Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNR, MND, MNSD, ERP, RP, PSF, AAT, RR, FF

Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution in which the Landlord applied:

- for an Order of Possession;
- for a monetary Order for money owed or compensation for damage or loss;
- for a monetary Order for unpaid rent;
- for a monetary Order for damage;
- to keep all or part of the security deposit; and
- to recover the fee for filing an Application for Dispute Resolution.

The Landlord stated that on August 22, 2016 the Application for Dispute Resolution, the Notice of Hearing, and 41 pages of evidence the Landlord submitted to the Residential Tenancy Branch on August 22, 2016 were personally served to the Tenant. The Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

The Tenant filed an Application for Dispute Resolution in which the Tenant applied:

- to recover the cost of emergency repairs;
- for a monetary Order for money owed or compensation for damage or loss;
- for an Order requiring the Landlord to make repairs to the rental unit;
- for an Order requiring the Landlord to provide services or facilities;
- for authority to change the locks;
- for authority to reduce the rent; and
- to recover the fee for filing an Application for Dispute Resolution.

The Tenant stated that on July 18, 2016 the Application for Dispute Resolution and the Notice of Hearing were personally served to the Landlord. The Landlord acknowledged receipt of these documents.

On August 19, 2016 the Tenant submitted 123 pages of evidence to the Residential Tenancy Branch. The Tenant stated that this evidence was posted on the Landlord's door on August 19, 2016. The Landlord stated that this evidence was received on August 22, 2016 and it was accepted as evidence for these proceedings.

For reasons outlined in my interim decision of September 06, 2016, the hearing on September 06, 2016 was adjourned. The hearing was reconvened on November 15, 2016. There was insufficient time to conclude the hearing on November 15, 2016 and the matter was adjourned for a second time.

In my interim decision of September 06, 2016 I gave each party the right to submit evidence that relates to whether or not rent was paid for June, July, or August of 2016. On September 12, 2016 the Tenant submitted 10 pages of evidence to the Residential Tenancy Branch. At the hearing on November 15, 2016 the Tenant stated that she served this evidence to the Landlord sometime in September of 2016, via registered mail, although she is uncertain of the date of service. The Landlord acknowledged receipt of this evidence.

8 of the 10 pages submitted to the Residential Tenancy Branch by the Tenant on September 12, 2016 relate to whether or not rent was paid for these months and those documents were accepted as evidence for these proceedings.

2 of the 10 pages submitted to the Residential Tenancy Branch by the Tenant on September 12, 2016 do not relate to the issue of rent. As the Tenant was not given leave to submit evidence for issues not related to rent after the proceedings commenced, these documents were not accepted as evidence.

At the hearing on November 15, 2016 the Landlord stated that he submitted 6 pages of evidence and a cover page to the Residential Tenancy Branch on September 16, 2016. He stated that he served this evidence to the Tenant sometime in September of 2016, via registered mail, although he is uncertain of the date of service. He was unable to cite a Canada Post tracking number to establish service of these documents. The Tenant stated that she did not receive this evidence and she did not receive notice from Canada Post regarding this registered mail.

At the hearing on November 15, 2016 the parties were advised that I was not in possession of the evidence the Landlord submitted to the Residential Tenancy Branch on September 16, 2016. After that hearing was adjourned I was able to locate 5 pages of evidence and a cover page that the Landlord submitted to the Residential Tenancy Branch on September 17, 2016.

At the outset of the hearing on November 15, 2016 the Landlord was advised that the evidence he submitted to the Residential Tenancy Branch in September was not being accepted as evidence because the Tenant did not acknowledge receipt of the evidence. In determining that the evidence should be excluded I was heavily influenced by the Landlord's inability to cite a Canada Post tracking number to corroborate his testimony that the evidence was served by registered mail.

Upon being advised that the hearing on November 15, 2016 was being adjourned the Landlord requested permission to re-serve the Tenant with the evidence he submitted to the Residential Tenancy Branch in September of 2016. Given the possibility that this evidence was not received by the Tenant as a result of a delivery error on the part of Canada Post, I granted the Landlord permission to re-serve this evidence to the Tenant.

At the hearing on January 04, 2017 the Landlord stated that on November 30, 2016 he re-served the Tenant with evidence he served to the Residential Tenancy Branch on September 16, 2016. The Tenant acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

The hearing was reconvened on January 04, 2017 and was concluded on that date

At the hearing on January 04, 2017 the Tenant withdrew her application for an Order requiring the Landlord to make repairs to the rental unit, to provide services, and for authority to change the locks, as she has vacated the rental unit.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Preliminary Matter

At the end of the allotted time for the hearing on January 04, 2017 the parties were advised that the hearing would be reconvened at a later date if either party wished to prevent additional evidence. Both parties stated that they did not need additional time to present evidence. After being advised that only issues discussed during the hearings would be considered in my adjudication, both parties declared that they wished to conclude that matter without the need for an additional hearing(s).

