Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

A hearing was convened on July 31, 2017 in response to cross applications.

The Landlord filed an Application for Dispute Resolution in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss and to recover the fee for filing this Application for Dispute Resolution.

The Landlord stated that on March 07, 2017 the Landlord's Application for Dispute Resolution, the Notice of Hearing, and documents/memory stick the Landlord submitted with the Application were sent to the Tenants, via registered mail, at the address on their rental application. The female Tenant stated that a friend still lives at the address on their rental application and that friend forwarded these documents to the Tenants. As the Tenants acknowledge receiving these items, the evidence was accepted as evidence for these proceedings.

The Tenants filed an Application for Dispute Resolution in which the Tenants applied for a monetary Order for money owed or compensation for damage or loss and to recover the security deposit.

The female Tenant stated that on May 19, 2017 the Tenants' Application for Dispute Resolution and the Notice of Hearing were sent to the Landlord, via registered mail. The Landlord acknowledged receipt of these documents.

On May 17, 2017 the Tenants submitted copies of decisions from two previous dispute resolution proceedings. The female Tenant stated that these documents were served to the Landlord with the Application for Dispute Resolution. The Landlord stated that these documents were not received as evidence for these proceedings. At the reconvened hearing the male Tenant stated that these documents were again mailed to the Landlord on, or about, August 11, 2017. The Landlord acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

On March 07, 2017 the Landlord submitted 23 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was served to the Tenants with the Application for Dispute Resolution. The Tenants acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On July 20, 2017 the Landlord submitted 59 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was delivered to the Tenants' mail box on July 20, 2017. The Tenants acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On July 13, 2017 the Tenants submitted an amended Application for Dispute Resolution and a binder of evidence to the Residential Tenancy Branch. The female Tenant stated that this evidence was served to the Landlord by a process server on July 13, 2017. The Landlord acknowledged receiving these documents and the evidence was accepted as evidence for these proceedings.

On December 10, 2017 the Tenants submitted 6 pages of evidence to the Residential Tenancy Branch. The female Tenant stated that this evidence was served to the Landlord on December 18, 2017. The Landlord acknowledged receipt of this evidence. Although this evidence was submitted after the commencement of the proceedings, I accepted the evidence as I find they may be highly relevant to the issues in dispute.

There was insufficient time to conclude the hearing on July 31, 2017 so the hearing was adjourned. The hearing was reconvened on October 23, 2017. There was insufficient time to conclude the hearing on October 23, 2017 so the hearing was adjourned. The hearing was reconvened again on January 10, 2018 and was concluded on that date.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. The parties were advised of their legal obligation to speak the truth during these proceedings.

I note that these hearings lasted in excess of 4 hours. The length of the hearings was not a reflection of the complexity of the issues. Rather, it was a reflection of the verbosity of two of the participants, by the disorganized presentation of some of the evidence, and by the number of irrelevant issues the parties attempted to raise. Two of the participants were frequently prevented from providing repetitive testimony.

Both parties submitted a large amount of documentary evidence, some of which was not relevant to the issues in dispute at these proceedings, many of which were duplications, and some of which were written submissions which were, or should have been, raised at the hearing. All of the evidence submitted by the parties has been reviewed, but is only referenced in this written decision if it is relevant to my decision.

Preliminary Matter

During the hearing on January 10, 2018 I made two attempts, at the request of the Tenants, to telephone the Witness who had previously appeared at the hearing on October 23, 2017. On both occasions I was directed to the Witness' voice mail.

Several minutes after the second attempt to telephone the Witness, an electronic recording informed me that the time for recording had expired. I pressed the appropriate number to “erase and re-record”, although I cannot be certain that the message was not recorded.

The Landlord and the Tenants all assured me they were not recording the proceedings.

It is my opinion that I did not properly end the telephone call after my second attempt to telephone this Witness and that a portion of the hearing was being recorded by his voice mail. I do not believe this error resulted in any prejudice to any party, as I do not believe any personal identifiers were disclosed during the recorded portion of the hearing.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit and unpaid rent/lost revenue?
Are the Tenants entitled to a rent refund, to compensation for expenses related to the end of this tenancy, and to keep all or part of the security deposit?

Background and Evidence

The Landlord stated that this tenancy began on September 01, 2016 and the Advocate for the Tenants stated that it began on September 03, 2016.

