Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing originally convened on April 15, 2019 and was adjourned to May 31, 2019 due to time constraints.

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

- 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.

The landlord, counsel for the landlord, the landlord's agent and the tenant 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 applied for dispute resolution on December 20, 2018. Counsel for the landlord submitted that the tenant was served with the landlord's application for dispute resolution on December 26, 2019 via registered mail and that the tenant received it on December 29, 2019. The tenant confirmed that he received the landlord's application for dispute resolution on or around December 29, 2019 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*.

Counsel for the landlord testified that the tenant was served with the landlord's amendment and evidence packages via registered mail on March 26, 2019 and that the tenant received the packages on March 27, 2019. Counsel for the landlord submitted that the tenant was also sent a copy of the landlord's amendment and evidence

packages via e-mail on or around March 26, 2019. The tenant testified that at the end of March 2019 he was no longer living at the address the landlord sent the amendment package to. The tenant testified that someone at the residence he used to live at signed for the packages, but he did not receive them. The tenant testified that he did receive the landlord's amendment and evidence packages via e-mail on or around March 26, 2019.

I find that while e-mail is not a form of service approved under section 88 or 89 of the *Act*, the tenant was sufficiently served with the above packages, for the purposes of this *Act,* pursuant to section 71 of the *Act,* because he acknowledged receipt of them.

Preliminary Issue- Landlord's Written Submissions

Counsel for the landlord submitted written submissions to the Residential Tenancy Branch one day prior to the first hearing and e-mailed the written submissions to the tenant the morning of the first hearing. The tenant confirmed receipt of the landlord's written submissions. During the course of the first hearing the landlord read his written submissions as to the timeline of events, out loud. At the end of the first hearing the landlord had read all of his submissions regarding the timeline of events but had not read his submissions regarding the legal basis of the landlord's claims.

Counsel for the landlord submitted that he would forgo oral submissions on the legal basis of the landlord's claims, in an effort to save time, if his written submissions would be considered, even though they were served on the tenant late.

Section 3.14 of the Residential Tenancy Branch Rules of Procedure (the "*Rules"*) state that evidence should be served on the respondence at least 14 days before the hearing.

In determining whether the delay of a party serving evidence on the other party qualifies as unreasonable delay I must determine if the acceptance of the evidence would unreasonably prejudice a party or result in a breach of the principles of natural justice and the right to a fair hearing. The principals of natural justice regarding the submission of evidence are based on two factors:

1. a party has the right to be informed of the case against them; and
2. a party has the right to reply to the claims being made against them.

In this case, the tenant testified that he received the landlord's written submissions which were, in any event, presented during the first hearing. As there was an approximately 6 week adjournment between the first and second hearing, I find that the tenant had ample time to review and respond to all of the landlord's written submissions at the second hearing. I find that the tenant is not prejudiced by the acceptance of the landlord's written submissions and legal arguments as they would have otherwise been accepted via the landlord's counsel's oral submissions. I therefore accept the landlord's written submissions into evidence and have considered them when rendering my decision.

I find that while e-mail is not a form of service approved under section 88 or 89 of the *Act*, the tenant was sufficiently served with the landlord's written submissions, for the purposes of this *Act,* pursuant to section 71 of the *Act,* because he acknowledged receipt of them.

Landlord's Amendment

Section 4.2 of the Rules states that in circumstances that can reasonably be anticipated, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

Counsel for the landlord submitted that some of the landlord's monetary claims set out in the landlord's amendment were decided upon in a previous hearing. Counsel for the landlord sought to amend the landlord's application and reduce the landlord's monetary claim from $4,857.49 to $2,882.49.

I find that since some of the landlord's monetary claims were decided on in a previous hearing, and thus cannot be re-heard, the requested amendment 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 reduce the monetary claim from $4,857.49 to $2,882.49.

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to retain the tenant's security deposit, pursuant to section 38 of the *Act*?
3. 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. This tenancy began on May 17, 2017 and ended in December of 2018. Monthly rent in the amount of $1,350.00 was payable on the first day of each month. A security deposit of $675.00 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree to the following facts. The parties had a previous cross application hearing regarding the same address as this hearing with the Residential Tenancy Branch on November 29, 2018 and that hearing was adjourned to March 11, 2018. In an Interim Decision dated November 30, 2018, pursuant to a Mutual Agreement to End Tenancy, the landlord was awarded an Order of Possession effective two days after service on the tenant and the parties' monetary claims were adjourned to the March 11, 2018 hearing. The landlord entered into evidence the Interim Decision dated November 30, 2018 and the Decision dated March 14, 2019.

