Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MND 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. This hearing spanned 2 hearing slots, as it had to be adjourned to hear all of the items on the application. The hearings took place on January 28, 2021, and April 26, 2021. The Landlord applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "Act").

Both parties attended the first hearing and provided testimony. The Landlord stated he sent 2 packages to the Tenant by registered mail, one on October 17, 2020, and the other on January 4, 2021. The Tenant confirmed receipt of these packages, which contained around 130 pages of evidence, as well as his amendments. The Landlord sent one additional package by regular mail, but this package only contained 4 pages, which the Landlord said were unimportant. The Tenant denied receiving this package, and the Landlord was unable to provide proof of service. The Landlord withdrew these 4 pages, uploaded on January 6, 2021.

The Tenant stated he sent his evidence to the Landlord by "express mail". The Landlord stated he never received this package. The Tenant stated he sent it to the Landlord's address for service, but was unable to provide any verifiable registered mail tracking information, or any further evidence he sent his evidence to the Landlord in accordance with the Rules of Procedure. The Tenant provided a receipt number, but there was no tracking information available based on the number he provided. Given the lack of evidence substantiating that he served his evidence in accordance with section 88 of the Act, I find the Tenant has failed to sufficiently serve his evidence. As such, it is not admissible, and will not be considered further.

The same day of the second hearing, April 26, 2021, the Tenants uploaded copies of emails from various times throughout 2020. However, as clearly stated in the interim decision from January 2021, I ordered that no new evidence may be submitted following the first hearing. There is no evidence that these emails are “new and relevant”, given they likely would have been available to the Tenants well before the first hearing. As such, I find the Tenants most recently submitted evidence on April 26, 2021, is not admissible as it as submitted contrary to my orders.

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 Matters - Second hearing

Following the first hearing on January 28, 2021, both parties were emailed a new Notice of Dispute Resolution Proceeding (dated January 29, 2021). The new Notice sent out listed the date and time for the second hearing, as well as the access codes, and telephone numbers. Both the dates and times, and the dial in codes are different from the first hearing. Records show both parties were sent copies of this notice for the second hearing on January 29, 2021. The second hearing was scheduled for April 26, 2021, at 11:00 am, as per the Notice of Dispute Resolution provided to the parties in the email on January 29, 2021.

The Tenant attended the second hearing. However, the Landlord did not attend the second hearing. After waiting for 11 minutes at the second hearing, the conference call was terminated, as the Landlord did not attend to present, explain, or speak to the remaining items on his application.

I note the following Rules of Procedure:

> *7.3 Consequences of not attending the hearing*
>
> *If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.*
>
> *7.4 Evidence must be presented*

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

During the first hearing, both parties were given an opportunity to present evidence, and make submissions regarding the first 3 items on the Landlord's monetary order worksheet. The second hearing was scheduled to allow the Landlord to present the remaining items on his application (including items 4-8 on the Monetary Order Worksheet), and to give the Tenant a chance to respond to those items. However, as stated above, the Landlord failed to attend the scheduled second hearing on April 26, 2021 at 11:00 am. As such, his application for the remaining items on his application is dismissed, without leave. My decision will focus on the first 3 items on his worksheet, as these were the items the Landlord presented in the first hearing, and are also items the Tenant was given an opportunity to respond to.

Issues to be Decided

- Is the Landlord entitled to compensation for damage to the unit or for damage or loss under the Act?
- Is the Landlord entitled to recover the cost of the filing fee?
- Is the Landlord entitled to retain all or a portion of the Tenant's security deposit in satisfaction of the monetary order requested?

Background and Evidence

Both parties agree that current rent is set at $1,199.25 and is due on the first of the month. The Landlord confirmed that he still holds a security deposit in the amount of $562.50. The parties confirmed that the tenancy started in May of 2016, and ended on October 1, 2020, when the Tenant moved out.

The parties appear to have signed a series of sequential fixed term tenancy agreements over the years. A copy of the most recent tenancy agreement was provided into evidence, which shows that the tenancy was for a fixed term starting on July 1, 2020, ending on December 31, 2020, at which point it would revert to a month-to-month tenancy.

The Tenant stated that he never really read the agreements that closely, but he was under the impression that he was under a month-to-month tenancy.