The Landlord stated that he created a tenancy agreement, initialed it, signed it, and emailed it to the Tenants for their signature. He stated that the tenancy agreement he sent to the Tenants indicated that the agreement was for a fixed term, the fixed term of which began on September 01, 2016 and ended on February 28, 2016.

The Landlord submitted a copy of a tenancy agreement that is not signed by the Tenants, which he refers to as a “clear copy of the tenancy agreement”. He stated that this is the document he emailed to the Tenants.

The Landlord stated that the Tenants returned a signed tenancy agreement to him. At the hearing he noticed that the fixed term of the tenancy began on September 03, 2016 and ended on March 03, 2016.

The Landlord submitted a copy of a tenancy agreement which he refers to as an “unclear email signed agreement”. He stated that this is the signed tenancy agreement the Tenants returned to him. This document is barely legible although it does appear that the Tenants have signed the agreement. The document also appears to be signed by the Landlords, although given the clarity of this signature it appears that the document was signed after it was returned to the Landlord. I note that the Landlord’s signatures are not identical to the signatures on the previously mentioned tenancy agreement.

The Advocate for the Tenants stated that the tenancy agreement the Tenants have declares that the fixed term of the tenancy began on September 03, 2016 and ended on March 03, 2016.

The Tenants submitted a copy of the tenancy agreement that they signed and returned to the Landlord. This copy is not signed by the Landlord. The Tenants contend they were never provided with a copy of the tenancy agreement after it was signed by the Landlords.

The Landlord and the Tenants agree that monthly rent of $2,495.00 was due by the first day of each month and that the Tenants paid a security deposit of $1,247.50.

The Tenants submit that they ended this fixed term tenancy agreement because they believed the Landlord had breached a material term of the tenancy agreement, which included mold in various areas of the rental unit and unclean carpets.

The Tenants contend that the deficiencies with the rental unit were not noticed when the rental unit was viewed prior to entering into the tenancy agreement. The female Tenant speculates that the deficiencies were not noticed because there were boxes piled in the rental unit that belong to the former occupant.

The Landlord stated that the boxes were not piled in the bathroom which is one of the areas where mold was a concern for the Tenants and that the rental unit was thoroughly inspected prior to entering into the tenancy agreement.

The Landlord stated that he completed a condition inspection report on September 06, 2016 and met with the Tenants on September 08, 2016 to discuss the condition of the rental unit and the contents of the report, at which time the Tenants added comments to the report.

The female Tenant stated that the Landlord came to the rental unit on September 08, 2016 with the condition inspection report partially completed. She stated that she added information to the report.

The Landlord and the Tenants agree that the Tenants made the following additions/changes to the inspection report:

- on page #1, the Tenants changed the condition of the carpet in the entry from “G” to “P”;
- on page #1, the Tenants changed the condition of the dishwasher from “G” to “2G 1B”;
- on page #1, the Tenants changed the condition of the carpet in the living room from “G” to “P”;
- on page #1, the Tenants added a comment regarding the presence of mold on wallpaper in the “extra room”;
- on page #1, the Tenants added “blinds – D”;
- on page #2, the Tenants changed the condition of the lighting fixtures, etc. in the dining room from “G” to “P”;
- on page #2, the Tenants changed the condition of the treads and landings in the stairwell and hall from “G” to “P”;
- on page #2, the Tenants changed the condition of the several areas in the bathroom from “G” to “P”;
- on page #2, the Tenants added a comment regarding the front and rear entrances;
- on page #2, the Tenants added “locks-P”;
- on page #3, the Tenants added all of the “P”s that appear beside the entry for the basement; and

- on page #3, the Tenants added “BD 4 – door split”.

The Landlord and the Tenants agree that both parties signed the condition inspection report after the changes/additions were made by the Tenants.

The Landlord and the Tenants agree that the Tenants sent the Landlord an email, dated September 05, 2016, which the Tenants submitted in evidence. In this email the Tenants inform the Landlord that the “carpets and the house” have not been cleaned.

The Landlord and the Tenants agree that the Tenants sent the Landlord an email, dated September 07, 2016, which the Tenants submitted in evidence. In this email the Tenants ask the Landlord to meet to do the “walk thru” and they express concern about the mold in the house and the “overall conditions of the bathrooms and plumbing”.

