to that party. In circumstances such as these, where the Landlord only sent one package that was addressed to both Respondents, I would have been unable to determine which Respondent had been served and which had not been served.

Given these circumstances I am unable to conclude that either Respondent was served with the Application for Dispute Resolution in accordance with sections 89(1)(c) or 89(1)(d) of the *Act*.

There is no evidence that the director authorized the Landlord to serve the Application for Dispute Resolution to the either Respondent in an alternate manner, therefore I find that the documents were not served in accordance with section 89(1)(e) of the *Act*.

On the basis of the male Respondent's testimony that he received the Application for Dispute Resolution and Notice of Hearing, albeit he cannot recall how, I find that these documents have been sufficiently served to the male Respondent in accordance with section 71(2)(b) of the *Act.*

There is no evidence that would cause me to conclude that the female Respondent received the Application for Dispute Resolution and I therefore cannot conclude that she has been sufficiently served pursuant to sections 71(2) of the *Act*.

The Agent for the Landlord was advised that the female Respondent has not been served with the Application for Dispute Resolution and the Notice of Hearing for the purposes of proceeding with the Landlord's application for a monetary Order. As she was not present at the hearing, the Agent for the Landlord was provided with the opportunity to either withdraw the Application for Dispute Resolution or to amend the Application for Dispute Resolution by removing the female as a named Respondent. The Agent for the Landlord opted to remove the female Respondent from the Application for Dispute Resolution and the Application for Dispute Resolution has been amended accordingly.

On February 17, 2016 the Landlord submitted 28 pages of evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that this evidence was sent to both Respondents, via registered mail, on February 17, 2016. The male Respondent acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On February 23, 2016 the male Respondent submitted 29 pages of evidence and a USB device to the Residential Tenancy Branch. The male Respondent stated that this evidence was delivered to the Agent for the Landlord's business office on February 23, 2016. The Agent for the Landlord acknowledged receiving the 29 pages of evidence and it was accepted as evidence for these proceedings.

The Agent for the Landlord stated that the Landlord did not receive the USB device that was allegedly delivered to his business office on February 23, 2016.

The male Respondent was advised that I would consider adjourning the hearing if he wished the opportunity to re-serve the USB device to the Landlord. The decision to allow the USB device to be re-served was based on the fact there is no evidence to corroborate the Tenant's testimony that the USB device was served or to refute the Agent for the Landlord's testimony that it was not received.

At the hearing on March 08, 2016 the male Respondent indicated that he would like the opportunity to re-serve the USB device, at which point the Agent for the Landlord stated that he does not want an adjournment; that he does not need to view the content of the USB device; and that he is willing to have the USB device accepted as evidence without having the opportunity to view it. He was advised that the hearing would continue but that he would be given the opportunity to reconsider this decision if, at a later point in the hearing, it appeared that I would be considering the USB device for the purposes of adjudicating this matter.

During the hearing on March 10, 2016 the Agent for the Landlord was advised that I believe the information on the USB device is relevant to issues in dispute at these proceedings. He was asked if he would like to reconsider the option of an adjournment for the purposes of having the USB device served to the Landlord. The Agent for the Landlord strongly opposed the acceptance of this evidence and repeatedly expressed his opinion that it should not be accepted, even after he was advised of my decision to include the evidence.

After being advised, on March 10, 2016, that I was going to accept the USB device as evidence the Agent for the Landlord was asked on at least three occasions if he would like an adjournment for the purposes of having the USB device re-served to the Landlord. The Agent for the Landlord refused to answer that question in spite of my repeated directions to respond. The Agent for the Landlord was advised that in the absence of a response I would adjourn the hearing to facilitate re-service of the USB device, at which point he stated that he did not want an adjournment and that he wished to proceed with the hearing with the understanding that the USB device had been accepted as evidence.

With the exception of the testimony of the Agent for the Landlord, I have no reason to discount the Tenant's testimony that the USB device was served to the Landlord. As I have found, on more than one occasion during these proceedings, that the testimony of the Tenant was more credible than the testimony of the Agent for the Landlord, I find that the USB device was properly served to the Landlord and that it should be accepted as evidence for these proceedings.

Although the Agent for the Landlord contends that he was not served with the USB device and that he is not in possession of that device, I find that he has had ample opportunity to be provided with a copy of the evidence and that he has declined that opportunity at his own peril.

Prior to the start of the hearing on March 08, 2016 the parties present at the hearings were advised that I would be asking a series of questions that I believed were relevant to the issues in dispute at these proceedings; that each party would be given an opportunity to respond to those questions; and that each party would be given the opportunity to make submissions that were relevant to the issues in dispute at these proceedings.

