Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNRL-S, MNDL-S, MNDCL-S, FFL
MNSD, MNDCT, FFT

Introduction

The landlord seeks compensation against her former tenant pursuant to section 67 of the *Residential Tenancy Act* ("Act"), and the tenant seeks compensation against her former landlord pursuant to section 67 of the Act. Both parties also seek to recover the cost of their application filing fees pursuant to section 72 of the Act.

Both parties attended the hearing, they were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

Preliminary Issue: Service

It should be noted that while each party confirmed serving the opposing side with their documentary evidence, and while each party confirmed receiving the other side's evidence, the landlord raised issues with the fact that she had to serve her evidence at "a derelict warehouse" instead of being able to serve the tenant in person.

The landlord also sought to confirm that she was permitted to serve, or contact, the tenant after this hearing by way of email. The tenant accepted that the landlord may contact her by email, and I confirmed the tenant's address during the hearing.

Last, the landlord briefly spoke about the tenant serving her with evidence but that the tenant has misspelled the landlord's name. To this, the landlord argued that the evidence should therefore not be considered to have been served upon her, and she requested what is commonly known in criminal law as a "no evidence motion." (Leaving aside the fact there is no known motion in an administrative hearing such as this one, I will nevertheless consider the landlord's objection.)

The tenant's mere misspelling of the landlord's name does not give rise to a finding that the evidence is therefore admissible. There is no evidence before me to find that the tenant intended for her evidence to be served to anyone else other than the landlord.

This is a case of what is known as a misnomer (see *Jackson v. Bubela,* 28 DLR (3d) 500 (BCCA). Applying the reasonable person test to the facts, one can arrive at no different conclusion other than the tenant intended to serve her evidence on the landlord, and that the landlord could not reasonably have concluded that the evidence was intended for anyone else. For this reason, it is my finding that the tenant's evidence was served on the correct person, despite a misspelling of that person's name.

Issues

1. Is the landlord entitled to any compensation?
2. Is the tenant entitled to any compensation?
3. Is either the landlord or the tenant entitled to recover the cost of their filing fee?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issues of this dispute, and to explain the decision, is reproduced below.

The tenancy began on either February 1 or February 5, 2021. The tenancy appeared to have ended on June 7, 2021. Monthly rent was $1,150.00 and the tenant paid a security deposit of $575.00, which the landlord currently holds in trust. A copy of the written tenancy agreement was in evidence.

A. Landlord's Application for Compensation

In her application, the landlord seeks the following compensation: (1) $1,902.45 comprising of eight subclaims for repairs, a replacement rug, painting, rental unit cleaning, blind cleaning and replacement, bifold door replacement and locks, and carpet cleaning; (2) $932.00 for lost income due to the tenant's alleged smoking; (3) $1,050.00 for "NoSignedNoticeToVacate."; and (4) $100.00 for the cost of the application filing fee.

A detailed and clear Monetary Order Worksheet was submitted into evidence by the landlord, and this worksheet breaks down the individual subclaims in further detail.

I. Claim for Repairs, Cleaning, Painting, and Locks

While the landlord seeks various amounts for the eight items listed on rows 1 through 8 of her Monetary Order Worksheet, I shall for brevity simply refer to this grouping of claims as the "rental unit repairs."

The landlord testified that the rental unit was spotless at the start of the tenancy and that no repairs were needed. However, when she conducted the walk-through inspection at the end of the tenancy there was much damage and uncleanliness.

Submitted into evidence were several photographs of the rental unit along with a completed Condition Inspection Report (the "Report"). The Report shows that the rental unit was in "Good" condition at the start of the tenancy, while a vast majority of the rental unit was marked as being in a "Dirty" or "Damaged" condition at the end of the tenancy. The tenant attended to the condition inspection at the start of the tenancy, but she did not participate at the end of the tenancy. Last, it is noted that the landlord submitted various receipts and invoices for the repairs and cleaning.

In response to this aspect of the landlord's application, the tenant testified that, in her opinion, she left the rental unit "very clean." She did admit, however, that her movers left something heavy on a shelf. That object then slid off the shelf during the night and damaged the bi-fold doors. The tenant also testified that the cords on the blinds were "shredded," but that this was not recorded or otherwise noted at the start of the tenancy.

II. Loss of Employment Income from Tenant Smoking

The landlord explained that she is an author and earns a living from writing. She works from home, which for her is the upper level of the residential home in which the rental unit is situated.

According to the landlord, the tenant smoked outside the rental unit, though the tenancy agreement strictly prohibited smoking in or les than 200 metres from the rental unit. The landlord was aware that the tenant was a previous smoker but was under the impression when they first met that the tenant really had stopped smoking. "I just thought that she was a sweet, nice little old lady," the landlord remarked, "but she [was] a smoker, a midnight smoker."

According to the landlord, the tenant smoked on April 7, April 17, and again on May 1, 2021. Submitted into evidence is a copy of an email or letter sent to the tenant on or shortly after the May 1st smoking, warning the tenant about the smoking prohibition.