The Landlord and the Tenants agree that the Tenants sent the Landlord an email, dated September 09, 2016, which the Tenants submitted in evidence. The parties agree that the parties met on September 08, 2016 to discuss problems with the rental unit, specifically the carpet and mold, and that this email was sent the following day.

In the email of September 09, 2016 the Tenants declare, in part, that they have determined the unit is uninhabitable due to mold and that they are “voiding the rental agreement effective immediately” and that they “expect to vacate before the 13th”. In this email they also report that the person who came to clean the carpets could not adequately clean the carpet.

The Tenants stated that the aforementioned emails were the only written notices of an alleged breach that were sent to the Landlord.

The Landlord and the Tenant agree that the carpets were cleaned on September 06, 2016, at the expense of the Landlord. The female Tenant stated that the carpet cleaner informed the Landlord the carpets could not be adequately cleaned. The Landlord stated that the carpet cleaner told him that it would cost more money to clean the carpets and he told the cleaner that he would pay whatever it cost to clean the carpets.

The Landlord stated that when the parties discussed the mold on September 08, 2016 he told the Tenants that he would fix their concerns. He stated that he added an entry on page 1 of the condition inspection report (will fix) which was meant to assure the Tenants he would respond to their mold concerns.

The female Tenant stated that when they met on September 08, 2016 the Landlord told him the mold was not a problem and he clearly indicated he would not be responding to their plumbing/mold concerns.

The Tenants submit that the rental unit was uninhabitable due to the presence of mold and that they could not, for health reasons, occupy the rental unit. They contend that the female Tenant had previously been hospitalized due to exposure from mold and they could not risk living in a rental unit with mold.

The Witness for the Landlord with the initials “S.M.” stated that he is a licensed home inspector and a certified mold inspector. He stated that:

- the Tenants asked him to view photographs of the rental unit;
- on the basis of the photographs he determined that there “appeared” to be mold damage in the bathroom;
- it appeared there was water damage on the floor in the bathroom;
- it appeared the bathroom had not been well maintained;
- it appeared there was mold on wallpaper in one of the rooms;
- on the basis of the photographs alone he is unable to determine whether the presence of mold rendered the rental unit uninhabitable;
- he was not able to collect samples from the rental unit, which is the only reliable method of determining whether mold in the rental unit is hazardous to health; and
- he may have reached a different conclusion regarding the presence of mold if he had been able to inspect the rental unit.

At the hearing on January 10, 2018 the Tenants asked to call the Witness for the Landlord with the initials “S.M.”. I dialed the telephone number for the Witness and was directed to voice mail. I dialed the telephone number again approximately 5 minutes later and was again directed to voice mail. It was not until after the hearing concluded that I realized this witness had testified at the previous hearing.

The Witness for the Landlord with the initials “S.C.” stated that she is a personal friend of the Tenants. The relevant testimony she provided was:

- she was inside the rental unit during the first day of the tenancy;
- she has administrative experience in the construction industry;
- the carpets were very dirty and could not be cleaned;
- the grout in the bathroom was moldy;
- the wall and ceiling in a room near the kitchen was moldy; and
- she has never known the female Tenant to move out of another home as the result of mold.

The Witness for the Landlord with the initials “B.L.” stated that:

- he is a licensed real estate broker and attorney in California;
- he provided a good reference for the female Tenant prior to the start of this tenancy;
- he gave the Tenants advice on how to respond to their concerns with the rental unit; and
- he attempted to discuss the mold problems with the Landlord, but he would not communicate with him.

The Landlord stated that after he met with the Tenants on September 08, 2016 he contacted a home builder and asked him to look into the Tenants’ concerns. The Landlord submitted a copy of a letter from this home builder, dated February 07, 2017. In the letter the builder confirms that on September 08, 2016 the Landlord asked him to inspect the home and that he inspected the home on September 13, 2016 at which time he noted that:

- the unit was in good condition for its age and had no major defects or health concerns;
- an exterior wall had minor water damage;
- the roof, building structure, and building envelope were all in good condition;
- all other repairs requested were quick and minor in nature or for cosmetic purposes; and
- in his opinion the house was completely livable and had no major defects or health concerns.

