



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDCL-S, FFL

Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, to keep all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

The Agent for the Landlord stated that on May 15, 2020 the Dispute Resolution Package and the evidence the Landlord submitted to the Residential Tenancy Branch in May of 2020 was sent to the Tenant, via email. The Tenant acknowledged receipt of these documents. As the Tenant acknowledged receipt of the documents, the evidence was accepted as evidence for these proceedings.

In May of 2020 the Tenant submitted evidence to the Residential Tenancy Branch. The Tenant stated that this evidence was served to the Landlord, via email sometime in May of 2020. The Landlord acknowledged receipt of this evidence. As the Landlord acknowledged receipt of the evidence, it was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each party affirmed that they would provide the truth, the whole truth, and nothing but the truth at these proceedings.

All documentary evidence accepted as evidence for these proceedings has been reviewed, although it is only referenced in this decision if it is directly relevant to my decision.

Issue(s) to be Decided

Is the Landlord entitled to compensation for lost revenue and/or liquidated damages?
Is the Landlord entitled to retain all or part of the security deposit?

Background and Evidence

The Landlord and the Tenant agree that:

- the tenancy began on February 01, 2020;
- the Landlord and the Tenant signed a fixed term tenancy agreement, the fixed term of which ended on January 31, 2020;
- the Tenant agreed to pay monthly rent of \$1,650.00 by the first day of each month;
- the Tenant paid a security deposit of \$825.00;
- the rental unit was vacated on April 30, 2020; and
- the Tenant provided a forwarding address to the Landlord, in writing, in April of 2020.

The Tenant stated that on April 01, 2020 she provided Agent for the Landlord #2 with written notice of her intent to vacate the rental unit, via text message. She stated that the notice informed the Landlord that she intended to vacate the rental unit by April 30, 2020.

The Agent for the Landlord #2 stated that on the Tenant provided him with written notice of her intent to vacate the rental unit, via text message. He stated that he does not recall the date he received this text message, although he agrees it informed the Landlord that the Tenant would be vacating the unit by April 30, 2020.

Neither party submitted a copy of the notice to end tenancy the Tenant served in April of 2020. Neither party was able to read out a copy of that notice, as they did not have it with them at the time of the hearing.

The Tenant stated that she had to give notice to end the tenancy because someone, who she believes was the Landlord, was repeatedly entering the attic above the rental unit. In support of this submission the Tenant stated that:

- this person would go into her attic every night;
- she estimates this person would go into the attic approximately five times per week during the day;
- she does not know what this person was doing in the attic;
- you can access the attic through the rental unit;

- this person was not accessing the access through the rental unit;
- she does not know how this person was accessing the attic;
- she does not know why this person was accessing the attic;
- she informed the Agent for the Landlord #2 that someone was accessing the attic, by text message, in Late February and in March of 2020;
- she informed the Agent for the Landlord that someone was continuing to access the attic when she gave her notice to end tenancy in April of 2020;
- she informed the Landlord's daughter that someone was accessing the attic; and
- the Landlord did nothing to prevent this person from accessing the attic.

In response to the submission regarding someone accessing the attic above the rental unit the Agent for the Landlord #2 stated that:

- the Tenant informed him that she believed someone was frequently accessing the attic;
- the Tenant informed him that this person was not accessing the attic through the rental unit;
- the only way a person could access the attic is through the rental unit;
- he told the Tenant that a person can only access the attic by going through the rental unit;
- the Tenant did not believe him when he told her that nobody can access the attic unless they went through the rental unit; and
- he does not believe that anyone was accessing the attic on a regular basis.

The Landlord is seeking compensation for lost revenue for the period between May 01, 2020 and May 15, 2020, in the amount of \$825.00.

The Agent for the Landlord stated that on, or about, April 10, 2020 the Landlord began advertising the rental unit on a popular website. She stated that the unit was re-rented for May 15, 2020 and that the Landlord did not collect any rent for the period between May 01, 2020 and May 14, 2020.

The Landlord is seeking liquidated damages, in the amount of \$1,000.00. The Tenant agrees that she signed the tenancy agreement that was submitted in evidence.

Analysis

On the basis of the undisputed evidence I find that the Landlord and the Tenant entered into a fixed term tenancy agreement, the fixed term of which was to end on January 31, 2021, and that the Tenant agreed to pay monthly rent of \$1,650.00.

Section 44(1)(a) of the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act*. There is no evidence that the Landlord gave the Tenant notice to end this tenancy.

