Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL FFL

Introduction

In this dispute, the landlord seeks compensation for loss of rent against his former tenant, pursuant to section 67 of the *Residential Tenancy Act* (the "Act"). He also seeks recovery of the filing fee under section 72 of the Act.

The landlord applied for dispute resolution on February 14, 2020 and a dispute resolution hearing was held, by way of telephone conference, on May 22, 2020. The landlord, the tenant, and two witnesses for the tenant attended the hearing, were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The parties did not raise any issues regarding the service of evidence.

I have only considered evidence that was submitted in compliance with the *Rules of Procedure,* to which I was referred, and which was relevant to the issues of this application. And, only relevant testimony will be reproduced herein.

Issues

1. Is the landlord entitled to compensation in the amount of $6,000.00?
2. Is the landlord entitled to recovery of the filing fee in the amount of $100.00?

Background and Evidence

The tenancy began May 1, 2019 and was to end, as per a fixed-term agreement, on April 30, 2020. Monthly rent was $2,000.00 and was due on the first of the month. The tenant paid a security deposit of $1,000.00, which the landlord subsequently returned. A copy of the written tenancy agreement was submitted into evidence.

On December 27, 2019, the tenant emailed the landlord, saying that there was a "weird smell" in the rental unit that was making her sick. She explained that she had been

having “a bit of an issue for the past 2 or 3 months” about “really bad smells” from a couple of locations within the rental unit. The next day, the landlord attended to the rental unit but did not smell anything; the smell was attributed to the possible presence of mold, according to the tenant. Nothing further occurred in this regard. A copy of this email was entered into evidence.

On January 26, 2020, the tenant emailed the landlord and advised that she had “found a place to move in for February.” In this email, a copy of which was submitted into evidence, the tenant writes:

> I have a feeling there is a leak somewhere that can’t be seen…somewhere behind the kitchen area - it's starting to smell more along those lines.
>
> I’ve been trying to look some more to see if I could see any signs, and there is one area right next to the fridge on the bottom corner of the cabinetry that looks water damaged (the wood is expanded). The only thing is, I can’t visibly see any water..however I wouldn’t be able to see if it’s just being absorbed into the wood or floor. I could suggest pulling out the fridge and seeing how it looks behind there. I’m unable to do it, as it’s too heavy.

A few days later, on January 31, 2020, the tenant emailed the landlord to tell him that she had cancelled all of the remaining cheques for the rest of the three months. The landlord seeks to recover the lost rent for the months of February, March and April 2020, for a total of $6,000.00. (I note that the landlord sought an additional $150.00, but he did not make any submissions regarding this amount during the hearing.)

The landlord testified about move-in and move-out inspection reports, neither of which referenced any information regarding the smell. These reports were submitted into evidence. Further, the landlord testified that while there was a receipt for naturopathic medication that the tenant was taking (for helping with sensitivities to mold), there was no medical reports submitted into evidence regarding any medical issues that the tenant had suffered. “If there was an actual hazard,” the landlord remarked, “there is no evidence.”

In an effort to find new tenants, the landlord told his property manager to start looking. Efforts included having an online advertisement and they had over 15 showings of the rental unit. Because of the pandemic, however, it took longer than usual to find someone. And, while the effort was described by the landlord as “strenuous,” they ultimately found new tenants who moved in May 1, 2020. Regarding this matter, the

tenant pointed out that the landlord listed the rental unit's rent at $2,100.00, $100 more than what she had been paying. Thus, she argued, he had not truly attempted to mitigate his losses. The landlord then lowered the rent back to $2,000.00 after he was not getting desired responses.

The tenant testified at length about her hypersensitivity to smells and to mold. As for the smells, she testified that they had begun emanating for "the past 2 to 3 months" (going back from December 27), meaning that they had started in September or October. The smell made her nauseous, and that she was "getting extremely sick." She went out and purchased a Dyson air purifier in an attempt to get rid of the smell and submitted into evidence several screenshots (from a smartphone) from the air purifier that displayed varying air conditions within the apartment, ranging from "very poor" to "fair."

The tenant also testified that, at great personal loss, she was forced to dispose of all of her furniture and much of her belongings at the end of the tenancy, due to the potential of mold contamination. As for the leak behind the cabinetry, she testified that if she had known about the issues beforehand, she would not have entered into the tenancy.

In his final submissions the landlord outlined several matters, including a remark that the tenant provided no notice as to what, exactly, needed fixing. The inspection reports reflected no issues either at the start of or at the end of the tenancy, and, that when he repaired a toilet in October 2019 the tenant did not mention the smell.

In her final submissions the tenant reiterated that had she known of the previous leak behind the cabinetry that she would not have moved in.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. if yes, did the loss or damage result from the non-compliance?
3. has the applicant proven the amount or value of their damage or loss?

4. has the applicant done whatever is reasonable to minimize the damage or loss?

The above-noted criteria are based on sections 7 and 67 of the Act, which state:

> 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.
>
> . . .
>
> 67 Without limiting the general authority in section 62 (3) [. . .] if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Did respondent fail to comply with Act, regulations, or tenancy agreement?