Prior to the start of the hearing on March 08, 2016 the parties were advised that they have a legal obligation to speak the truth in the proceedings. The parties were reminded of this obligation at the start of the hearing on March 10, 2016.

At both hearings the parties were provided with the opportunity to make relevant submissions, to call witnesses, and to ask relevant questions.

Preliminary Matter #1

There was insufficient time to conclude the proceedings on March 08, 2016 in the one hour that was allotted for the hearing. After determining that a considerable amount of additional time would be required to conclude the proceedings and that the hearing could not be concluded prior to the end of the working day, I determined that the hearing should be adjourned.

Both parties indicated they would be available to continue with the hearing on March 10, 2016 at 2:30 p.m. The parties were directed to join the teleconference at that time/date using the same phone numbers and codes used to access the teleconference on March 08, 2016.

I decided to reconvene this hearing on March 10, 2016, rather than adjourning the matter for approximately six weeks, in an attempt to maintain the momentum of the proceedings and to avoid the need to revisit evidence/testimony that may be forgotten by the parties due to the passage of time.

My decision to reconvene the hearing on March 10, 2016 was influenced, to some degree, by the apparent desire of both parties to conclude the proceedings in a timely manner.

The hearing was reconvened on March 10, 2016; the reconvened hearing lasted approximately 90 minutes; and the proceedings were concluded on that date.

Preliminary Matter #2

During the hearing on March 08, 2016 the Agent for the Landlord asked if the hearing was being recorded. The parties were advised that the hearing was not being recorded, at which point the Agent for the Landlord stated that he was recording the hearing.

The Agent for the Landlord was advised that he was not permitted to record the proceedings. Rule 9.1 of the Residential Tenancy Branch Rules of Procedure stipulate that “private audio, photographic, video or digital recording of the dispute resolution proceeding is not permitted”.

Rule 9.2 of the Residential Tenancy Branch Rules of Procedure stipulates that a party may make a written request for an official recording by a court reporter in advance of the dispute resolution proceeding. As there has been no written request for a recording, the proceedings were not officially recorded.

Preliminary Matter #3

On at least two occasions during the first hearing and three occasions during the second hearing the Agent for the Landlord argued that I should not allow testimony regarding mice in the rental unit. The Agent for the Landlord was advised on each occasion that I considered the matter to be relevant and the Tenant was permitted to make submissions regarding the presence of mice in the rental unit.

Rule 3.6 of the Residential Tenancy Branch Rules of Procedure stipulate that evidence must be relevant to the claim being made in the Application for Dispute Resolution. This rule further stipulates that I have the discretion to decide whether evidence is or is not relevant to the issues identified on the Application.

The Agent for the Landlord's objection to a discussion of mice was based, in part, on the fact the Tenant had not filed an Application for Dispute Resolution seeking compensation for mice in the rental unit and, in part, on his opinion that the issue was not relevant to the Landlord's claim for lost revenue.

My decision that the Tenant's submission regarding mice was relevant was due to the need to determine if the Tenant had the right to end this fixed term tenancy in accordance with section 45(3) of the *Act* and/or whether this tenancy agreement had been frustrated as a result of the mice. Both of these issues are addressed in the analysis portion of this decision.

Preliminary Matter #4

I found the Agent for the Landlord's conduct during these proceedings to be disruptive and inappropriate.

Rule 8.7 of the Residential Tenancy Branch Rules of Procedure stipulates that one party cannot disrupt the other party's presentation with questions or comments. I note that on several occasions the Agent for the Landlord disrupted these proceedings either by interrupting while the Tenant and/or the Arbitrator were speaking or by making comments/noises in the background while the Tenant was speaking.

I found that the Agent for the Landlord disrupted and unnecessarily prolonged the hearings by repeatedly raising the issue of the relevance of evidence relating to mice, after he was clearly advised that I considered the issue to be relevant and would allow the evidence. This disruption is outlined more fully in the section titled "Preliminary Matter #3".

I found that the Agent for the Landlord disrupted and unnecessarily prolonged the hearings by repeatedly refusing to respond to my question about whether or not he wanted me to adjourn the hearing for the purposes of having evidence re-served to him. This disruption is outlined more fully in the introduction portion of this decision.

While the Agent for the Landlord was making his final submission he interrupted his submission to aggressively and repeatedly demand that a new Arbitrator be assigned to conduct these proceedings; he expressed in various ways that he believed the Arbitrator was not conducting the hearing appropriately; he advised the Arbitrator that he had lodged a complaint; and he advised the Arbitrator that this would be the final hearing the Arbitrator conducted. After being advised on approximately five occasions that his request for a new Arbitrator was denied and that he should continue with his submission, he continued reading his final submission. I found this behaviour to disruptive, abusive, and wholly inappropriate.

