



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL -S; MNDCL -S; FFL

Introduction

A hearing was scheduled for October 25, 2019 to deal with a landlord's application for a Monetary Order for unpaid; estimated costs to remove the tenant's personal possessions from the property; and, authorization to retain the tenant's security deposit. Both parties appeared at originally scheduled hearing of October 25, 2019.

The hearing was adjourned on October 25, 2019 and an Interim Decision was issued on October 30, 2019. The Interim Decision should be read in conjunction with this decision.

The hearing reconvened on February 7, 2020 and only the landlord appeared.

Since the tenant did not appear, I explored service of documents upon the tenant as I had ordered on October 25, 2019. The landlord testified that he emailed the documents to the tenant as ordered and authorized. The landlord did not receive a response to the email or a follow up email he sent to the tenant, so the landlord sent the documents to the tenant via registered mail on November 21, 2019 and a search of the registered mail tracking number showed the registered mail was successfully delivered on November 26, 2019 (the registered mail tracking number is provided on the cover page of this decision). I was satisfied the landlord had met his obligation to re-serve the hearing documents upon the tenant as I had ordered and authorized.

The landlord testified that shortly after the registered mail was delivered to the tenant, he received a response from the tenant whereby the tenant explained that he had been out "in the bush". The landlord requested the tenant consent to reschedule the reconvened hearing set for December 19, 2019 and the tenant consented, in writing, on November 28, 2019. Accordingly, the Residential Tenancy Branch processed the

rescheduling request and notified the parties via email of the new hearing date set for February 7, 2020.

Having been satisfied the tenant was duly notified of this hearing, I continued to hear the landlord's claim for unpaid rent despite the tenant's failure to appear for the hearing.

I reviewed the purpose of the reconvened hearing with the landlord, which was to determine the landlord's claim for unpaid rent and disposition of the security deposit, as described in the Interim Decision. The landlord sought to have me make a determination as to liability for the costs to clean up the property and remove the tenant's possessions; however, I declined to do so since the Interim Decision sent to the parties clearly provides that such claims were pre-mature and dismissed with leave and that the only claim I would consider at the reconvened hearing would be the claim for unpaid rent.

Issue(s) to be Decided

1. Is the landlord entitled to recover unpaid rent from the tenant in the amount requested?
2. Is the landlord authorized to retain all or part of the tenant's security deposit?

Background and Evidence

The landlord submitted that the parties had executed a total of three tenancy agreements. Below, I summarize the key elements of those agreements.

- The first agreement commenced on September 1, 2017 and required the tenant to pay rent of \$875.00 on the first day of every month. The landlord testified that the monthly rent was discounted as the road access to the property was uncertain.
- The second agreement commenced on December 1, 2017 and the monthly rent was set at \$1,500.00. Road access to the property was available as there was ongoing litigation involving the landlord and the right to access the property by road.
- The third tenancy agreement commenced on October 1, 2018 and was for a fixed term set to expire on September 30, 2019. When this agreement was executed the road access to the property had been lost. Rather, the tenancy agreement stipulates that the landlord would provide a boat launch and dock, as well as trail access. The tenancy agreement provides that monthly rent was

\$1,125.00; however, the landlord explained that amount is the sum of the monthly rent for the property of \$875.00 plus 12 monthly payments of \$250.00 to repay of a \$3,000.00 loan the landlord made to the tenant so that the tenant may buy a boat to access the property. The landlord stated that instead of creating a separate loan agreement the landlord thought it would be simpler to add the boat loan payment to the monthly rent obligation and capture it in the tenancy agreement.

The third tenancy agreement (herein referred to as the tenancy agreement) indicates the security deposit was \$562.50. The landlord stated that he thought it was one-half of \$875.00 but acknowledged that it may be \$562.50 since that is what the tenancy agreement stipulates.