The Landlord submitted a copy of a home inspection report, dated September 13, 2017, in which the inspector notes there are no problems with the mold or plumbing in the rental unit and that the unit is in "completely livable condition".

The Tenants argue that the home inspection report is inconsistent with the Landlord's testimony that there was mold on the wallpaper in one of the rooms. The Landlord stated that he had removed all the wallpaper that was suspected of being contaminated by mold prior to this inspection.

The Tenants argue that the person who completed this home inspection report is not licensed to conduct home inspections. The Tenants submitted evidence that the Home Inspection Licensing Regulation requires home inspectors to be licensed. The Tenants submitted an email from Consumer Protection BC, in which the author declared that neither party is not, and has never been, licensed with Consumer Protection BC.

The Landlord stated that the company he used for the home inspection report, dated September 13, 2017, was referred to him by a real estate agent. He stated that after learning that the Tenants were arguing that the inspector was not a licensed home inspector, he contacted the inspector. He stated that the inspector assured him that he was licensed and that he told him he had been in business for many years. He stated that the inspector did not provide him with an inspection license number.

The Landlord submitted a copy of an appraisal report of the home, dated July 06, 2016, in which no problems with the unit were noted. The Tenants contend that this report does not reflect the condition of the unit at the start of the tenancy, as the report was completed two months prior to the start of the tenancy. They further contend that it cannot be an accurate report because it does not reflect the problem with the wallpaper that the Landlord acknowledged was damaged.

The Tenants contend that the credibility of the Landlord's documentary evidence is in question because it was not submitted in evidence at two previous dispute resolution proceedings.

The Landlord submitted a video recording of the rental unit, which he contends represents the condition of the rental unit. He stated that this video was taken on September 12, 2017. The Tenants contend that the video recording is not dated and may not, therefore, reflect the condition of the unit at the time of their tenancy.

The Tenants submitted numerous photographs which they contend represent the condition of the rental unit during their tenancy.

The Landlord and the Tenants agree that the rental unit was vacated on September 11, 2016.

The Tenants are seeking compensation, in the amount of $6,258.00, for expenses related to the premature end of this tenancy.

The Landlord stated that on September 13, 2017 and September 14, 2017 he advertised the rental unit on two popular websites, and that he regularly updated those websites. He stated that at times he advertised the rent as $2,495.00; at times he advertised it at $2,500.00, and at times he advertised it for as little as $1,950.00 in an effort to generate interest. The Tenants do not dispute this testimony.

The Landlord stated that he was able to re-rent the unit, at a monthly rate of $2,500.00, effective November 15, 2017. The Tenants do not dispute this testimony.

The Landlord is seeking compensation for unpaid rent and lost revenue for the months of September and October of 2017, plus the first two weeks of November of 2017.

The Landlord stated that the Tenants paid $7,246.98 in rent, in advance. He stated that this represented three month's rent. He stated that he based this testimony on his bank statement which he referred to during the hearing, although he did not submit any documentary evidence to corroborate that testimony.

The female Tenant stated that the Tenants paid $5,700.00 in rent, in U.S. funds, in advance. The Tenants submitted a bank statement that corroborates this statement.

The female Tenant stated that the $5,700.00 in U.S. funds they paid was the equivalent of $7,497.50. She subsequently stated that the Tenants submitted bank documentation that declares the $5,700.00 in U.S. funds was the equivalent of $7,500.00. I was not able to locate this document during the hearing nor was I able to locate the document after the hearing.

The Tenants are seeking to recover all of the rent that paid on the basis of their contention that the rental unit was not habitable.

The Landlord is seeking compensation, in the amount of $367.50, for cleaning the carpet. This claim is based on the undisputed evidence that the Landlord paid to have the carpet cleaned after the start of the tenancy, at the request of the Tenants.

The Landlord is seeking compensation, in the amount of $366.00, for cleaning the rental unit at the end of the tenancy. The Landlord stated that a variety of cleaning was required after the rental unit was vacated, including vacuuming, cleaning the bathrooms, and "general" cleaning.

The female Tenant stated that the rental unit was not clean at the start of the tenancy and that it did not require cleaning at the end of the tenancy as a result of the Tenants occupying the unit.

