Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VISTA PACIFIC PROPERTIES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNDC, MNSD, FF; MNDC, O

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("*Act*") for:

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for its application from the tenant, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the *Act* for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, pursuant to section 67; and
- other unspecified remedies.

The landlord's lawyer, AK and the landlord's two agents, SF and EF (collectively "landlord") and tenant and her agent, DA (collectively "tenant") attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord's lawyer provided written authorization to represent the "landlord company" named in this application at this hearing. The landlord's two agents confirmed that they were the managers for this rental building and that they also had authority to represent the landlord company at this hearing. The tenant confirmed that her agent had authority to speak on her behalf at this hearing.

"Witness PP" testified on behalf of the tenant at this hearing and both parties had equal opportunities to question the witness. This hearing lasted approximately 100 minutes in order to allow both parties to fully present their submissions.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 88, 89 and 90 of the Act, I find that both parties were duly served with the other party's application.

Preliminary Issue – Previous Hearing at the Residential Tenancy Branch ("RTB")

Both parties confirmed that they attended a "previous hearing" at the RTB on May 2, 2016, after which an "interim decision" of the same date was issued by a different Arbitrator. The previous hearing was scheduled to hear the tenant's application. The Arbitrator adjourned the tenant's application to be heard together with the landlord's application at this hearing on September 28, 2016. In the interim decision, the Arbitrator noted that the landlord had not received all of the tenant's written evidence and had set aside that evidence for the previous hearing. However, during this hearing, the landlord confirmed that the tenant's written evidence was received and reviewed by the landlord and the landlord was ready to proceed with this hearing on the basis of me considering that evidence at the hearing and in my decision. Accordingly, I considered all of the tenant's written evidence at this hearing and in my decision.

The previous hearing interim decision also amended the style of cause to reflect only the name of the landlord company as a landlord, not the names of the two landlord managers named in the tenant's application. This amendment has been implemented on the front page of this decision and the monetary order.

Issues to be Decided

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to retain the tenant's security deposit in partial satisfaction of the monetary award requested?

Is either party entitled to a monetary award for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the tenant entitled to other unspecified remedies?

Is the landlord entitled to recover the filing fee paid for its application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the parties and witness PP, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on October 15, 2015 for a fixed term to end on October 31, 2016. The tenancy actually ended on October 21, 2015, when the tenant provided verbal notice to the landlord regarding her intention not to move in to the unit. Monthly rent in the amount of $1,095.00 was payable on the first day of each month. A security deposit of $547.50 and a "clicker" garage access deposit of $50.00 were paid by the tenant and the landlord continues to retain these deposits. A half month's rent of $547.50 for the period from October 15 to 31, 2015 and a half month's parking fee of $10.00, were paid by the tenant to the landlord and the landlord continues to retain these monies as well. A written tenancy agreement was signed by both parties and a copy was provided for this hearing.

The landlord stated that a move-in condition inspection report form was completed. The tenant said that she may have signed this report, but could not recall and said that it did not occur on October 10, 2015, the date indicated on the report. Both parties agreed that no condition inspection was completed at the time of the completion of the report. The landlord said that the tenant viewed the rental unit a few times prior to the move-in condition inspection report being filled out. Both parties agreed that no move-out condition inspection report was completed for this tenancy. Both parties agreed that the tenant's written forwarding address was provided by the tenant to the landlord on October 26, 2015, by way of a letter. A copy of the letter was provided for this hearing.

The landlord seeks a monetary order of $5,227.50 plus the $100.00 filing fee paid for its application. The landlord seeks $300.00 for liquidated damages and $4,927.50 for a loss of rent from October 15, 2015 to February 28, 2016 because the tenant breached the fixed term tenancy agreement. The landlord seeks to offset the security deposit of $547.50 and half a month's rent paid by the tenant of $547.50, towards the above amounts. The tenant disputes all of the landlord's claims, stating that she was forced to end the fixed term tenancy early because the landlord breached a material term of the written tenancy agreement.

