Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNDCL, MNDL-S

Introduction

This hearing convened as a result of Landlord's Application for Dispute Resolution filed on June 24, 2019 in which the Landlord claimed monetary compensation from the Tenant in the amount of $16,000.00, authority to retain the Tenants' security deposit, and recovery of the filing fee.

The hearing was scheduled for teleconference on August 22, 2019 and continued on October 22, 2019. Both parties called into the hearings and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

On June 24, 2019 the Tenants obtained a Monetary Order for $2,300.00 which included return of their security deposit. The file number for that matter is included on the unpublished cover page of this my Decision. As such, the Landlord's claim to retain the security deposit is no longer relevant.

The parties confirmed their email addresses during the hearing as well as their understanding that this Decision would be emailed to them.

Issues to be Decided

1. Is the Landlord entitled to monetary compensation from the Tenants?

2. Should the Landlord recover the filing fee?

Background and Evidence

Introduced in evidence was a copy of the residential tenancy agreement confirming that this one year fixed term tenancy began August 1, 2018; monthly rent was $2,200.00 and the Tenants paid a security deposit of $1,100.00.

Although the Tenants prepared and signed a Mutual Agreement to End Tenancy for the end of October 2018, the Landlord did not sign the document. In her testimony the Landlord confirmed she did not agree to the tenancy ending at that time.

The Landlord testified that two of the Tenants, M.B. and K.M., gave notice to end their tenancy on December 7, 2018 (by email; a copy of which was provided in evidence) and moved out by December 9, 2018. She confirmed that the other Tenant, A.J. move out by December 31, 2018. Notably A.J. was not named on the Landlord's Application, nor was A.J. present during the hearings. The Landlord stated that she had no means of contacting A.J.

In the hearing before me the Landlord confirmed that she sought monetary compensation for the following:

unpaid rent for January 2019 to June 2019 pursuant to the fixed term $2,200.00 x 6 =	$13,200.00
Cleaning and rubbish removal	$550.00
Travel expenses between Landlord's residence and rental unit	$600.00
Replacement cost of the Internet box	$336.00
Replacement cost of the organizer	$30.00
Filing fee	$100.00
Total claimed	**$14,816.00**

In terms of the unpaid rent the Landlord testified as follows. She confirmed that the Tenants moved from the rental unit on December 31, 2018. She stated that she began advertising January 1, 2019 on Craigslist once the tenancy ended. Introduced in evidence was an ad placed sometime later in which the Landlords had reduced the rent to $1,900.00. The original ad was not provided in evidence. The Landlord confirmed that she did not advertise the rental unit anywhere but on Craigslist.

The Landlord noted that she had to reduce rent because they were not generating enough interest. The Landlord claimed that the community in which the rental unit is located is not experiencing a rental housing crisis as in other parts of British Columbia.

The Landlord also stated that the Tenants told her they were moving out early December and “then were gone as of December 9”. She then clarified that the other Tenant, A.J. stayed until the end of December 2018.

The Landlord testified that she rented the unit out as of July 1, 2019 for $1,900.00.

She confirmed that there were ten showings of the rental unit between January 1, 2019 and June 30, 2019. The Landlord stated that she lives approximately four hours driving distance away from the city in which the rental unit is located. The Landlord stated that she and her husband did the showings and they did not hire someone in the community in which the rental unit was located to show the unit. The Landlord also stated that she received other requests to see the rental unit, but “with the commute” they could only do so on weekends. The Landlord also stated that she runs two group homes in the community in which she resides such that it is more difficult to travel and show the rental unit.

In terms of the claim for cleaning and rubbish removal the Landlord provided an invoice in evidence as well as three photos of the items which were left.

The Landlord confirmed that she did not perform a move out condition inspection as she was not present when the tenancy ended.

In terms of the Landlord’s claim for compensation related to the internet box, the Landlord stated that the Tenants removed the internet box, or at least they claimed they did not know where it was when the tenancy ended. In this respect the Landlord sought the $336.00 replacement cost.

The Landlord also claimed the cost of replacing the shower organizer. She stated that it was removed by the Tenants at the end of the tenancy. In this respect the Landlord requested $30.00. In support she provided an internet printout of a comparable shower organizer.

In response to the Landlord's claim, the Tenant M.B. testified as follows.

M.B. confirmed that the Tenants disputed the Landlord's claim for monetary compensation for unpaid rent. She submitted that as they gave the Landlord several months notice of their intention to end the tenancy, the Landlord could have started advertising much sooner than she did. In support the Tenant confirmed that as early as October 2018 they informed the Landlord they wished to end their tenancy effective October 31, 2018. Introduced in evidence was a letter from the Tenants from October 3, 2018 wherein they attached a signed mutual agreement to end the tenancy; in that letter the Tenants also write:

> "We have appreciated the time spent at the [rental unit], however, we feel that living at another property would be more suitable for our housing needs at this time.".

The Tenant also stated that there is in fact a "housing crisis" in the community in which the rental unit is located, contrary to the Landlord's claims, such that had the Landlord advertised sooner she could have rented the rental unit without any loss of rent. The Tenant further stated that there are tons of people looking for housing in the community as rental units are scarce. Finally, she noted that they provided the Landlord with the opportunity to view the rental unit while they were still living there and the Landlord did not offer to show the unit to anyone in that time.

