



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on April 8, 2019, and July 15, 2019, by conference call. The Tenant applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- A monetary order for compensation for damage or loss under the Act.

The Landlord was present at both hearings along with her counsel (collectively referred to as the "Landlord"). The Tenant was also at both hearing, along with an advocate (collectively referred to as the "Tenant"). The Landlord confirmed receipt of the Tenant's documentary evidence, and amendment and took no issue with the service of these documents. The Tenant confirmed receipt of the Landlord's documentary evidence.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Is the Tenant entitled to compensation for damage or loss under the Act?

Background and Evidence

General Background Information

Both parties agree that:

- monthly rent was \$1,161.00 and was due on the first of the month.
- The Tenant lived in a basement suite of the Landlord's house and there was a severe flood in the rental unit on December 19, 2016.
- At the time of the flood, the Tenant was living with his elderly father
- The Tenant was required to move out in order for remediation to occur
- The Tenant stayed in a motel from December 19, 2016, until February 27, 2017
- The Tenant did not have his own insurance, but the Landlord's insurance paid for the Tenant to stay at a motel while the remediation was happening. During this time, the Tenant paid his monthly rent to the insurer, and the insurer paid for the added expense of living at a motel.

The Tenant stated:

- His father became ill towards the end of February 2017, and ceased living with him for the next year (he passed away on February 21, 2018). His father was in a care facility for the last year of his life.
- He rented space at a house in Sidney, where he slept on the couch for March and April of 2017.
- In May of 2017, he moved to Calgary to live with a friend until the start of August 2017.
- He moved again in August of 2017 and stayed until September of 2018 where he lived in an unsuitable living environment where he dealt with threats and issues from others living there.
- He then slept on the floor at a church from approximately September 2018 until January 2019.

The Tenant laid out his claim *roughly* as it related to the 4 part test for damages. The Tenant stated that the Landlord breached the Act because she ended the tenancy illegally. More specifically, the Tenant pointed to an email from the Landlord on January 31, 2017, where she stated that she had re-rented the unit as of April 1, 2017. The Landlord expressed that she had re-rented the unit to someone else, after her ongoing conversations with the Tenant throughout January 2017 (while he was living at the motel, considering his options). The Tenant stated that he never agreed to end the tenancy, and was forced out by the Landlord and the flood. The Tenant stated that he

went back to gather a few more of his belongings (from the flooded rental unit) on February 11, 2017, and he found that the locks had been changed.

The Landlord expressed that this was an unfortunate event, as the contractor had changed the locks on the rental unit when they started doing construction. The Landlord stated that it was not her intention to lock the Tenant out. The Landlord expressed that she believed, based on her verbal conversations with the Tenant throughout January 2017, and the emails towards the end of January/Early February, that the Tenant was in agreement with her that the tenancy was over.

The Tenant expressed that he never agreed that he wanted to move elsewhere. The Tenant stated that his father entered the hospital on February 24, 2017, which further complicated matters. The Tenant stated that both his and his father's health declined and he lost contact with his son because of being displaced from the rental unit. The Tenant stated that he has a few medical issues which have been exacerbated from having to live in homeless shelters, and from not having a proper place to live, since the flood occurred. The Tenant stated that there are well documented harms, and negative health outcomes for those who live in shelters and in the streets. The Tenant provided copied of studies, and opinions from healthcare professionals with respect to how these living situations can negatively impact those involved.

The Tenant stated he is seeking \$12,500.00 in damages because the Landlord illegally ended his tenancy, and caused him significant hardship in the process. More specifically, the Tenant is seeking \$3,212.50 for damage or loss under the Act and \$9,287.50 in aggravated damages, as a result of how the tenancy ended. The Tenant provided a monetary order worksheet which specified 3 items as follows:

1) \$2,902.50 – 75 days loss of use of rental unit

The Tenant stated that this amount is calculated by taking \$38.70 per day (his per diem rental rate) and multiplying it by 75. The Tenant is seeking to recover rent he paid from February 11, 2017, until the end of April 2017, (the date of April 30, 2017 was clarified in the second hearing). The Tenant gave his formal written notice that he would be terminating the tenancy on April 11, 2017, although he had been living elsewhere for a period of time already.

The Tenant stated that he tried to find suitable housing and attempted to mitigate his losses, but due to the shortage of affordable housing, he ended up in a series of

unsuitable situations (sequence outlined above). The Tenant stated that he did everything he could to find another place.