Rule 7.4 of the Residential Tenancy Branch Rules of Procedure stipulates that evidence must be presented at the hearing by the party who submitted the evidence or by an agent representing that party and that written submissions submitted in evidence that are not presented at the hearing may or may not be considered.

In her written submission and evidence the Tenant makes reference to a variety of other deficiencies with the rental unit, including a non-functioning security system, the absence of a fire alarm, problems with locks/keys, and a variety of plumbing/septic problems. I note that only issues "presented" at the hearings and discussed by the parties have been considered in this adjudication.

I find that it would be unfair to the Landlord to consider issues not raised by the Tenant during the hearing. In reaching this conclusion I was heavily influenced by the fact that the Tenant referred to numerous deficiencies in her evidence package and that her failure to raise those issues at the hearing denied the Landlord the opportunity to respond to each issue.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession?
Is the Landlord entitled to for a monetary Order unpaid rent/lost revenue?
Is the Landlord entitled to keep all or part of the security deposit?
Is the Tenant entitled to recover the cost of emergency repairs?
Is the Tenant entitled to compensation as a result of deficiencies with the rental unit and/or a breach of her right to the quiet enjoyment of the rental unit?

Background and Evidence

The Landlord and the Tenant agree that:

- the tenancy began on May 01, 2016;
- the Landlord allowed the Tenant to move into the rental unit prior to May 01, 2016;
- the Tenant was not required to pay rent for April for 2016;
- the parties entered into a fixed term tenancy, the fixed term of which ends on May 01, 2021;
- the Tenant was planning on operating a dog daycare on a portion of the residential property;
- the Tenant agreed to pay monthly rent of $3,500.00;
- the Tenant provided the Landlord with post-dated cheques for rent;
- a condition inspection report was not completed at the beginning of the tenancy;
- the Tenant paid a security deposit of $1,750.00;
- the parties communicated, via text message, regarding the need for repairs; and
- at least some of those text messages were submitted as evidence by the Tenant.

The Tenant stated that:

- she was going to live in the upper portion of the rental unit;
- her daughter was going to rent the lower portion of the rental unit;
- she installed a fence on the property and upgrade an outbuilding in preparation for her business venture;
- her daughter decided not to live on the residential property due to deficiencies with the property;
- she has been unable to operate her business at this site because of deficiencies with the property;

- because of conflicts with the Landlord and his failure to address deficiencies with the property she decided not to live or operate a business on the property; and
- she thinks the Landlord has breached the contract.

At the hearing on September 06, 2015 the Tenant stated that she is not living at the rental unit but she still accesses the unit for the purposes of packing and cleaning. At the hearing on September 06, 2015 the Landlord stated that the Tenant told him that she is leaving and, in any event, that she will not be staying at the rental unit until after the hearing on September 06, 2016.

At the hearing on November 15, 2016 the Tenant stated that she gave notice to end the tenancy, via text message, on September 29, 2016. She stated that in this text message she informed the Landlord that she would be vacating the unit by September 30, 2016.

At the hearing on November 15, 2016 the Landlord stated that he received a text message from the Tenant on September 29, 2016 in which the Tenant informed him that she was vacating the unit but he did not “accept” the notice because it was not on the form generated by the Residential Tenancy Branch.

At the hearing on November 15, 2016 the Tenant stated that in the text message she sent on September 29, 2016 she informed the Landlord that she had left the keys to the unit inside the rental unit. The Landlord stated that his father went to the rental unit on September 30, 2016 and could not locate the keys to the rental unit.

At the hearing on November 15, 2016 the Tenant stated that she fully vacated the rental unit on September 30, 2016. The Landlord stated that he thinks the rental unit was still occupied in October of 2016 as he went to the unit in early October and found personal property at the complex. The Landlord stated that he changed the locks to the rental unit sometime in early October of 2016.

At the hearing on January 04, 2017 the Landlord stated that when he went to the rental unit in early October there was a crib, a car seat, dirty diapers, and a variety of garbage left in the unit. At this hearing the Tenant stated that she understood her child had removed all of the personal property by the end of September, although she did not inspect the unit after the final move had been completed.

At the hearing on January 04, 2017 the Landlord stated that he sent the Tenant a text message on September 30, 2016, in which he asked her where the keys were. The Tenant stated that she informed the Landlord the keys were left on the window sill. The Landlord stated that he never located the keys inside the rental unit.

The Landlord applied for an Order of Possession, however he acknowledges that when these proceedings commenced neither party has served a notice to end the tenancy.

The Landlord stated that his claim for $25,000.00 relates to rent that is due for June, July, August, and September of 2016, plus loss of revenue for the duration of the five year lease.

The Landlord stated that he attempted to cash the post-dated rent cheque for June of 2016 and it was not honored by the Tenant's financial institution. The Landlord submitted a copy of a financial statement that indicates a cheque from the Tenant in the amount of $3,500.00 was returned due to insufficient funds on July 05, 2016. He submitted no evidence to show that a rent cheque was not honoured by the Tenant's financial institution in June of 2016.