The landlord's property manager testified that on December 3, 2018 she posted a copy of the Order of Possession and the Interim Decision both dated November 30, 2018 on the tenant's door. The tenant testified that he received a copy of the Interim Decision on his door on December 6, 2018 but that the landlord and or his agent did not serve him with a copy of the Order of Possession.

The tenant testified that he filed a review consideration application regarding the Interim Decision and the Order of Possession. The tenant's application for review consideration was made on December 5, 2018. The tenant's application for review consideration was dismissed on December 6, 2018. The tenant's application for review consideration states that he received both the Interim Decision and Order of Possession on December 3, 2018.

Both parties agreed that on December 7, 2018 the tenant called the landlord's counsel and requested to stay at the subject rental property until the end of December 2018, counsel for the landlord did not provide the tenant with an extension. Both parties agree that counsel for the landlord e-mailed the tenant a letter on December 7, 2018 which states in part:

> …my client anticipates receiving vacant possession of the rental unit … by tomorrow, December 8, 2018 at 12:00 pm noon.
>
> ….In the event you overhold any longer, we will be filing the Order with the BC Supreme Court and employing the services of a court-appointed bailiff to remove you and your personal property from the Unit at the earliest opportunity….

The property manager testified to the following facts. The property manager was contacted by the caretaker at the subject rental property and informed that on December 9, 2018 the tenant attended at the subject rental property with a moving truck and moved out of the subject rental property.

On December 10, 2018 the landlord's property manager attended at the subject rental property and found that the tenant had removed substantially all of his personal property. The landlord entered into evidence photographs of the subject rental property taken on December 10, 2018. The photographs show that all of the furniture at the subject rental property had been removed and various garbage bags, boxes, food items and general debris on the floor remained. The property manager testified that she believed that the tenant no longer resided at the subject rental property and so changed the locks on December 10, 2018. On December 10, 2018 the landlord's property manager completed a move out condition inspection report (the "First Move Out Inspection Report") which was entered into evidence.

The tenant testified that he had not finished moving out of the subject rental property and was only notified that the locks had been changed in an email from the property manager dated December 10, 2018 which states:

> The care taker contacted me and informed me he watched the video of you moving out on Sunday.
>
> It's been noted you left quite a bit of items behind along with a mess and some damages to the walls in the hallway. Will you be retrieving the rest of your belongings? We will need to make arrangements to give these items to you as all locks have been changed and fobs deactivated. I'd also like to confirm a time with you that you will be present to inspect the condition of the unit for damages and deficiencies/cleaning.

Both parties agree to the following. On December 11, 2018 the tenant e-mailed the landlord's property manager and copied the landlord and the landlord's counsel. The e-mail stated the following:

> I would like to confirm that I have not moved, and I was still present and living inside the apartment on Monday. If necessary I will sopena [sic] the security cameras as evidence to prove I was still living there. Did you secure a writ of possession from the Supreme Court before you entered my apartment and changed the locks?
>
> I do not have any transportation now and, without any prejudice, I would like to request that my stuff be sent directly to a storage locker.
>
> I deny any allegations that we damaged any walls or left a mess behind and put the landlord to strict proof thereof. In the alternative, The [sic] caretaker was uncooperative and refused to return our calls.
>
> I deny that the apartment is abandoned and we put the landlords to strict proof thereof. I will be willing to carry out an inspection upon receiving a copy of the writ of possession from the landlords.

The tenant testified that he took a shower at the subject rental property on December 10, 2018 and that the floor was still wet when the property manager took the photographs of the subject rental property on December 10, 2018. The tenant testified that a photograph of the bathroom floor entered into evidence by the landlord shows that the floor is wet. The tenant testified that this is proof that he was still living at the subject rental property on December 10, 2018. In the photograph the grout near the

bathtub is a darker colour than grout further away from the bathtub. It is not possible to determine if this is due to staining, water or some other cause.