Section 45(2) of the *Act* authorizes a tenant to end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice and is not earlier than the date specified in the tenancy agreement as the end of the tenancy. Regardless of when the Tenant gave the Landlord notice to end the tenancy in April of 2020, in which she informed the Landlord of her intent to end the tenancy by April 30, 2020, I must conclude that the Tenant did not serve proper notice to end the tenancy on that date. The Tenant did not have the right to end this tenancy pursuant to section 45(2) of the *Act* until the end of the tenancy of the tenancy, which was January 31, 2021.

As neither party gave proper written notice to end this tenancy, I find that the tenancy did not end pursuant to section 44(1)(a) of the *Act*.

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. As the tenancy agreement does not stipulate that the rental unit must be vacated on April 30, 2020, I find that the tenancy did not end pursuant to section 44(1)(b) of the *Act*.

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. As there is no evidence that the parties agreed in writing to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(c) of the *Act*.

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. On the basis of the undisputed evidence, I find that this tenancy ended when the Tenant vacated the rental unit on April 30, 2020, pursuant to section 44(1)(d) of the *Act*.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. A tenancy agreement is frustrated where, without the fault of either party, the agreement becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the agreement as

originally intended is now impossible. Where an agreement is frustrated, the parties to the agreement are discharged or relieved from fulfilling their obligations under the agreement.

I find that there is insufficient evidence to establish that this tenancy agreement was frustrated. I therefore find that this tenancy did not end pursuant to section 44(1)(e) of the *Act*.

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act*.

I considered section 45(3) of the *Act* which stipulates, in part, that if a landlord has failed to comply with a material term of the tenancy agreement and the landlord 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.

Residential Tenancy Branch Policy Guideline #8, with which I concur, defines a material term as 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 I accepted that a person frequently entering the attic above the rental unit was a breach of a material term of the tenancy agreement, I would find that the Tenant has submitted insufficient evidence to establish that anyone was entering the attic on a regular basis.

Although I accept that the Tenant believes a person was regularly entering the attic, I find that there is simply no evidence to corroborate that submission. I find the testimony of the Agent for the Landlord #2, who stated that a person can only access the attic through the rental unit, was forthright and credible. When I consider this evidence with the testimony of the Tenant, who stated that the attic was not being accessed through the rental unit, and I find it entirely possible that she was hearing noises that were not generated by an individual.

As the Tenant has submitted insufficient evidence to establish that the Landlord or anyone authorized by the Landlord was regularly accessing the attic, I find that she did not have the right to end this fixed term tenancy pursuant to section 45(3) of the *Act*.

I find that the Tenant breached section 45(2) of the *Act* when she vacated the rental unit prior to the end of the fixed term of the tenancy agreement.

Section 67 of the *Act* authorizes me to order a tenant to pay compensation to a landlord if the landlord suffers a loss as a result of the tenant failing to comply with the *Act*. On the basis of the evidence of the Landlord and in the absence of evidence to the contrary, I find that in spite of reasonable efforts to find a new tenant, the Landlord experienced \$825.00 in lost revenue for the period between May 01, 2020 and May 14, 2020 as a result of the Tenant breaching section 45(2) of the *Act*. I therefore find that the Tenant must compensate the Landlord for the lost revenue experienced by the Landlord in the amount of \$825.00.

Section 8 of the tenancy agreement submitted in evidence requires the Tenant to pay liquidated damages of \$1,000.00 if the Tenant prematurely ends the fixed term tenancy. This section specifies that the payment is for administrative costs of advertising and re-renting. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement.

The amount of liquidated damages agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into. I find that \$1,000.00 is a reasonable estimate given the expense of advertising a rental unit; the time a landlord must spend showing the rental unit and screening potential tenants; and the wear and tear that moving causes to residential property. When the amount of liquidated damages agreed upon is reasonable, a tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally liquidated damage clauses will only be struck down when they are oppressive to the party having to pay the stipulated sum, which I do not find to be the case in these circumstances. On this basis, I find that the Landlord is entitled to collect liquidated damages of \$1,000.00.

I find that the Landlord's Application for Dispute Resolution has merit and that the Landlord is entitled to recover the fee for filing this Application for Dispute Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of \$1,925.00, which includes \$825.00 in lost revenue, \$1,000.00 in liquidated damages, and \$100.00 in compensation for the fee paid to file this Application for Dispute Resolution. Pursuant to

section 72(2) of the *Act*, I authorize the Landlord to retain the Tenant's security deposit of \$825.00 in partial satisfaction of this monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance \$1,100.00. In the event the Tenant does not voluntarily comply with this Order, it may be served on the Tenant, filed with the Province of British Columbia Small Claims Court and 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 *Act*.

Dated: September 18, 2020

Residential Tenancy Branch