The tenant seeks a monetary order of $1,155.00. The tenant seeks the return of her security deposit of $547.50, the "clicker" garage access deposit of $50.00, the parking fee of $10.00 for half of October 2015, and rent of $547.50 for half of October 2015.

The landlord disputes all of the tenant's claims, stating that the tenant breached the fixed term tenancy and is not entitled to a return of the monies paid.

The tenant stated that she ended the fixed term tenancy early because the landlord breached a material term of the tenancy agreement. The tenant noted that she made verbally clear to the landlord, prior to moving in, that she would not tolerate any insects in the rental unit. The tenant said that she previously lived in rental units with insects, including silver fish and bed bugs, and that she did not want to live in this environment again. The tenant claimed that the landlord assured her that the rental building was insect-free and that there were no problems regarding insects, as the rental units were regularly sprayed when tenants moved in and out.

The tenant said that she discovered a few insects in the rental unit on October 21, 2015 when she had her bed delivered there. The tenant testified that she showed these insects to the landlord's managers and that she had them tested in a lab. Witness PP testified that she accompanied the tenant to the lab and viewed the insects. The tenant stated that she gave verbal notice to the landlord on October 21, 2015, that she would not move into the unit. The tenant claimed that she provided a letter with a forwarding address to the landlord on October 26, 2015, again stating that she would not be moving into the rental unit. The tenant claimed that it was a material term of her tenancy to live in an insect-free rental unit. The tenant maintained that the landlord breached this term because there were insects in her rental unit and other rental units of the building and that the landlord was aware of this problem. The tenant said that the landlord's inability to re-rent the unit for such a long period of time was unusual and probably due to the insect problem in the rental building.

The landlord stated that no material term was breached because the insect-free requirement was not included as a specific term in the written tenancy agreement. The landlord explained that there was additional space in the "other" category of the tenancy agreement to include this term, but the tenant failed to do so. In the alternative, the landlord submitted that if living in an insect-free unit was a material term, the tenant did not provide proper written notice in accordance with the *Act*, of a material breach of the tenancy agreement, in order to give the landlord a reasonable period of time to rectify the issue. The landlord also maintained that the tenant failed to provide sufficient evidence that the insects she discovered came from the rental unit. The landlord claimed that pest control spraying was done by the landlord, out of an abundance of caution, on October 22, 2015, the day after the tenant's complaint about insects on October 21, 2015. The landlord maintained that the tenant did not return to the unit or fulfill the terms of her fixed term tenancy agreement, after the landlord attempted to rectify the issue.

Analysis

Landlord's Application

Fixed Term Tenancy

Section 45(3) of the Act states that if the landlord has breached a material term of the tenancy agreement and failed to correct it within a reasonable period after the tenant gives written notice of the failure, the tenant may end a tenancy effective on a date after the date the landlord receives the notice. The tenant testified that the landlord breached a material term of the tenancy agreement because the rental unit had insects and she had advised the landlord verbally that she would not move into a unit with insects.

I find that the tenant did not provide the landlord with a written notice to end the tenancy for breach of a material term, in accordance with the requirements of sections 45(4) and 52 of the *Act*. The tenant agreed that she did not give a written material breach notice to the landlord. The tenant simply notified the landlord verbally on October 21, 2016 that she was not moving into the unit because of insects. The tenant did not provide the landlord with a "reasonable period" of time as per section 45(3) of the *Act* to rectify any potential issues with insects, as the landlord sprayed the unit on October 22, 2015, the day after the tenant's complaints.

Therefore, I find that there was no material breach of the tenancy agreement by the landlord, which would have allowed the tenant to terminate the tenancy prior to the fixed term end date.

Loss of Rent

I find that the landlord and tenant entered into a fixed term tenancy for the period from October 15, 2015 until October 31, 2016.