The Landlord is seeking compensation, in the amount of $235.00, for re-keying the rental unit. The Landlord stated that he thinks the Tenants returned all of the keys to the unit but he re-keyed the locks because he did not know if they had made copies of the keys. The female Tenant stated that all of the keys were returned at the end of the tenancy and that they did not make copies of the keys.

The Tenants are claiming compensation, in the amount of $290.00, for costs associated to participating in the hearing. These costs include legal fees, mailing costs, and copying costs.

The Tenants are claiming compensation, in the amount of $200.00, for fees they paid to file different Applications for Dispute Resolution.

The Landlord and the Tenants agree that the security deposit has not yet been returned and the Landlord did not have written authorization to retain any portion of the security deposit of $1,247.50

The female Tenant stated that the Tenants provided a forwarding address to the Landlord by text message and by email, although she is not sure when the electronic messages were sent. The Tenants spent considerable time reviewing their evidence during the hearing but were unable to locate a copy of an email or text in their evidence package which corroborates this testimony.

The Landlord stated that he did not receive a forwarding address for the Tenants, in writing, until he was served with this Application for Dispute Resolution. He stated that he did not understand this service address should be used to return the security deposit to the Tenants.

The female Tenant stated that the Tenants told the Landlord he could send mail to the address listed on their rental application form, although she acknowledged that information was not provided in writing.

The Landlord stated that he was told he could mail items to the address listed on their rental application form, but he was never provided with that address as a forwarding address, in writing.

The Landlord stated that he did not apply to keep the security deposit because he never received a forwarding address for the Tenants, in writing, until he was served with the Tenants' Application for Dispute Resolution. He stated that he did not apply to keep the security deposit after he received the Tenants' Application for Dispute Resolution because he believed that matter would be resolved on the basis of the Tenants' Application for Dispute Resolution.

The Advocate for the Tenants referred to the bullet 18 of the Landlord's summary of events, which he contends establishes that the Landlord did receive a forwarding address for the Tenants. In this bullet the Landlord writes, in part:

> I confirmed I still had her security deposit and confirmed there was no
> damage done be her however as I had no forwarding address and no condition report signed upon leaving since the property was abandoned
> so I still have the deposit to return. Now I have a forwarding address however am waiting for outcome of this dispute resolution to determine if items like carpet cleaning should be deducted out of the security deposit or not.

The Landlord stated that the reference to receiving a forwarding address in bullet 18 refers to the service address provided by the Tenants in their Application for Dispute Resolution.

Analysis

On the basis of the testimony of both parties and the three tenancy agreements submitted in evidence, I find that the Landlord created a tenancy agreement, initialed it, signed it, and emailed it to the Tenants for their signature. This agreement declared that the fixed term of the tenancy agreement began on September 01, 2016 and ended on February 28, 2016.

I find that the Tenants amended the aforementioned tenancy agreement to indicate the fixed term began on September 03, 2016 and ended on March 03, 2016. I find that they signed the agreement and returned it to the Landlord.

I find that the Landlord signed the amended tenancy agreement, at which point both parties were bound to the terms of that agreement.

Section 45(2) of the *Act* stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than the 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. As the Tenants entered into a fixed term tenancy agreement, the fixed term of which ended on March 03, 2017, the Tenants did not have the right to end this tenancy pursuant to section 45(2) of the *Act.*

Section 45(3) of the *Act* stipulates that if a 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, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice. The Tenants bear the burden of proving that they had the right to end this tenancy pursuant to section 45(3) of the *Act.*

Even if I accepted the Tenants' submission that the presence of mold in the unit and the dirty carpet breached a material term of the tenancy agreement, I would conclude that the Tenants did not have the right to end this tenancy pursuant to section 45(3) of the *Act.*

In determining that the Tenants did not have the right to end the tenancy pursuant to section 45(3) of the *Act* I have placed little weight on the email dated September 05, 2016, in which the Tenants informed the Landlord that the rental unit/carpet needed cleaning. I find that this was simply an informative letter and did not serve as notice that the Landlord had breached a material term of the tenancy agreement.

In determining that the Tenants did not have the right to end the tenancy pursuant to section 45(3) of the *Act* I have placed little weight on the email dated September 07, 2016, in which the Tenants ask the Landlord to meet to complete and "walk thru" and they express concern about the mold in the house and the "overall conditions of the bathrooms and plumbing". Although I accept that the email notifies the Landlord of the Tenant's concerns, it does not clearly inform the Landlord, in writing, that this email does not serve as written notice of a breach of the tenancy agreement.