Both parties agreed that there was food in the refrigerator on December 10, 2018. The tenant testified that the presence of food in the refrigerator proves that he was still residing at the subject rental property on December 10, 2018. The property manager testified that she has dealt with many tenants moving out of a variety of rental properties and that in her experience it is very common for tenants to leave food in the fridge after they have vacated the subject rental property. The property manager testified that she believed the tenant had moved out of the subject rental property and she was not going to store perishable food on the tenant's behalf, so she threw it in the garbage.

The property manager testified that it took her between 4.5 to 5 hours to move the tenant's abandoned property to a storage locker. The property manager testified that she charged the landlord $420.00 for her labour. An invoice for same was entered into evidence. The landlord is seeking to recover this expense from the tenant.

The property manager testified that she purchased boxes to pack up the tenant's abandoned property which cost $51.47. A receipt for same was entered into evidence. The landlord is seeking to recover this expense from the tenant.

The property manager testified that the cost of the 5 x 10 ft storage locker for the first month was $195.02 and the cost for the second month was $99.75, for a total of $294.77. Receipts for same were entered into evidence. The landlord is seeking to recover this expense from the tenant. The property manager testified that she rented a 5 x 10 ft storage locker on the recommendation of the storage company and it had more than enough space for the tenant's belongings. The tenant testified that a 5 x 10 ft storage locker was big enough to store an entire one-bedroom apartment which shows that the tenant had not moved substantially all of his belongings out and had not abandoned the subject rental property.

The tenant testified that the landlord locked him out of the storage locker after one month, contrary to the *Act.* The property manager testified that the tenant was never denied access to his storage locker. In support of the tenant's testimony the tenant entered into evidence an e-mail to the landlord dated January 9, 2019 which states in part:

> I am also giving you notice that the Act states that the tenant's personal property, once removed from the rental unit, must be kept in a safe place for a period of

> not less than 60 days. As such your threats to remove my property on Jan 12, 2019 deadline is not in accordance with the *Act* and there will be serious consequence if these items are being disposed of wrongfully.

Both parties agreed that a joint move in condition inspection report was completed by both parties on May 18, 2017. The move in condition inspection report was entered into evidence.

The property manager testified that she attempted to schedule a move out condition inspection to be conducted with the tenant on December 13, 2018 but the tenant was not available. Both parties agree that the tenant and the property manager attended at the subject rental property on December 14, 2018 and completed a move out inspection and inspection report (the "Second Move Out Inspection Report") which was entered into evidence. The Second Move Out Inspection Report was signed by both parties and states:

> The tenant agrees to return to the condo 9 am December 14. To clean for 2 more hours to ensure apartment is to clean standards of manager. Tenant agrees to return underground remote by Dec 14. Tenant will replace the light bulb or leave bulb in bathroom.

Both parties agreed that the tenant returned on December 14, 2018 to clean the subject rental property. Both parties agreed that a move out condition inspection report was completed on December 14, 2018 (the "Third Move Out Condition Inspection Report"). The Third Move Out Inspection Report was signed by both parties and states that the following areas were damaged:

- Living room walls- holes from photos;
- Living room fireplace- has never worked;

The Third Move Out Condition Inspection Report states that the following areas were dirty:

- Bathroom mirror;
- Bathroom baseboards;
- Bathroom trim;
- Kitchen- dirty under appliances;
- Kitchen- dirty on top of fridge
- Kitchen- cabinets sticky
- Kitchen- fridge, stove and over- insufficiently clean

The Third Move Out Condition Inspection Report states: “I [tenant] will authorize only 300 to be deducted from the deposit. Tenant returned remote and came back for additional cleaning.” The property manager testified that the tenant agreed to a $300.00 deduction from his security deposit for cleaning.

The tenant testified that the property manager told him that if he attended at the subject rental property on December 14, 2018 to clean the subject rental property the landlord would return his security deposit. The property manager testified that she did not promise that the landlord would return the tenant’s deposit but that if the subject rental property were properly cleaned, it would put the tenant in a better position with regard to his security deposit.