The Tenant stated that her rent cheque for June was cashed by the Landlord and that rent has been paid for June of 2016. The Tenant submitted a copy of a cheque for rent June of 2016, in the amount of $3,500.00, with a stamp on that indicates it was cleared on June 08, 2016. Upon viewing this document at the hearing on November 15, 2016, the Landlord acknowledged that rent has been paid for June of 2016.

The Landlord stated that he attempted to cash the post-dated rent cheque for July of 2016 and it was not honored by the Tenant's financial institution. The Tenant agrees that this rent cheque was not honored by her financial institution.

At the hearing on September 06, 2016 the Tenant stated that sometime in the middle of July of 2016 she paid rent for July, in the amount of $2,813.92. At that hearing the Landlord denied receiving this payment.

At the hearing on November 15, 2016 the Tenant stated that she deposited a certified cheque, in the amount of $2,813.00, in the Landlord's bank account on July 16, 2016. The Tenant submitted a copy of a certified cheque in this amount, dated July 16, 2016. At this hearing the Landlord acknowledged that the Tenant paid $2,813.00 in rent for July of 2016 by depositing it into his account.

In regards to the rent for July the Tenant stated that:

- she withheld $404.25 in rent for July in an attempt to recover the cost of repairing some electrical problems at the rental unit;
- prior to the start of the tenancy there were exposed wires in the rental unit and in an outbuilding she refers to as the "boat house";
- the Landlord promised to repair these exposed wires prior to the start of the tenancy;
- when she moved into the rental unit there were exposed electrical wires in various locations;
- she believed the exposed wires were unsafe;
- she withheld $281.83 in rent for July in an attempt to recover the cost of removing garbage from the yard;
- when this tenancy began there were several plastic bins containing a variety of debris from the fire pit in the yard;

- prior to the start of the tenancy the Landlord agreed to remove all the garbage from the yard;
- the Landlord arranged to have some garbage removed from the yard but the plastic bins or their content were not removed;
- after the tenancy began she could not report the electrical problems or the problem with the garbage to the Landlord as he had informed her that he would be out of town for an extended period and he did not leave her with emergency contact information;
- she did not attempt to contact the Landlord regarding these issues by phoning the numbers provided on the tenancy agreement, as she believed she could not contact him at those numbers due to him being out of town;
- she hired an electrician to repair the electrical problems;
- the electrical repairs were completed on May 12, 2016;
- she hired a company to remove the garbage;
- the garbage was removed on May 19, 2016;
- she asked the Landlord for permission to deduct the cost of the electrical repairs and garbage removal from her July rent, but he would not agree to that deduction; and
- she told the Landlord that the receipts for the electrical repair and garbage removal were at the rental unit but he refused to pick it up.

In regards to the rent for July the Landlord stated that:

- prior to the start of the tenancy he did not promise to finish some electrical work at the residential complex;
- there were no exposed electrical wires on the residential property;
- prior to the start of the tenancy he did promise to remove garbage from the yard;
- on May 04, 2016 he hired two people to remove the garbage;
- he went to the residential complex on May 04, 2016 and determined that all of the garbage had been removed from the yard;
- prior to leaving town on holidays he told the Tenant she could contact his mother at the telephone number provided on the tenancy agreement;
- he was not advised of the Tenant's concerns about the electrical issues until later in August of 2016;
- he was not advised of the Tenant's concern about the garbage until he was served with her Application for Dispute Resolution;
- the Tenant never told him she had made repairs to the electrical system or that she had paid to have garbage removed until she served him with the Application for Dispute Resolution; and
- the Tenant never offered to provide him with a receipt for the electrical repairs or the garbage removal until they were provided as evidence for these proceedings.

In a text message sent to the Landlord on July 13, 2016 the Tenant indicates she is seeking compensation for the cost of electrical repairs and garbage removal.

The Tenant submitted a copy of an invoice from an electrical contractor, dated May 12, 2016, in the amount of $404.25. The invoice details the work that was completed in the rental unit.

The Tenant submitted a copy of a letter from electrician, dated August 04, 2016, in which the author identified several repairs that were made as they "were a potential safety hazard".

The Tenant stated that she submitted a copy of a receipt, dated May 19, 2016, which shows she was charged $281.83 for removing garbage from the residential complex. The Landlord acknowledged that he was served with a copy of this receipt as evidence for these proceedings. At the hearing on September 06, 2016 the parties were advised that I did not have a copy of this receipt.

The Landlord submitted a copy of a receipt, dated May 04, 2016, for disposal costs of $109.21. There is a handwritten note on this receipt that indicates wages of $168.00 was paid to **"**clear all bins/cans/objects".

The Tenant stated that in early August she went to the Landlord's financial institution to deposit a certified cheque, in the amount of $3,500.00, and she was told the payment would not be accepted. She stated she has been unable to pay the rent for August of 2016. The Tenant submitted a copy of certified cheque dated August 04, 2016.

