Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-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 tenant's security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, 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.

Both parties agree that the tenant was served with the landlord's application for dispute resolution via registered mail. I find that the tenant was served with the landlord's application for dispute resolution in accordance with section 89 of the *Act.*

Preliminary Issue- Landlord's March 12, 2019 Evidence

The landlord testified that on March 12, 2019 he submitted evidence to the Residential Tenancy Branch and served a copy on the tenant. The tenant testified that he did not receive the March 12, 2019 evidence.

Section 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the "Rules") states that evidence not submitted at the time of Application for Dispute Resolution that are intended to be relied on at the hearing must be received by the respondent not less than 14 days before the hearing. I find that since the tenant did not receive the landlord's March 12, 2019 evidence package, it is not admitted into evidence.

Preliminary Issue- Amendments

In the landlord's original application for dispute resolution, the landlord claimed $6,000.00 for loss of rental income and $500.00 for a cleaning service.

During the hearing the landlord testified that he wished to withdraw his $500.00 claim for the cleaning service. Pursuant to section 64 of the *Act,* I amend the landlord's claim to remove the $500.00 claim for the cleaning service.

During the hearing the landlord testified that since he filed for dispute resolution, his loss of rental income has increased from $6,000.00 to $25,200.00.

Section 4.2 of the Rules states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is granted at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

I find that in this case the fact that the landlord is seeking compensation for the entirety of his alleged loss of rental income, not just the amount claimed lost on the date the landlord filed the application, should have been reasonably anticipated by the tenant. Therefore, pursuant to section 4.2 of the Rules and section 64 of the *Act*, I amend the landlord's application to include a monetary claim for loss of rental income in the amount of $25,200.00.

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 tenant's security deposit, pursuant to section 38 of the *Act*?
4. Is the landlord entitled to recover the filing fee from the tenant, 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. The parties entered into three successive fixed term tenancy agreements for the following time periods and rates:

- Tenancy Agreement #1: February 1, 2017 to January 31, 2018 at a rental rate of $5,500.00 per month;
- Tenancy Agreement #2: February 1, 2018 to April 31, 2018 at a rental rate of $5,500.00 per month;
- Tenancy Agreement #3: May 1, 2018 to April 30, 2019 at a rental rate of $6,000.00 per month.

The aforementioned tenancy agreements were signed by both parties and entered into evidence.

Both parties agree to the following facts. At the time that each of the tenancy agreements were signed, the parties also signed a Mutual Agreement to End Tenancy effective for last day of each of the fixed term tenancy agreements. A security deposit of $3,000.00 was paid by the tenant to the landlord and the landlord has retained that security deposit. The landlord did not offer the tenant two opportunities to complete the move in condition inspection and move in condition inspection report. A move in condition inspection report was not completed. The tenant moved out of the subject rental property at the end of November 2018. A move out condition inspection report was completed and signed by both parties on November 30, 2018.

The tenant testified that the landlord did not provide him with a copy of the move out condition inspection report at the time of signing.

Both parties agree to the following facts. On October 26, 2018 the tenant e-mailed the landlord with a notice to end tenancy effective November 30, 2018 and posted a copy of the notice to end tenancy on the landlord's door. The landlord confirmed receipt of the tenant's notice to end tenancy on October 26, 2018. The notice to end tenancy contains the tenant's forwarding address. The notice to end tenancy states in part:

> "Please be advised I am ending the Tenancy Agreement for this rental and giving notice today that I will vacate the unit on November 30, 2018 at noon that day due to financial reasons I am unable to continue the lease and other considerations.
>
> I have made every effort to avoid this notice without success and I have enjoyed my stay there during these past nearly two years."

Both parties agree that on October 26, 2018 the landlord responded to the tenant's notice to end tenancy e-mail. The landlord's response stated that the landlord would try to mitigate his loss by immediately re-marketing the subject rental property but that since the tenant was breaching the fixed term tenancy, he would be liable for any loss of rental income suffered by the landlord until the end of the fixed term.

Both parties agree that the tenant responded to the landlord's October 26, 2018 e-mail by providing the landlord with a letter dated November 7, 2018 which stated that he was ending the tenancy due to the following material breaches:

- unclean apartment on move in;
- failure of the landlord to compensate tenant for services stated to be included in rent in Tenancy Agreement #1 and Tenancy Agreement #2;
- failure of the landlord to provide the same terms in Tenancy Agreement #3 as the previous two tenancy agreements, as was agreed.

The landlord applied for dispute resolution on November 14, 2018.

The landlord testified to the following facts. In an effort to mitigate any loss of rental income, on October 26, 2018, he hired a real estate company to find a new tenant for the subject rental property. The real estate company he hired is the same company who found the tenant. The real estate company marketed the property aggressively for a rental rate of $6,000.00 on numerous online websites and other corporate branches.

