Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding The Esplanade & Terra Property Management (agent)
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

For the tenant: MNDCT, MNSD
For the landlord: MNDL-S, MNRL-S, MNDCL-S, FFL

Introduction

This hearing was convened as a result of an Application for Dispute Resolution (application) by both parties seeking remedy under the *Residential Tenancy Act* (the Act). The landlord applied for a monetary order for unpaid rent or utilities, for damages to the unit, site or property, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, to keep all of part of the tenant's security deposit and pet damage deposit, and to recover the cost of the filing fee. The tenant applied for a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and for the return of their security deposit and pet damage deposit. The tenant's filing fee was waived.

The hearing commenced on August 20, 2019 and after 60 minutes was adjourned. An Interim Decision was issued dated August 20, 2019, which should be read in conjunction with this decision. In the Interim Decision, the tenant's application was refused pursuant to section 59(5)(c) of the Act, which is explained in greater detail in the Interim Decision. As a result, only the landlord's application has been considered in this decision and the tenant is at liberty to reapply. This decision does not extend any related timelines under the Act.

On October 22, 2019, the hearing was reconvened and after an additional 52 minutes, the hearing concluded. Attending both dates of the hearing were the tenant and two agents for the landlord SB-T and KG (agents). The parties gave affirmed testimony, were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and make submissions to me. Words utilizing the singular shall also include the plural and vice versa where the context requires.

As both parties confirmed having been served with documentary evidence in response to the landlord's application, I find the parties have been sufficiently served as required by the Act.

Preliminary and Procedural Matter

The parties confirmed their email addresses at the outset of the hearing and stated that they understood that the decision would be emailed to the parties. In addition, any monetary order will be emailed to the appropriate party for service on the other party.

Background and Evidence

A copy of a fixed-term tenancy agreement was submitted in evidence. The tenancy began on August 1, 2018. The parties disputed the end of tenancy date. The agent testified that they considered the tenant had vacated April 26, 2019, while the tenant testified that they vacated on March 28, 2019. There is no dispute that the tenant paid a security deposit of $850.00 and a pet damage deposit of $850.00 for a total in combined deposits of $1,700.00 (combined deposits), which the landlord continues to hold. The landlord filed their application on May 13, 2019. The monthly rent was $1,700.00 per month during the tenancy and did not include electrical utilities.

The landlord has claimed $2,337.45, which is comprised as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Unpaid/loss of April 2019 rent	$1,700.00
2. Liquidated damages	$300.00
3. NSF Fee	$25.00
4. Paint & repair & cleaning, lock change, key replacement	$301.46
5. Unpaid hydro utilities for April 2019	$10.99
TOTAL	**$2,337.45**

Regarding item1, the landlord has claimed $1,700.00 for unpaid rent/loss of rent for April 2019. According to the written tenancy agreement, the fixed-term tenancy did not revert to a month to month tenancy until July 31, 2019. Instead of waiting until after July 31, 2019, the tenant issued the landlord a one-month notice dated March 18, 2019, giving notice that the tenant would be vacating the rental unit on April 30, 2019.

Regarding item 2, the landlord has claimed $300.00 for the cost of liquidated damages. According to the tenancy agreement submitted in evidence, clause 5 indicated that the parties agreed that $300.00 would be paid to the landlord for liquidated damages and reads as follows:

> **LIQUIDATED DAMAGES.** If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provide the landlord with notice, whether written or oral, or by conduct, or an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of $300.00 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not prejudice the landlord from claiming future rental revenue losses that will remain unliquidated.

Although the tenant alleged during the hearing that the amount of $300.00 was fraudulently added by the landlord after the tenancy agreement was signed, the agent vehemently denied any such action and that a copy of the same tenancy agreement signed on July 13, 2018 was provided to the tenant and was not altered in any way. Furthermore, the tenant confirmed during the hearing that the tenant did not write to the landlord and submitted no emails in evidence to support that the tenant had every claimed that the tenancy agreement was fraudulently altered by the landlord.

Regarding item 3, the landlord has claimed $25.00 for a non-sufficient funds (NSF) fee. The agent stated that the $25.00 NSF fee was incurred by the landlord as a result of the tenant having insufficient funds for the April 2019 rent cheque, which was charged to the landlord by the bank.

Regarding item 4, the landlord has claimed $301.46 for paint, repair, cleaning, lock change and key replacement costs. The agent referred to the outgoing Condition Inspection Report (CIR) submitted in evidence. The agent referred to the CIR which indicates “stove not clean/oven not clean”. The CIR is also noted that the outgoing portion was completed without the tenant present. The agent stated that after several attempts to schedule a mutually agreeable time with the tenant without any success, the landlord was forced to serve a Notice of Final Opportunity to Schedule a Condition Inspection. The landlord filed a Notice of Final Opportunity to Schedule a Condition Inspection (Final Notice) in evidence attached to an email to the tenant dated April 23, 2019. The tenant responded to that email 15 minutes later, and as a result, I am satisfied that the tenant received the Final Notice. The Final Notice listed April 25, 2019 at 8:00 a.m. for the outgoing CIR. The agent stated that since the tenant failed to attend the outgoing portion, the CIR was completed without the tenant present.