Rule 8.7 of the Residential Tenancy Branch Rules of Procedure authorizes an Arbitrator to **"**give directions to a party, to a party's agent or representative, a witness, or any other person in attendance at a dispute resolution proceeding who presents rude, antagonistic or inappropriate behaviour". The rule further states that a person who does not comply with the Arbitrator's directions may be excluded from the dispute resolution proceeding and that the Arbitrator may proceed with the dispute resolution proceeding in the absence of the excluded party.

On the rare occasions when a party demonstrates the type of conduct displayed by the Agent for the Landlord in this hearing I have placed the party in "mute mode", which is a teleconferencing tool that allows me to silence one party while still permitting that party to hear the teleconference. At the hearing on March 10, 2016 I was unable to place the Agent for the Landlord in "mute mode" due to technical difficulties with the teleconferencing system.

I strongly considered discontinuing the teleconference on March 10, 2016 due to the highly inappropriate conduct of the Agent for the Landlord and his repeated disregard to follow my directions regarding his conduct. I opted to continue with the hearing, however, because the hearing was almost over and I did not want to subject the Respondent to further inconvenience and delay.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit, to compensation for lost revenue/unpaid rent, and to keep all or part of the security deposit?

Background and Evidence

The Agent for the Landlord and the male Respondent (hereinafter referred to as the Tenant) agree that:

- the tenancy began on June 01, 2015;
- the Landlord and the Tenant entered into a written tenancy agreement for a fixed term, the fixed term of which was to end on May 31, 2016;
- the female Respondent is named on this tenancy agreement but she did not sign it;
- the tenancy agreement requires the Tenant to pay monthly rent of $2,500.00 by the first day of each month;
- the Tenant paid a security deposit of $1,250.00; and
- a condition inspection report was completed at the beginning of the tenancy.

The Tenant stated that he vacated the rental unit on August 30, 2015. He stated that on August 30, 2015 he left a forwarding address on a piece of paper inside the rental unit and that he

delivered the keys to the rental unit to the Agent for the Landlord's business office on September 01, 2015.

The Agent for the Landlord stated that the keys were received on September 01, 2015 and that he went to the rental unit on September 02, 2015, at which time he determined the rental unit had been abandoned. The Agent for the Landlord acknowledged locating the forwarding address inside the rental unit on September 02, 2015.

The Agent for the Landlord stated that a condition inspection report was completed on September 02, 2015, in the absence of the Tenant, after the rental unit was determined to be abandoned. He stated that he attempted to contact the Tenant, via text and phone messages, in an effort to arrange for a final inspection but the Tenant did not respond to those messages. The Tenant stated that he did not receive any messages regarding a final inspection of the rental unit.

The Tenant stated that he determined it was necessary to vacate the rental unit because of the presence of mice.

The Tenant stated that:

- on July 18, 2015 he informed the Agent for the Landlord of the presence of mice in the rental unit;
- he asked the Agent for the Landlord to have a pest control company inspect the rental unit on several occasions;
- the Agent for the Landlord stated that he would not be sending pest control to the unit;
- the Agent for the Landlord told the Tenant that he had been informed of a problem with mice prior to entering into the tenancy agreement and that they had agreed to control the problem with mouse traps;
- prior to the start of the tenancy he had been told that he should use mouse traps but he was not specifically informed that mice were present in the rental unit;
- he believed the mouse traps would be needed to control the presence of mice outside of the rental unit;
- the Tenant eventually contacted a pest control company, who inspected the rental unit; and
- other than the inspection that had been arranged by the Tenant, the unit was not inspected or treated by a pest control company while he was living in the rental unit.

The Agent for the Landlord stated that:

- prior to the Tenant entering into the tenancy agreement the Tenant was told there may be mice in the rental unit and that they could be controlled with mouse traps;
- in July of 2015 the Tenant advised the Landlord that there were mice inside the rental unit;
- initially the Tenant was told that the Landlord was not willing to hire a pest control company and that the Tenant should attempt to control the mice with traps;
- sometime in late July or early August of 2015 the Agent for the Landlord made arrangements to have a pest control technician inspect the rental unit;
- after the rental unit was inspected in late July or early August the Tenant was advised that the pest control technician recommended that traps be used to control the mice; and

- the technician who wrote the estimate submitted in evidence by the Tenant is the same technician who inspected the rental unit sometime in late July or early August at the request of the Agent for the Landlord.