The Landlord stated that the tenancy was frustrated. The Landlord stated that the flood of December 19, 2016, made the rental unit uninhabitable, and as such, the tenancy is over effective that date. The Landlord stated that the rental unit had a foot of water in it, and required substantial remediation, which took several months (from late December 2016, until early March 2017). The Landlord stated that the Tenant was required to move into a motel while the remediation was going on, as flooring, drywall, cabinets, and paint required work. The Landlord stated that her insurance kicked in, and collected the monthly rent from the Tenant, and in turn paid for the extra amount that it cost to put the Tenant up in a motel from December 19, 2016, until February 27, 2017.

During the time the Tenant was staying in the motel, there were several discussions and negotiations about whether or not the tenancy was ending, whether it was frustrated, and whether or not both parties were on the same page about ending the tenancy. Many of these conversations were undocumented and verbal. There are a few different email chains provided into evidence. In some of these conversations, which started in early January, the Tenant expressed that he was in a difficult financial position, and was weighing his options (seeking advice) and that he was also dealing with difficult family issues which were stressful. The Landlord expressed in these communications that she had an interest in helping the Tenant find a more affordable place to live (she was tired of working out alternative rent payment arrangements), and it also appeared the Landlord was looking to formally end the tenancy with the Tenant.

The Landlord stated that the flood was caused by a failed sump pump across the street, and it was no one's fault. The Landlord stated that after having some discussions with the Tenant about moving out in January 2017, she took this as a verbal agreement that he agreed to end the tenancy. The Landlord was unable to produce anything showing that the parties agreed to end the tenancy in writing, other than some emails showing back and forth discussion about different options. On January 29, 2017, the Landlord stated that she found a new tenant to move in for April 1, 2017, which she believed would allow for plenty of time for the remediation to complete. The Landlord sent the Tenant an email on January 29, 2017, indicating she had found someone to move in, and that he would not be able to move back into the unit after it had been remediated. The Landlord stated that in the days following this, there was lots of dialogue about the Tenant moving on, and the Landlord feels this is evidence that they agreed to end the tenancy. As per the emails and text messages, the parties were discussing different offers and payments from the Landlord and the Tenant to bring the tenancy to an end.

The messages appear to discuss a variety of options, payments, dates, and arrangements, none of which were specifically show that an agreement was made in writing.

The Tenant provided a copy of a Mutual Agreement to End Tenancy which the Landlord drafted up and sent to the Tenant (dated February 13, 2017). The Landlord had signed this document, and laid it out in a manner as to formally end the tenancy and lay out the terms of payment to the Tenant. The Tenant did not sign this document, and continued to explore his options. The communications provided into evidence reveal some failed negotiations, and distress over lack of suitable housing options.

2) \$310.00 – moving costs

The Tenant stated that he did not have renters insurance and had to pay the following amounts to move his things out of the rental unit:

- February 11, 2017 - \$60.00 for labour to help move
- February 25, 2017 - \$220.00 for labour to help move
- March 11, 2017 - \$30.00 for labour to help move

The Tenant stated that he had to return several times to move his belongings out of the way of the construction work. The Landlord stated that they offered to help move his things on February 4, 2017, but he denied the help. The Landlord stated that the Tenant caused significant delays in the remediation because he would not return to move his things out of the way.

The Tenant stated that he wants to recover this money that he spent to hire help to move his things. The Tenant provided receipts into evidence.

3) \$9,287.50 - Aggravated damages

The Tenant stated that he is seeking the above amount for aggravated damages because of all the negative health outcomes and stress he endured after losing his tenancy illegally. The Tenant stated the following to highlight some of the challenges he has had to face after losing his tenancy:

- He has had asthma/COPD for 30 years, which has gotten worse since he lost his tenancy
- He has COPD for many years, but it wasn't until after he lost his tenancy and that he started feeling the effects of asthma and COPD in a substantial way.
- He passed a kidney stone at an undetermined date
- Someone passed away in the shelter he was living in
- He had to live at Our Place community shelter which was a stressful and unhealthy environment.
- He has PTSD, which has been caused and exacerbated by his lack of healthy living environment
- He lost contact with his son after losing his tenancy because he no longer had space for his son to stay.
- His father's health declined after the flood occurred, and his father was hospitalized sometime in February of 2017, and was subsequently placed in a care facility until he passed away.

The Landlord stated that the Tenant has lived in the rental unit since 2008, and has had health challenges for many years, including issues with COPD and asthma. The Landlord stated that the Tenant's father's health was declining for many years leading up to the flood. For example, one day they found the Tenant's father in the bushes after he took a fall on the property. The Landlord stated she repeatedly tried to help the Tenant find more help for his father, as he required lots of assistance. The Landlord stated that the Tenant has had employment issues, even before the flood. The Landlord stated that the Tenant had many times where he was short on rent, and she would allow him to work off what he owed. The Landlord stated she went out of her way to keep him housed, and allow the tenancy to continue over the years. The Landlord stated that she even paid for his storage locker from February 11, 2017, until the end of April 2017, so that the Tenant could keep his belongings safe while the construction finished.

