Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

This hearing, reconvened from a Judicial Review decision of May 6, 2021, originated with cross-applications for Dispute Resolution under the Residential Tenancy Act ("Act") by the parties.

The Landlord originally filed a claim for:

- a monetary order for damages and loss pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The Tenant originally filed a claim for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended this hearing and were given an opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. In accordance with the *Act*, Residential Tenancy Rule of Procedure 6.1 and 7.17 and the principles of fairness and the Branch's objective of fair, efficient and consistent dispute resolution process parties were given an opportunity to make submissions and present evidence related to

the claim. The parties were directed to make succinct submissions, and pursuant to my authority under Rule 7.17 were directed against making unnecessary submissions or remarks not related to the matter at hand.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act* and in any event sufficiently served with all materials pursuant to section 71(2)(c).

Scope of this Hearing

This mater was originally heard by the Residential Tenancy Branch over the course of two days with hearings occurring on September 17, 2020 and November 10, 2020. The presiding arbitrator issued written reasons for judgement dated November 26, 2020, ultimately issuing a monetary award in the tenant's favour in the amount of $14,439.37.

After exhausting the internal review process of the Branch, where the original decision of November 26, 2020 was upheld, the landlord applied pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c.241 to set aside the original monetary order in favour of the tenant.

The judicial review application was heard in the Supreme Court of British Columbia on April 28, 2021 and Madam Justice Power issued oral reasons for judgment on May 6, 2021. A copy of the oral judgment was submitted into evidence.

In the oral reasons the landlord's position on the November 26, 2020 decision is summarized as follows:

> [31] The Landlord disputes two aspects of the November 26, 2020, decision.
>
> [32] First, she submits that the arbitrator's decision to "not allow" video evidence was patently unreasonable. I am of the view that this issue is properly considered in the context of procedural fairness, as opposed to substantive review. In any event, the Landlord submits that the arbitrator's failure to consider the video

> evidence hindered the arbitrator in her ability to adjudicate the Landlord's claim for damages, and that it was patently unreasonable for her to have neither adjourned the proceeding nor requested resubmission of the video evidence.
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> [33] The Landlord places particular reliance on s. 75 of the RTA which, in her submission, requires the arbitrator to review evidence, even if it would not normally be admissible under the rules of evidence, if it is necessary or relevant to the proceeding. It is clear from the Landlord's submissions that from her perspective, the video evidence was crucial to the success of her application.
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> [34] Second, the Landlord submits that it was patently unreasonable for the arbitrator to have concluded that the March 1, 2020, handwritten note constituted a proper notice to end tenancy for landlord's personal use under s. 49 of the RTA. This finding enabled the arbitrator to award compensation under s. 51 which, in the submission of the Landlord, was also patently unreasonable:
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> > The notice to end tenancy for landlord's use was not in the approved Residential Tenancy Branch form as required under the RTA. It was a handwritten note delivered to the tenant to give them notice that the landlord was intending to move back into the unit. It was a way to let the tenant know of the intention of the landlord, but was never to be a proper notice under s. 49. As a result, the notice to end tenancy for landlord's use was not an effective notice to end tenancy under the Act. Therefore, it was patently unreasonable for the Tribunal member to rely on the notice to impose a penalty under s. 51. The Tribunal member did not take statutory requirements into account.

As regards the first issue, regarding the original arbitrator’s exclusion of the video evidence, the Court found that:

> [54] I have concluded that the Landlord's right to procedural fairness was not breached when the arbitrator determined that she would not give consideration to the Landlord's video evidence.

In analyzing the second portion of the landlord's application for judicial review the Court concluded:

> [68] Although it may be that the arbitrator's overall interpretation of the evidence was reasonable, I find that it was patently unreasonable for the arbitrator to have overlooked the mandatory notice criteria under s. 52 without providing any reasons or justification. If she did exercise her statutory discretion to amend the notice or otherwise find it to be valid, she did not articulate that in her reasons.
>
> [69] Therefore, I have concluded that the arbitrator's decision to treat the handwritten note as notice under s. 49 and to award compensation to the Tenant pursuant to s. 51 on that basis was patently unreasonable.
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> [70] I have decided that it is appropriate to remit this matter back to the RTB for re-determination, taking into account the above considerations.
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> [71] The petition is allowed in part**. I remit the issue as to whether the Tenant is entitled to a monetary order under s. 51 of the RTA to the RTB for re-determination**, taking into account these reasons for judgment.
>
> [emphasis added]