Section 44(1) of the Act lists fourteen categories under which a tenancy may be ended, and references section 45 of the Act. Section 45 of the Act deals with a tenant's notice to end a tenancy, and reads, in its entirety, as follows:

> (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) 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.
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> (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.

(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.

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

In this dispute, the tenancy was a fixed term tenancy, so section 45(2) applies. The tenant gave notice by way of email to the landlord on January 26, 2020 and stated "I've found a place to move to for February. I'll be moving on Thursday, [January 30] and doing the cleaning of the apartment on Friday." In other words, she ended the tenancy on a date that was earlier than the date specified in the tenancy agreement as the end of the tenancy, which was April 30, 2020. Thus, I conclude that the tenant breached section 45(2)(b) of the Act by ending the tenancy early.

I must, however, turn my mind to whether section 45(3) of the Act might apply. And, while the tenant did not specifically argue this, it is worth considering. In this case, the tenant notified the landlord once, and only once – on December 27, 2019 – about weird smells, but she did not outline any actual failure on the part of the landlord. Certainly, a landlord should investigate such smells as they may very well be caused by something that affects his obligations under section 32 of the Act, which states:

(1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In this case, however, the tenant brought the smells to the landlord's attention, who then visited the rental unit and found nothing wrong. In other words, he discharged his obligations at that point. Nothing further was mentioned by the tenant until she sent the email of January 26, 2020, advising the landlord that she was leaving.

I conclude that, based on the sole complaint of December 27, 2019, the tenant, having not provided a clear, written notice of a failure of a material term of the tenancy, cannot take advantage of this section. Finally, while much was made by the tenant regarding her being sick from the smell, and the possible presence of mold (no evidence was provided to prove that mold existed) as the reason for her ending the tenancy, this is not a recognized reason for ending a tenancy under the Act.

Regarding the tenant's compliance with section 45(4) of the Act, section 52 of the Act reads as follows:

> In order to be effective, a notice to end a tenancy must be in writing and must
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> (a) be signed and dated by the landlord or tenant giving the notice,
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> (b) give the address of the rental unit,
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> (c) state the effective date of the notice,
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> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
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> (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
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> (e) when given by a landlord, be in the approved form.

In this case, the only defect in the tenant's notice was that it did not give the address of the rental unit. Thus, while it is a minor error (both parties certainly knew what the address was), it is nevertheless a breach of the Act.

Did the loss or damage result from non-compliance?

Having found that the tenant breached the Act, I must next determine whether the landlord's loss resulted from that breach. This is known as *cause-in-fact,* and which focusses on the factual issue of the sufficiency of the connection between the respondent's wrongful act and the applicant's loss. It is this connection that justifies the imposition of responsibility on the negligent respondent.

The conventional test to determine cause-in-fact is the *but for* test: would the applicant's loss or damage have occurred *but for* the respondent's negligence or breach? If the answer is "no," the respondent's breach of the Act is a cause-in-fact of the loss or damage. If the answer is "yes," indicating that the loss or damage would have occurred whether or not the respondent was negligent, their negligence is not a cause-in-fact.

In this case, I find that but for the tenant's ending the tenancy as she did – a mere five days before the end of the month – that the landlord would not have suffered a loss of rent for February 2020, would likely not have suffered a loss of rent for March 2020, and possibly not suffered a loss of rent for April 2020.

Has applicant proven amount or value of damage or loss?

There is no dispute or question that the monthly rent was $2,000.00. Three months remained on the fixed term tenancy, thus, the total amount claimed and proven is $6,000.00.

Has applicant done whatever is reasonable to minimize damage or loss?

The landlord testified that he made almost immediate efforts (including through his property manager) to find new tenants. Fifteen showings are a sufficient number to establish that reasonable efforts were made, and, it is through no fault of the landlord that there would have been increased difficulty in finding tenants after the province declared a state of emergency in March. It is unreasonable to expect the landlord to find a new tenant for February 1 when the tenant gave notice on January 26. That having been said, reasonable efforts were made.

However, the tenant is correct in arguing that the landlord did not completely make reasonable efforts on all fronts: increasing the rent from $2,000 to $2,100 is not a reasonable action to minimize loss. That said, it represents a 5% increase, which is not in itself significant, but it is worth considering that the maximum allowable rent increase

for 2020 is 2.6%. This is not to say that a landlord cannot increase the rent for a new tenant to whatever amount he or she so chooses, but rather, when an increase is made at the same time a landlord is required to mitigate loss, it is a factor that must negatively affect mitigation. Consequently, I find that the landlord did not take all reasonable steps to mitigate his loss and therefore I reduce the amount claimed by 5% to $5,700.00.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has met the onus of proving all four criteria in establishing that he is entitled to compensation in the amount of $5,700.00.

Finally, section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee. As the landlord was successful, I grant his claim for reimbursement of the filing fee of $100.00.

Conclusion

I hereby grant the landlord a monetary order in the amount of $5,800.00, which must be served on the tenant. The order may be filed in, and enforced as an order of, the Provincial Court of British Columbia.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: May 25, 2020

Residential Tenancy Branch