The property manager testified that on December 14, 2018 the tenant did not bring any cleaning supplies to the subject rental property other than toilet paper. The property manager testified that she left three bottles of the tenant’s cleaning supplies at the subject rental property. The tenant testified that the landlord did not leave any bottles of cleaning supplies at the subject rental property but did not deny that he attended at the subject rental property without cleaning supplies.

The property manager testified that the tenant did not do a good job cleaning and that a professional cleaner needed to be hired. The landlord entered into evidence a cleaning invoice for the subject rental property in the amount of $183.75.

The property manager testified that the carpets at the subject rental property required cleaning and a company was hired to conduct this cleaning. A carpet cleaning invoice in the amount of $157.50 was entered into evidence.

The tenant testified that the landlord would have avoided all the cleaning charges if the landlord had asked him if he had moved out of subject rental property prior to changing the locks as he would have properly cleaned the subject rental property if he had not been locked out.

Counsel for the landlord submitted that pursuant to the Mutual Agreement to End Tenancy which had an effective date of October 31, 2018 the landlord signed a new tenancy agreement with new tenants commencing November 1, 2018 at a rental rate of $1,450.00. The new tenancy agreement was entered into evidence.

Counsel for the landlord submitted that the new tenants were unable to take possession of the subject rental property until January 1, 2019 due to the tenant overholding the subject rental property. Counsel for the landlord submitted that that the landlord compensated the new tenants for delay in moving in by reducing the new tenants' rental rate by $50.00 per month for the remainder of the term of the tenancy and providing the tenants with one month's free rent in the amount of $1,400.00. The landlord is seeking compensation for this added expense in the amount of $1,400.00

The tenant testified that he didn't find out that the landlord had obtained a new tenant for the subject rental property until he received the landlord's application for dispute resolution for the previous hearings on or around October 14, 2018. The tenant testified that if he had been informed on September 1, 2018 that a that a new tenant was moving in, he would have vacated the subject rental property on October 31, 2018. The tenant testified that since he was not made aware of the new tenant early enough, he is not responsible for the one month's free rent the landlord gave to the new tenants.

The tenant testified that he received an e-mail from an information officer at the Residential Tenancy Branch. The e-mail dated October 25, 2018 was entered into evidence and states:

> Tenants who disagree with a notice need to apply for dispute resolution- If a tenant submits an application for dispute resolution by the appropriate deadline, the notice is suspended until a Residential Tenancy Branch arbitrator makes a decision. If not, the tenancy ends on the date stated in the notice.
>
> This means that you do not need to move until the arbitrator makes a decision at/after your scheduled hearing. (if at all)
>
> The tenancy should continue as usual until then- be sure to pay rent when it is due as well. Otherwise the landlord may be able to service a 10 Day notice for Unpaid rent.

Landlord's Written Legal Argument

Counsel for the landlord made written submissions which state, in part:

> The Landlord respectfully submits that the Tenant's property that remained in the Premises after the Tenant moved out on December 9, 2018 was effectively abandoned by the Tenant in accordance with s. 24(1)(a) of the Regulations. This is corroborated by the fact that the tenancy was ended by various means, including a mutual agreement to move out on October 31, 2018, and more recently by an order of possession granted by the Residential Tenancy Branch
>
> In the alternative, the Landlord submits that the personal property was abandoned in accordance with s.24(1)(b)(ii) of the Regulations. This is corroborated by the following circumstances surrounding the giving up of the rental unit as required by section s.24(2) of the Regulations:
>
> a. the Agent was informed by the building's caretaker that the Tenant had obtained a moving truck and that the Tenant had damaged parts of the building's common property in the process of moving out his belongings;
> b. when the Agent entered the Premises, they found no furniture except for depression in the carpet where furniture had previously stood; and
> c. despite claiming no to have moved out, the Tenant requested that his abandoned belongings be moved to storage, as the Tenant did not own a vehicle to move the items himself.
>
> Following the Tenant's abandonment of the Premises, it is submitted that the Landlord through his Agent removed the abandoned property in accordance with ss.24(3), 25(1) and 30 of the Regulations, by exercising reasonable care and caution in obtaining a storage locker to move the abandoned property to and moving the abandoned property to same.
>
> The Landlord therefore respectfully submits that he be granted a monetary order in the sum of $471.47 to recover the moving expenses the Landlord incurred in moving the Tenant's abandoned property to storage.
>
> The Landlord further submits that he be granted an additional monetary order in the sum of $294.77 to recover the cost to obtain and maintain a suitable storage locker to keep the Tenant's abandoned property safe and secure.