The parties also submitted into evidence a copy of the Consent Order dated May 6, 2021 which states in relevant parts:

> THIS COURT ORDERS:
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> 1. That the Decision of [original Arbitrator] of the Residential Tenancy Branch in File No. 110005814, Additional File 110009330 (the "RTB Files") and the Monetary Order against [the Landlord], in favour of [the Tenant] in the amount of $14,439.37, dated November 26, 2020 be and the same are set aside;
> 2. That the RTB Files be remitted to the Residential Tenancy Branch for re-hearing in accordance with the Oral Reasons for Judgment of Madam Justice Power dated May 6, 2020;
> 3. That each party bears its own costs of this Petition.

It is evident that the sole issue that has been remitted back to the Branch for determination is the issue of the tenant's application for a monetary award on the basis of a Notice to End Tenancy for Landlord's Use pursuant to section 49 of the *Act*.

I find that an ordinary reading of the Oral Reasons is that the issue of whether the Tenant is entitled to a monetary award pursuant to section 51 of the Act has been reopened but the balance of the decision of November 26, 2020 is not before me for reconsideration.

I indicated to the parties at the outset of the hearing that, regardless of the issues to be considered, this would be a full participatory hearing with parties given an opportunity to make relevant submissions.

Additional Monetary Claim

At the outset of the hearing the landlord sought to increase their monetary claim by $4,233.47 which they describe as expenses incurred since the issuance of the original decision of November 26, 2020 for the cost of pursuing a judicial review including legal fees, courthouse parking, postage, photocopies and court filing fees.

Pursuant to section 64(3)(c) of the *Act* and Rule 4.2 of the Rules of Procedure I find that these costs now claimed are not reasonably foreseeable additional amounts arising from this tenancy but new heads of claim. Consequently, I decline to amend the landlord's application to add these new claims for a monetary award.

As I have declined to amend the landlord's application to include a claim for these items it is not necessary to make a finding on their merits. I will note parenthetically that the issue of costs of the judicial review proceeding has been conclusively dealt with in the Court's decision of May 6, 2021 wherein the parties are ordered to bear their own costs. I further note that much of the items the landlord attempted to claim appear to be the ordinary costs associated with litigation or complaints that may not form the basis for a monetary award under the *Act*. I reiterate that as I have declined to allow the landlord to amend their application to add these claims I have not made a finding as to their merits.

Issue(s) to be Decided

Is the tenant entitled to a monetary award pursuant to section 51 of the *Act*?

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 arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This tenancy began on July 13, 2015, originally for a fixed-term of one-year with subsequent fixed-term tenancies signed by the parties. Monthly rent at the end of the tenancy was $1,120.00 payable on the first of each month. A security deposit of $500.00 and pet damage deposit of $500.00 were collected at the start of the tenancy and are still held by the landlord. The parties performed a move-in and move-out inspection of the unit and prepared a condition inspection report.

The parties agree that there were verbal discussions about the tenancy ending in 2020. The parties agree that the landlord never issued a 2 Month Notice to End Tenancy for Landlord's Use on the prescribed form provided by the Branch. The parties gave undisputed testimony that the only written notice provided by the landlord was a handwritten page dated March 1, 2020.

A copy of the handwritten note was submitted into evidence. It reads as follows:

> March 1 2002 [sic]
>
> Dear [Tenant]
> Re: [rental unit address]
> This is a notice to advise you that I am not re-newing your lease at the end of August. I am moving back in and my current house is for sale. If you find a place, I will need a 30 day notice to vacate. Email to follow.
>
> [Landlord]

The parties agree that the date on the handwritten note is an error and it was actually issued on March 1, 2020. The tenant submits a phone log and states that there were additional conversations with the landlord on March 16, 2020, dealing with the end of the tenancy.

The parties agree that they signed a Mutual Agreement to End Tenancy dated March 19, 2020 with an end of tenancy date of April 30, 2020. The parties agree that the

tenant failed to pay rent in the amount of $1,120.00 on April 1, 2020. The tenant submits that they were entitled to withhold the last month's rent pursuant to section 51(1) and (1.1) of the *Act*. The landlord says the tenant was not authorized to withhold the rent pursuant to the *Act* and there was no agreement between the parties allowing for such compensation. The landlord notes that they included a claim for the unpaid rent of $1,120.00 in their monetary application.

