



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held by teleconference on March 20, 2020. The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage or loss under the Act;
- authorization to retain all or a portion of the Tenant's security deposit in satisfaction of the monetary order requested pursuant to section 38; and,
- to recover the cost of the filing fee.

The Landlord and the Tenant both attended the hearing. All parties provided testimony. The Tenant confirmed he did not submit any evidence. The Landlord stated she sent the Notice of Hearing by registered mail to the Tenant, which the Tenant acknowledges receiving. Subsequent to this, the Landlord sent her evidence, by registered mail to the same address, which was not picked up by the tenant. The Tenant denies getting the mail. The Landlord stated she sent the evidence package on February 29, 2020, and provided a copy of the registered mail tracking information. Pursuant to section 88 and 90 of the Act, I deem this package was received by the Tenant on March 5, 2020, the fifth day after its registered mailing.

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.

Preliminary and Procedural Matters

The parties disagree with respect to whether or not there was a valid tenancy and a tenancy agreement. The Tenant asserts that the tenancy never started, and he has no obligations based on the tenancy agreement he signed. The Tenant stated that since he never moved in, there is no tenancy. I note the Tenant paid a security deposit when he signed the tenancy agreement.

I note the following portion of the Act:

Start of rights and obligations under tenancy agreement

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit

In order to enter into a contract, mutual declarations of intent must be exchanged. In this case, the Landlord agreed to rent the premises to the Tenant for a price. The Tenant agreed to pay this price, along with a security deposit, which he paid. In most cases, a contract is considered to have been “entered into” once the material terms of the contract have been agreed upon (an offer, and its acceptance). I find the parties rights and obligations under the tenancy agreement began at the time they both signed the agreement (offer and acceptance). This date was August 5, 2019.

I find there was a valid tenancy agreement, and I accept jurisdiction. Below is my analysis of the issues on the application.

Issue(s) to be Decided

- Is the Landlord entitled to a monetary order for damage or loss under the Act?
- Is the Landlord authorized to retain all or a portion of the Tenant’s security and pet deposit in partial satisfaction of the monetary order requested pursuant to section 38?

Background and Evidence

Both parties provided a substantial amount of conflicting testimony during the hearing. However, in this review, I will only address the facts and evidence which underpin my

findings and will only summarize and speak to points which are essential in order to determine the issues identified above. Not all documentary evidence and testimony will be summarized and addressed in full, unless it was specifically pointed out by the parties and is pertinent to my findings.

During the hearing, the Landlord verbally explained that rent was \$2,500.00 per month, and the Tenant was responsible for paying \$112.00 for internet, and was also responsible for paying for the Fortis bills. The Fortis bills would vary each month.

A copy of the signed tenancy agreement was provided into evidence, and it shows under section 3a that monthly rent was set at "\$2,612.00 + Fortis" and was due on the first of the month. The following excerpt was included in the tenancy agreement under section 3b:

b) What is included in the rent: (Check only those that are included and provide additional information, if needed.)
The landlord must not terminate, or restrict a service or facility that is essential to the tenant's use of the rental unit as living accommodation, or that is a material term of the tenancy agreement.

<input checked="" type="checkbox"/> Water	<input checked="" type="checkbox"/> Natural gas	<input checked="" type="checkbox"/> Garbage collection	<input checked="" type="checkbox"/> Refrigerator	<input checked="" type="checkbox"/> Carpets
<input type="checkbox"/> Cablevision	<input checked="" type="checkbox"/> Sewage disposal	<input checked="" type="checkbox"/> Recycling services	<input checked="" type="checkbox"/> Dishwasher	<input checked="" type="checkbox"/> Parking for 2 vehicles
<input checked="" type="checkbox"/> Electricity	<input type="checkbox"/> Snow removal	<input checked="" type="checkbox"/> Kitchen scrap collection	<input checked="" type="checkbox"/> Stove and oven	<input checked="" type="checkbox"/> Other: Mailbox and 1 key
<input checked="" type="checkbox"/> Internet	<input type="checkbox"/> Storage	<input type="checkbox"/> Laundry (coin-op)	<input checked="" type="checkbox"/> Window coverings	<input checked="" type="checkbox"/> Other: 1 Garage Opener Key
<input checked="" type="checkbox"/> Heat	<input type="checkbox"/> Recreation facilities	<input checked="" type="checkbox"/> Free laundry	<input checked="" type="checkbox"/> Furniture	<input type="checkbox"/> Other:

The Landlord stated that she met with the Tenant and signed the tenancy agreement on August 5, 2019. The tenancy agreement provided into evidence shows that the Tenant signed a 1-year fixed term agreement, starting August 15, 2019, and ending on August 31, 2020. The Landlord stated she collected the security deposit in the amount of \$2,500.00 and signed the agreement with the Tenant on August 5, 2019, but she did not give the keys to the Tenant at that point.