In determining that the Tenants did not have the right to end the tenancy pursuant to section 45(3) of the *Act* I accept that the Tenants informed the Landlord that there were problems with the rental unit when they sent the email dated September 09, 2016. Specifically, I find that the Tenants informed the Landlord that they considered the rental unit uninhabitable due to mold. I find that this served as written notice that the Tenants believed the Landlord had breached a material term of the tenancy agreement.

I find, however, that the Tenants did not give the Landlord reasonable time to respond to their concern about mold. In reaching this conclusion I was heavily influenced by the fact the Tenants declare they are "voiding the rental agreement effective immediately" in their email of September 09, 2016. I find that declaring that the tenancy was ending on the date the written notice of the breach was sent and then vacating two days later does not constitute a reasonable amount of time to correct the situation.

I favor the testimony of the Landlord, who stated that he told the Tenants that he would fix their concerns, over the testimony of the female Tenant who stated that the Landlord clearly indicated he would not be responding to their plumbing/mold concerns. In reaching this conclusion I was heavily influenced by the

letter from a builder who declared that on September 08, 2016 the Landlord asked him to inspect the home and that he inspected the home on September 13, 2016. I find that this letter clearly indicates the Landlord's willingness to address the Tenants' concerns and corroborates his testimony that he told the Tenants he would address their concern.

In regards to the testimony of whether or not the Landlord told the Tenants that he would fix their concerns with mold, I was further influenced by the entry on the condition inspection report that appears below the entry regarding mold in the "extra room", which simply declares "will fix". I find that this entry corroborates the Landlord's testimony that he told the Tenants he would address their concerns about mold.

I find that the Tenants have submitted insufficient evidence to establish that the Landlord told them he would not be responding to their concerns about mold and I therefore cannot conclude that they were justified in ending the tenancy on September 11, 2016 without giving the Landlord a reasonable opportunity to address their concerns.

I find that the Tenants have submitted insufficient evidence to establish that this rental unit was uninhabitable due to the presence of mold. In reaching this conclusion I was heavily influenced by the testimony of the Witness for the Tenant with the initials "S.M.". As this witness clearly acknowledged that he was unable to collect samples from the rental unit and that samples are the only reliable means of determining whether mold in the rental unit is hazardous to health, I find that his evidence is of limited evidentiary value. I specifically note that his evidence is based on photographs of the rental unit while the expert evidence provided by the Landlord is based on an examination(s) of the rental unit.

In adjudicating this matter I have placed little weight on the testimony of the Witness for the Tenant with the initials "S.C.". Although I accept the Witness' testimony that it appeared there was mold in the rental unit, it does not establish that the rental unit was uninhabitable as a result of that mold. I note that the Witness has no expertise in examining mold and her observations do not establish that the substance she believes was mold is hazardous to health.

In adjudicating this matter I have placed little weight on the testimony of the Witness for the Tenant with the initials "B.L.", as he did not have any evidence that is directly relevant to the issues in dispute at these proceedings.

Although the Landlord does not bear the burden of proving that the rental unit was habitable, I find that the Landlord did submit evidence that corroborates his submission that the rental unit was habitable.

I find that the letter from the home builder who inspected the rental unit on September 08, 2017, in which the home builder declared the home was "in completely liveable condition and had no major defects or health concerns", corroborates the Landlord's submission that the rental unit was habitable.

I find that the appraisal report dated July 06, 2017, in which the appraiser did not note any problems with the home, corroborates the Landlord's submission that the rental unit was habitable. I find that this report was only created two months prior to the start of the tenancy and is, therefore, reasonably relevant.

Given that the Landlord does not bear the burden of proving the rental unit was habitable and the Landlord provided the aforementioned credible evidence regarding the habitability of the rental unit, I do

not find it necessary to consider the home inspection report that is dated September 13, 2017. As I am not relying on the evidence provided in the home inspection report, I find it is not necessary for me to determine whether the author of that report is a licensed home inspector.

