Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER LUXURY REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, MNRL-S, FFL

Introduction

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

- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- a Monetary Order for damage or compensation, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord testified that the tenants were individually served the notice of dispute resolution packages by registered mail on May 8, 2018. The landlord provided the Canada Post Tracking Number to confirm this registered mailing. The tenant confirmed receipt of the dispute resolution packages but did not know on what date. I find that the tenants were deemed served with these packages on May 13, 2018, five days after their mailing, in accordance with sections 89 and 90 of the *Act.*

Tenant S.N.B. (the "tenant") testified that his last name was not included on the landlord's application for dispute resolution. Tenant S.B.'s first and last names were reversed. Pursuant to section 64 of the *Act*, I amended the landlord's application to correctly state the tenants' names.

Preliminary Issue- Tenant's Evidence

The landlord testified that he did not receive any evidence from the tenants. The tenant testified that they did not send their evidence to the landlord.

Section 3.15 of the Residential Tenancy Branch Rules of Procedure (the "Rules") states that the Respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. I find that since the tenants did not serve their evidence on the landlord, the tenant's evidence is excluded from this proceeding.

Issue(s) to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
4. Is the landlord entitled to recover the filing fee from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 23, 2017 and was originally set to end on May 31, 2018; however, the tenants move out prior to the end of the fixed term tenancy. Monthly rent in the amount of $3,500.00 was payable on the first day of each month. A security deposit of $1,750.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that on February 5, 2018 the tenants sent the landlord an e-mail which stated:

1. That the construction occurring around the subject rental building disturbed the tenants.
2. The tenants were not satisfied with the repairs made to front door to the subject rental building and were concerned for their safety.
3. The tenant's subject rental property was entered by a cable technician without their approval or notification.

The February 5, 2018 e-mail concluded by requesting a mutual agreement to end tenancy for April 1, 2018 due to the above listed issues. The February 5, 2018 e-mail did not provide a timeline for the above issues to be solved and did not state that if the above issues were not solved in a reasonable time period that the tenants would end the tenancy for breach of a material term. Breach of a material term was never mentioned in the February 5, 2018 e-mail. The February 5, 2018 e-mail was entered into evidence by the landlord.

Both parties agree that the landlord responded to the February 5, 2018 e-mail on February 7, 2018. The February 7, 2018 e-mail stated:

1. The construction surrounding the subject rental building was underway when the tenants viewed the property and was in full view for the tenants to see. The landlord stated that nothing was withheld from the tenants.
2. The door was repaired, and the lock is functioning, so the tenants should not feel unsafe. The landlord stated that new hardware is on order but takes time to get the specific door handle and lock as the strata has strict rules about changing hardware.
3. The landlord apologized for the unauthorized cable technician visit, stating that they did not want the tenants' internet to be disrupted.

The February 7, 2018 e-mail went on to state that the tenants are permitted to terminate their lease for April 1, 2018 but that should they terminate their lease, they would not be released from their rental contractual obligations which would include a lease break fee which is used to find a new tenant, and future rent until the subject rental property is re-rented. The landlord ended the e-mail by asking the tenants if they would like to break their lease and incur the aforementioned costs. The February 7, 2018 e-mail was entered into evidence by the landlord.

Both parties agree that on February 11, 2018 the tenant e-mailed the landlord and asked that the landlord reconsider his request for a mutual early lease termination. The February 11, 2018 e-mail was entered into evidence by the landlord.

Both parties agree that on February 19, 2018 the landlord e-mailed the tenant denying his request for a mutual end to tenancy and affirming the lease break fee and potential for the tenants to be responsible for future rent. The landlord asked the tenant to let him know if the tenant wanted to break his lease as he would need to re-market the property to find a new renter.

Both parties agree that on March 31, 2018 the tenant's father arrived at the landlord's office and tried to give the keys to the landlord. The landlord testified that he was surprised by this as the tenant had never confirmed with him that he was going to break his lease early. The landlord testified that he told the tenant's father to keep the keys until a move out condition inspection could be completed. Both parties agree that a move out condition inspection was completed on April 10, 2018 and the keys were returned to the landlord at that time.

Both parties agree that on March 31, 2018 the tenant e-mailed the landlord. The March 31, 2018 e-mail stated that the tenant's parents would keep the subject rental property keys until a move out inspection of the unit is completed. The tenant's March 31, 2018 e-mail was entered into evidence by the landlord.

Both parties agree that on March 31, 2018 the landlord responded to the tenant's March 31, 2018 e-mail stating that the landlord had not received confirmation from the tenant that the tenants wanted to break their lease and therefore the landlord had not marketed the subject rental property for re-rental.