The Landlord stated that rent has not been paid for August of 2016, although he understands the Tenant attempted to deposit a rent payment for August into his account. He stated that he told his financial institution not to accept cheques from the Tenant because her cheque for July was returned due to insufficient funds and he did not want to incur any additional banking fees.

The Landlord and the Tenant agree that the Tenant has made no attempts to pay rent for September and October of 2016.

The Landlord stated that he advertised the rental unit on one popular website sometime during the first week of October; that he updated that advertisement sometime in the third week of October; that he has not updated his advertisement since October of 2016; and the rental unit has not yet been re-rented.

The Tenant is seeking compensation, in the amount of $14,000.00, in part, because the Landlord refused to accept payment for rent for August of 2016 after it was offered to his financial institution in the form of a certified cheque.

The Tenant is seeking compensation, in part, because the she had to remove garbage from the yard at the start of the tenancy.

The Tenant is seeking compensation, in part, because of electrical deficiencies with the rental unit. In addition to exposed live wires, the Tenant stated that:

- the electrical panels did not have doors at any point in the tenancy; and
- she submitted photographs of the uncovered electrical panels.

The Landlord stated that:

- the electrical panels did have doors at the start of the tenancy; and
- the Tenant must have removed the doors to the electrical panels prior to photographing the panel.

The Tenant is seeking compensation, in part, because the door and window frames in the media room were not finished. The Tenant stated that:

- at the start of the tenancy the Landlord agreed that the door and window frames in the media room would be finished;
- the framing was not finished at any point during her tenancy;
- there was mould in the vicinity of the window that was not removed at any point during her tenancy;
- the Landlord agreed to remove the mould prior to the start of the tenancy;
- the mould was never removed;
- she agreed to pay a pet damage deposit of $500.00;
- she did not pay any portion of this damage deposit; and
- she did not agree to have her contractor complete these repairs in lieu of paying the pet damage deposit.

The Landlord stated that:

- he told the Tenant the door and window frame in the media room would be completed prior to the start of the tenancy;
- there was no mould in the vicinity of the window frame;
- he told the Tenant the water stains in the vicinity of the window frame in the media room would be removed prior to the start of the tenancy;
- his contractor was unable to complete the promised repairs to the door and window frames;
- he and the Tenant agreed that a contractor working on the property on behalf of Tenant would complete the repairs to the door and window frames;
- he and the Tenant agreed that the cost of these repairs would be deducted from the pet damage deposit that the Tenant agreed to pay;
- the parties never discussed how much the pet damage deposit would be reduced in compensation for these repairs; and
- the Tenant never paid any of the pet damage deposit of $500.00 she agreed to pay prior to the start of this tenancy.

The Tenant submitted photographs of the door and window in the media room and the staining in the vicinity of the window.

In a series of text messages from April 29, 2016 and April 30, 2016 the Landlord asks the Tenant to pay the Tenant's contractor to complete the "trim" and other deficiencies. Although it is not clearly spelled out, it appears that the Landlord is suggesting that the cost of repairing the trim can be deducted from the pet damage deposit that is due.

The Tenant is seeking compensation, in part, because the main bathroom door had been "kicked in". The Tenant stated that:

- the Landlord promised to repair the door prior to the start of the tenancy;
- the door was never repaired during the tenancy; and
- she did not tell the Landlord that her contractor would repair the door.

The Landlord stated that:

- he promised to repair the bathroom door prior to the start of the tenancy; and
- he did not arrange to have the door repaired during the tenancy because the Tenant agreed that her contractor would repair the door.

The Tenant submitted a photograph of the damaged bathroom door.

The Tenant is seeking compensation, in part, because a closet door in the master bedroom was not repaired. The Tenant stated that:

- the Landlord promised to repair the door prior to the start of the tenancy;
- the door was never repaired during the tenancy; and
- she did not tell the Landlord that her contractor would repair the door.

The Landlord stated that:

- the closet door was not installed at the start of the tenancy
- he promised to install the closet door prior to the start of the tenancy; and
- he did not arrange to have the door installed during the tenancy because the Tenant agreed that her contractor would install the door.

The Tenant is seeking compensation, in part, because the shower head in the upstairs bathroom was not installed. The Tenant stated that:

- the Landlord promised to install the shower head prior to the start of the tenancy;
- the Landlord had not installed the shower head by the time the tenancy began;
- she installed a shower head during the first week of the tenancy; and
- she took the shower head with her when the tenancy ended.

The Landlord stated that there was a shower head in that bathroom at the start of the tenancy; the Tenant did not like the shower head that had been installed; and that he agreed to have his plumber install the Tenant's shower head.