The landlord testified that the property had a boat launch when the third tenancy agreement was executed but that there was not a dock. The landlord looked into constructing a dock, but the shoreline proved to be too challenging. The landlord looked into setting up a winch system instead of a dock but the system the landlord proposed to the tenant was not satisfactory to the tenant since the boat passengers would have to get their feet wet when disembarking the boat. The tenant proposed a more expensive winching system, but the landlord was of the position it was not economically feasible. The landlord then had a contractor lined up to build a dock in May 2019 but then the landlord cancelled the dock building contract when it became evidence the tenancy may be ending shortly due to loss of the trail access.

The landlord explained that in May 2019 the trail access to the property was at risk of being lost too. The trail that the parties expected the tenants to use to come and go from the property was thought to be on a public right of way; however, a neighbouring land owner had their property surveyed and it turned out that the trail was crossing this person's land in places. That land owner put the tenant on notice that trail access would be denied after July 1, 2019.

The landlord testified that in response to the anticipated loss of the trail access the landlord was of the position it was a good idea to end the tenancy and efforts were made to find the tenant alternative living accommodation. On June 23, 2019 the landlord sent a proposal to the tenant, via email, to end the tenancy. On June 27, 2019 the landlord sent a second proposal to the tenant, via email, to end the tenancy as of July 1, 2019 and the landlord would bear some of the costs to remove the tenant's possessions. The tenant did not accept the landlord's proposals and on June 27, 2019

the landlord received from the tenant, via registered mail, a written notice that states the following (names and address omitted for privacy reasons):

Several months of discussion and attempts to have you deal with your breach of the material terms of the lease have been unsuccessful. You have been aware for over a month that the illegal trail access you've left for your rental property will be unavailable as of July 1st, leaving your tenant no option but to leave.

This is official notice as of June 25th, 2019 that your tenant [REDACTED] BC, will be ending the tenancy and leaving on July 1st, 2019.

The landlord attended the property on July 1, 2019 and the parties participated in a move-out inspection together. The tenant returned the keys to the landlord and provided his forwarding address on the move-out inspection report. The landlord proceeded to file his Application for Dispute Resolution on July 14, 2019 so as to meet his obligation to make a claim against the security deposit within 15 days.

The landlord seeks to recover from the tenant unpaid rent of \$2,625.00 (\$875.00 x 3) for the months of July, August and September 2019. In his written submissions, the landlord submitted the following with respect to his claim for unpaid rent:

The tenants notified the landlord of their intention to end the tenancy unilaterally on June 27th, 2019 via signed statement delivered by registered mail, citing access difficulties. The landlord now considers this to be an illegitimate and illegal fashion in which to end a tenancy, and thus argue that continued rental payments are due in the absence of mutual consent and a contractual, legally valid end to the tenancy.

In addition to the landlord's position that the tenant unlawfully ended the tenancy early, the landlord submitted that the tenant left garbage and possessions at the property, rendering it unrentable. Also, a former guest of the tenant/occupant was found on the property in September 2019 when the property was being shown to potential buyers. The landlord suspects the former guest may have been accessing the property more times since he received a \$187.00 hydro bill after the tenancy ended.

As for efforts to re-rent the property, the landlord acknowledged that he has not tried to re-rent the property yet but that he may do so after he returns to the area in May 2020 and clean up the property and build a dock.

As for selling the property, I asked the landlord when he listed the property for sale to which he stated he could not recall. As to whether the property had been sold, the landlord stated that the property did not sell as it is a difficult property to sell given the challenges in accessing the property.

The landlord pointed out that three payments of \$250.00 for the boat loan were not made to him by the tenant and the tenant is in possession of the boat. I informed the landlord that I do not have jurisdiction over loan agreements and that his recourse for an unpaid boat loan is in the appropriate forum such as the Civil Resolution Tribunal.

The landlord also requested that I authorize the landlord to deduct the \$187.00 hydro bill from the tenant's security deposit; however, I declined to consider that request as the landlord has not made a claim for hydro costs or otherwise put the tenant on notice that such a claim would be decided by way of this proceeding. I informed the landlord of his right to make another Application for Dispute Resolution for other damages and losses not addressed by way of this decision.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Upon consideration of everything before me, I provide the following findings and reasons.