The Landlord explained that she did not hear anything further from the Tenant until August 13, 2019, when he sent her a text message stating that he would no longer be moving in. The Landlord provided copies of the text messages. The Tenant stated he told the Landlord within 48 hours of signing the tenancy agreement, but he did not have any evidence to support that he told the Landlord any sooner than August 13, 2019, which was 2 days before the tenancy was slated to begin.

The Tenant stated that he had some health issues, and his job didn't line up, so he had to back out of the rental agreement. The Tenant stated that he asked for his security

deposit back, but at this point the parties escalated their discussions, and the relationship became somewhat hostile and acrimonious.

The Landlord stated that she had planned on moving out of the unit so that the Tenant could move in. The Landlord stated that her plan was to rent a place closer to her work in a different city. The Landlord stated that when the Tenant contacted her 2 days before he was supposed to move in, so that he could cancel, it left her scrambling to try and find new renters to mitigate her losses. It also cost her money because she had already committed to renting a different place.

The Landlord stated that she posted the ad to re-rent her place right away on August 13, 2019. A copy of this ad was provided into evidence. The Landlord stated that within a day, she decided to reduce the rent to \$2,400.00, including Fortis, in order to help spur interest because at that time she hadn't received any inquiries yet. The Landlord stated that she received a couple of inquiries at the lower price but she was not able to find new tenants until October 9, 2019, when a new tenancy agreement was signed. The Landlord stated that the new Tenants moved in on October 20, 2019. The Landlord stated that she only got 3 inquiries between August and October.

The Landlord provided a monetary order worksheet outlining the two items she is seeking in this application. They are as follows:

1) \$1,200.00 – Lost rent

The Landlord stated that since she had to reduce the rent to \$2,400.00, from \$2,500.00, in order to re-rent the property, she wants to recover the \$100.00 per month over the 12 month period the original fixed term agreement was supposed to be for.

2) \$611.00 – Fortis BC gas bills

The Landlord stated that she is seeking to recover the above amount because she had to include Fortis in monthly rent in order to attract renters, whereas it was not included in the agreement she had initially signed with the Tenant. The Landlord stated that including the Fortis bills in rent will cost around \$611.00 per year (based off of her last years bills). The Landlord stated this is only an estimate based on last years usage but she feels she should be entitled to this amount because it was not something she would have had to pay for, had the initial tenancy agreement with the Tenant been upheld and honored.

The Landlord summarized some of her interactions with the Tenant and provided copies of their text messages in and around the material time. The Landlord stated the Tenant called and was aggressive towards her, but she did not have any evidence to support this. The Tenant denied he was calling or that he threatened her. The text messages provided by the Landlord show that the Tenant texted her on August 13, 2019, backed out of the agreement and asked for his deposit back. The Landlord accepted the message and responded by stating that she will seek new tenants as soon as possible, but that she would not be returning the deposit until it was re-rented.

The following day the Tenant confirmed that he was unable to follow through on the move and his job offer because he came down with an illness, and was in the hospital. The Tenant apologized and asked for his deposit back, as he was struggling financially. The Tenant sent another text the following day again asking for his deposit back. However, the Landlord did not respond to the text until the next day, August 16, 2019. She stated that she still had not found new tenants, and until she found someone to rent the place, she would be retaining the deposit. The Tenant sent a couple more text messages that same day, August 16, 2019, stating that he wanted to know where the ad was posted, and also that he may have a potential renter for the place.

The Landlord did not respond that day, and the following morning, the Landlord texted the Tenant and stated that she still had not found a new tenant, and she expressed how time consuming this has been. The Landlord stated that she did not like that the Tenant was trying to call her the previous evening, and requested that the Tenant only use email or text.