The Tenant submitted an estimate from a pest control company, dated August 20, 2015, in which the author of the estimate declared that he "found heavy mouse dropping and the smell of mouse urine in the home"; that the "downstairs area of the home smell of urine was bad"; and "the issue with the has been here for some time now, do to the amount of mice dropping found and the heavy smell of urine". (Reproduced as written)

At the request of the Landlord the author of the pest control estimate was called as a witness. The Witness for the Landlord stated that:

- he is a pest control technician;
- sometime during the summer of 2015 he went to the rental unit at the request of the Tenant to inspect the rental unit for mice;
- he lives in the general vicinity of the rental unit and is aware that mice are a common problem in the area;
- that he has had mice in his own home;
- sometime after completing the inspection he wrote the estimate dated August 20, 2015, in which he recorded his observations;
- sometime after completing the report he treated the rental unit at the request of the Landlord;
- the invoice for the treatment was dated September 30, 2015 but he is not certain when the unit was actually treated;
- he believes the rental unit was vacant when it was treated;
- he is certain that he did not attend the rental unit prior to being contacted by the Tenant; and
- he has worked for the Agent for the Landlord's company in the past and has found that the company responds appropriately to reports of pest infestations.

In response to a question asked of him by the Agent for the Landlord, the Witness for the Landlord stated that it is <u>not</u> possible he attended the rental unit prior to being contacted by the Tenant.

In response to repeated questions asked of him by the Agent for the Landlord the Witness for the Landlord stated that the information on his estimate is an <u>accurate</u> reflection of his observations during the inspection and was not influenced by anything the Tenant had said to him.

The Tenant stated that when he was speaking with the Agent for the Landlord over the telephone he told him he would move out if the problem with the mice was not rectified and that he personally told the Landlord that he would move out if the problem was not rectified. He stated that he does not know if he told the Agent for the Landlord or the Landlord, via email, that he would move out if the problem was not rectified.

The Agent for the Landlord stated that the Tenant never informed him, either verbally or in writing, that he would vacate the rental unit if the problem with mice was not rectified.

The Tenant stated that “he thinks” he provided the Landlord with notice of his intent to vacate the rental unit, via email, sometime during the last week of July of 2015. The Agent for the Landlord stated that the Tenant never provided the Landlord with verbal or written notice of his intent to vacate the rental unit.

The Agent for the Landlord contends that the Tenant is simply using the issue with mice as a reason to prematurely end the fixed term tenancy. The Tenant stated that he did not actually want to vacate the rental unit but he did not feel he could remain in the rental unit after the Landlord refused to have the unit treated by a pest control company.

The Agent for the Landlord stated that the Landlord advertised the rental unit on several websites shortly after the Landlord determined the rental unit had been vacated. The Tenant does not dispute that the Landlord advertised the rental unit in a reasonable manner.

The Agent for the Landlord stated that the rental unit was rented to a third party on January 20, 2016 and that the Landlord received rent of $780.65 for January of 2016. The Agent for the Landlord stated that the Landlord was only able to re-rent the unit after the rent was reduced to $2,200.00.

The Landlord is seeking compensation of $2,500.00 in lost revenue for September, October, November, and December of 2015, when the rental unit was vacant.

The Landlord is seeking compensation of $1,719.35 in lost revenue for the month of January of 2016, which is the difference between the $780.65 in rent collected from the new tenant for January and the amount the Tenant would have paid if the fixed term tenancy had continued.

The Landlord is seeking compensation of $300.00 in lost revenue for the February, March, April, and May of 2016, which is the difference between the rent due from the new tenant and the amount the Tenant would have paid if the fixed term tenancy had continued.

The Landlord is seeking compensation for liquidated damages, in the amount of $625.00. The Landlord submitted a copy of the tenancy agreement signed by the Tenant. There is a liquidated damages clause in this agreement that stipulates the Tenant will pay $625.00 to the Landlord if the “tenant provides the landlord with notice, whether written, oral, or by conduct of an intention to breach this Agreement and end the tenancy by vacating and does vacate before the end of the fixed term”.

The Landlord initially claimed compensation of $157.50 for cleaning the carpet, which was subsequently reduced to a claim for $141.75. The Landlord submitted an invoice to show that the Landlord was charged $141.75 to clean the carpets in the rental unit.

The Agent for the Landlord stated that the carpets were clean and odour free at the start of the tenancy. The Tenant stated that the carpets were old at the start of the tenancy but he does not recall if they had an odour at the start of the tenancy.

The Agent for the Landlord and the Tenant agree that the carpets had an odour at the end of the tenancy.

The Tenant stated that he did not notice the carpets smelled of urine until after the tenancy started. He stated that the smell of the urine was coming from the carpets and various other areas in the home.

The Agent for Landlord stated that the carpets also had faint staining at the end of the tenancy. He stated the carpets were cleaned to eliminate the odour and to clean the faint staining.

The Tenant stated that the carpets were professionally cleaned at the end of the tenancy and did not require cleaning for the purposes of removing stains from the carpet. He stated that he has a copy of the receipt for cleaning the carpet but he forgot to submit the receipt in his evidence package.