….The Landlord further submits that based on the evidence tendered, the Tenant did not leave the rental unit reasonably clean and undamaged, neither in the first instance nor when the Tenant returned for a couple of hours to clean up the Premises.

Therefore, the Landlord submits that he be granted a monetary order in the sum of $341.25 to recover the cost he incurred in remediating the rental property to a habitable state.

Compensating New Tenants

The landlord respectfully submits that the Tenant's non-compliance with the act, specifically the Tenant's overholding by two months and leaving the property in an uninhabitable state, was the only cause which led to the tenancy agreement between the Landlord and [the new tenant] to be frustrated, thereby delaying the new tenancy.

The Landlord therefore seeks an order for damages incurred to compensate the new tenant, in the sum of $1,400.00

Tenant's Written Legal Argument

The tenant's written submissions state in part:

Applying the principles of *Fok v. British Columbia (Residential Tenancy Dispute Resolution Officer)* 2010 BCSC 1613,

A. As a result of the landlord's failure to serve the tenant with an Order of Possession or obtain a Writ of Possession issued under the Supreme Court Civil Rules, the landlord had no legal rights to change the locks and disable the fobs.
B. The landlord had no legal rights to restrict the tenant from further access the Rental Property.
C. The premises was not abandoned as the tenant was not yet completely moved out. When the landlord changed the locks and disabled the FOBs, he had prevented the tenant from cleaning the Rental Property and the landlord's losses were in fact self inflicted.

D. The tenant had objected to being locked out and confirmed in writing that the apartment is not abandoned and he had not finished moving his possessions yet. The landlord knew or should have known that the tenant's possession were not abandoned and would be eventually retrieved by the tenant.
E. Given that the landlord had not abandoned the Rental Property, the landlord did not have the authority to hold or move the tenant's possession. As a result, the landlord were bailees at common law and owed a duty of care to the tenant (*Bello v. Ren* 2009 BCSC at para 15) The tenant is therefore entitled to claim any losses and damages as a result of this illegal move.
F. The principle of "*restitutio in integrum"* governs damages for a breach of bailee's duty of care at common law. The landlord disposed of tenant's possession without his permission and illegally retained the possession of the tenant's property, depriving him of use of his possessions in the storage unit for over thirty days and refused to release them to the tenant in a timely manner.

Overholding

Under s 7(2) of the RTA, the Act states that any time a monetary claim arises between landlord and Tenant, both have a duty to mitigate damages (i.e. minimize losses)….

Applying the principles in *Canson Enterprises Ltd. V. Boughton &Co*., [1991] 3 SCR 534, 1991 Can LII 52 (SCC):

A. The agent had breached her duty of care at the start of the tenancy and committed the tort of misrepresentation by deceiving the tenant into renting the apartment on June 1st, 2017 when the property was already up for sale. The landlord had full knowledge that eviction is inevitable and attempted to contract out the Act by making the tenant waive the two months compensation for the landlord's use of property.
B. The landlord had financially benefitted from receiving 18 months of bonus rent revenues from the tenant during this entire sale period. With the benefit of hindsight, no renter would have agreed to rent the property when it is already put up for sale. Then tenant had, on the other hand, suffered financial losses, as well as emotional and mental pain and suffering.