The Tenant is seeking compensation, in part, because the Landlord did not complete renovations in an outbuilding she was intending to use for her business. The Tenant stated that:

- the Landlord promised to install drywall on the walls in the outbuilding prior to the start of the tenancy;
- the Landlord promised to replace the trim in the outbuilding prior to the start of the tenancy;
- the Landlord promised to repair the entrance to the outbuilding prior to the start of the tenancy;
- she paid a contractor $1,200.00 to complete these repairs;
- the Landlord agreed that she would not have to pay her $500.00 pet damage deposit in lieu of these repairs;
- the Landlord did not offer to compensate her for the remaining amount she paid to complete the repairs; and
- she did not submit any evidence, such as a text message or other written documentation, which establishes the Landlord agreed to renovate the outbuilding.

The Landlord stated that:

- he did not agree to make any renovations in the outbuilding, with the exception of completing some electrical work;
- the Tenant's contractor made some renovations in the outbuilding at the request of the Tenant and with the consent of the Landlord; and
- he did not agree to compensate the Tenant for the renovations she made to the outbuilding.

The Tenant is seeking compensation, in part, because there were several holes in the wall of the rental unit. The Tenant stated that:

- the Landlord told her that all of the holes in the wall would be repaired prior to the start of the tenancy;
- there was a hole in the ceiling of the downstairs media room, which was never repaired;
- she submitted a photograph of the hole in the ceiling;
- the hole in the media room ceiling was never covered with a vent during her tenancy;
- there is a hole in the media room wall, near a sensor, which is depicted in a photograph she submitted;
- there is a square hole in the laundry room wall behind the dryer (approximately 4"X3");
- she submitted a photograph of the hole in the laundry room wall;
- there is a hole in the bedroom wall (approximately 12"X8"); and
- she submitted a photograph of the hole in the bedroom wall.

The Landlord stated that:

- he told her that all "necessary repairs" would be completed prior to the start of the tenancy, but they did not specifically discuss holes in walls;

- when the tenancy began there was a vent covering the hole in the media room ceiling, which is not present in the photograph submitted by the Tenant;
- he does not know why there is a hole in the wall of the media room near the sensor and he was not aware of the hole prior to these proceedings;
- the hole in the laundry room wall provides access to a water shut off and should not be enclosed; and
- the hole in the bedroom wall provides power for water and should not be enclosed.

Analysis

On the basis of the undisputed evidence I find that the Landlord and the Tenant entered into a fixed term tenancy agreement, for which the Tenant agreed to pay monthly rent of $3,500.00.

Section 44(1)(a) of the *Residential Tenancy Act (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 to show that the Landlord ended this tenancy by giving notice to the Tenant.

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; is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and 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.

Even I found that the Tenant had given the Landlord written notice to end the tenancy on September 30, 2016 I would not conclude that this notice ended the tenancy in accordance with section 45(2) of the *Act,* as the Tenant did not have the right to end this fixed term tenancy until the end of the fixed term of the tenancy, which was May 01, 2021.

As neither party gave proper notice to end this tenancy in accordance with these sections, 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. As the end of the fixed term of this tenancy is May 01, 2021, I find that the tenancy has not ended 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. I find that this tenancy ended when the Tenant vacated the rental unit.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. As there is no evidence that this tenancy agreement was frustrated, I find 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.*

In adjudicating this claim I have considered section 45(3) of the *Act*, which authorizes a tenant to end a tenancy early if the landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure.

Residential Tenancy Branch Policy Guideline #8, with which I concur, reads, in part:

> A material term is 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.
>
> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
>
> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

I find that there is insufficient evidence to establish that the agreement to make repairs to the rental unit was a material term of the tenancy agreement. In reaching this conclusion I was influenced, in part, by the fact that the parties cannot now agree on precisely what repairs/renovations were promised. In my view the parties would have clearly discussed and documented the required renovations/repairs if those repairs were material to the tenancy agreement.

In concluding that the repairs to the rental unit was not a material term of the tenancy agreement I was further influenced by my determination that many of the deficiencies the Landlord acknowledged were promised were either cosmetic or have already been rectified. I therefore cannot conclude that the failure to make these repairs would justify ending this fixed term tenancy.

As there is no dispute that the rental unit has been vacated, I dismiss the Landlord's application for an Order of Possession.

On the basis of the testimony of the Tenant and the cheque dated May 31, 2016 which was submitted in evidence, I find that rent has been paid in full for June of 2016. In reaching this conclusion I was heavily influenced by the stamp on the back of the cheque that indicates the cheque was cleared on June 08, 2016 and the note on the front of the check that indicates it is for "June rent". In reaching this conclusion I was further influenced by the fact the Landlord acknowledged rent has been paid for June after he had the opportunity to view the rent cheque for June.

As I have determined that rent has been paid in full for June of 2016, I dismiss the Landlord's claim for unpaid rent from June.

Section 33(3) of the *Act* stipulates that a tenant may have emergency repairs made only when all of the following conditions are met:
(a) emergency repairs are needed;
(b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;
(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

Even if I were to conclude that the electrical repairs and garbage removal constituted "emergency repairs" as defined by section 33(1) of the *Act*, I would find that the Tenant is not entitled to compensation for those "emergency" repairs.

