



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1099523 BC LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S MNDL-S MNRL-S FFL

Preliminary Issue – Rescheduling of this Hearing

I note that this hearing was originally scheduled for December 6, 2018 at 1:30 p.m. The Residential Tenancy Branch rescheduled this hearing to January 10, 2019 at 1:30 p.m. and contacted the parties to inform them of the rescheduled date and time.

Introduction

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

- a Monetary Order for unpaid rent and for compensation for damage or loss under the *Act* pursuant to section 67 of the *Act*;
- authorization to retain the tenants' security deposit in partial satisfaction of this claim pursuant to sections 38 and 67 of the *Act*; and
- recovery of the filing fee for this application from the tenant pursuant to section 72 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord's agent S.J. attended on behalf of the corporate landlord and is herein referred to as "the landlord".

As both parties were present, service of documents was confirmed. The landlord testified that he served each of the named tenants individually with the Notice of Dispute Resolution Proceeding package and some of his submitted evidence by Canada Post registered mail on August 9, 2018. The landlord served the tenants with a second package of evidentiary documents and the Amendment to the original application by Canada Post registered mail on November 20, 2018. The tenants confirmed that they each received both packages from the landlord.

The tenants testified that they served the landlord with their evidence by regular mail on November 28, 2018. The landlord confirmed that he received the tenants' evidence package.

Therefore, I find that the documents for this hearing were served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

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

Is the landlord entitled to a monetary award for compensation for damage or loss?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

A written tenancy agreement was submitted into documentary evidence by the landlord. The parties confirmed their understanding of the following facts pertaining to this tenancy:

- This fixed term tenancy began around October 8, 2017 with a scheduled end date of October 31, 2018. The parties confirmed that the tenants moved from another rental unit in the rental property, which consists of a duplex with an upper and lower unit on each half of the duplex.
- Monthly rent of \$1,080.00 was payable on the first of the month.
- The rental unit was a three-bedroom, one-bathroom located in the upper level of one-half of the duplex.
- The tenants paid a security deposit of \$540.00, which continues to be held by the landlord.
- The tenants verbally advised the landlord that they wished to end their tenancy around July 12, 2018 and provided written notice to the landlord by email on July 15, 2018. The tenants were fully moved out of the rental unit by July 29, 2018.
- The landlord acknowledged receipt of the tenants forwarding address on July 29, 2018.
- The landlord filed an Application for Dispute Resolution on August 5, 2018, seeking to retain the tenants' security deposit.

In the Amended Application for Dispute Resolution, the landlord claimed \$600.00 in liquidated damages and \$1,080.00 in lost rental revenue for the months of August, September and October, for a total claim of \$3,840.00 (\$600.00 + \$3,240.00), due to the tenants ending their fixed term tenancy early.

The landlord originally included in his Application for Dispute Resolution a claim against the tenants for \$200.00 for the cost of repairing a broken kitchen window. During the hearing, the landlord acknowledged that it was the occupant of one of the other rental units in the property that had thrown an object at the tenants, breaking their kitchen window. I explained to the

landlord that as the tenants were not responsible for breaking the window, and there was no dispute that the neighbouring occupant broke the window, there were no grounds under the *Act* for the landlord to proceed with a claim against the tenants for damages as they had not damaged the property. The landlord withdrew his claim on this item, therefore I find that the landlord's claim against the tenants for the damage to the kitchen window is dismissed without leave to reapply.

The tenants claimed that they were being threatened by the occupant living in the neighbouring rental unit, the one who broke their kitchen window. The tenants claimed that the landlord failed to address their concerns for their safety despite their complaints. The tenants testified that they called police regarding their concerns on July 7, 8, and 9, 2018, however, no police report was submitted into evidence, and no charges were laid by police in the matter. The tenants provided their written notice to end their tenancy on July 15, 2018. On July 17, 2018, the above-noted incident regarding the broken window occurred.

The landlord testified that the tenants contributed to the acrimonious relationship between them and the neighbouring occupant over a dispute pertaining to the neighbouring occupant's cat.

The landlord testified that on July 20, 2018 he placed a free advertisement on Craigslist to re-rent the rental unit at a monthly rent between \$1,550.00 and \$1,600.00. The landlord also placed a sign in the window of the rental unit at the end of August or September 2018 to advertise it for rent.

The landlord testified that he showed the rental unit three times in August, two times in September, one time in October, and three times in November 2018. The landlord stated that a new tenant signed a one-year tenancy agreement on November 23, 2018 with a move-in date of December 1, 2018, and a monthly rent of \$1,560.00.

The landlord testified that the broken kitchen window was boarded up until September 11, 2018 when it was finally fixed.

The landlord did not submit any evidence, such as a copy of the Craigslist add or emails from prospective tenants regarding requests for showings, to support his testimony or his claims regarding his efforts to re-rent the rental unit.

The tenants disputed the landlord's claim and testified that they searched to find that rental ad on Craigslist but could not find it.

The tenants also disputed the landlord's claim for liquidated damages given the landlord did not provide any evidence of advertising costs related to the re-renting of the unit.

Analysis

The landlord is seeking compensation for lost rental revenue of \$3,240.00 for three months of rent on the basis that the tenants ended the fixed-term tenancy early in contravention of section 45(2) of the *Act*, which states:

A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

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

The tenants testified that they were concerned for their safety regarding threats made by the neighbouring occupant, however no police report was submitted into evidence and no charges were laid against the occupant by police.