C. Using the full benefit of hindsight, the tenant would not have rented the apartment had he known that the landlord would pressure him into leaving - and this dispute would subsequently not have taken place.
D. The landlord failed to act reasonably to mitigate his losses after the new tenant agreement was signed on Oct 23rd 2018 and chose to do so only after 14 days from the tenant's scheduled move out date. By then, the damage was already irreversible. It is not fair that the landlord's delay in mitigation be reimbursed at the expense of the tenant, particularly if the landlord's losses are a direct result of his own inaction.
E. The landlord had a duty of care to inform the tenant about the details of any new tenancy agreement before the tenant's move out date, including details of any potential damages due to a frustrated contract. This would have afforded the tenant a fair opportunity to reevaluate his decision whether to move out or not before the 31st Oct 2019.
F. He had instead chosen to be evasive, deceitful and non-transparent in communicating the actual facts. Overall, the tone of the landlord's emails did not seem to correspond or reflect the high level of urgency and the anticipated monetary losses described in the landlord's application. Using the full benefit of hindsight, the tenant would not have chosen to stay beyond the 31st Oct 2018 move out date had he been given this crucial piece of information.
G. The landlord had an opportunity to mitigate these rental losses for Nov-Dec 2018 when the tenant made a reasonable request to extend his stay till 1st Jan 2019, but this offer was subsequently declined. The landlord had chosen to leave the apartment vacant throughout the remaining period in December through his own fault when he could have instead collected rent from the tenant.
H. The landlord had not taken these most obvious steps in (D) - (G) to alleviate his losses and it can be said that he is the "author of his own misfortune".
I. Without the benefit of these additional facts, the tenant had to make a reasonable and a calculated decision to remain in the apartment, solely based on what he believed to be sound and solid advice provided by the RTB Information Officers.
J. Had he known that this RTB advice is speculative and not secure, he would have on hindsight not have remained in the apartment beyond 31st October 2018 and would have found alternative ways to mitigate his losses.

Analysis

Service of Order of Possession

The tenant testified that he received the November 30, 2018 Interim Decision on his door on December 6, 2018 but did not receive the Order of Possession. The property manager testified that she posted the Order of Possession and the Interim Decision on the tenant's door on December 3, 2018. The tenant's application for review consideration of my Interim Decision and Order states that the tenant received both the Interim Decision and Order of Possession on December 3, 2018. The tenant's application for review consideration of my Interim Decision was made on December 5, 2018 and dismissed on December 6, 2018.

A useful guide in regard to credibility, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

In this case, I find that the tenant's testimony regarding the date he received the Interim Decision is not concordant with the date's he stated he received both the Interim Decision and Order of Possession in his application for review consideration. I also note that the tenant filed for an application for review consideration of the Interim Decision and Order of Possession one day prior to when he testified he received the Interim Decision.

Based on the above, I find that the tenant's testimony is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. I therefore accept the property manager's testimony over that of the tenant. I find that the tenant received the Order of Possession on December 3, 2019.

I find that the tenant's review consideration application stayed the Order of Possession until the tenant's application for review consideration was dismissed and the Order of Possession was confirmed on December 6, 2018.

Abandonment

Section 24(1)(b)(ii) of the *Regulation* states:

> **24** (1) A landlord may consider that a tenant has abandoned personal property if subject to subsection (2), the tenant leaves the personal property on residential property from which the tenant has removed substantially all of his or her personal property.

Based on all the evidence provided, including the photographs of the subject rental property taken on December 10, 2018, I find that by December 10, 2018 the tenant had removed substantially all of his personal property. I note that no furniture remained at the subject rental property on December 10, 2018 and only garbage bags and scattered items remained.

The photograph of the fridge shows that few food items remained, the majority of which were condiments and liquids. I find that the food items left in the fridge do not prove continued habitation at the subject rental property as many people do not move opened fridge items as they may spill in transport. I find that the darkened grout in one of the bathroom photographs does not prove continued habitation as it is not clear what the darkened grout is from.

Section 24(2)(b) of the *Regulation* states:

> The landlord is entitled to consider the circumstances described in paragraph (1)(b) as abandonment only if the circumstances surrounding the giving up of the rental unit are such that the tenant could not reasonably be expected to return to the residential property.

I find that the circumstances surrounding the giving up of the rental unit are such that the tenant could not reasonably be expected to return to the residential property. The tenant in this dispute was served with and received an Order of Possession on December 3, 2018 which he disputed on December 5, 2018. His review consideration application was dismissed on December 6, 2018. On December 7, 2018 the tenant asked the landlord, through his counsel, if he could remain at the subject rental property

until December 31, 2018. The tenant's request was denied on December 7, 2018 and he was informed that a bailiff would be hired if he did not voluntarily vacate the subject rental property by December 8, 2018. The tenant then arranged for a moving truck to attend at the subject rental property on December 9, 2018 and removed substantially all of his possessions.