The Tenant responded by text stating that he understands and respects that, and indicated that he may be able to get his job offer back, which would enable him to carry out the tenancy agreement (which he had already backed out of). The Tenant requested that he be able to fulfill the tenancy agreement he signed, if he can get his job offer back on track. The Tenant re-iterated that he would like to make arrangements with his employer, should the Landlord still want to proceed with the tenancy arrangements. The Landlord responded later that day, on August 17, 2019, and expressed that she was confused about why the Tenant initially backed out of the agreement, but now wants to move forward. The Landlord stated in her text message that she was going to try to show the unit to other tenants in the coming days.

Following this, the Tenant took issue with his requests being ignored, and his tone became slightly more aggressive and insistent that he get his deposits back right away. The text message thread degraded quickly, and the Tenant questioned the legality of

the suite, and the Landlord appears to have contacted the police, as she felt the Tenant's language was threatening. The Tenant denies that he ever threatened her and feels the Landlord is taking advantage of him and his deposit.

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 Landlord 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 Tenant. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord 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.

I note the following portions of the *Act*:

"tenancy" means a tenant's right to possession of a rental unit under a tenancy agreement;

How a tenancy ends

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.*

Tenant's notice

45 (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,*
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*
- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

Form and content of notice to end tenancy

52 *In order to be effective, a notice to end a tenancy must be in writing and must*

- (a) be signed and dated by the landlord or tenant giving the notice,*
- (b) give the address of the rental unit,*
- (c) state the effective date of the notice,*
- (d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy,*
 - (d.1) for a notice under section 45.1 [tenant's notice: family violence or long-term care], be accompanied by a statement made in accordance with section 45.2 [confirmation of eligibility], and*
- (e) when given by a landlord, be in the approved form.*

Based on all of the above, the evidence and the testimony provided at the hearing, I find as follows:

I note that the Tenant never moved into the rental unit, nor did he get the keys. However, as stated at the outset of this decision, I find there was a valid tenancy agreement, and subsequently a tenancy (since the Tenant had a right to possess the rental unit as of August 15, 2019.). It appears that the relationship degraded after the Tenant signalled that he wanted to back out of the tenancy agreement, 2 days prior to moving in.

I note the parties exchanged several text messages and there was some discussion surrounding the Tenant backing out of the agreement, the Landlord looking for replacement tenants, and whether or not the Landlord would return the security deposit.

With respect to the text message the Tenant sent on August 13, 2019, saying he no longer wanted to move in, I find this text message was sufficient to act as the Tenant's formal notice that he would be terminating the tenancy. The Landlord accepted it as such, and moved on to find new tenants.

In determining that the Landlord received the Tenant's notice to end tenancy "in writing" when it was sent by text message, I was guided, in part, by the definition provided by the Black's Law Dictionary Sixth Edition, which defines "writing" as "handwriting, typewriting, printing, photostating, and every other means of recording any tangible thing in any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof". I find that a text message meets the definition of written as defined by Black's Law Dictionary.

I was further guided by section 6 of the *Electronics Transactions Act*, which stipulates that a requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is accessible by the other person in a manner usable for subsequent reference, and capable of being retained by the other person in a manner usable for subsequent reference. As text messages are capable of being retained and used for further reference, I find that a text message can be used by a tenant to provide a landlord with a notice to end tenancy, pursuant to section 6 of the *Electronics Transactions Act*.

Section 88 of the *Act* specifies a variety of ways that documents, other than documents referred to in section 89 of the *Act*, must be served. Service by text message or email is not one of methods of serving documents included in section 88 of the *Act*.

Section 71(2)(c) of the *Act* authorizes me to conclude that a document not given or served in accordance with section 88 or 89 of the *Act* is sufficiently given or served for purposes of this *Act*. As the Landlord acknowledged receiving the text message (on August 13, 2019) in which the Tenant stated his intentions (to back out of the tenancy agreement), I find that the Landlord was sufficiently served with the Tenant's notice to end tenancy.

In reaching this conclusion I was influenced, to some degree, by the Landlord's testimony that she communicated with the Tenant via text message multiple times, at the start of the tenancy. This satisfies me that the Landlord was not averse to communicating with the Tenant by text message until the relationship became more hostile.

