



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MASHLEY REAL PROPERTY PARTNERSHIP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing was convened by way of conference call in response to the landlord's application for an Order permitting the landlord to keep all or part of the tenant's security deposit; for a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act (Act)*, regulations or tenancy agreement; and to recover the filing fee from the tenant for the cost of this application.

The tenant and landlord attended the conference call hearing, and were given the opportunity to be heard, to present evidence and to make submissions. The landlord and tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. The parties confirmed receipt of evidence. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the landlord permitted to keep all or part of the security deposit?
- Is the landlord entitled to a Monetary Order for money owed or compensation for damage or loss?

Background and Evidence

The parties agreed that this tenancy started on October 15, 2015 for a fixed term tenancy that was due to expire on September 30, 2016. Rent for this unit was \$1,045.00 per month due on the 1st of each month. The tenant paid a security deposit of \$500.00 on October 03, 2015.

The landlord testified that this was a fixed term tenancy and the tenant moved out and broke the lease on March 30, 2016. The tenancy agreement provided that the landlord may charge the tenant a liquidated damages fee of \$300.00 if the tenant ended the tenancy before the end of the fixed term. The landlord therefore seeks to recover \$300.00 from the tenant and seeks an Order to permit the landlord to retain this from the security deposit held in trust by the landlord.

The landlord testified that the tenant informed the landlord that she was ending the tenancy because the landlord did not maintain the rental unit and that this entitled her to end the tenancy before September 30, 2016. The landlord testified that the tenant had complained of mould on the bedroom windows and the landlord investigated her concerns by looking at the problem and contacting Strata about these issues the tenant claimed she had. The landlord testified that he could see no cause for concern and he is only able to maintain the unit and is not responsible for common areas of the building including the building envelope which the Strata have responsibility for.

The landlord testified that he did see some dirt on the window sill and around the window and some chipped paint and assumed this occurred because this is an older building with single pane windows. The landlord also looked at the balcony and the eave strove did look rotten and was leaking. Strata came and looking at the exterior and interior of the unit several times and they reported back to the landlord that there was no leak point for water ingress and that the mould was caused as a result of high humidity in the unit.

The landlord testified that he reported this back to the tenant and the landlord did agree to get an air quality test done but later retracted this offer as even if it showed poor air quality it would not show the cause of any mould and Strata had already determined there was no water ingress. The landlord testified that any mould was not as a result of the landlord's failure to do adequate repairs or maintenance and it is the tenant's responsibility to clean any mould and condensation from windows.

The landlord testified that he suggested to the tenant if she wanted to leave early then they could sign a mutual agreement to end the tenancy. The tenant did not take up this offer and the next day the landlord wrote to the tenant and withdrew his offer. The tenant only later signed this mutual agreement but it was not signed by the landlord and the landlord only saw this in the tenant's evidence package.

The landlord testified that the tenant claimed she suffered health issues as a result of the mould yet she has not provided any evidence such as a doctors or a hospital letter confirming this.

The tenant testified that she moved into the unit towards the end of October and the first weeks living there she would wake up with a headache. It was not until she opened the curtains that she saw the mildew and the window glass was black from mould. The tenant testified that she wiped the windows and then contacted the landlord. The landlord came out and said the sills were soft and moist and that he would look into this.

The tenant testified that she cleaned the windows and frames with bleach and water every week but this did not resolve the issues. The Strata sent a caretaker round to look and he was only there for about five minutes. He did not come with any tools to remove the sills and when he pushed the glass he said it was not fitted into the frame and this was a problem with the gasket. A contractor came the next day to look at the window and he pushed the glass and the tenant could see the glass coming away at the bottom. This contractor said he would get the parts and fit a new gasket as where the glass was

coming away it was blocking the drainage holes where moisture and condensation is supposed to escape.

The tenant testified that she went away for two weeks but there was no contact with this contractor. The tenant called the caretaker again when she returned and he said he would send out a glass company. When the man from the glass company arrived he looked at the window and said he would not fix it because of the mould was sorted out. The tenant reported this straight away to the landlord. The landlord said he would contact Strata and get back to the tenant. Several weeks went by with any response so the tenant purchased an air purifier and a dehumidifier for the unit. The tenant decided then to take up the window sill and found it was soaking wet. The tenant took pictures of this and sent them to the landlord. Further to this, up the side of the window was so bad you could push your finger through it.