In the condition inspection report submitted by the Landlord there are notes that indicate the carpet in the “rec room” and two bedrooms needed additional cleaning.

In the USB device submitted by the Tenant the Tenant provided a video recording of the rental unit that shows, in part, the condition of the carpet in the “rec room” and two bedrooms at the end of the tenancy.

The Landlord is seeking compensation, in the amount of $200.55, for rekeying and repairing locks to the rental unit. The Landlord submitted an invoice to show that the Landlord was charged $54.00 plus tax for repairing the patio door lock and $137.00 plus tax for re-keying locks and duplicating keys.

The Agent for the Landlord stated that the Tenant was provided with eight keys to the rental unit at the start of the tenancy and that the Tenant only returned four keys at the end of the tenancy. He stated that given the “negative attitude” displayed by the Tenant at the end of the tenancy and upon the advice of the police, the Landlord determined that the rental unit should be re-keyed.

The Tenant stated that he was provided with eight keys at the start of the tenancy and that he returned eight keys at the end of the tenancy.

The Agent for the Landlord stated that sliding patio door on the lower level was equipped with a secondary lock on the top corner of the door. He stated that the secondary lock was in good condition at the start of the tenancy and that it was broken at the end of the tenancy. He stated that several pieces of the secondary lock were found on the floor beside the patio door.

The Tenant stated that the patio door lock worked properly at the end of the tenancy and that the secondary lock was not left, in pieces, on the floor beside the patio door.

On the condition inspection report submitted in evidence by the Landlord there is an entry that reads “patio door lock broken downstairs”.

The Landlord initially claimed compensation of $450.00 for “lawn maintenance”, which was subsequently reduced to a claim for $425.25 for “clean up yard”. The Landlord submitted an invoice, dated September 03, 2015, to show that the Landlord was charged $425.25 for “Flower Bed Clean-up, Mowing, Weeding, Trimming, and Debris Removal”.

The Agent for the Landlord stated that one of the terms of the tenancy agreement required the Tenant to maintain the lawn area adjacent to the house, which included mowing the lawn in that area, and to weed the garden.

The Tenant stated that there was a term in the tenancy agreement that required him to maintain the lawn area adjacent to the house, which he interpreted to mean he must mow the lawn in certain areas. He stated that he did not have his copy of the tenancy agreement with him at the time of the hearing. Upon being advised that the agreement in my possession indicated he would also be responsible for weeding, he agreed that he was also responsible for weeding the garden.

The Agent for the Landlord stated that when he viewed the rental property on September 02, 2015 he concluded that the lawn needed mowing and that the flower beds needed weeding. He stated that he arranged to have a gardening company mow the lawn and weed the garden on September 03, 2015.

The Tenant stated that he mowed the lawn on the day before the rental unit was vacated and that when he vacated the rental unit the gardens were in good condition.

On the condition inspection report submitted in evidence by the Landlord there is one entry that reads “garden full of weeds” and one entry that indicates the parking area has “weeds growing”. The Landlord claimed compensation of $250.00 for “cost of dispute for our client”. The Agent for the Landlord stated that this claim relates to fees associated to the Agent for the Landlord’s company serving documents in relation to these proceedings and to fees associated to the Agent for the Landlord participating in these hearings.

The Landlord initially claimed compensation of $4,500.00 for “management fees”, which was subsequently reduced to a claim for $1,312.50. The Agent for the Landlord withdrew this claim at the hearing on March 10, 2016 and the merits of that claim were not, therefore, discussed at the hearing.

The USB device submitted in evidence by the Tenant provides a video recording of various areas in the interior and exterior of the rental unit. In the recording the Tenant declares that the images were recorded on September 01, 2015, which is corroborated by a photograph of a newspaper dated September 01, 2015.

The Agent for the Landlord asked to call the Residential Tenancy Branch Policy Director, whom he identified by name, as a witness. He was given time to see if she would be willing/available to participate in the hearing and he subsequently advised that she was not available to participate in the hearing.

At the conclusion of the hearing each party was given the opportunity to raise issues that had not been discussed up to that point in the hearing. The Tenant declined the opportunity to make additional submissions.

The Agent for the Landlord read a lengthy submission, which was largely a repetition of testimony that had already been presented. Part way through the Agent for the Landlord’s final submission the Tenant objected to the repetitive nature of the submission.

The Tenant was advised that although the Agent for the Landlord's submission was highly repetitive he was being provided with the opportunity to read the entire submission to ensure the Agent for the Landlord was provided with a full opportunity to be heard and to ensure there were no grounds to overturn this decision in the event these proceedings are subject to judicial review. After the Agent for the Landlord repeatedly and strongly objecting to my comments, he continued reading his submission.