The landlord testified that the tenant's father provided the tenant's forwarding address in writing on April 10, 2018. The landlord applied for dispute resolution on April 24, 2018. The landlord testified that the subject rental property was re-marketed on several online sites on April 10, 2018. The landlord testified that the subject rental property was not advertised sooner because the owner of the subject rental property was out of the country and it took a few days to contact him and get the required authorization. The landlord testified that a new renter was found and a new tenancy started on May 31, 2018 at a rental rate of $3,000.00 per month. The new tenancy agreement was entered into evidence.

In the landlord's original application, the landlord sought recover April 2018's rent and possibly May 2018's rent as at the time of filing there was still a possibility that the landlord would find a renter for May 2018. The landlord's original application also sought to recover liquidated damages. At the hearing the landlord testified that he is seeking to recover April 2018's rent and the prorated rent for May 2018 (30 out of 31 days) for a

total of $6,912.10. The landlord testified that since the original term of the tenancy agreement was until May 31, 2018 the payment of April and May's rent would satisfy the rental term; therefore, the landlord is not seeking liquidated damages.

The tenant testified that due to the landlord's material breaches, as stated in the February 5, 2018 e-mail, he was permitted to end the tenancy early and is not required to pay rent for April and May 2018. I asked the tenant what sections of the tenancy agreement the tenant believes the landlord breached, he testified that he is not alleging that the landlord breached the tenancy agreement, but that the landlord breached the *Act* in the following ways:

1. In not repairing the door, the landlord breached his obligation to repair and maintain the subject rental property, pursuant to section 32 of the *Act*.
2. The construction noise breached the tenant's right to be free from unreasonable disturbance, pursuant to section 28(b).
3. The unauthorized entrance of the cable technician breached the tenants' right to privacy, pursuant to section 28(a).

The tenant also testified that on several occasions, the construction prevented the tenants from driving out of the parkade which made it difficult to get to doctors' appointments and other engagements. The tenant testified that this was a breach of the tenants right to use common areas free from significant interference, pursuant to section 28(d).

Analysis

Section 45 of the *Act* sets out when and how a tenant may end a tenancy. Section 45(2) states that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

> (a)is not earlier than one month after the date the landlord receives the notice,
> (b)is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
> (c)is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Pursuant to section 45(2), the earliest date the tenants could end their tenancy was May 31, 2018.

Section 45(3) states 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.

Section 45(3) states that a tenant may end a tenancy for a breach of a material term of the tenancy agreement, not for breach of a section of the *Act*. Since the tenant based the early termination of his fixed term contract on breaches of the *Act* instead of breaches of the tenancy agreement, the requirements of section 45(3) of the *Act* were not met. I find that the tenant was not permitted to end his fixed term tenancy early based on alleged breaches of the *Act*.

Damages/compensation and the duty to mitigate

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

Policy Guideline 5 states that where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided. The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved.

Policy Guideline 3 states that the damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy.

In this case, the tenants ended a one-year fixed term tenancy two months early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement for the months of April and May 2018. Pursuant to section 7, the tenants are required to compensate the landlord for that loss of rental income. However, the landlords also have a duty to minimize that loss of rental income by re-renting the unit at a reasonably economic rate as soon as possible. Based on the e-mails exchanged between the tenant and the landlord, I find that the tenants did not confirm with the landlord that they were going to terminate the lease until March 31, 2018 when the keys to the subject rental property were attempted to be returned to the landlord.

The landlord started to advertise the subject rental property on April 10, 2018, 10 days after receiving confirmed notice of the tenant's intention to vacate. I find that in waiting 10 days to advertise the subject rental property the landlord failed to mitigate its damages. I find that the landlord should have marketed the subject rental property within five days of receiving confirmed notice of the tenants' intention to vacate the subject rental property. I find that due to the landlord's failure to mitigate its damages for five days, the landlord is not entitled to receive compensation for those five days' rent. I find that the landlord is entitled to receive $3,500.00 for April 2018's rent and is entitled to receive a pro-rated amount for May 2018's rent, pursuant to the following calculation:

$3,500.00 (rent) / 31(days in May) = $112.90 (daily rate)

$112.90 (daily rate) * 6 (5 days for mitigation and 1 day for the new tenancy starting on May 31, 2018) = $677.40

$3,500.00 (rent) - $677.40 = **$2,822.60**

Security Deposit

Section 38 of the *Act* states that within 15 days after the later of:

(a)the date the tenancy ends, and

(b)the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c)repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security deposit pursuant to section 38 of the *Act.*

Section 72(2) states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit due to the tenants. I find that the landlord is entitled to retain the tenants' entire security deposit in the amount of $1,750.00 in part satisfaction of his monetary claim for unpaid rent against the tenants.

As the landlord was successful in this application, I find that he is entitled to recover the $100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	**Amount**
April rent	$3,500.00
May rent- prorated	$2,822.60
Filing Fee	$100.00
Less security deposit	-$1,750.00
TOTAL	**$4,672.60**

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

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 30, 2018

Residential Tenancy Branch