The Tenant stated that he informed the Landlord that he would be vacating by email on August 1, 2020, and September 1, 2020. The Tenant did not provide any proof of what he sent, and when. The Landlord provided a copy of an email from the Tenant, which was sent, and received, by the Landlord on September 10, 2020. Although it appears some conversation/exchange happened regarding the Tenant wanting to move out at the end of September or early October, the Landlord stated that this September 10, 2020, email was the first formal notice he was given.

The Tenant denies that he damaged the rental unit prior to leaving, and does not feel he should be responsible for any of the repairs to the walls, the carpets etc. The Tenant stated any damage was for reasonable wear and tear, based on normal usage, and he noted that many of the building elements were old, and in need of updating or replacing.

The Landlord provided a monetary worksheet to lay out the items he is seeking. They are as follows:

1) $3,597.75 – Rental Losses
2) $837.50 – Costs to re-rent unit – Agent Fees
3) $109.66 – BC Hydro carrying costs until new Tenants were found (Oct – Dec)

The Landlord explained that since the Tenant was under a fixed term tenancy agreement until the end of December 2020, he is responsible for the losses incurred by the Landlord for the costs to re-rent the unit, the utility carrying costs while the unit was being re-listed/shown, and the lost rent for October through till the end of December.

The Landlord provided a screenshot of his banking information to show he paid $26.66, plus $83.00 to BC Hydro for the period of October- December 2020. The Landlord stated the heat and electricity was kept as low as possible, just while the unit was being shown, in order to minimize costs while they searched for new renters, following the Tenant's early breach of the fixed term agreement.

The Tenant does not feel he should have to pay this amount as it is not clear what the periods and amounts are for. The Tenant stated he paid for all his bills prior to moving out.

The Landlord further explained that since he is out of town, he had to hire an agent to manage the re-listing of the rental unit, which ended up costing him $837.50. The Landlord provided a copy of the bill he paid for this item, and feels the Tenant should have to pay for this amount because he broke the lease, and caused him to have to

scramble and re-list the property. The Tenant does not feel he should have to pay for the agent fees.

The Landlord stated that he was unable to re-rent the unit until January 2021, and as a result, he suffered rental losses for October, November, and December 2020, totalling $3,597.75. The Landlord stated he did his best to mitigate his losses, and re-posted the ad on or around September 7, 2020, which was before he received formal written notice from the Tenant, but after he was made aware of the Tenant's eventual plans. The Landlord stated he wanted to re-rent the unit at a reasonable rate, as well as do so quickly.

The Landlord explained that he did a market analysis of the comparable rental units, and this included speaking with the strata president of the townhouse complex, talking with his agent, and looking at comparable units in Surrey, Delta, and Langley. The Landlord stated that most of the similar sized townhouse units were around $2,000.00 to $2,600.00. The Landlord stated that he also found an almost identical rental unit within the same complex, that was also the same size, for $1,800.00. The Landlord provided copies of emails, listings, and comparables to show he did a lot of research prior to re-listing the unit.

The Landlord explained that he listed the unit for rent on Craigslist (two different ads, renewed every few days to keep them active) for $1,595.00. The Landlord stated that they had almost 5 showings per week, but only a very small number of actual applications. The Landlord suspects this was because many people had lost their jobs, and didn't have sufficient financial footing to meet his application requirements.

The Landlord stated that he also acted as promptly as possible, and not only did he post multiple ads, he refreshed them often. The Landlord stated that he also experimented with a lower rent for 2 weeks to see if he could find new tenants. However, the Landlord stated that it did not result in more interest, just lower quality applicants who were not employed. The Landlord stated that after a brief period of lowered rent at the end of September, he posted it again at $1,595.00. The Landlord stated that he eventually signed new tenants on December 7, 2020, starting January 1, 2021, for $1,595.00 per month.

The Tenant stated that he told the Landlord on August 20, 2020, that he would be moving out, but he was unable to provide any evidence to support that he sent his Notice at that time. The Tenant stated he also sent an email on September 1, 2020, which is why the Landlord re-listed the unit around September 7, 2020. The Tenant

stated that the townhouse is 14 years old, and was not renting because it had not been properly updated.

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.

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I have reviewed the 3 items listed above, along with supporting documentary evidence and testimony.