I determined that it would be more efficient to simply allow a full reading of the submission than to interrupt the Agent for the Landlord whenever he raised issues that had been previously raised. After hearing the entire submission I am satisfied that the submission contained no new substantive issues.

Analysis

On the basis of the undisputed evidence I find that the Landlord and the Tenant entered into a fixed term tenancy agreement, the fixed term of which was to end on May 31, 2016, and that the Tenant agreed to pay monthly rent of $2,500.00.

Section 44(1)(a) of the *Act* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act.* There is no evidence that the Landlord gave the Tenant notice to end this tenancy.

Section 45(2) of the *Act* authorizes a tenant to end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice and is not earlier than the date specified in the tenancy agreement as the end of the tenancy. Even if the Tenant advised the Landlord, via email, that he would be ending this tenancy prior to May 31, 2016, I could not conclude that the Tenant served proper notice to end the tenancy as the Tenant did not have the right to end the tenancy prior to the end of the fixed term of the tenancy.

As neither party gave proper written notice to end this tenancy, I find that the tenancy did not end pursuant to section 44(1)(a) of the *Act.*

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. I find that the tenancy agreement provides that the Tenant will vacate the rental unit at the end of the fixed term, which is May 31, 2016. As the Tenant vacated the rental unit prior to May 31, 2016, I find that the tenancy did not end pursuant to section 44(1)(b) of the *Act.*

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. As there is no evidence that the parties agreed in writing to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(c) of the *Act.*

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. On the basis of the testimony of the Tenant and in the absence of evidence to the contrary, I find that this tenancy ended when the Tenant vacated the rental unit on August 30, 2015.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. A tenancy agreement is frustrated where, without the fault of either party, the agreement becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the agreement as originally intended is now impossible. Where an agreement is frustrated, the parties to the agreement are discharged or relieved from fulfilling their obligations under the agreement.

The test for determining that a tenancy agreement has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the agreement. A tenancy agreement cannot be considered frustrated in circumstances where a landlord has the ability to rectify a problem with a rental unit, regardless of the cost or inconvenience of that remedy.

In my view the presence of mice in the rental unit is not sufficient to determine that this tenancy agreement is frustrated, even if it could be established that the presence of mice represents a health hazard, as it is highly likely the Landlord could have remedied that issue, albeit at some expense.

I find that this tenancy agreement was not frustrated and that the tenancy did not end pursuant to section 44(1)(e) of the *Act.*

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act.*

I find that the Tenant did not comply with section 45(2) of the *Act* when he vacated the rental unit prior to the end of the fixed term of the tenancy agreement.

Section 67 of the *Act* authorizes me to order a tenant to pay compensation to a landlord if the landlord suffers a loss as a result of the tenant failing to comply with the *Act*. On the basis of the evidence of the Landlord and in the absence of evidence to the contrary, I find that in spite of reasonable efforts to find a new tenant, the Landlord experienced several months of lost revenue as a result of the Tenant breaching section 45(2) of the *Act.*

I therefore find that the Tenant must compensate the Landlord for the lost revenue experienced by the Landlord in the following amounts:

- $2,500.00 from September of 2015;
- $2,500.00 from October of 2015;
- $2,500.00 from November of 2015;
- $2,500.00 from December of 2015;
- $1,719.35 from January of 2016, which reflects the difference in the rent collected from the new tenant and the rent that would have been collected if this tenancy had continued;
- $300.00 from February of 2016, which reflects the difference in the rent collected from the new tenant and the rent that would have been collected if this tenancy had continued;
- $300.00 from March of 2016, which reflects the difference in the rent collected from the new tenant and the rent that would have been collected if this tenancy had continued;

- $300.00 from April of 2016, which reflects the difference in the rent to be collected from the new tenant and the rent that would have been collected if this tenancy had continued; and
- $300.00 from May of 2016, which reflects the difference in the rent to be collected from the new tenant and the rent that would have been collected if this tenancy had continued.

In adjudicating the claim for lost revenue I considered section 45(3) of the *Act* which stipulates, in part, that if a landlord has failed to comply with a material term of the tenancy agreement and the landlord 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 Branch Policy Guideline #8, with which I concur, defines a material term as a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

Residential Tenancy Branch Policy Guideline #8 suggests that when determining the materiality of a term an Arbitrator should focus on the "importance of the term in the overall scheme of the tenancy agreement" and that the person relying on the term must present "evidence and argument supporting the proposition that the term was a material term".

Residential Tenancy Branch Policy Guideline #8 further suggests that whether or not a term is material is typically determined by the facts and circumstances surrounding the creation of the tenancy agreement in question and that the true intentions of the parties must be determined.

