



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER LUXURY REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

MNDCL-S, MNRL-S, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed the landlord served the tenant with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail. Both parties also confirmed the tenant served the landlord with the submitted documentary evidence via Canada Post Registered Mail on September 11, 2020. Neither party raised any service issues. I accept the undisputed testimony of both parties and find that both parties have been sufficiently served as per sections 88 and 89 of the Act.

At the outset, the landlord's agent, B.W., K.K. and H.C. clarified that the landlord is actually only the named landlord, S.S. and that the named company is the landlord's agent as per the signed tenancy agreement. The tenant made no comment. On this basis, the landlord's application is amended to remove the named landlord (a company) leaving only the named landlord, S.S.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for unpaid rent, for money owed or compensation for damage or loss and recovery of the filing fee?

Are the landlords entitled to retain all or part of the security deposit?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on November 1, 2019 on a fixed term tenancy ending on July 31, 2020 and then thereafter on another fixed term or month-to-month basis as per the submitted copy of the signed tenancy agreement dated October 31, 2019. The monthly rent is \$4,395.00 payable on the 1st day of each month. A combined security and pet damage deposit of \$4,395.00 was paid.

The landlords seek a monetary claim of \$7,002.50 which consists of:

\$4,395.00	Unpaid Rent, May 2020
\$2,197.50	Liquidated Damages
\$200.00	Move Out Fee

The landlords claim that the tenant advised the landlord via email on April 22, 2020 that the rental unit had been vacated on March 23, 2020 and that they would not be returning. The landlord stated that the tenant breached the fixed term tenancy which ends on July 31, 2020 and seeks unpaid rent/loss of rent for May 2020 of \$4,395.00. The landlord has submitted a copy of the email dated April 22, 2020 which states in part,

...Unfortunately we had to return to New Zealand on 23 March before our border closed and flights out of Vancouver stopped. We knew it may be for a while but have been optimistic about returning as our daughter is still enrolled in school in Canada and in a July summer programme. However, the borders of our respective countries remain closed, plans are grounded and based on monitoring the Canadian government updates and NZ airlines it looks like the travel situation is unlikely to improve until the end of 2020 at the earliest.

Because we cannot return to our apartment (or indeed Canada) and as foreign citizens on temporary visas, don't qualify for rental assistance, we have no option but to cancel our rental contract early on the grounds of frustration...

The apartment is clean and in the state we rented in as we knew we might be away for a month or two (although sadly no one was expecting predictions of a year or two when we left). The owner is welcome to keep the mattress and linen we had to put into the spare room for the base she bought. I have also left a good vaccum cleaner as the one there was useless. I have left the keys with a friend. Do you have a non contact way of returning them while our office is closed?

[reproduced as written]

The landlord claims that the tenant failed to provide proper notice to end the tenancy and as a result the landlord suffered a loss of rent for May 2020 of \$4,395.00. The landlord stated that upon being notified via email on April 23, 2020, the landlord immediately began advertising the unit for rent on April 24, 2020. The landlord received rental inquiries, had showings, but did not find a new tenant until June 2020 for a new tenancy agreement to begin on July 1, 2020.

The tenant argued that the tenancy agreement was frustrated and that under Residential Tenancy Policy Guideline #34, Frustration provides for the test for frustration as:

The test or determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

The landlord also argues the tenants had a choice of vacating the rental unit as shown in email exchanges between the tenant and the landlord dated March 16, 2020 that the tenants already were contemplating their situation. It states in part,

Can you send me or M. a copy of the lease agreement please. We are trying (like everyone) to assess the best course of action over the next few months will borders closing. One option is to go home to NZ and ride it out and come back when everything settles down but Canada is closing its borders today has thrown a spanner in that plan as the coming back might not be so simple! Anyway the agreement should be a help as the only thin I can access is the strata K doc which I don't need.

[reproduced as written]

The landlord stated that at the time of this email communication the Canada Border had just closed and the landlord (C.C.J.W. and her daughter) were still occupying the rental unit while M.W. was in New Zealand.

The landlord also referenced another email from the tenant dated March 17, 2020 at 11:43am which states in part,

Do you have a key? I'm just thinking that if we do go home and can't get back you might need to be able to enter the apartment and mailing it may take a while!

[reproduced as written]

This was followed up by another email from the landlord to the tenant dated March 17, 2020 at 11:47am which states,

No I don't have one currently. Please keep me posted on your plans.

[reproduced as written]

The landlord argued that the tenant was present, occupying the rental unit until she chose to vacate it with her daughter and return to New Zealand.

The landlord also seeks liquidated damages of \$2,197.50 for the tenant pre-maturely ending the tenancy without notice. The landlord immediately made efforts to re-rent the unit beginning on April 24, 2020 despite being notified on April 23, 2020 by email that the tenant had vacated the rental unit on March 23, 2020. The landlord stated that a new tenant was not found to occupy the rental unit until July 1, 2020.