The agent referred to the security deposit statement box on the last page of the outgoing CIR, which reads in part:

> Paint & damage repair $120.49
> Key replacement $105.00
> Other cleaning stove $75.97

The agent stated that the oven had to be cleaned twice and referred to many colour photos in evidence in support of item 4. One photo was a close up of what the landlord claimed was a dirty glass hood fan, which the tenant stated did not look dirty to the tenant and had been cleaned. Another photo described by the agent as a dirty stovetop the tenant stated was a ceramic cooktop and was only marked from regular wear and tear by other tenants and was in that condition when the tenant moved into the rental unit.

The agent also referred to a few photos of a curtain rod and the tenant stated that the curtain rod was there and that they added curtains to the rod, which they forgot to remove before vacating the rental unit. In another photo, the agent claims the inside of the oven was dirty and the tenant replied by stating that it was as clean as it could be as the self-cleaning feature was used and chemicals are not supposed to be used with a

self-cleaning oven, so after the self-cleaning cycle was completed, it was wiped out with soap and water.

In a few other photos, the agent stated that two sets of hooks were left, one being wood and metal, which the tenant stated were there before they moved into the rental unit, and the second set of plastic hooks were installed by the tenant and to remove, the pull tab on the bottom can be pulled and they come off the wall easily with no damage.

In addition, the agent referred to another photo, which the agent stated showed screw holes from a TV mount, which the tenant stated was not from the tenant as the tenant did not have a TV in the rental unit. In a different photo, the agent stated that a table was left on the balcony, which the tenant denied and stated was left behind as the table was there when the tenant moved into the rental unit. The tenant also stated that the table continues to be on the balcony as the tenant has seen the table when going by the rental unit since vacating.

The wall marks photo presented by the agent were taken at a distance and I find them to be very minor in nature, which I will address later in this decision. Regarding the key and fob replacement charge of $105.00, the tenant stated that they continue to hold one key and a fob and the parties agreed that only one key was left in the rental unit. The tenant's position is that they can return the key and fob and that the landlord should not have charged for those as an arrangement could have been made for the return of both the remaining key and the fob.

Regarding item 5, the landlord has claimed $10.99 for the unpaid hydro utility bill for the month of April 2019. A copy of the invoice was submitted in evidence and supports the amount of $10.99. The agent stated that the effective vacancy date of the tenant's one month written notice was April 30, 2019 and that the tenant owed utilities until the end of April 2019 as a result. A copy of the tenant's one month notice was dated March 18, 2019 and was submitted in evidence and the agent stated it was received by the landlord on March 21, 2019.

Analysis

Based on the documentary evidence and the oral testimony provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

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 what is reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Item 1 - The landlord has claimed $1,700.00 for unpaid rent/loss of rent for April 2019. According to the written tenancy agreement, the fixed-term tenancy did not revert to a month to month tenancy until July 31, 2019. Instead of waiting until after July 31, 2019, the tenant issued the landlord a one-month notice dated March 18, 2019 and received on March 21, 2019, giving notice that the tenant would be vacating the rental unit on April 30, 2019. Section 45(2) of the Act applies and states:

> **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.**

[Emphasis added]

Based on the above, I find the tenant was not authorized to end the fixed-term tenancy by issuing a one-month notice and breached section 45(2) of the Act as a result. Therefore, section 26 of the Act applies and states:

> **Rules about payment and non-payment of rent**
>
> **26** (1) **A tenant must pay rent when it is due under the tenancy agreement,** whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

[Emphasis added]

Given the above, I find the tenant also breached section 26(1) of the Act and as a result, I find the landlord has met the burden of proof for this item. Therefore, I grant the landlord **$1,700.00** for unpaid April 2019 rent as claimed.

Item 2 - The landlord has claimed $300.00 for the cost of liquidated damages. I have reviewed the liquidated damages clause and find that it is enforceable as a term of the signed tenancy agreement. Although the tenant claims the tenancy agreement was altered by the landlord, I find the tenant has provided insufficient evidence to support that allegation. Therefore, consistent with my finding regarding item 1 above where I made a finding that the tenant breached section 45(2) of the *Act* by breaching the fixed-term tenancy, I find the landlord has met the burden of proof for this item. Therefore, I grant the landlord **$300.00** for liquidated damages as claimed.