There is nothing in the written tenancy agreement that specifies there is a mouse problem in the rental unit. On the basis of the testimony of both parties, however, I am satisfied that the Agent for the Landlord told the Tenant there may be a need to control mice with traps.

On the basis of the testimony of the Witness for the Landlord, I find that the presence of mice in homes in the vicinity of this rental unit is not uncommon. I therefore find that the Agent for the Landlord acted reasonably and responsibly when he informed the Tenant, prior to the start of the tenancy agreement, that there may be a need to control mice with traps. Given that the Tenant had been warned of the potential for mice and the rental unit is located in an area where mice are not uncommon, I cannot conclude that the presence of mice in the rental unit is a breach of a material term of the tenancy.

Regardless of whether or not the presence of mice in the rental unit is a breach of a material term of the tenancy, the Landlord remained obligated to comply with section 32(1) of the *Act*, which requires a landlord to provide and maintain a rental unit in a state of repair that complies with health, safety, and housing standards. I specifically note that I have not made any finding on whether or not the Landlord has complied with section 32(1) of the *Act*, as that is not relevant to the issues in dispute at these proceedings.

I do note, solely for the purposes of assessing credibility, that I favoured the testimony of the Tenant, who stated that the Landlord never engage the services of a pest control company during his tenancy, over the testimony of the Agent for the Landlord, who stated that he arranged to have the unit inspected by the Witness for the Landlord's pest control company in late July or early August of 2015. In reaching this conclusion I was heavily influenced by the evidence of the Witness for the Landlord, who stated that he did not inspect the rental unit until he was contacted by the Tenant and he believes he did not treat the unit until after the unit had been vacated.

Residential Tenancy Branch Policy Guideline #8 suggests that to end a tenancy for a breach of a material term the party alleging the breach bears the burden of proving that they informed the other party, in writing:

- that there is a problem;
- that they believe the problem 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 if the problem is not fixed by the deadline, the party will end the tenancy.

Even if I had concluded that the Landlord had failed to comply with a material term of the tenancy agreement by not responding to the report of mice in a more proactive manner, I would find that the Tenant has submitted insufficient evidence to establish that he had grounds to end this tenancy pursuant to section 45(3) of the *Act.*

In reaching this conclusion I was heavily influenced by the fact that the email the Tenant allegedly sent to the Landlord regarding the mice was not submitted in evidence. In the absence of that email I am unable to conclude that the Tenant clearly informed the Landlord, in writing, that he believed the presence of mice was a breach of a material term of the tenancy; that he would end the tenancy if the problem was not rectified; and that he provided the Landlord with a reasonable deadline for rectifying the problem.

On the basis of the tenancy agreement submitted in evidence, I find that there is a liquidated damages clause in the agreement that was signed by the Tenant which requires the Tenant to pay $625.00 to the Landlord if he vacates the rental unit prior to the end of the fixed term tenancy. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement.

The amount of liquidated damages agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into. I find that $625.00 is a reasonable estimate given the expense of advertising a rental unit; the time a landlord must spend showing the rental unit and screening potential tenants; and the wear and tear that moving causes to residential property. When the amount of liquidated damages agreed upon is reasonable, a tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally liquidated damage clauses will only be struck down when they are oppressive to the party having to pay the stipulated sum, which I do not find to be the case in these circumstances. On this basis, I find that the Landlord is entitled to collect liquidated damages of $625.00.

When making a claim for damages under a tenancy agreement or the *Act,* the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

Section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged, except for reasonable wear and tear.

On the basis of the undisputed evidence I find that the carpets in the rental unit had an odour at the end of the tenancy and, as such, required additional cleaning. I find, on the balance of probabilities, that the odour in the carpet was the result of mice in the rental unit. In reaching this conclusion I was heavily influenced by the estimate from the pest control company

submitted by the Tenant, in which the author of the estimate declared that there was a “smell of mouse urine in the home”; that the “downstairs area of the home smell of urine was bad”; and “the issue with the has been here for some time now, do to the amount of mice dropping found and the heavy smell of urine”. (Reproduced as written)

Given that the odour in the carpets was the result of mice in the rental unit, which was beyond the direct control of the Tenant, I find that he was not obligated to clean the carpets in order to eliminate the smell of mice urine.

I favour the testimony of the Tenant, who stated that the carpets were not dirty or stained at the end of the tenancy, over the testimony of the Agent for the Landlord, who stated that the carpets had faint staining at the end of the tenancy. This conclusion was heavily influenced by the digital evidence submitted by the Tenant. In my view the video recording of the rental unit shows the carpet in the “rec room” and two bedrooms were left in reasonably clean condition at the end of the tenancy.

In adjudicating the claim for carpet cleaning I have placed limited weight on the condition inspection report submitted by the Landlord which notes that the carpet in the “rec room” and two bedrooms needs additional cleaning. This reference may simply reflect the need to clean the carpets as a result of an odour; however the video recording refutes the submission that they also needed to be cleaned as a result of faint staining.