The landlord entered into evidence a contract with a realty company stating same. The contract is signed by the landlord but not the realty company. The landlord testified that he entered into evidence the copy he sent to the realty company for signing and that the realty company did sign it.

The landlord testified to the following facts. The real estate company showed the subject rental property on over a dozen occasions but could not find a new tenant at the rental rate of $6,000.00. The landlord verbally told the realty company to decrease the rental rate to $5,500.00 per month but could not recall on what date this reduction was

made. On February 8, 2019 as a new tenant had still not been found at the rental rate of $5,500.00 per month, the landlord instructed the realty company to reduce the rent to $4,800.00.

The landlord testified to the following facts. New tenants were found for the subject rental property at the end of February 2019 for a tenancy starting on April 1, 2019 at a rental rate of $4,800.00. The new tenancy agreement was entered into evidence and states same.

The landlord is seeking $6,000.00 for the months of December 2018 to March 2019 for a total of $24,000.00 and the difference in value of what he would have earned from the tenant in April 2019 less what he received from the new tenants ($4,800.00) for a total of $1,200.00.

The tenant testified that in November 2018 he stumbled upon an advertisement for the subject rental property for a rental rate of $6,495.00 which a possession date of May 1, 2019. The tenant entered into evidence the above described advertisement.

The landlord testified that the advertisement in question was made prior to the tenant providing him with his notice to end tenancy and is for an effective date of May 1, 2019 which is the day after the end of Tenancy Agreement #3. The landlord testified that prior to receiving the tenant's notice to end tenancy he was proactively seeking a tenant after the expiry of the fixed term. The landlord testified that as soon as the tenant reminded him of the advertisement in question in the tenant's letter dated November 7, 2018, he immediately called the real estate broker who had put that listing up and had it taken down.

The tenant's written submissions state that Tenancy Agreement #2 was in effect from February 1, 2018 to April 31, 2018 and the landlord insisted it be terminated with a signed Mutual Agreement to End Tenancy even when the tenant objected that this was not allowed under the current rental laws in BC. The tenant testified that the landlord told the tenant that he was within his rights to require the tenant to sign the Mutual Agreement to End Tenancy and the tenant had no choice. The tenant signed Lease #2 and a Mutual Agreement to End Tenancy effective April 31, 2018. The tenant's written submissions indicate that the tenant is alleging he signed these documents under duress.

The tenant testified that he was rushed into signing Tenancy Agreement #3 and that it was signed in a dimly lit parking garage. The landlord testified that it was signed in the

lobby of the subject rental building over the course of a 30-minute conversation. The tenant entered into evidence a signed witness statement from the tenant's partner who stated that she saw the tenant leave to go to the underground parkade to meet the landlord. She waited for the tenant in the subject rental property and he returned a few minutes later without a copy of Tenancy Agreement #3.

The tenant testified that he believed that the terms of Tenancy Agreement #3 were to be the same as the terms of Tenancy Agreements #1 and #2 and so he did not read Tenancy Agreement #3 before signing it and did not know they had changed until he received a copy Tenancy Agreement #3 on October 26, 2018.

The tenant testified that contrary to section 15 of Tenancy Agreement #3, the landlord did not provide him with a copy of Tenancy Agreement #3 within 21 days of signing. The tenant testified that he did not receive a copy of the lease until October of 2018 when he requested a copy from the landlord.

The landlord testified that he forgot to give the tenant a copy of Tenancy Agreement #3 but that he gave the tenant a copy as soon as he requested it in October of 2018. The tenant argued that the landlord's failure to provide him with a copy of Tenancy Agreement #3 invalidated that tenancy agreement and his tenancy continued on a month to month basis from Tenancy Agreement #2 and so he did not breach a fixed term.

The tenant testified that Tenancy Agreement #3 raised the rent over and above the legal limit under section 43 of the *Act* which voided the tenancy agreement.

Analysis

Duress

The tenant's written submissions state that he signed Tenancy Agreement #3 and the Mutual Agreement to End Tenancy effective April 30, 2019, under duress.

Duress involves coercion of the consent or free will of the party entering into a contract. To establish duress, it is not enough to show that a contracting party took advantage of a superior bargaining position; for duress, there must be coercion of the will of the contracting party and the pressure must be exercised in an unfair, excessive or coercive manner. *Lei v. Crawford,* 2011 ONSC 349 (CanLII), (approved *Jestadt v. Performing Arts Lodge Vancouver,* 2013 BCCA 183)

Whether the signing of Tenancy Agreement #3 and the Mutual Agreement to End Tenancy effective April 30, 2019 was completed in the lobby or the parkade of the subject rental building, I am unable to find the essential elements necessary to form the defence of duress. It may be that to the tenant the landlord had the superior bargaining position, but the tenant was free to make application to this forum to dispute the validity of any of the Mutual Agreements to End Tenancy and to refuse to sign a new Tenancy Agreement and Mutual Agreement to End Tenancy. I find that the tenant has not proved, on a balance of probabilities that he signed the aforementioned documents under duress.