The Tenant confirmed they did not personally try to advertise the rental unit to anyone else.

In terms of the Landlord's claim for cleaning and rubbish removal, the Tenant stated that they vacated the rental unit on December 8, 2018. Their other roommate, A.J., stayed until December 31, 2018. She noted that A.J. said she would leave it clean and tidy. She also confirmed that she was not there when the tenancy ended, nor was A.J. going to give testimony.

In terms of the Landlord's claim for compensation for the internet box, the Tenant claimed that they left the internet boxes at the rental unit. She also noted that the Landlord was asking for the passwords for the internet boxes for the next renters, such that it was clear that she had the boxes.

In terms of the shower organizer the Tenant stated that she had no information about the shower organizer, only to say that they do not have it.

Although present at the hearing, the Tenant K.M. did not testify.

In reply to the Tenant's testimony, the Landlord noted that it was actually the third roommate who was asking for the wifi password, not the Landlord such that the internet box was there at the time.

The Landlord also confirmed that she was not present at the rental unit when A.J. moved out. She stated that their upstairs tenant, J., took the keys.

In terms of the Tenants' claim that the Landlord could have advertised in October 2018, the Landlord noted that the Tenants made a proposal, but there was no agreement as to the end of the tenancy. The Landlord noted that the Tenants did not give legal notice until December 7, 2018 and moved out a few days later such that the Landlord could not have shown the rental unit while they were still there.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at**:**

www.gov.bc.ca/landlordtenant.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Landlord has the burden of proof to prove her claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;
- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;
- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

Section 37(2) of the *Act* requires a tenant to leave a rental unit undamaged, except for reasonable wear and tear, at the end of the tenancy and reads as follows:

> **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.

In the case before me the Landlord claims loss of rent due to the Tenants ending the tenancy before the expiration of the fixed term. The evidence confirms that the Tenants moved out December 31, 2018, some seven months before the July 31, 2019 expiration of the fixed term.

The Tenants allege the Landlord breached a material term of the tenancy by entering the rental unit without their knowledge or consent, and further that this alleged breach justified ending the tenancy early.

Residential Tenancy Branch Policy Guideline 22: Termination or Restriction of a Service or Facility defines material term as follows:

> **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. Even if a service or facility is not essential to the tenant's use of the rental unit as living accommodation, provision of that service or facility may be a material term of the tenancy agreement. When considering if a term is a material term and goes to the root of the agreement, an arbitrator will consider the facts and circumstances surrounding the creation of the tenancy agreement. It is entirely possible that the same term may be material in one agreement and not material in another.

As noted, the parties attended a hearing relating to the Tenants' claim for compensation for breach of their right to quiet enjoyment and in particular their claim that the Landlord entered the rental unit without their knowledge or consent. By Decision dated June 24, 2019 the presiding Arbitrator found as follows:

> "In this matter, the landlord provided testimony that they did not enter the living area of the rental unit, which is separated by a door from the laundry area, but only accessed the furnace closet located in the laundry room. The landlord submitted photographic evidence of the laundry room and furnace closet in support of their testimony.
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> Further to this, the landlord testified that the tenant K.M. allowed them access when they attended at the rental unit on September 29, 2018 to explain that they needed to access the furnace closet to turn the furnace on as they were travelling out of town the next day.
>
> I accept the landlord's testimony that permission was granted by the tenant K.M. for the landlord to access the furnace room at the time of entry as tenant K.M. was not in attendance at the hearing as a witness to dispute the testimony.
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> Although I accept that the tenants had requested to be provided with 24 hours notice I also find that it would be reasonable for the tenant to permit the landlord access at the time of entry to turn on the furnace since the furnace was not located in the living area of the rental unit, and the tenants would require the furnace to be turned on to provide heat to the rental unit, for their own comfort and well-being.
>
> As explained at the beginning of the "Analysis" section, a claimant must prove that the damage or loss stemmed directly from a violation of the tenancy agreement or contravention of the *Act* on the part of the respondent.
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> Section 29(1)(a) of the *Act* allows a tenant to give permission to a landlord access to the rental unit at the time of entry. Although the evidence is clear that the tenant K.M. requested 24 hours notice of entry in her earlier email, I do not find any evidence submitted by the tenants to dispute the landlord's testimony that the tenant K.M. permitted access to the landlord to the laundry area upon the landlord's attendance at the rental unit. I find it reasonable to believe that the tenant K.M. permitted access at the time of entry upon

> explanation that the access would only take a few minutes, was necessary to provide heat to the rental unit, and that the landlord would be leaving town the next morning.
>
> Therefore, based on the testimony and evidence before me, on a balance of probabilities, I find that there is not sufficient evidence to establish that the landlord accessed the rental unit in contravention of section 29 of the *Act*, resulting in a loss of quiet enjoyment to the tenants pursuant to section 28 of the *Act*. As such, the tenants claim for compensation on this issue is dismissed.