On the basis of the undisputed evidence I find that the Tenant did not have the right to make those "emergency repairs" as she did not make at least 2 attempts to telephone the Landlord at the number provided on the tenancy agreement in regards to the need for repairs, as is required by section 33(3)(b) of the *Act*. In reaching this conclusion I was heavily influenced by the Tenant's testimony that after the tenancy began she did not attempt to contact the Landlord regarding the electrical problems or the need to remove the garbage by phoning both numbers provided on the tenancy agreement, as she believed she could not contact him at those numbers due to him being out of town. I find it entirely possible that the Tenant may have been able to make contact with someone at those numbers, who could have relayed a message to the Landlord in regards to the need for repairs.

Section 33(5) of the *Act* stipulates that a landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant claims reimbursement for those amounts from the landlord and gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

Section 33(6) of the *Act* stipulates that subsection (5) does not apply to amounts claimed by a tenant for repairs if the tenant made the repairs before one or more of the conditions in subsection (3) were met. As the Tenant made the electrical repairs and removed the garbage prior to complying with section 33(3)(b) of the *Act*, I find that the

Landlord would not be obligated to reimburse the Tenant for those costs, even if they were considered emergency repairs.

As the Tenant has not established that she is entitled to recover the cost of the electrical repairs and garbage removal, I find that she did not have the right to withhold those costs from her July rent payment and that she is obligated to pay her rent in full for July of 2016. As the parties agree that the Tenant only paid $2,813.00 in rent for July of 2016, I find that she still owes $687.00 in rent for that month.

On the basis of the undisputed evidence I find that the Tenant attempted to pay her rent for August of 2016 by attempting to deposit a certified cheque into the Landlord's account and that she was unable to do so because the Landlord had told his financial institution to refuse cheques from the Tenant. Although the Tenant has made reasonable efforts to pay her rent for August of 2016, the undisputed evidence is that the rent for that month remains unpaid. As the Tenant is obligated to pay rent for August of 2016, I find that she must pay $3,500.00 in rent to the Landlord for August.

On the basis of the undisputed evidence I find that the Tenant did not pay any rent for September of 2016. As the tenancy had not ended prior to rent being due on September 01, 2016, I find that the Tenant was obligated to pay rent for September of 2016. I therefore find that the Tenant owes $3,500.00 in rent for September.

I find that the Tenant did not comply with section 45(2) of the *Act* when she ended this fixed term tenancy on a date that was earlier than the end date specified in the tenancy agreement. I therefore find that the Tenant must compensate the Landlord for some losses the Landlord experienced as a result of the Tenant's non-compliance with the *Act,* pursuant to section 67 of the *Act*. Specifically, I find that the Tenant must compensate the Landlord for the lost revenue the Landlord experienced in October and November of 2016, which is $7,000.00.

Section 7(2) of the *Act* stipulates, in part, that a landlord who claims compensation for damage or loss that results from a tenant's non-compliance with the *Act*, the regulations, or their tenancy agreement, must do whatever is reasonable to minimize the damage or loss. In these circumstances, I find that the Landlord has not taken reasonable steps to minimize the lost revenue that he may experience for any period after December 01, 2016.

I find that it would have been reasonable for the Landlord to continue to update his internet advertisement and to advertise in additional locations once it became apparent that he was unable to re-rent the unit for December of 2016. In my view the Landlord has not made a reasonable effort to re-rent the unit for December of 2016 and I therefore dismiss any claim for lost revenue for any period after December 01, 2016.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the

rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

I find that the Landlord breached the Tenant's right to the quiet enjoyment of her rental unit when he refused to accept her rent payment for August of 2016. I find that refusing to accept payment in the form of a certified cheque is entirely unreasonable, given that it would be highly unlikely that this cheque would not be honoured.

I find that refusing the rent payment for August constitutes a "significant interference" to the enjoyment of the rental unit. I find that attending a financial institution and having a certified cheque refused would be embarrassing for most people. More importantly, I find that the Landlord's refusal to accept rent would cause most people significant concern about the stability of their tenancy. I find that to be particularly true in these circumstances, where the Tenant was intending to operate a business on the residential property and after the Tenant has made improvements to the property for the purposes of operating that business.

I favour the testimony of the Tenant, who declared that all of the garbage had not been removed from the yard by May 04, 2016, over the testimony of the Landlord, who testified that all of the garbage had been removed from the yard by May 04, 2016. I favoured the testimony of the Tenant because she provided the Landlord with a receipt for garbage removal, dated May 19, 2016, which shows she was charged $281.83 for removing garbage from the residential complex. I can find no logical reason to conclude that the Tenant would have paid to have garbage removed from the property if all of the garbage had been previously removed by the Landlord.