The Landlord stated that she made several payout offers to the Tenant throughout April of 2017, to help the Tenant move on, but he denied the offers. The Landlord also feels she went out of her way over the years to allow him to work off his rent debt, and thoughtfully ensure he was able to keep a roof over his head. The Landlord also stated that she went out of her way to engage with her insurance company to advocate for

them to pay for the added costs for the Tenant to stay in a motel (beyond base rent). The Landlord stated that her type of insurance does not normally cover this type of thing, but she pushed for it because she knew the Tenant didn't have his own insurance. The Landlord stated that there is no evidence that the Tenant's negative health outcomes were caused by the flood or her actions.

The Tenant stated he wanted to be given the chance to find a roommate (after his father went into care), and to return to the rental unit and figure out a way to pay his rent.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Tenant to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Landlord. Once that has been established, the Tenant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Tenant did everything possible to minimize the damage or losses that were incurred.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

First, I will consider whether or not the tenancy agreement was frustrated by the flood that occurred in the rental unit. I turn to the following portion of the *Act*:

- 44** (1) A tenancy ends only if one or more of the following applies:
- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
 - (i) section 45 [*tenant's notice*];
 - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
 - (ii) section 46 [*landlord's notice: non-payment of rent*];
 - (iii) section 47 [*landlord's notice: cause*];
 - (iv) section 48 [*landlord's notice: end of employment*];
 - (v) section 49 [*landlord's notice: landlord's use of property*];
 - (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];

- (vii) section 50 [*tenant may end tenancy early*];
- (b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
- (c) the landlord and tenant agree in writing to end the tenancy;
- (d) the tenant vacates or abandons the rental unit;
- (e) the tenancy agreement is frustrated;
- (f) the director orders that the tenancy is ended;
- (g) the tenancy agreement is a sublease agreement.

Next, I turn to the following portion of the Act:

92 The ***Frustrated Contract Act*** and the doctrine of frustration of contract apply to tenancy agreements.

Frustration is an English contract law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract.

If an event occurs which causes an inordinate delay in the performance of the contract, frustration may be held. However, it must be a serious delay which affects the intended purpose of the contract. Although the Tenant was clearly displaced, disrupted and inconvenienced, I find the interruption caused by the flood in the rental unit was relatively short lived within the context of a long term tenancy agreement, which in this case was in existence for many years. The flood occurred on December 19, 2016, and the remediation efforts began right away, and continued throughout January and February, and finally ended in March of 2017. I note the Landlord stated the tenancy was frustrated as of the date of the flood. However, I find I do not agree.

I note the Landlord took steps to engage with the tenant to formally end the tenancy but there is also no indication any of these negotiations were successful. Meanwhile, as the remediation was going on, the Landlord had her insurance pay for the Tenant to stay in a motel. Then, while the Tenant was staying in the motel, and the Landlord and Tenant were having discussions about whether or not the tenancy was over, the Landlord turned around (without either party having given proper notice to end the tenancy) and found new tenants at the end of January 2017, effective April 1, 2017. This signals to me that the Landlord had an idea the remediation was not going to continue excessively long. After considering the totality of the situation, I find the tenancy agreement was not frustrated.

With respect to when the tenancy actually ended, I note the Tenant was living in a motel from December 19, 2016 until February 27, 2017. During this time, the Tenant was still paying rent to the Landlord's insurer, and they in turn were paying for the added costs for staying in the motel. This continued until the end of February 2017, and after failed and/or unclear end of tenancy negotiations, the Tenant realized the Landlord had re-rented to someone else, effective April 1, 2017. As a result, the Tenant rented space in a house (slept on the couch) starting the beginning of March 2017 (for 2 months).

The Tenant took some time to finish moving his belongings out of the Landlord's property. It appears, based on the receipts provided by the Tenant for moving costs, that he had someone helping him up until March 11, 2017. The Landlord also stated that the remediation didn't fully complete until sometime in March. The Landlord stated that the new Tenants did not move in until April 1, 2017. I also note the Landlord drafted a mutual agreement to end tenancy in February. However, the Tenant never signed it. I also find that none of the communications in writing constitute an agreement between the parties to end the tenancy.

Given the totality of the situation, I find and order that the tenancy ended at the end of March 2017, since the rental unit was re-rented for April 1, 2017, and a new tenancy took effect that date. I note the Tenant gave formal written notice that he wanted to end the tenancy on April 11, 2017. However, at that point, the tenancy was already over; the Tenant was living elsewhere, and the Landlord had new renters.