Subsection 45(2) of the Act sets out how a tenant may end a fixed term tenancy:

> *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*
>
> > *(a) is not earlier than one month after the date the landlord receives the notice,*
> >
> > *(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*

> *(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

The above provision states that the tenant cannot give notice to end the tenancy before the end of the fixed term. If she does, she may have to pay for rental losses and liquidated damages to the landlord. In this case, the tenant ended the tenancy on October 21, 2015, just six days after the tenancy began. I find that the tenant breached the fixed term tenancy agreement. As such, the landlord is entitled to compensation for losses it incurred as a result of the tenant's failure to comply with the terms of her tenancy agreement and the *Act*.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable, to re-rent the premises after receiving written notice of the tenant's intention to vacate the rental unit. The landlord posted an advertisement in the local newspaper and provided a copy of the advertisement. The landlord did not provide the date when the advertisement was first placed in the newspaper.

However, I find that the landlord has not attempted to fully minimize its losses under section 7(2) of the *Act*. The landlord only advertised in one local newspaper, which has limited access to potential renters. The landlord did not reduce the monthly rent of the unit or offer a shorter fixed term lease or a month-to-month tenancy, as incentives to try to attract potential tenants. The landlord said that only a one-year fixed term lease would be accepted. The landlord said that it was a slow time of year for rentals, as noted by the number of ads in the local newspaper page printout that was provided for this hearing. However, the tenant and witness PP noted that it was a busy time of year for rentals in the last three years and questioned why it took so long for the landlord to find a new tenant.

The landlord is claiming for 4.5 months of rental loss from October 15, 2015 to February 28, 2016, the period during which the property could not be re-rented due to the tenant's breach. The landlord provided a copy of a fixed term written tenancy agreement for the new tenant, indicating that the new tenancy began on March 1, 2016 and ends on February 28, 2017.

The liquidated damages clause of the tenancy agreement addendum states that the landlord is not precluded from claiming a loss of rental income if liquidated damages are paid by the tenant. Accordingly, I find that the landlord is entitled to half a month's rent for the period from October 15, 2015 to October 31, 2015, totalling $547.50. The tenant gave notice on October 21, 2015 and most potential renters are unable to rent prior to the first day of a month because they are required to give notice to their own landlords to leave their own units. I also award a further $1,095.00 to the landlord for a loss of November 2015 rent.

I make these findings on the basis that the landlord had a reasonable period of time from October 21, 2015, the date notice was given to it regarding the tenant not moving in, until November 30, 2015, in order to advertise, show and re-rent the rental unit. I find that 4.5 months is an unreasonable period of time to have a unit vacant and is due to the landlord's failure to fully mitigate its losses, as noted above.

Liquidated Damages

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 agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result, will be unenforceable.

In this case, the liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting a unit after a tenant's breach. The cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why a landlord enters into a fixed-term tenancy agreement is to attempt to limit the number of times the landlord must incur the costs of re-renting.

I find it more likely than not that, when a tenant breaches a fixed term tenancy agreement resulting in an early end to the tenancy, the landlord incurs the costs of re-renting earlier than it would have without the breach. This exposes the landlord to extra costs of re-rental. For that reason, I find there is a loss to the landlord associated with the tenant's breach. The next question is whether the $300.00 amount specified in the tenancy agreement is a genuine pre-estimate of that loss.

The landlord stated that the liquidated damages of $300.00 are to cover administrative costs of the rental advertisement in the local newspaper, to answer phone calls about the unit and to show the unit to potential tenants. The landlord testified that the rental unit was listed for approximately $217.00 per month in the newspaper. The landlord also said that painting and cleaning of the unit was done before the new tenant moved in. I find that $300.00 is a genuine pre-estimate of the loss and not a penalty.

The tenant breached the fixed term tenancy agreement and signed the tenancy agreement. Page 1 at clause 5 of the tenancy agreement discusses liquidated damages, stating that the tenant is responsible for this cost. Accordingly, I find that the landlord is entitled to $300.00 for liquidated damages from the tenant.