I favour the testimony of the Tenant, who declared that she had to repair exposed live electrical wires, over the testimony of the Landlord, who testified that there were no exposed wires. I favoured the testimony of the Tenant because her evidence was corroborated by an invoice from an electrician, which indicates there were "live wires in open boxes (7)" and that he fixed "live outlet hanging out of wall".

I favour the testimony of the Tenant, who declared that two electrical panels did not have doors on them over the testimony of the Landlord, who testified that the panels were covered at the start of the tenancy.

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the*

> *probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In regards to the electrical panel doors I find the version of events provided by the Tenant to be more probable than the version of events provided by the Landlord because I can find no logical reason to conclude that the Tenant would remove the doors, as the Landlord contends, and because the absence of doors is consistent with other unfinished electrical tasks in the rental unit, such as uncovered electrical outlets and live wires.

On the basis of the undisputed evidence I find that the Landlord agreed that the door and window frame in the media room would be finished and that any staining in the area of the window would be remediated. On the basis of the undisputed evidence I find that these repairs were not completed at any point during this tenancy.

I find that there is insufficient evidence to establish that the Tenant agreed to have her contractor complete the repairs to the door and window frames. Although the Landlord appears to be asking the Tenant to have her contractor complete these repairs, in the text message of April 30, 2016, there is nothing in that series of text messages that indicates the Tenant agreed to assume responsibility for these repairs. A landlord cannot simply abdicate responsibility for repairs to a rental unit by asking a tenant to make arrangements for the repairs unless the tenant clearly agrees to assist the landlord. This does not appear to be the case in these circumstances and I find that the Landlord failed to take reasonable steps to repair the window and door frames, as promised.

On the basis of the undisputed evidence I find that the Landlord agreed that the bathroom door would be repaired and that this repair was not completed at any point during this tenancy. As the Tenant disputed the Landlord's claim that she agreed to have her contractor complete the repairs and the Landlord submitted no evidence to corroborate this submission, I find that the Landlord remained obligated to ensure this repair was completed.

On the basis of the undisputed evidence I find that the Landlord agreed that a closet door would be installed and that this door was not installed at any point during this tenancy. As the Tenant disputed the Landlord's claim that she agreed to have her contractor install the door and the Landlord submitted no evidence to corroborate this submission, I find that the Landlord remained obligated to ensure the door was installed.

I favour the testimony of the Tenant, who declared that there was no shower head in the upstairs bathroom, over the testimony of the Landlord, who declared that there was a shower head in that bathroom but that his plumber replaced it with one provided by the Tenant, at the request of the Tenant.

I favoured the testimony of the Tenant in regards to the shower head, in part, because her version of events is more consistent with these circumstances than the version of

events provided by the Landlord. I find it highly unlikely, given the number of alleged deficiencies with this rental unit and the renovations the Tenant was making, that she would have been concerned with the type of shower head allegedly provided by the Landlord at the start of the tenancy.

I favoured the testimony of the Tenant in regards to the shower head, in part, because I have found her testimony to be consistently more reliable and should, therefore, be considered more reliable in regards to the shower head. In determining that the Landlord's testimony has been less reliable I was influenced by:

- the invoice from the electrician that refutes the Landlord's testimony that there were no exposed live wires in the rental unit;
- the text messages exchanged between the parties in July of 2016 that clearly establishes that the Landlord was aware of the Tenant's concern with garbage in July although he testified he was unaware of an on-going problem with garbage until being served with notice of these proceedings;
- the text messages exchanged between the parties in July of 2016 that clearly establishes that the Landlord was aware of electrical issues in July, which he contends he was unaware of until August of 2016;
- the fact that the Landlord claimed compensation for unpaid rent for June of 2016, he testified rent had not been paid for June of 2016, and he did not acknowledge rent had been paid for June until a copy of a cheque for $3,500.00 which had been submitted as evidence was discussed at the hearing; and
- the fact that the Landlord claimed compensation for unpaid rent for July of 2016, he testified that no rent had not been paid for July of 2016, and he did not acknowledge some rent had been paid for July until a copy of a certified cheque for $2,813.00 which had been submitted as evidence was discussed at the hearing.

I find that find that the Landlord's failure to make the aforementioned repairs constitutes a "significant interference" to the enjoyment of the rental unit. I find that the need to request the necessary repairs; the Landlord's failure to respond adequately to those requests; and, in some circumstances the expense incurred for making the repairs would cause a reasonable person to question the viability of their new tenancy.

Assigning compensation for loss of quiet enjoyment is highly subjective. In these circumstances I find that the Tenant is entitled to compensation of $7,000.00, which is the equivalent of two month's rent, for the loss of quiet enjoyment associated to the failure to make the aforementioned repairs and for the refusal to accept rent for August of 2016.