Section 8 of the Addendum, Liquidated Damages in the event of breaking the lease:

If the Tenant(s) repudiates or breaches the fixed term tenancy before the end of the original term, the Landlord may, at the Landlord's option, treat this Agreement as being at an end. In such event, the sum of \$2,197.50 plus GST of \$109.88 will be paid by the Tenant(s) to the Landlord or Vancouver Luxury Realty (VLR) as damages, and not as a penalty, towards the administration costs of -re-renting the Rental Unit. The Landlord and Tenant(s) acknowledge and agree that the payment of such damages will not preclude the Landlord from exercising any right of pursuing any remedy available in law or in equity for breach of this agreement, including, but not limited to, claims for loss or damage pertaining to the Rental unit or its appliances, furniture, furnishings, or finishes, and damages incurred as a result of lost rental income, or any other costs or losses arising from or related to the Tenant(s) repudiation or breach of any term of this

agreement. The Landlord of VLD shall have no obligation to accept any repudiation or breach of the lease by the tenant(s), and payment of the said sum of half month's rent shall not limit the Landlord's rights, remedies or claims in any way.

The tenant also argued that if the tenancy agreement has been frustrated the liquidated damages clause sought for by the landlord would also be set aside as unenforceable.

The landlord seeks \$200.00 for the cost of a strata move-out fee. The tenants argue that no actual move-out took place as they had only removed personal items for some suite cases. The landlord argued that the strata move-out fee is more than just booking the elevator to move personal items. The landlord stated that the tenant did remove personal items when they vacated by packing and removing their personal items in their suite cases when they left the country. The tenant also argued that the landlord has not provided any supporting evidence of a strata move-out fee of \$200.00 of that it was being imposed by the strata. The tenant stated that when they moved in there was no strata move-in fee and the landlord has not provided any evidence of a strata move-out fee imposed by the Strata. The landlord argued that a strata move-out fee was listed in the Addendum to the signed tenancy agreement #2, Moving (Strata Properties Only) which states in part,

The tenant(s) hereby agree that they will pay the cost, if any, set out in the strata bylaws pertaining to the Rental Unit for move in or move out fees. This is an additional cost to be paid prior to move in date. The Tenant(s) property must be in move in or out of the residential property through designated doors, at the sole risk of the Tenant(s) and must have proper notice delivered to the Strata Company. The Tenant(s) will be liable for any cost associated with moving, including cost resulting from injury, any damages to the Tenant(s) belongings, the residential property, or the Rental Unit. This applies regardless furnished or unfurnished properties.

[reproduced as written]

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual

monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

On the landlord's claim for unpaid rent/loss, the tenants have argued that the tenancy was frustrated due to Covid and the closure of borders of New Zealand. The tenants also argued that under Residential Tenancy Policy Guideline #34, Frustration provides for the test for frustration as:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseen event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test or determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if frustration is the result of their own deliberate or negligent act or omission.

The Covid Pandemic is a Global event that no one has been truly prepared for. However, in this instance, the tenant, C.W. and her daughter were in residence at the time of the Canada Border closing at the rental unit. This is shown by the tenant's email to the landlord dated April 23, 2020. I find that the tenant made a choice after researching their options as noted in the same email and the subsequent emails with the landlord to vacate the rental unit and return to New Zealand. As such, I cannot find that the tenant did not have a choice as the tenancy agreement was not frustrated until the tenant vacated the tenancy on March 23, 2020. I also note that the tenant failed to mitigate any possible losses by notifying the landlord on March 23, 2020 or soon thereafter to allow the landlord and opportunity to minimize this loss for May 2020. On this basis, I find that the landlord has provided sufficient evidence to satisfy me that the tenant vacated the rental unit without proper notice which caused the landlord to suffer a loss of rent for May 2020 of \$4,395.00.

On the landlord's second claim of liquidated damages of \$2,197.50, the tenant has also argued that this term would be unenforceable if the tenancy agreement was frustrated. I find that as frustration did not occur until after the tenant vacated the rental unit that the landlord is entitled to liquidated damages. This portion of the landlord's claim is granted.

On the landlord's claim for a \$200.00 Strata Move-out Fee, I find that the landlord has failed. Despite providing evidence in the Addendum page 2 regarding moving, which is clear that the Strata Fee is imposed, if any, regardless if the rental unit is furnished or unfurnished. The landlord failed to provide any evidence that a Strata Move-Out Fee of \$200.00 was imposed by the Strata. The tenant also argued that no Strata Move-In Fee was charged. As such, in the absence of any evidence that a strata mov out fee was imposed, the landlord has not been successful in this portion of the claim.

The landlord has established a total monetary claim of \$6,592.50. The landlord is also entitled to recovery of the \$100.00 filing fee. I authorize the landlord to retain the combined \$2,197.50 security deposit and the \$2,197.50 pet damage deposits in partial satisfaction of this claim.

Conclusion

The landlord is granted a monetary order for \$2,297.50.

This order must be served upon the tenant. Should the tenant fail to comply with this order, the order may be filed in the Small Claims Division of the Provincial 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 *Residential Tenancy Act*.

Dated: October 6, 2020

Residential Tenancy Branch