Although the prior hearing dealt with the Tenants' claim for monetary compensation for an alleged breach of quiet enjoyment, I find that the issue: whether the Landlord breached section 29 during the tenancy, has already been decided by the Residential Tenancy Branch. In that respect the presiding Arbitrator found the Landlord had not breached section 29. It is not open for me to revisit that finding or substitute my finding in its place. Similarly, this hearing is not an opportunity for the Tenants to submit testimony and evidence they should have presented at the prior hearing.

In any event, I wish to point out that even in the event I had found the Landlord breached section 29, I would not have found this sufficient to allow the Tenants to end their tenancy early.

Pursuant to section 45(3) of the *Act,* a tenant may end a tenancy early in the event the landlord breaches a material term of the tenancy. However, section 45(3) does not allow a tenant to end a tenancy immediately following such an alleged breach, rather, section 45(3) provides as follows:

> **45** (3)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.
>
> [emphasis added in italics]

In the case before me there was no evidence that the Tenants gave the Landlord *written notice* of the alleged breach, nor was there any suggestion they afforded the Landlord an opportunity to *correct the situation within a reasonable period* after such written notice was provided.

In all the circumstances I find the Tenants were not permitted to end their tenancy early pursuant to section 45(3) of the *Act.*

I will now turn to the Landlord's claim for unpaid rent.

A tenant is potentially liable for all rent payments due pursuant to a fixed term tenancy agreement. However, in all cases the landlord's claim for unpaid rent is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent.

Although the Tenants informed the Landlord that they were prepared to end the tenancy at the end of October 2018, the Landlord did not agree to this date and did not sign the Mutual Agreement to End Tenancy. The evidence indicates they then gave notice to end their tenancy in early December; however, one of the Tenants remained in the rental unit until the end of December such that the Landlord could not have been certain when the rental unit would be vacant and ready to be re-rented. I find it reasonable that the Landlord did not advertise the rental unit until the final Tenant had moved out. In these circumstances, I find the Landlord is entitled to unpaid rent for the month of January 2019 in the amount of **$2,200.00**.

Conversely, I decline the Landlord's request for unpaid rent for the balance of the fixed term for the following reasons.

The Landlord stated that she resides a four hour drive away from the rental unit. She confirmed that she does not employ a property manager or agent in the community in which the rental unit is located. She further testified that she was only able to show the rental unit approximately ten times between January 1, 2019 and June 30, 2019, which is an average of 1.67 times a month. She also stated that the property could have been shown more, but she was only able to show the property on weekends due to the time it took her to drive to the rental unit as well as her work commitments.

While the Landlord may choose to reside in a different community than that which the rental unit is located, this business choice should not be to the determinant of her tenants. In all the circumstances I find that showing the rental unit 10 times in a six month period was insufficient to discharge her duty to mitigate her losses.

Similarly, I find, based on the evidence before me, that the Landlord failed to actively market the rental unit. The Landlord testified that she only advertised on Craigslist. The only evidence before me of such advertising was an ad placed sometime after the tenancy ended. I find the Landlord has provided insufficient evidence to support a finding that she mitigated her losses by advertising the rental unit to others.

I do not accept the Landlord's evidence that the community in which the rental unit is located is immune to the housing crises in British Columbia. I find that the Landlord could have rented the unit sooner had she been more proactive in terms of advertising, as well as hiring an agent to attend to showings on a more regular basis.

For these reasons I find the Landlord is only entitled to recover the January 2019 rent.

I accept the Landlord's evidence that the Tenants failed to clean the rental unit as required by section 37. The photos submitted by the Landlord, as well as the invoice provided in evidence support this claim. The Tenants confirmed they were not present when the tenancy ended, and relied on their roommates' assurance that she would clean the rental unit when she moved out. The Tenant who remained until December 31, 2018 did not call into the hearing and did not provide testimony in response to the Landlord's claims. I therefore find the Landlord is entitled to the **$550.00** claimed.

I similarly award the Landlord the cost of replacing the internet box in the amount of **$336.00** as well as the **$30.00** cost to replace the shower organizer. Again, I prefer her testimony that those items were removed by the Tenants, as opposed to the testimony of the Tenant M.B. as M.B. was not present when the tenancy ended.

Notably, neither party was present for a move out condition inspection. The parties are reminded that they must inspect the rental unit at the beginning and end of the tenancy pursuant to sections 23 and 35 of the *Act.*

For reasons set out previously, I dismiss the Landlord's claim for her travel expense between her residence and the rental unit. Again, this is a business choice which is should not be to the detriment of the tenants.

As the Landlord has been successful in part of her claim, I award her recovery of the $100.00 filing fee pursuant to section 72 of the *Act.*

Conclusion

The Landlord is entitled to monetary compensation in the amount of **$3,216.00** for the following:

Loss of rent for January 2019 $2,200.00 x 6 =	$2,200.00
Cleaning and rubbish removal	$550.00

Internet box	$336.00
Shower organizer	$30.00
Filing fee	$100.00
Total awarded	**$3,216.00**

I grant her a Monetary Order for **$3,216.00** awarded**.** This Order must be served on the Tenants and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

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: November 6, 2019

Residential Tenancy Branch