Given this factual scenario, I find that it was reasonable for the landlord to believe that the tenant had vacated the subject rental property and abandoned some of his possessions in an effort to avoid being forcibly removed by a bailiff and incurring costs of same.

In the e-mail dated December 10, 2018 from the property manager to the tenant, the property manager asked the tenant if was going to retrieve the belongings he left at the subject rental property. In the December 11, 2018 e-mail the tenant asserted that he had not moved out or abandoned his property but requested that the property manager move his belongings to a storage locker.

I find that the tenant's statement that he did not abandon the possessions at the subject rental property does not accord with the facts of this case. Stating a fact does not make it true. I confirm my above finding that it was reasonable for the landlord to believe, given the facts of this case, that the tenant, who had removed substantially all of his possessions from the subject rental property and requested the landlord to move the remainder of his belongings to storage, would not return to the subject rental property. I note that the tenant did not try to regain access or possession on the subject rental property or request to take conduct of his personal belongings

Section 24(3) of the *Regulation* states:

> If personal property is abandoned as described in subsections (1) and (2), the landlord may remove the personal property from the residential property, and on removal must deal with it in accordance with this Part.

Pursuant to section 24(3) of the *Regulation,* I find that the landlord was entitled to remove the tenant's remaining personal possessions and put them into storage, which I note the tenant requested.

The tenant testified that his access to the storage locker was restricted by the landlord. The landlord denied that his access to the storage locker was restricted. The onus or burden of proof is on the party making the claim. When one party provides testimony of

the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

I find that the e-mail the tenant entered into evidence in support of his allegation that the landlord restricted his access to the storage locker does not support his testimony. The e-mail in question warns the landlord that the landlord is required to store his items for 60 days and that the landlord cannot after only 30 days remove his property from storage. The e-mail does not allege that the landlord restricted his access to the storage locker. The evidence submitted by the landlord shows that the landlord paid for two months worth of storage. I find that, on a balance of probabilities, the tenant has not proved that the landlord restricted access to the storage locker.

I find that the caselaw cited by the tenant, *Fok v. British Columbia (Residential Tenancy Dispute Resolution Officer)*, 2010 BCSC 1613 (*Fok v. British Columbia)* to be of no assistance as the facts of that case differ markedly from the case at hand. In *Fok v. British Columbia* the arbitrator's finding that the subject rental property was not abandoned was upheld. In this case, I have found that the subject rental property was abandoned.

Storage and Cleaning

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due.

In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Section 37 of the *Act* states:

> **37** (1)Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.
>
> (2)When a tenant vacates a rental unit, the tenant must
>
> (a)leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and
>
> (b)give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

Section 7 of the *Act* states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

I find that the Order of Possession was enforceable on December 8, 2018, two days after the tenant's application for review consideration was dismissed. I find that the tenant failed to comply with the Order of Possession as he did not remove substantially all of his personal belongings until December 9, 2019. I find that this delay breached section 37(1) of the *Act.*

I find that the tenant breached section 37(2)(a) of the *Act* because he left a variety of personal items at the subject rental property which he requested the landlord's property manager to pack up and put into storage for him. I find that this action resulted in a loss to the landlord who had to purchase boxes to move the tenant's personal property, pay the property manager to move the tenant's personal property and pay for the storage locker for two months. The landlord entered into evidence receipts for the above costs totaling $766.24. I find that the landlord mitigated his damages as the property manager contacted the tenant on December 10, 2018 and asked him how he would like to collect his possessions, thereby providing the tenant with an opportunity to collect the items himself, lessening the monetary loss incurred. I find it was the tenant who requested the property manager to pack his belongings up for him and move it to storage. Pursuant to section 67, I find the landlord is entitled to recover $766.24 from the tenant.

Based on the photographic evidence and the three move out condition inspection reports entered into evidence, I find that the subject rental property required significant cleaning after the tenant vacated the subject rental property contrary to section 37(2)(a)

of the *Act*. I find that it was reasonable for the landlord to hire a cleaner and have the carpets cleaned. The landlord entered into evidence a cleaning receipt in the amount of $183.75 and a carpet cleaning receipt in the amount of $157.50 for a total of $341.25. I find that the landlord mitigated the damages as the property manager provided the tenant with an opportunity to complete the cleaning himself, thereby lessening the damages incurred. Based on the move out condition inspection reports, I find that the tenant did not adequately clean the subject rental property and it required professional cleaning. I therefore find that the landlord is entitled to recover $341.25 from the tenant for the cost of cleaning and carpet cleaning.