Material Breach

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) of the *Act*, the earliest date the tenant could end his tenancy was April 30, 2019.

Section 45(3) of the *Act* 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.

Residential Tenancy Policy Guideline 8 states that to end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;

- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I find that the tenant did not inform the landlord that there was a problem that he considered to be a material breach until after he provided the landlord with notice to end the tenancy. Contrarty to Policy Guideline #8 I find that the November 7, 2018 letter from the tenant to the landlord did not provide a reasonable deadline for the problems to be rectified. I find that the tenant has not met the requirements set out in Policy Guideline #8 to end a tenancy for breach of a material term.

I note that 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.

I find that the tenant has not proved, on a balance of probabilities, that section 15 of Tenancy Agreement #3 was a material term. The tenant has not furnished any evidence that he requested a copy of Tenancy Agreement #3 between the date of signing and October 2018, or any evidence suggesting that both parties were aware that section 15 of Tenancy Agreement #3 was a material term. I find that the failure of the landlord to provide the tenant with a copy of Tenancy Agreement #3 does not void the agreement.

The tenant argued that the landlord increased his rental rate over that allowed by section 43 of the *Act* and that Tenancy Agreement #3 is therefore void. I find that a tenancy agreement is not automatically voided in instances where a landlord increases the rental rate over that allowed in section 43 of the *Act.* In such instances, a remedy that is available to the tenant is to apply to the Residential Tenancy Branch to dispute the rent increase and or seek recovery of the illegal rent increase paid to the landlord. I find that the tenant has not proved, on a balance of probabilities, that the rental rate was

a material term. I decline to make any findings on the legality of the rent increases of this tenancy.

I find that Tenancy Agreement #3 was freely entered into and is a valid fixed term tenancy agreement.

Breach of Fixed Term Tenancy

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, 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 attempting to re-rent the premises at a greatly increased rent will not constitute mitigation. Pursuant to Policy Guideline 5, if I find that the party

claiming damages has not minimized the loss, I 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 tenant ended a fixed term tenancy agreement five months early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement from December 2018 to April 2019. Pursuant to section 7, the tenant is 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. I accept the landlord's testimony that he contacted the same realty company who located the tenant, to find a new tenant the same day the landlord learned of the tenant's intention to vacate the subject rental property. I accept the landlord's testimony that the subject rental property was marketed at a rate of $6,000.00 per month which was subsequently lowered to $5,500.00 per month and finally lowered to $4,800.00 per month.

I find that the landlord's duty to mitigate was not impacted by the old advertisement of the subject rental property at the rental rate of $6,495.00 because the stated availability of that advertisement was after the tenant's fixed term tenancy agreement and was taken down by the landlord on November 7, 2018. I find the landlord mitigated his damages by hiring a professional realty company to locate a new tenant at the same rental rate as that paid by the tenant as soon as the landlord became aware of the tenant's intention to vacate the subject rental property.

Pursuant to section 7 of the *Act* and Policy Guideline 16, I find that the landlord is entitled to loss of rental income as follows:

- December 2018 to March 2019 at a rental rate of $6,000.00 per month = $24,000.00
- April 2019: $6,000.00 (rent landlord would have received from tenant under Tenancy Agreement #3) - $4,800.00 (rent landlord received under new tenancy agreement) = $1,200.00

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.

Section 24 of the Act states that if the landlord does not provide the tenant with two opportunities for a move in inspection to be completed, the right of the landlord to claim against a security deposit for damage to the residential property is extinguished.

Section 36 of the *Act* states that if the landlord does not provide the tenant with a copy of the move out condition inspection report, the right of the landlord to claim against a security deposit for damage to the residential property is extinguished.

I find that the landlord made an application for dispute resolution claiming against the security deposit in accordance with section 38 the *Act.* I find that the landlord's claims are for loss of rental income and not for damages to the subject rental property and so sections 24 and 36 of the Act have no impact on the landlord's claim to retain the tenant's security deposit. I find that the landlord is entitled to retain the tenant's entire security deposit in the amount of $3,000.00.

As the landlord was successful in his application, I find that he is entitled to recover the $100.00 filing fee from the tenant, in accordance with section 72 of the *Act*.

Conclusion

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

Item	**Amount**
Loss of rent December 2018- March 2019 at a rental rate of $6,000.00 per month	$24,000.00
Loss of rent April 2019	$1,200.00

Filing Fee	$100.00
Less security deposit	-$3,000.00
TOTAL	**$22,300.00**

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

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: March 20, 2019

Residential Tenancy Branch