The parties executed a fixed term tenancy agreement set to run from October 1, 2018 to September 30, 2019. I find the tenancy ended on July 1, 2019 when the tenant returned possession of the property to the landlord. The landlord is of the position that ending the tenancy on July 1, 2019, before the expiry of the fixed term, is a breach of the Act and the tenancy agreement by the tenant. Upon consideration of all of the facts of this case, I find the tenant was in a position to end the tenancy early, as explained below.

When entering into the third tenancy agreement, there was no road access to the property. Access to the property was to be from the water and a walking trail. The

tenancy agreement provides that the landlord would provide a boat launch and dock for the tenant to access the property from the water. The landlord had yet to provide a dock when the tenant's continued use the trail became an issue in May 2019.

Where a landlord breaches a material term of a tenancy agreement, the tenant may end a tenancy early under section 45(3) of the Act. I heard that when the third tenancy agreement was executed, the dock did not exist. Accordingly, I find that reasonable person would expect that a dock would be built within a reasonable amount of time after the tenancy agreement was entered into. The dock never was built; however, I do not see evidence that the tenant put the landlord on written notice that he must provide the dock by a certain date or he would end the tenancy prior to the notice delivered to the landlord on June 27, 2019. Therefore, I am not satisfied the tenant ended the tenancy for lack of a dock under section 45(3) of the Act.

Without a dock in place, the tenant primarily relied upon the trail to access the property and the tenant's continued ability to use the trail was at risk of being lost. It would appear that, until the neighbour had her property surveyed, both the landlord and tenant were of the belief that the trail was entirely accessible by the public and would provide a way for the tenant to come and go from the property in the absence of a road. As it turns out, the landlord and tenant were mistaken about that belief and I find that to be a mutual mistake by both parties when they entered into the third tenancy agreement.

Section 91 of the Act provides that tenancy agreements are subject to common law that applies to contracts in general. Section 91 provides:

91 Except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia

Under the doctrine of mistake, a contract is voidable where a mutual or common mistake is made by the parties. A **mutual mistake** occurs when the parties to a contract are both mistaken about the same material fact within their contract. There is a meeting of the minds, but the parties are mistaken. As such, the contract is voidable.

In light of the above, I find the tenant was in a lawful position to void the tenancy agreement due to the mutual mistake concerning the trail access and he did so effective July 1, 2019. Accordingly, I find the tenant was not bound to pay rent after July 1, 2019. Considering the tenant did not pay rent for the period after June 2019, I find the landlord entitled to receive rent for the one day in July 2019 which I calculate to be \$28.23 (\$875.00 / 31 days in July).

As for the landlord's position that tenant's former guest continued to access the property after the tenant left on July 1, 2019 I find that is not a basis to award the landlord unpaid rent past July 1, 2019 as it was upon the landlord to secure the property after the tenant returned possession on July 1, 2019 and if the former guest committed an illegal break and enter that is a criminal matter the landlord may pursue against that person in the criminal justice system.

As for the landlord's position that the garbage and possessions left on the property by the tenant after July 1, 2019 caused the landlord to suffer loss of rent, the landlord has been granted leave to reapply for damages and losses associated to cleaning up the property and removal of the tenant's possessions and loss of rent may be considered as a component of that claim. However, it is important to point out that any future claim is subject to the test for damages outlined earlier in the analysis.

Given the landlord's very limited success in this application, I make no award for recovery of the filing fee to the landlord.

I authorize the landlord to deduct \$28.23 from the tenant's security deposit and I order the landlord to return the balance of the tenant's security deposit in the net amount of \$537.27 to the tenant without further delay. In keeping with Residential Tenancy Policy Guideline 17, I provide the tenant with a Monetary Order in the amount of \$537.27 to serve and enforce upon the landlord.

Conclusion

The landlord is awarded \$28.23 for unpaid rent. The landlord is authorized to deduct \$28.23 from the tenant's security deposit and is ordered to return the balance of the security deposit in the net amount of \$537.27 to the tenant without further delay. The tenant is provided a Monetary Order in the amount of \$537.27 to serve and enforce upon the landlord.

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: February 11, 2020

Residential Tenancy Branch