I do not concur with the submission that the credibility of the Landlord's documentary evidence is in question because it was not submitted in evidence at two previous dispute resolution proceedings. In the absence of any evidence to suggest that the documentary evidence I have relied on is not from credible experts, I accept that documentary evidence at face value.

I have viewed all of the photographs/videos of the rental unit that were submitted in evidence. I find that the photographs demonstrate some cosmetic deficiencies with the rental unit; however they do not, in my view, establish that the Tenants could not live in the rental unit.

I find that the Tenants did not comply with section 45(2) of the *Act* when they ended the fixed term tenancy on a date that was earlier than the end date specified in the tenancy agreement.

As the Tenants occupied the rental unit during a portion of September of 2017; the Tenants did not have the right to end the tenancy pursuant to section 45(2) of the *Act*; and the Tenants failed to establish they had the right to end the tenancy section 45(2) of the *Act,* I find that the Tenants were obligated to pay rent for September, in the amount of $2,495.00.

As the Tenants did not have the right to end the tenancy pursuant to sections 45(2) or 45(3) of the *Act* and the Landlord made reasonable attempt to mitigate his losses by attempting to fine a new tenant, I find that the Tenants must compensate the Landlord for the lost revenue he experienced between October 01, 2017 and November 15, 2017, pursuant to section 67 of the *Act*. I find that the Landlord is entitled to compensation of $2,495.00 for October of 2017 and $1,245.00 for November of 2017 ($2,495.00 less the $1,250.00 he presumably received in rent from the new tenant for the last half of November).

Although the Landlord did not have a legal right to collect rent in advance, the fact remains that he did collect at least $7, 246.98 in rent prior to the start of the tenancy. I therefore find that he has been fully compensated for the $6,240.00 in unpaid rent/ lost revenue for the period between September 01, 2017 and November 15, 2017 and I dismiss his claim for a monetary Order for rent/lost revenue.

As the Landlord has failed to establish the right to retain all of the rent he collected in advance, I grant the Tenants' application for a refund of their rent payments.

Before determining the amount of the refund due to the Tenants I must first determine how much rent was actually paid. On the basis of the bank statement submitted in evidence by the Tenants, I find that on August 31, 2016 the Tenants paid $5,700.00 in U.S. funds. As I was unable to locate a bank document that establishes how much this amount was in Canadian funds at the time of the payment, I cannot corroborate the female Tenant's contradictory testimony that it was $7,497.50 or $7,500.00.

While I recognize that bank rates are in continual flux, I find it reasonable to conclude that on August 31, 2016 the conversion rate was approximately $1.29275. This conclusion is based on the "TransferWise" document dated August 25, 2016 which indicates that was the conversion rate on August 25, 2016. On the basis of this conversion rate, I find that the Tenants paid $7,368.67 in Canadian funds for rent. I find that this calculation is more reliable than the testimony of either of the parties, as neither party provided documentary evidence to corroborate their testimony.

As the Landlord collected $7,368.67 in rent and he has only established a right to $6,240.00 in unpaid rent/lost revenue, I find that he must return $1,128.67 in rent to the Tenants.

Section 67 of the *Act* authorizes me to order a tenant or landlord to pay money to the other party if the tenant or landlord suffers a loss as a result of the other party failing to comply with the *Act*.

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

As the Tenants did not have the right to end the tenancy pursuant to sections 45(2) or 45(3) of the *Act,* I dismiss all of their claims for expenses relating to the premature end of the tenancy.

On the basis of the undisputed evidence, I find that the Landlord cleaned the carpets after the start of the tenancy, at the request of the Tenants. While I accept the Landlord incurred this cost, it is not a cost he incurred as a result of the Tenants failing to comply with the *Act* or the tenancy agreement. In the event the Landlord did not believe that the carpets required cleaning, he had the option of simply refusing the pay for cleaning the carpet. I therefore dismiss his claim for cleaning the carpet.

I find that the Landlord submitted insufficient evidence to establish that the rental unit required cleaning at the end of the tenancy as a result of the Tenants occupying the rental unit. In reaching this conclusion I was influenced by the testimony of the female Tenant and the Witness for the Landlord with the initials "S.C.", both of whom declare that the rental unit was not clean at the start of the tenancy. I find that this testimony was corroborated by photographs submitted in evidence, which show dirty areas that are not consistent with the amount of dirt that would accumulate during this 8 day tenancy.