Section 45.1(2) of the *Act*, provides limited criteria for ending a fixed-term tenancy early, as follows, in part:

- (2) A tenant is eligible to end a fixed term tenancy under this section if a statement is made in accordance with section 45.2 [*confirmation of eligibility*] confirming one of the following:
 - (a) if the tenant remains in the rental unit, the safety or security of either the tenant or a dependent of the tenant who lives in the rental unit is or is likely **at risk from family violence carried out by a family member of the tenant**;
 - (b) the tenant has been assessed as requiring long-term care;
 - (c) the tenant has been admitted to a long-term care facility.

[My emphasis added]

Based on the testimony of the tenants, I find that the tenants' reasons do not meet the criteria under section 45.1 of the *Act*. Therefore, I find the tenants contravened the *Act* by ending a fixed-term tenancy early.

Section 67 of the *Act* provides that, where an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement, an arbitrator may determine the amount of that damage or loss and order compensation to the claimant.

The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide sufficient evidence to establish **all** of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;

3. The actual monetary amount or value of the damage or loss; **and**
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

Residential Tenancy Policy Guideline 5. Duty to Minimize Loss provides guidance regarding the expectation for a landlord to mitigate a rental income loss due to a tenant ending a tenancy in contravention of the *Act*, as follows:

Claims for loss of rental income

*In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, **the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent.** Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect. Oral notice is not effective to end the tenancy agreement, and the landlord may require written notice before making efforts to re-rent.*

[My emphasis added]

The landlord testified that he advertised the rental unit for rent on one free classified online website, Craigslist, starting on July 20, 2018 seeking a monthly rent between \$1,550.00 and \$1,600.00, which was a significantly higher monthly rent than what the tenants were paying of \$1,080.00. Although the landlord testified that the tenants were paying a comparably low rent, the landlord did not submit any evidence to support his claim that the rent he was seeking was a “reasonably economic” rent for the size, location and condition of the rental unit. The landlord could have submitted rental advertisements for comparable rental units in support of his testimony. Ultimately, it took the landlord until the end of November to find tenants willing to pay the low end of the rent scale he was seeking, at \$1,560.00. Further to this, the landlord did not fix the broken kitchen window until September 11, 2018, which may have deterred potential interested renters.

The landlord also failed to submit into evidence a copy of the Craigslist advertisement to support his testimony that he placed the rental unit for rent on July 20, 2018, as this was disputed by the tenants. The tenants testified that they could not find the rental unit advertised on Craigslist but only saw a small sign in the window, which the landlord testified was not put up until August or September 2018. The landlord testified that he did not conduct any showings until August 2018.

I find that the landlord has failed to provide sufficient evidence to establish the fourth point, mitigation of loss, required in a claim for compensation pursuant to section 7(2) of the *Act*, which in this matter required the landlord to “make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent”.

Therefore, I find the landlord has not met the burden of proof, on a balance of probabilities, that reasonable efforts were made to re-rent the rental unit at reasonably economic rent in order to mitigate the claimed loss.

Given the above, I find that the landlord has not satisfied **all** elements of the test for compensation in relation to the claim for lost rental revenue. I find that the landlord's monetary claim for lost rental revenue has no merit due to insufficient evidentiary proof of mitigation of loss, and therefore, must be dismissed without leave to reapply.

The landlord is also seeking compensation of \$600.00 for liquidated damages.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance to the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result, will be unenforceable.

In this case, the landlord testified that the liquidated damages claim represents the cost pertaining to his time taken to show the rental unit for re-renting. The cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. In this case, the landlord testified that he did not pay for any advertisements posted to re-rent the unit, as he used a free internet site and placed a sign in the window. The landlord testified that showings were held in August, September, October and November prior to securing a new tenant, however, the landlord did not provide any calculation of his labour costs in terms of the number of hours spent showing the rental unit. I also note that given the landlord failed to fix the broken kitchen window and sought a significantly higher rent than paid by the tenants, these factors may have contributed to the landlord taking longer to re-rent the unit.

Although the tenants vacated the rental unit prior to the end of their fixed term, based on the testimony and evidence before me, on a balance of probabilities, I do not find that the landlord provided sufficient evidence to show how the \$600.00 claimed for liquidated damages in clause 11 of the addendum to the tenancy agreement was a genuine pre-estimate of the cost of re-renting the unit and not a penalty. For the above reasons, I dismiss the landlord's claim of \$600.00 for liquidated damages without leave to reapply.

Security Deposit

The landlord continues to hold the \$540.00 security deposit.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 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

In this case, the tenants provided their forwarding address to the landlord on July 29, 2018, as confirmed by the landlord. On August 5, 2018, the landlord filed an Application for Dispute Resolution to retain the security deposit in satisfaction of their claim for compensation, which is within the 15-day time limit provided in the *Act*.

As the landlord's claim for compensation is dismissed, the landlord is ordered to return the security deposit to the tenants. I issue a Monetary Order in the tenants' favour in the amount of the security deposit, \$540.00.

As he was unsuccessful in his application, the landlord shall bear costs of the filing fee.

Conclusion

I issue a Monetary Order in the tenant's favour in the amount of \$540.00 pursuant to sections 38, 67 and 72 of the *Act*.

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

The landlord shall bear the costs of his own filing fee.

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: January 18, 2019

Residential Tenancy Branch