I find the Tenant was under a fixed-term tenancy agreement until December 31, 2020, as per the agreement provided into evidence. The Tenant was under the impression he could end the tenancy with only one month's notice. However, it appears he did not read the agreement he signed with sufficient care and attention.

Regardless of whether the Tenant provided his notice to end tenancy on August 20, 2020, or in early September 2020, the Tenant was not legally entitled to end the tenancy in this manner, prior to the end of his fixed term tenancy agreement. I find the Tenant breached section 45 (2) of the Act, which states as follows:

> ***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.

A tenancy may only end in one of the following ways:

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.

Given the Tenant gave invalid and premature notice, I find the tenancy did not end by way of the notice he gave, but rather it ended on October 1, 2020, when the Tenant vacated the rental unit. In any event, the Tenant breached the Act and the tenancy agreement by ending the tenancy prior to the end of his fixed term. As such, he is liable for some of the losses incurred up until the end of the fixed term agreement, and to re-rent the unit early.

I note the following relevant portions of the **Policy Guideline #5 – Duty to Minimize Loss**:

Loss of Rental Income
When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:

1. *re-rent the rental unit at a rent that is reasonable for the unit or site; and*
2. *re-rent the unit as soon as possible.*

[…]

If a landlord is claiming compensation for lost rental income, evidence showing the steps taken to rent the rental unit should be submitted or the claim may be reduced or denied. If a landlord is claiming a loss because they rented the rental unit for less money than under the previous tenancy, or they were unable to rent the unit, evidence like advertisements showing the price of rent for similar rental units, or evidence of the vacancy rate in the location of the rental unit may be relevant.

[…]

Partial mitigation
Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. If in the above example the tenant reported the leak, the landlord failed to make the repairs and the tenant did not apply for dispute resolution soon after and more damage occurred, this could constitute partial mitigation. In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.

I also note the following relevant portions of the **Policy Guideline #3 – Claims for Rent and Damages for loss of rent**

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

In this case, I have considered the Landlord testimony and evidence on this matter, and I find he has provided detailed and compelling evidence to show he tried to ascertain what fair market value was for monthly rent. Although the Landlord did not provide a complete record of what was available on the market, it appears the Landlord invested a

significant amount of effort to try and find a reasonable economic rent by obtaining many market comparables, and opinions from market professionals.

That being said, I note the Landlord and the Tenant entered into a tenancy agreement only a couple of months before the tenancy ended, and monthly rent was set at $1,199.25. Although the Landlord did some market analysis when the Tenant moved out, he chose to significantly increase monthly rent to $1,595.00. In this case, I find the Landlord has partially mitigated his losses, as I find his choice to raise the rent, in the current pandemic rental climate, likely contributed to his inability to re-rent sooner.

Although the Landlord is seeking $4,544.91 in total for the first 3 items on his list (Rental Losses, agent fee, and BC Hydro costs), I find he is only entitled to 2/3 of this amount, which totals $3,029.94, due to the partial mitigation.

As stated in the preliminary matters section, the Landlord failed to attend the second hearing to explain or present any of his other monetary items (4-8 on the worksheet), which were related to damage to the walls/carpet. The Tenant specifically denies doing any damage. Ultimately, I find the Landlord has failed to sufficiently present and explain how and why the Tenant is responsible for the remaining items on his worksheet. The onus is on the Landlord to attend the hearings, which were convened for his own application, to articulate his submissions, and present his evidence. As this was not done for the other items, the Landlord's application for those matters is dismissed, without leave to reapply.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlord was partially successful with his application, I order the Tenant to repay the $100.00 fee that the Landlord paid to make application for dispute resolution. Also, I authorize the Landlord to retain the security deposit to offset the other money owed.

In summary, I find the Landlord is entitled to the following monetary order:

Item	**Amount**
Items #1-3 above	$3,029.94
PLUS: Filing Fee	$100.00
Subtotal:	$3,129.94
LESS: Security Deposit	$562.50
Total Amount	**$2,567.44**

Conclusion

The Landlord is granted a monetary order in the amount of **$2,567.44**, as specified above. This order must be served on the Tenants. If the Tenants fail to comply with this order the Landlord 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: April 27, 2021

Residential Tenancy Branch