There is no evidence, however, of when this was sent or whether the tenant ever received it. There is also in evidence a string of emails between the parties, some of which references the moving out, and some of which speaks to the smoking. Notably, the tenant at no point admits to smoking, and merely states “Well I haven’t smoked for many months...despite what you have convinced yourself of…but I sure do feel like it”.

The landlord has serious smoke allergies, has twice previously had pneumonia, and suffered serious medical issues when the tenant smoked. She added that “if I die, then [the tenant] would have no place to live.” A copy of a medical report was in evidence. And because of those medical issues the landlord could not work for four days. In her estimate, the landlord suffered a loss of income in the amount of $932.00.

In rebuttal the tenant was adamant that “I did not smoke” and that the landlord “made this up in her head.” She went on to say that she does not know how one would prove that they do not smoke, but she repeated her position: “I did not smoke.”

III. Compensation for Loss of Month’s Rent

The written tenancy agreement is drafted in a manner that, upon first reading, clearly indicates that the tenancy was a periodic (that is, a month-to-month) tenancy. The little box next to the part of the tenancy agreement on page two that reads “A) and continues on a month-to-month basis until ended in accordance with the Act.” is filled in.

However, the landlord argued that this was drafted in error, and that the tenancy agreement ought to have reflected her intention to rent the rental unit as a one-year fixed term tenancy. She testified that in support of this intention and supposed agreement of the parties the tenant provided her with twelve months’ worth of post-dated rent cheques.

An addendum to the tenancy agreement was in evidence. Section, or clause 29, on page eight of the addendum states, in part, that “The Tenant agrees to provide a minimum of six (6) weeks’ signed written notice to move after the Lease expiry date and not to move during the month of December on any calendar year.” Both the landlord and the tenant signed the eight-page addendum on February 5, 2021.

It is the tenant's position that the tenancy was a month-to-month tenancy. She acknowledged having given twelve post-dated cheques, but not as confirmation that the tenancy was a one-year fixed term tenancy.

In respect of how the tenancy came to an end, the tenant sent an email on May 5, 2021 to the landlord in which she writes, *inter alia,* as follows:

> As per the notice period in our rental agreement, please consider this email as 6 weeks notice of my intention to vacate your suite in the basement of [address of rental unit].
>
> My actual move date will be Saturday June 5, 2021. I would appreciate it if you would move your vehicle and open the garage door on this date.

The landlord testified that she was nevertheless "in the dark about her moving," despite the tenant's assurances.

B. Tenant's Application for Compensation

In her application, the tenant seeks the following compensation: (1) $575.00 for the return of her security deposit; (2) $225.00 for the cost of having to place stop payments on ten cheques; (3) $100.00 for, as described by the tenant in her application, "Cost to close bank account because she cashed by July Post dated cheque ..New cheques, Pension pmt 3 weeks delayed"; and (4) $100.00 for the cost of the application filing fee.

I. Claim for Security Deposit

By default, the tenant's security deposit will be ordered returned if the landlord's application is dismissed. The tenant confirmed that this is the amount sought.

II. Claims for Cost of Stop Payments, Closing Account, Delay in Pension

The tenant did not provide a cogent explanation for why ten post-dated cheques needed stop payments placed on them when twelve were given at the start of the tenancy. Further, there is in evidence no documentary evidence showing the cost or dollar amounts of any of the specific items being claimed for.

Regarding a cheque for July 2021, the tenant testified that while the landlord attempted to cash that cheque, it was later reversed by the bank, and she suffered no monetary loss as a result.

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.

A. Landlord's Application

I. Claim for Repairs, Cleaning, Painting, and Locks

Section 37(2) of the Act requires a tenant to leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, when they vacate.

In this dispute, the landlord presented oral and documentary evidence proving that the tenant did not leave the rental unit reasonably clean and undamaged except for reasonable wear and tear. The tenant argued that she left the rental unit "very clean."

The landlord submitted a Condition Inspection Report and photographs into evidence to support her claim. Section 21 of the *Residential Tenancy Regulation* clearly states that

> In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The tenant did not provide a preponderance of evidence to the contrary, and as such it is my finding that the landlord has proven a breach of section 37(2) of the Act. Further, the landlord has submitted documentary evidence of the various subclaims relating to cleaning, repairing, and otherwise bringing the rental unit back into a rentable condition.

In summary, 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 her claims for compensation for rental unit repairs in the amount of $1,902.45.

It is worth noting that many of the terms of the addendum to the tenancy agreement are, in fact, contrary to the Act. In most circumstances, they would be unenforceable. For example, the requirement that “The blinds, carpet, suite and patio must be cleaned to original condition of Condition Inspection Report” runs contrary to the requirement of the Act, which only requires that a rental unit be left reasonably clean. The landlord should be aware that any term of a tenancy agreement that is inconsistent with the Act is not enforceable.

That having been said, it is nevertheless my finding that the tenant breached section 37(2) of the Act and must compensate the landlord for that breach.

II. Claim for Loss of Employment Income from Tenant Smoking

While the landlord provided no direct proof of the tenant having smoked on the various dates alleged, the various documents, including the medical report, and the repeated references to the smoking within the landlord’s email communication, is circumstantial evidence proving that the tenant did indeed smoke.