As the *Act* only requires tenants to leave a rental unit in reasonably clean condition and I have concluded the carpets were left in reasonably clean condition, with the exception of the odour for which the Tenant is not responsible, I dismiss the Landlord’s claim for cleaning the carpet.

Section 37(2)(b) of the *Act* stipulates that at the end of the tenancy a tenant must return all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property. On the basis of the undisputed evidence, I find that the Tenant was provided with eight keys at the start of the tenancy.

I find that the Landlord has submitted insufficient evidence to establish that the Tenant did not return all of the keys to the rental unit at the end of the tenancy. In reaching this conclusion I was heavily influenced by the absence of evidence that corroborates the Agent for the Landlord’s testimony that only four keys were returned at the end of the tenancy or that refutes the Tenant’s testimony that eight keys were returned at the end of the tenancy.

Typically a condition inspection report indicates how many keys were provided to the Tenant at the start of the tenancy and how many keys were returned at the end of the tenancy. The Landlord submitted one page of the condition inspection report that was completed in regards to this tenancy; however it does not appear to be the complete report. The portion of the report submitted does not indicate how many keys were provided/returned. In the absence of this written information, I find that the Landlord submitted insufficient evidence to establish that not all the keys were returned and I dismiss the Landlord’s claim for rekeying the locks to the rental unit.

I find that the Landlord has submitted insufficient evidence to establish that the secondary lock on the patio door was damaged at the end of the tenancy. I favour the evidence of the Tenant, who stated that the patio door lock was not damaged at the end of the tenancy and that the secondary lock was not left in pieces on the floor beside the door, over the testimony of the

Agent for the Landlord who stated that the lock was damaged and the pieces of the secondary lock were found on the floor beside the patio door.

I favoured the testimony of the Tenant over the testimony of the Agent for the Landlord regarding the secondary lock, in large part, because of the digital evidence submitted by the Tenant. The video recording of the rental unit, recorded on September 01, 2015, clearly shows that there is no broken lock on the floor beside the patio door on the lower level of the rental unit.

I find the video evidence to be more compelling than the entry on the condition inspection report that indicates the lock was broken. I find the video evidence to be more compelling because it allows me to make an independent assessment of the condition of the rental unit whereas the condition inspection report is simply a record of the Agent for the Landlord's observations that were recorded in the absence of the Tenant.

As the Landlord has submitted insufficient evidence to establish that the patio door lock was damaged, I dismiss the Landlord's claim for repairing this lock.

On the basis of the testimony of both parties and the tenancy agreement submitted in evidence, I find that the Tenant was required to maintain the lawn area adjacent to the house, which included mowing that lawn area, and to maintain the gardens, which included weeding.

I find that the Landlord has submitted insufficient evidence to establish that the lawn needed mowing or that the garden needed weeding at the end of the tenancy. I favour the evidence of the Tenant, who stated that the lawn did not need mowing and that the garden did not need weeding, over the testimony of the Agent for the Landlord who stated that the lawn needed mowing and the garden needed weeding.

I favoured the testimony of the Tenant over the testimony of the Agent for the Landlord regarding the yard maintenance, in large part, because of the digital evidence submitted by the Tenant. In my view, the video recording of the exterior of the home that was recorded on September 01, 2015 demonstrates that the lawn has been recently mowed and the gardens are in reasonably good condition.

I find the video evidence to be more compelling than the entry on the condition inspection report that indicates weeding is required. I find the video evidence to be more compelling because it allows me to make an independent assessment of the condition of the yard. While the lawn and garden may not meet the standards of the Landlord, I find that they were left in reasonable condition and, for the purposes of this tenancy agreement, the Tenant complied with his obligation to maintain the yard during this tenancy.

As the Landlord has submitted insufficient evidence to establish that the yard required maintenance at the end of the tenancy, I dismiss the Landlord's claim for yard maintenance.

The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of *Act*. With the exception of compensation for filing the Application for Dispute Resolution, the *Act* does not allow an Applicant to claim compensation for costs associated with participating in the dispute resolution process. I therefore dismiss the Landlord's claim to recover the costs of being represented by a third party at these proceedings.

I find that the Landlord's Application for Dispute Resolution has considerable merit and that the Landlord is entitled to recover the fee for filing this Application for Dispute Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of $13,644.35, which is comprised of $12,919.35 in lost revenue, liquidated damages of $625.00, and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to retain the Tenant's security deposit of $1,250.00 in partial satisfaction of this monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the amount $12,394.35. In the event the Tenant does not voluntarily 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.

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: March 15, 2016

Residential Tenancy Branch