Although the Tenant's written notice to end tenancy did not clearly state the address of the rental unit, and it did not contain a written signature (as per section 52 of the *Act*), I note the Landlord reasonably interpreted it to mean that it was for this rental unit, and that it was sent and drafted by the Tenant.

Director's orders: notice to end tenancy

68 (1)*If a notice to end a tenancy does not comply with section 52 [form and content of notice to end tenancy], the director may amend the notice if satisfied that*

(a)the person receiving the notice knew, or should have known, the information that was omitted from the notice, and

(b)in the circumstances, it is reasonable to amend the notice.

I hereby amend the Tenant's written notice to end tenancy accordingly, and I find the Tenant gave, and the Landlord received, the notice to end tenancy on August 13, 2019.

Despite my findings thus far, I note the Tenant was under a fixed term tenancy agreement until August 2020, and he was not in a position to legally end the tenancy without repercussions and liability. I find the manner in which the Tenant gave his notice breached section 45(2) of the *Act*, as he could not give this notice prior to the end of his fixed term agreement, which still had a year left on it. I find the Tenant's breach of this portion of the *Act* caused the Landlord significant stress and work, as she was trying to

coordinate moving herself out of the rental unit in a short period of time. I also note the Landlord attempted to reduce the rent so that she could attract a new tenant sooner. The Landlord also posted the rental unit on multiple sites. I note that, even with these mitigation efforts, she was unable to re-rent the unit until October 20, 2019, around 2 months after the Tenant backed out of his agreement with her.

In this case, I note the Landlord is seeking to recover 2 different items (monthly rental loss, and extra utility expenses), as laid out above, due to the fact she had to lower the monthly rent in order to attract new renters. I also note that as an applicant the Landlord bears the burden of proof to establish the value of her loss. Having reviewed the Landlord's testimony and evidence, I find the Landlord has demonstrated that she suffered *some* loss. However, she has not sufficiently clarified how much she lost after the Tenant backed out of the agreement and left her scrambling to find new tenants.

I note the Landlord's initial tenancy agreement with the Tenant is not very clear with respect to what rent is, and what is included, such that I would be able to determine how much she lost based on the structure of the new tenancy agreement, which appears to be structured differently, with different utilities included. The landlord did not sufficiently reconcile what the differences were between her revenue under the new tenancy agreement, versus what it would have been under this tenancy agreement, had it been carried out.

In making this finding, I have considered the Landlord's explanation regarding what monthly rent was during the hearing, versus what was listed on the tenancy agreement. I find the Landlord's explanation of what is included in rent is inconsistent with what is written in the tenancy agreement, and the tenancy agreement itself is also internally inconsistent, or at the very least, unclear. I note the Landlord listed rent as "\$2,612.00 + Fortis" in the tenancy agreement. However, I also note she indicated in section 3b that water, gas, electricity and internet are all "included in rent". Section 3a indicates Fortis bills are added on top of the \$2,612.00 base rent but section 3b shows it is included. I do not find this clear, in fact, I find it conflicting.

I find the Landlord has failed to clearly articulate and lay out in a consistent and understandable manner, what monthly rent was, and what utilities were included. I also note the Landlord explained in the hearing that monthly rent was only \$2,500.00, with Fortis and internet being extra. I do not find the agreement provided into evidence, and the testimony are sufficiently consistent and clear such that I could find the Landlord has met the burden of proof to demonstrate the value of her loss.

Although the value of the Landlord's loss is not clear, I accept that she would have suffered some amount of loss. An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:

"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.

Given the Tenant breached section 45(2), I find a nominal award is appropriate. I award the Landlord a nominal amount of \$900.00 for the entirety of her application.

Section 72 of the *Act* gives me authority to order the repayment of a fee for an application for dispute resolution. Since the landlord was substantially successful in this hearing, I also order the tenant to repay the \$100. Also, pursuant to sections 72 of the *Act*, I authorize that the security deposit, currently held by the landlord, be kept and used to offset the amount owed by the tenant.

The Landlord holds a security deposit of \$2,500.00. I allow her to retain \$1,000.00 from this deposit for the issues above. I order the Landlord to return the balance, \$1,500.00.

Conclusion

The Landlord is authorized to retain \$1,000.00 from the security deposit and must return the balance.

The Tenant is granted a monetary order in the amount of **\$1,500.00**. 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: March 23, 2020

Residential Tenancy Branch