The tenancy ended on April 30, 2020 in accordance with the Mutual Agreement. The parties performed a move-out inspection together on April 26, 2020 and prepared a condition inspection report. The tenant also provided a forwarding address in writing on the inspection report.

The tenant submits that the landlord did not use the rental unit for the reason indicated in their conversations or on the note of March 1, 2020.

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.

Section 51 provides that a tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord compensation equivalent to 12 times the monthly rent under certain circumstances.

Section 49 provides that a landlord may end a periodic tenancy if the landlord intends in good faith to occupy the rental unit. Subsection 49(7) provides that: A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*

Section 52 provides that:

> 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,
>
> (b) give the address of the rental unit,

(c) state the effective date of the notice,
(d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
(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
(e) when given by a landlord, be in the approved form.

The parties agree that no Notice to End Tenancy on the prescribed form was ever issued by the landlord. The landlord served on the tenant a handwritten note on March 1, 2020 informing the tenant they would not be renewing the lease and would be moving into the rental unit. The parties subsequently signed a Mutual Agreement to End Tenancy on March 19, 2020 which provides that the tenancy would end on April 30, 2020.

I find the handwritten note of March 1, 2020 does not meet the requirements of the *Act*. It is not in the approved form and does not provide an effective date for the tenancy to end. I find this correspondence would have had no power or effect as a notice to end tenancy. The tenant was under no obligation to vacate the rental unit.

If the parties believed that the handwritten note were an effective notice under the *Act*, there would have been no need for further discussion or for the parties to enter a Mutual Agreement to End the Tenancy as they did. The fragments of text message communication between the parties show that as late as March 18, 2020 the parties continued to negotiate and came to an agreement as to when the tenancy would end.

I find the conduct of the parties to be inconsistent with what would be reasonably expected if there were an effective Notice to End Tenancy issued. In any event, I accept the undisputed evidence of the parties that the only written notice provided by the landlord was the handwritten note of March 1, 2020, which I find to be deficient and not consistent with the form and content requirements of section 52 of the *Act*.

I find that the issuance of this handwritten note does not trigger the obligation of the landlord to provide a monetary award to the tenant pursuant to section 51 as there was no valid notice to end tenancy issued pursuant to section 49.

I therefore find no basis for a monetary award and dismiss this portion of the tenant's application.

As noted above, I find that only the portion of the original applications pertaining to the tenant's claim for a monetary award pursuant to section 51 has been remitted back for reconsideration by the Judicial Review decision of May 6, 2021.

Accordingly, I find I have no authority to make new findings on the other portions of the applications pertaining to the landlord's claim for a monetary award for damages and loss nor the disposition of the deposits for this tenancy.

I do find that the portion of the landlord's application seeking a monetary award of $1,120.00 for unpaid rent on April 1, 2020 falls within my authority as the tenant's right to withhold the equivalent of one month's rent is compensation provided under section 51(1) and (1.1) when a valid notice to end tenancy pursuant to section 49 has been issued.

I accept the undisputed evidence of the parties that there was no agreement between them to allow the tenant to withhold the rent and the tenant believed they were entitled to do so based solely on their interpretation of the handwritten note as a valid notice to end tenancy.

As I have found that no effective notice pursuant to section 49 was issued, I therefore find that the tenant had no right to withhold the rent payable on April 1, 2020 pursuant to subsections 51(1) and (1.1) of the *Act*.

I therefore find that the landlord is entitled to a monetary award in the amount of $1,120.00 for the rental arrear for this tenancy.

I find that the portions of the original decision in which the landlord was issued a monetary award in the amount of $500.63 and the tenant was awarded a return of the deposits of $1,500.00 stand.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I therefore issue a Monetary Award in the landlord's favour in the amount of $120.63 on the following terms.

Item	Amount
Landlord's Monetary Award from Nov 26, 2020 decision	$500.63
Landlord's Monetary Award for Unpaid Rent	$1,120.00
Tenant's Monetary Award from Nov 26, 2020 decision	-$1,500.00
Total Monetary Order	**$120.63**

Conclusion

The portion of the tenant's application seeking a monetary award pursuant to section 51 are dismissed without leave to reapply.

I issue a monetary order in the landlord's favour in the amount of $120.63. The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this 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: July 4, 2022

Residential Tenancy Branch