Item 3 - The landlord has claimed $25.00 for an NSF fee, which I find the tenant is responsible for as April 2019 rent was not paid and consistent with item 1, I find the tenant is responsible to pay. Therefore, I find the landlord has met the burden of proof and I grant the landlord **$25.00** for this item as claimed.

Item 4 - The landlord has claimed $301.46 for paint, repair, cleaning, lock change and key replacement costs. Although the outgoing CIR indicates “stove not clean/oven not clean”, I have reviewed the colour photos and find that the cooktop and the inside of the oven appear to show normal wear and tear and I find the photos support the tenant’s version of events. For example, the photo showing the inside of the oven I find looks reasonably clean and is consistent of a used oven that has gone through a self-cleaning

cycle. In addition, I find the photo evidence of the glass hood fan not to be dirty as claimed by the agent, and I find that photo rather supports that the hood fan was reasonably clean. While both parties may have different standards for a level of reasonably clean, section 37 of the Act requires the cleaning to be reasonably, and I find the cleaning was reasonable in the photos submitted by the agent. Therefore, I find the landlord has failed to provide sufficient evidence for the $75.97 cleaning portion, which I dismiss without leave to reapply, due to insufficient evidence.

Regarding the key and fob replacement of $105.00, I find the tenant breached section 37(2)(b) of the *Act* which applies and states:

> **Leaving the rental unit at the end of a tenancy**
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> **37**(2) When a tenant vacates a rental unit, the tenant must
>
> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and
>
> (b) **give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.**
>
> [Emphasis added]

I find it is the responsibility of the tenant to ensure the landlord or agent have all keys and means of access at the end of the tenancy, and not days, weeks or months afterwards. Therefore, I find the landlord has met the burden of proof for the **$105.00** portion of this claim and I grant that amount.

Regarding the paint and damage portion of $120.49, I find the photographic evidence supports normal wear and tear and that none of the photos show damage that exceed reasonable wear and tear which is both expected and permitted under section 37 of the *Act.* For example, I find the photos of alleged screw holes to be very small and minor. I also find the wall marks photos to be very minor and of very little weight as a result. In addition, I find the curtain photos do not appear to support a claim for damage. I also find the wood and metal hooks not to support damage and would more likely than not, add value to the rental unit versus supporting the need for repair. Therefore, I dismiss the paint and damage portion of $120.49 of this item without leave to reapply, due to insufficient evidence.

Item 5 - The landlord has claimed $10.99 for the unpaid hydro utility bill for the month of April 2019. I have considered the invoice for the utilities and the tenancy agreement and I find the tenant is responsible for the electrical utilities until the end of April 2019 as that is the date listed on the tenant's notice to vacate. Therefore, even if the tenant decided to vacate early, I find the tenant is still responsible for those costs. Therefore, I find the tenant breached the tenancy agreement and I find the landlord has met the burden of proof for the full **$10.99** claims for this item, which I grant to the landlord.

As the landlord's application has merit, I grant the landlord **$100.00** pursuant to section 72 of the Act for the full recovery of the cost of the filing fee.

Based on the above, I find the landlord has established a total monetary claim as follows:

ITEM DESCRIPTION	AMOUNT GRANTED
1. Unpaid/loss of April 2019 rent	$1,700.00
2. Liquidated damages	$300.00
3. NSF Fee	$25.00
4. Paint & repair & cleaning, lock change, key replacement	$105.00
5. Unpaid hydro utilities for April 2019	$10.99
6. Filing fee	$100.00
TOTAL	**$2,240.99**

Regarding the tenant's combined deposits, the landlord continues to hold the tenant's combined deposits, which total $1,700.00. Pursuant to section 38(3) of the Act, the landlord is authorized to retain the tenant's full combined deposits of $1,700.00, which have accrued $0.00 in interest, in partial satisfaction of landlord's monetary claim. I grant the landlord a monetary order pursuant to section 67 of the Act for the balance owing by the tenant to the landlord in the amount of **$540.99.**

Conclusion

The landlord's application is mostly successful.

The tenant's application has been refused pursuant to sections 59(5)(c) and 59(2)(b) of the *Act.* The tenant is at liberty to reapply. I note that this decision does not extend any applicable time limits under the Act.

The landlord has established a total monetary claim of $2,240.00 and has been authorized to retain the tenant's combined deposits of $1,700.00 and owes the landlord a balance of $540.00. The landlord has been granted a monetary order in that amount. Should the landlord require enforcement of the monetary order, the landlord must first serve the tenant with the monetary order. The order may then be filed in the Provincial Court of British Columbia (Small Claims) and enforced as an order of that Court.

This decision will be emailed to the parties as indicated above. The monetary order will be emailed to the landlord only for service on the tenant as necessary.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: November 6, 2019

Residential Tenancy Branch