In that the Tenant is entitled to a significant award I was influenced by:

- the undisputed evidence that the Tenant was intending to operate a business at this site;
- the undisputed evidence she undertook considerable expense and effort to start the business;

- the undisputed evidence that the Tenant decided to abandon the tenancy and her business at this location as a result of various deficiencies and problems paying the rent;
- my conclusion that the Landlord did not make reasonable efforts to complete the promised repairs and the absence of evidence that the Tenant agreed to make those repairs on behalf of the Landlord;
- the text messages exchanged between the parties which would not, in my view, convince the average tenant that the landlord will make the promised repairs in a timely manner;
- my conclusion that the average tenant, when considering all of the problems with this tenancy, would conclude that investing additional money into the business would not be a reasonable course of action, given the Landlord was refusing the accept rent and apparently not completing promised repairs; and
- the Landlord's actions made it difficult to operate a business on the residential property during the tenancy.

In determining that the Tenant was not entitled to a more significant award I was heavily influenced by my conclusion that the Tenant did not need to vacate the rental unit. I find that the Tenant could have made any emergency repairs to the rental unit and deducted those repairs from the rent, providing those repairs complied with section 33 of the *Act.* I also find that the Tenant could have moved into the rental unit and continued with her business and simply filed an Application for Dispute Resolution seeking an Order requiring the Landlord to make repairs that he promised to make, although she would bear the burden of proving what repairs were promised.

I find that the Tenant has submitted insufficient evidence to support her submission that the Landlord agreed to make any changes to an outbuilding, with the exception of some electrical repairs. In reaching this conclusion I was heavily influenced by the absence of any evidence, such as a text message or other documentation, to corroborate her submission that the Landlord agreed to install drywall, trim, and to repair an entrance or to refute the Landlord's testimony these renovations were not promised.

I find it insufficient to rely on the Tenant's testimony in regards to the renovations in the outbuilding, in part, because there is no reference to those repairs in any of the text messages submitted in evidence. Given that these renovations are relatively significant I find it highly unlikely that the Tenant would not have mentioned the repairs in the texts that were exchanged between April and July of 2016 if the Landlord had promised to complete the repairs. I note that the Tenant made several references to other deficiencies with the unit in those text messages, such as missing trim in the media room and holes in the walls, which are relatively minor in comparison to the renovations.

As the Tenant has failed to establish that the Landlord promised to renovate an outbuilding, I find that she is not entitled to compensation arising from the Landlord's failure to renovate the outbuilding.

In adjudicating the claim for compensation I have placed no weight on the submission that there were holes in the walls/ceiling. On the basis of the photographs submitted in evidence; the testimony of the Landlord; and the absence of evidence to the contrary, I find that the hole in the wall in the bedroom and the laundry room are access holes which do not need to be covered.

Even if the hole in the ceiling and the wall of the media room were present at the start of the tenancy and the Landlord specifically promised to repair them, I find that those repairs were so minor that they do not, in and of themselves, warrant compensation.

The compensation awarded to the Tenant is not intended to compensate the Tenant for the costs of any renovations/repairs made to the rental unit. A tenant is only entitled to compensation for making repairs to the rental unit if the repairs are an emergency, as defined by section 33(1) of the *Act,* and only then if the Tenant complies with various requirements of section 33 of the *Act.* As has been previously discussed, the Tenant has failed to establish that she is entitled to compensation pursuant to section 33 of the *Act.*

There is nothing in the *Act* that entitles tenants to compensation for making repairs to the rental unit even if the repairs are made with the consent of the Landlord. I therefore have not awarded any compensation for any repairs or renovations made by the Tenant. If the Tenant was still occupying the rental unit it is likely that I would have the Landlord to make some repairs to the rental unit, which would have been made at the Landlord's expense.

The compensation awarded to the Tenant is not intended to compensate the Tenant for any costs associated to moving out of the rental unit or losses associated to her business venture. As I have previously determined that the Tenant did not have the right to end this fixed term tenancy prematurely and she did not need to vacate the rental unit, I cannot conclude that she is entitled to compensation for losses of this nature.

Although the Landlord and the Tenant agree that the Tenant agreed to pay a $500.00 pet damage deposit and that the Landlord subsequently informed the Tenant she did not have to pay the deposit. The parties do not agree on why the deposit was waived. The Tenant contends it was in compensation for work completed in the outbuilding and the Landlord contends it was compensation for work completed in the residential building. As the parties cannot agree on this issue, I find that a pet damage deposit has not been paid and that the Tenant has not received any form of compensation as a result of the payment being waived.

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

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

Conclusion

The Landlord has established a monetary claim, in the amount of $14,787.00, which includes $687.00 in rent for July; $7,000.00 in rent for August and September; $7,000.00 in lost revenue; 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 security deposit of $1,750.00 in partial satisfaction of the claim, leaving a balance of $13,037.00.

The Tenant has established a monetary claim, in the amount of $7,100.00, which includes $7,000.00 for loss of quiet enjoyment and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution.

After offsetting the two claims I find that the Landlord is entitled to a monetary Order of $5,937.00. Based on these determinations I grant the Landlord a monetary Order for $5,937.00. 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 *Act*.

Dated: January 15, 2017

Residential Tenancy Branch