As the landlord was only partially successful in its application, I find that it is not entitled to recover $100.00 filing fee paid for its application.

Tenant's Application

Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

The tenancy ended on October 21, 2015. The tenant provided the landlord with a written forwarding address on October 26, 2015. The tenant did not give the landlord written permission to retain any amount from her deposit. The landlord did not return the full deposit to the tenant. The landlord filed an application for dispute resolution to claim against the deposit more than 15 days after receiving the written forwarding address from the tenant. The landlord's application was filed on April 18, 2016.

The landlord continues to hold the tenant's security deposit of $547.50. Over the period of this tenancy, no interest is payable. As per section 38(6) of the *Act* and Residential

Tenancy Policy Guideline 17, I am required to double the value of the return of the tenant's security deposit, totalling $1,095.00, even though the tenant did not apply for it. The tenant is not required to apply for double, as long as she did not specifically waive this right. I find that the tenant did not waive this right.

I order the landlord to return the tenant's "clicker" deposit of $50.00, which was paid by the tenant at the beginning of this tenancy.

Monetary Loss

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, the onus is on the tenant to prove, on a balance of probabilities, the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the tenant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I accept the tenant's evidence that she found some insects in her rental unit. The tenant provided testimony about collecting these insects and taking them to a lab for analysis. Although witness PP did not attend at the rental unit, I accept her evidence that she accompanied the tenant to the lab for the analysis of the insects. I find that the landlord would not have had pest control attend at the rental unit for spraying, if there were no insects found in the rental unit. Further, the landlord said that each unit is sprayed after a tenant leaves and before a new tenant moves in.

However, I find that the landlord addressed the insect problem immediately on October 22, 2015, the day after the tenant reported the issue on October 21, 2016. The landlord provided an invoice from the pest control company to show that spraying was done on

the above date in the tenant's rental unit. Therefore, I find that the landlord fulfilled its obligations under section 32 of the *Act*, to ensure that the rental unit complied with health, safety and housing standards required by law and that the unit was suitable for occupation by a tenant, having regard to its age, character and location.

The tenant did not demonstrate that her own rental unit was uninhabitable due to the insects. The tenant found a few insects, confronted the landlord and then gave her notice on the same day that she would not be moving in. As noted above, she did not serve a material breach letter to the landlord or provide the landlord with any time to rectify the issue. The landlord addressed the issue the next day by having the unit sprayed, but the tenant did not wait for this outcome or attempt to move in after.

Accordingly, I dismiss the tenant's claim for a monetary order of $547.50 for the return of a half month's rent paid to the landlord for October 2015, without leave to reapply.

I order the landlord to return the tenant's parking fee of $10.00 which was paid for half of October 2015, as the tenant did not use the parking service at the rental unit, since she did not move into the unit.

Conclusion

I issue a monetary order in the landlord's favour in the amount of $240.00 against the tenant as follows:

Item	Amount
Loss of Rent from October 15, 2015 to October 31, 2015	$547.50
Loss of Rent from November 1 to 30, 2015	1,095.00
Liquidated Damages	300.00
Less Half Month's Rent already paid by Tenant to Landlord for October 2015	-547.50
Less Award to the Tenant for Return of Double the Security Deposit	-1,095.00
Less Return of Clicker Deposit to Tenant	-50.00
Less Return of Parking Fee to Tenant	-10.00

Total Monetary Award	**$240.00**

The landlord is provided with a monetary order in the amount of $240.00 in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The tenant's application for other unspecified relief is dismissed without leave to reapply, as no evidence was presented with respect to this claim.

The tenant's application for a monetary order of $547.50 for a return of half of October 2015 rent, is dismissed without leave to reapply.

The landlord's application to recover the $100.00 filing fee is dismissed without leave to reapply.

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: October 3, 2016

Residential Tenancy Branch