I find that the tenant has not proved, on a balance of probabilities, the property manager promised to return his security deposit if he retuned on December 14, 2018 to clean the subject rental property.

Overholding

Section 7 of the *Act* states:

> 7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
> (2)A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

I find that while the tenant was entitled to remain at the subject rental property until his application for review consideration on my Interim Decision and Order of Possession was dismissed, the tenant remains liable for damages his actions have caused the landlord.

The tenant testified that he would not have chosen to stay beyond the effective date of the Mutual Agreement to End Tenancy had he known that the landlord had signed a new tenancy agreement effective November 1, 2018. The tenant testified that since the landlord did not tell him about the new tenancy agreement prior to September 1, 2018, he should not be responsible for the losses the landlord suffered arising out of this new tenancy agreement.

I find that the landlord acted reasonably when he found new tenants for the subject rental property effective November 1, 2018 after both parties signed the Mutual Agreement to End Tenancy. I find that the landlord was under no obligation to inform the tenant that new tenants had been found for the subject rental property as the tenant is not privy to the landlord's contractual relationships. I find that the tenant's refusal to move out of the subject rental property in accordance with the Mutual Agreement to End Tenancy frustrated the tenancy agreement between the landlord and the new tenants.

I find that the landlord suffered losses arising out of the frustrated tenancy agreement. I find that the landlord would not have suffered those losses if the tenant had moved out in accordance with the Mutual Agreement to End Tenancy. Pursuant to section 7 and 67 of the *Act*, I find that that tenant must compensate the landlord in the amount of $1,400.00 which is the value of one month's rent the landlord did not receive from the new tenants as a direct result of the tenant's actions.

I find that the new tenancy agreement was signed with the new tenants before the landlord became aware that the tenant intended on breaching the Mutual Agreement to End Tenancy. I find that the landlord mitigated his damages by reaching a reasonable settlement with the new tenants, thereby limiting the losses that could have been incurred.

I decline to consider the tenant's written submissions regarding November and December 2018 rent as those issues were dealt with in my previous decision and are res judicata.

Res judicata prevents a plaintiff from pursuing a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment. It also precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. Former adjudication is analogous to the criminal law concept of double jeopardy.

I note that the information officers at the Residential Tenancy Branch provide information and not legal advice. I find that the information provided to the tenant was sound; however, the tenant may not have interpreted the information provided correctly.

I find that the information provided by the Residential Tenancy Branch was about the tenant's occupation of the subject rental property, not about damages arising out of the tenancy.

I find the tenant's written submissions about whether or not the subject rental property was put up for sale before or during the tenancy to be irrelevant to this application as the landlord did not sell the subject rental property or end the tenancy via a Two Month Notice to End Tenancy for Landlord's Use of Property due to sale of the property. I therefore decline to address each of the tenant's submissions on this point. I also find that the case law cited, *Canson Enterprises Ltd. V. Boughton &Co*., [1991] 3 SCR 534, 1991 Can LII 52 (SCC), is factually distinct from this case and the findings are not transferable.

Security Deposit

I find that this tenancy ended on December 9, 2018 when the tenant removed substantially all of his belongings from the subject rental property. The landlord applied for dispute resolution on December 20, 2018.

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 tenant's security deposits within 15 days after the date the tenancy ended pursuant to section 38 *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 or pet damage deposit

due to the tenant. I find that the landlord is entitled to retain the tenant's entire security deposit in the amount of $675.00 in part satisfaction of his monetary claim against the tenant.

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

Conclusion

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

Item	**Amount**
Property manager labour	$420.00
Boxes	$51.47
Storage	$294.77
Cleaning	$183.75
Carpet cleaning	$157.50
Loss of one months' rent	$1,400.00
Filing Fee	$100.00
Subtotal	**$2,60749**
Less security deposit	-$675.00
TOTAL	**$1,932.49**

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: June 07, 2019

Residential Tenancy Branch