Next, I will address each of the Tenant's monetary items in the same order as above:

1) \$2,902.50 – 75 days loss of use of rental unit

I note the Tenant is seeking compensation equivalent to 75 days' worth of rent for February 11, 2017, the day he was locked out, until the end of April 2017. I note the Tenant was paying rent to the insurer up until the end of February in exchange for a place to live at a motel, which likely would have cost more than this. It is likely the insurer had to pay extra for the Tenant to live at the motel beyond his base rent. In any event, the Tenant still had a place to stay at a motel for the month of February in exchange for his normal rent amount. As a result, I find the Tenant is not entitled to compensation for February 11, 2017, until the end of February 2017. However, I find the Tenant is entitled to be compensated for March 2017, in full, as I find the Landlord illegally ended the tenancy without written consent from the Tenant, which is a breach of section 44 of the Act.

I decline to award the Tenant compensation for April 2017, as the tenancy had already ended, and the Tenant had found alternative accommodation. I also find the Tenant had several weeks to seek more suitable accommodation after allegedly being locked out on February 11, 2017. I appreciate that finding a suitable and affordable rental unit is challenging. However, the Tenant has not sufficiently demonstrated that he took sufficient steps to find new suitable housing, and mitigate the negative outcomes. As such, he is only entitled to compensation for March, which amounts to a full month's rent, \$1,161.00.

2) \$310.00 – moving costs

As specified above, I find the Landlord breached the Act by ending the tenancy, and re-renting the unit, without first getting or giving notice or obtaining a written agreement that the previous tenancy had been ended lawfully. As a result of this breach, I find the Tenant is entitled to some compensation, as this contributed to the need to move his belongings. I note the Tenant provided receipts that he paid for help to move his things after the tenancy began to go sideways. However, I also note the Landlord offered to help move the Tenant's belongings around February 4, 2017. I find the Tenant did not sufficiently mitigate his losses by accepting free help from the Landlord to move his belongings. In this case, I find a nominal amount is more appropriate:

“Nominal damages” are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

I award the Tenant a nominal amount of \$100.00 to cover some of the costs he incurred as a result of the Landlord's breach of the Act.

4) \$9,287.50 - Aggravated damages

The Tenant stated that he is seeking the above amount for aggravated damages because of all the negative health outcomes and stress he endured after losing his tenancy illegally. When asked how the Tenant arrived at this amount. He was unable to explain.

An arbitrator may award aggravated damages. These damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Losses of property, money and services are considered "pecuniary" losses. Intangible losses for physical inconvenience and discomfort, pain and suffering, grief, humiliation,

loss of self-confidence, loss of amenities, mental distress, etc. are considered "non-pecuniary" losses.) Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's wilful or reckless indifferent behaviour. They are measured by the wronged person's suffering.

The damage must be caused by the deliberate or negligent act or omission of the wrongdoer.

In this case, I find there is insufficient evidence to establish that the Landlord acted in a deliberate, negligent and/or high-handed manner.

Although the Landlord breached the Act by finding new renters without properly ending the previous tenancy, I do not find her actions were egregious or sufficiently high handed as to warrant aggravated damages. I further find her actions were in good faith for a large part of the time. More specifically, I note the Landlord went out of her way to request that her insurance provide alternative living accommodation for the Tenant at no added cost to him, while the remediation was going on. The Landlord knew the Tenant did not have insurance, and had some financial challenges, so it appears she was acting in good faith when she sought to keep the Tenant housed.

However, it is clear the Landlord either misinterpreted or intentionally misinterpreted that the Tenant wanted to end the tenancy so that she could find different tenants. In any event, she failed to comply with section 44 of the Act, and she failed to lawfully end the tenancy. I find the Landlord's actions, although not sufficiently deliberate, negligent and high-handed as to warrant aggravated damages, did cause the Tenant some stress, and suffering over the following months. Further, I note the Tenant opines that his negative health outcomes were a result of his illegal eviction. However, I find there is insufficient evidence to support that many of the issues (Asthma, COPD, kidney stones) were directly attributable to his loss of housing. In this case, I find a nominal award is more appropriate to compensate for some, but not all of the Tenant's suffering. I award the Tenant \$500.00.

In summary, I grant the monetary order based on the following:

<u>Claim</u>	<u>Amount</u>
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Compensation for Rent - March 2017	\$1,161.00
Moving costs – Nominal	\$100.00
Aggravated Damages - Nominal	\$500.00
TOTAL:	\$1,761.00

Conclusion

The Tenant is granted a monetary order pursuant to Section 67 in the amount of **\$1,761.00**. This order must be served on the Landlord. If the Landlord fails to comply with this order the Tenant may file the order in the Provincial Court (Small Claims) and be 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: July 17, 2019

Residential Tenancy Branch