However, what the landlord has not provided is a persuasive argument, supported by any evidence, as to how she in fact suffered a loss of income in the amount of $932.00 as a result of the tenant’s breach of the tenancy agreement. No T4 or T4002 or any other documentary verification of the landlord’s income was submitted from which a calculation for four days’ loss of income could be understood.

Given that the landlord has not persuaded me as to the actual dollar amount suffered or lost as a result of the tenant’s breach, I am unable to consider this aspect of her claim and it is therefore dismissed.

III. Claim for Compensation for Loss of Month’s Rent

While the landlord’s arguments and explanation regarding this aspect of her claim were somewhat muddled, it is my understanding that she seeks compensation for the tenant not having provided sufficient notice as per the tenancy agreement. And, consequently, she was unable to start showing the rental unit to the next potential tenant.

Was the tenancy a fixed-term tenancy (as the landlord submits) or was it a periodic month-to-month tenancy (as the tenant submits)?

The tenancy agreement clearly states that the tenancy was a month-to-month. While the landlord argued that this was a mistake on her part, she now wishes to rely on her intention that it was a fixed-term tenancy for the purposes of this application.

In cases were there is an ambiguous, or disputed term of an agreement, or where the parties dispute a term, and where neither party has provided persuasive evidence that might bring clarity to the term, I must apply the *contra proferentem* rule.

Contra proferentem is a rule of contractual interpretation which provides that an ambiguous term will be construed against the party responsible for its inclusion in the contract. This interpretation will therefore favour the party who did not draft the term, because the party not responsible for the ambiguity should not be made to suffer for it. This rule endeavours to encourage the drafter to be as clear as possible when crafting an agreement upon which the parties will rely. In this case, it was the landlord who was responsible for drafting and preparing the final version of the tenancy agreement.

I am not persuaded that the mere provision of twelve post-dated cheques by the tenant is proof that the tenant also accepted that the tenancy was a one-year fixed-term tenancy. There is, in fact, nowhere in evidence anything persuading me to find that the tenant also believed it was a fixed-term tenancy.

As a brief aside, clause 29 of the addendum provides no additional clarity on whether the tenancy was periodic or fixed. It merely states that the tenant has to provide a minimum of six weeks' signed written notice to end the tenancy "after the Lease expiry date." This statement is essentially rendered moot given that the tenancy agreement itself does not reference a "lease" expiry date.

For these reasons, it is my finding that the tenancy was a periodic tenancy. Section 45(1) of the Act states that

> A tenant may end a periodic 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, and
> (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.

In this case, the tenant gave written notice on May 5, 2021 that she would be ending the tenancy in six weeks. This means that the intended end of tenancy date would be June 16, 2021. However, as rent was payable on the first day of the month under the tenancy agreement, the corrected date would in fact be June 30, 202. (See section 53(1) of the Act regarding an automatically corrected change of incorrect dates.)

Last, given that the tenancy was, as I find, a periodic tenancy, the tenant was only required to give one month's notice pursuant to section 45(1) of the Act; at no time was she required to provide six week's notice and the landlord was not permitted to require that six week's notice be given under a periodic tenancy. To reiterate: the landlord cannot impose a six-week notice requirement on any of her present or future tenants, as any such requirement runs contrary to sections 45(1) and 45(2) of the Act.

In summary, there is no evidence before me to find that the tenant breached the Act or the tenancy agreement such that the landlord is entitled to compensation in the amount of $1,050.00. This aspect of the landlord's application is dismissed.

B. Tenant's Application

Leaving aside the tenant's claim for the return of her security deposit and for the application filing fee, the tenant has not persuaded me that the landlord breached any section of the Act, the regulations, or the tenancy agreement.

Further, while the landlord's attempt to cash the tenant's July cheque was rather brash, and it is understandable as to why the tenant would want to place stop payments on the remaining post-dated cheques, there is no documentary evidence to establish the actual cost of doing so. Nor was there any documentary evidence showing a loss of monies from the delay of the tenant's pension payment.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I must find on a balance of probabilities that the tenant has not met the onus of proving her claim for the above-noted matters.

Summary

In summary, the landlord is awarded $1,902.45 in compensation and an additional $100.00 (pursuant to section 72 of the Act) for the cost of the application, for a total of $2,002.45.

Section 38(4)(b) of the Act permits a landlord to retain an amount from a security or pet damage deposit if "after the end of the tenancy, the director orders that the landlord may retain the amount." As such, I order and authorize the landlord to retain the tenant's $575.00 security deposit in partial satisfaction of the above-noted award.

The balance of the award, $1,427.45, is granted to the landlord by way of a monetary order. A copy of this order is issued in conjunction with this decision, to the landlord. Should the tenant fail to pay the balance within 15 days of receiving this decision then the landlord must serve a copy of the monetary order on the tenant and she may then enforce the order in the Provincial Court of British Columbia (Small Claims Division).

The tenant's application for the return of her security deposit is dismissed, as are her remaining claims.

Conclusion

The landlord's application is granted, in part.

The tenant's application is dismissed, without leave to reapply.

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

Dated: January 17, 2022

Residential Tenancy Branch