The landlord testified that the building is around 40 years old. The landlord purchased the unit just before this tenancy and it was updated with new flooring but the landlord does not know when it was last painted. The landlord testified that on the move in condition inspection report completed with the tenant everything is checked off as being good. The landlord testified that neither of them noticed any mould around the windows.

The tenant testified that when they did the inspection it was late in the afternoon in October and there was no power to the unit and no lights to see clearly.

The landlord testified that the windows are the Strata's responsibility and therefore the tenant cannot hold the landlord responsible for their maintenance. The landlord disputes that the person from the glass company would not do the replacement until the mould was dealt with and he does not believe that the gasket needed replacing. The landlord believes the Strata only sent the window company in to look at the windows and not replace them. In an email from a member of the Strata it states that the Delta Window technician should not have provided the tenant with that information about mould.

The tenant testified that she gave the landlord amply time to deal with the mould issue in her unit and was therefore justified, when nothing was done, to end the tenancy. The only reason she wanted to leave the unit was because the tenant and her daughter were getting sick. The tenant agreed she has not provided letters from her doctor or the hospital but referred to the letters from her workplace and her daughter's school showing all the time they had to take off because they were sick.

Analysis

After careful consideration of the testimony and documentary evidence before me and on a balance of probabilities I find as follows: The tenant did end her tenancy before the end of the fixed term; however, s. 45(3) of the *Act* states:

(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 am satisfied from the evidence presented that the tenant's unit was suffering from some mould issues that created undesirable living conditions for the tenant and her daughter. It is evident from the tenant's photographic evidence that the window was in a state of disrepair and that this caused more condensation and subsequent mould then would normally be present around the frame; the glass; the walls around the window; and the window sill.

I am also satisfied on a balance of probabilities that the tenant cleaned the area with bleach and water solution to attempt to combat this problem and purchased an air purifier and dehumidifier. The tenant did contact the landlord about these issues and yet no action was taken by either the landlord or the Strata to remedy the problem with the window as shown in the tenant's evidence.

The landlord argued that as the Strata has the responsibility for the windows then there was nothing he could do even if he believed there was a problem. The tenant sent the landlord photographs of the window area showing there were issues. It is then up to the landlord to ensure Strata remedy this problem in a timely manner. I refer the parties to the Residential Tenancy Policy Guidelines #21 regarding repair orders respecting Strata properties which states in part: Where repairs are required because of a defect originating in the common area, an order that the necessary repairs be done will not be made against a landlord who is the owner or lessor of a strata lot as the owner or lessor has no authority to make the repairs. The owner or lessor is required to ensure that the strata corporation is aware of the problem and take reasonable steps to ensure that the repair is made in a timely manner.

While I accept the landlord did work with Strata he did not follow up after they sent in a window company who then did not do any repair work to remedy the problem. The tenant gave the landlord notice to end the tenancy as required under s. 45(3) of the *Act* and I find the tenant had a right to end the tenancy as the landlord did not comply with s. 32 of the *Act*.

Consequently, as I have found the landlord did not comply with the *Act* and the tenant was able to give notice to end her tenancy before the end of the fixed term then the liquidated damages clause in the tenancy agreement has no effect. The landlord's claim to recover \$300.00 for liquidated damages is dismissed.

The landlord returned \$100.00 of the security deposit to the tenant on April 05, 2016. I Order the landlord to return the balance of the security deposit to the tenant of \$400.00.

As the landlord's claim has no merit the landlord is not entitled to recover the filing fee of \$100.00.

Conclusion

The landlord's application is dismissed in its entirety without leave to reapply.

A copy of the tenant's decision will be accompanied by a Monetary Order for **\$400.00**. The Order must be served on the landlord. Should the landlord fail to comply with the Order the Order may be enforced through the Provincial (Small Claims) Court of British Columbia 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: September 20, 2016

Residential Tenancy Branch