In determining that the Landlord submitted insufficient evidence to establish the rental unit required cleaning as a result of this tenancy; I find that the Landlord did not submit any documentary evidence, such as photographs, which would cause me to conclude that the unit required cleaning as a result of the Tenants occupying the unit.

As the Landlord submitted insufficient evidence to establish that the rental unit required cleaning at the end of the tenancy as a result of the Tenants occupying the rental unit, I dismiss the Landlord's claim for cleaning the unit.

I find that the Landlord submitted insufficient evidence to establish that the Tenants did not return all of the keys to the rental unit they had in their possession at the end of the tenancy. In reaching this conclusion I was heavily influenced by the female Tenant's testimony that all keys were returned and by the absence of any evidence to support the Landlord's concern that the keys had been copied. I therefore dismiss the Landlord's claim for re-keying the locks.

The dispute resolution process allows a party to claim for compensation or loss as the result of a breach of *Act*. With the exception of compensation for the cost of filing the Application for Dispute Resolution, the *Act* does not allow a party to claim compensation for costs associated with participating in the dispute

resolution process. I therefore dismiss the Tenants' claim for legal fees, copying costs, and mailing costs as they are costs which are not denominated, or named, by the *Act.*

I dismiss the Tenants' application to recover the $200.00 in fees they paid to file different Applications for Dispute Resolution. As I am not in a position to assess the merit of the previous Applications for Dispute Resolution, I am unable to award those costs. An application for recover those costs should have been made at the time of the original hearing.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or file an Application for Dispute Resolution claiming against the deposits.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. The Tenants are seeking double the return of the security deposit.

I find that the Tenants have submitted insufficient evidence to establish that the forwarding address was provided by text and email prior to serving the Landlord with the Tenants' Application for Dispute Resolution. In reaching this conclusion I was influenced by the absence of evidence, such as a copy of the electronic messages, which corroborates the Tenants' submission that the address was served by text and email or that refutes the Landlord's testimony that it was not received by text or email.

In considering the disposition of the security deposit I have placed no weight on the testimony that the Tenants told the Landlord he could send mail to the address listed on their rental application form. As this information was not provided in writing, it does not satisfy the requirements of section 38(1) of the *Act*.

In considering the disposition of the security deposit I have placed limited weight on bullet 18 of the Landlord's summary of events, in which the Landlord writes "I had no forwarding address", followed by "Now I have a forwarding address". I find that this bullet does not establish when the Landlord received the forwarding address and it does not establish that it was received prior to receiving the Tenants' Application for Dispute Resolution. I therefore find that this bullet is not inconsistent with the Landlord's testimony that he never received a forwarding address for the Tenants, in writing, until he was served with the Tenants' Application for Dispute Resolution.

I find that it would be inappropriate and unfair to conclude that the Tenants provided the Landlord with a forwarding address in writing if the Tenants only provided the address when the Landlord was served with the Application for Dispute Resolution. I find that the legislation contemplates that the forwarding address be provided, in writing, prior to a tenant filing an Application for Dispute Resolution. I find it would be unfair to expect the Landlord to conclude differently, as the Landlord may be led to believe that it is too late for the Landlord to make a claim against the deposit because the matter is already scheduled to be adjudicated. I therefore dismiss the Tenants' application to recover double the security deposit.

As both parties are fully prepared to consider the matter of the security deposit at these proceedings, I find it reasonable to consider that matter even though the Landlord has not applied to keep it and the Tenants' application to recover it was premature. I find that neither party is disadvantaged by considering that matter at these proceedings.

As the Landlord has failed to establish a right to retain any portion of the security deposit, I find that it must be returned to the Tenants.

I find that the Application for Dispute Resolution filed by each party has merit. I therefore find that they are both responsible for paying the cost of filing their own Application for Dispute Resolution and I dismiss their claims to recover the fee for filing an Application for Dispute Resolution.

Conclusion

The Tenants have established a monetary claim, in the amount of $2, 376.17, which includes a rent refund of $1,128.67 and $1,247.50 for the return of the security deposit.

Based on these determinations I grant the Tenants a monetary Order for $2,376.17. In the event the Landlord does not voluntarily comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court, and enforced as an Order of that Court.

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 16, 2018

Residential Tenancy Branch