Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCL-S, FFL, MNDL-S, MNRL-S**

Introduction

This review hearing was reconvened following a monetary order being awarded to the landlord on January 21, 2020 and corrected on January 29, 2020. On February 9, 2020, the tenant was successful in having the corrected monetary order suspended based on the grounds of an inability to attend the original hearing. A review hearing was scheduled for April 17, 2020.

The hearing of April 17, 2020 was adjourned for the parties to re-exchange all of the documents they intended to rely upon for this hearing.

Both parties attended this reconvened hearing; acknowledged receipt of one another's evidence and stated they were prepared to have the merits of the landlord's application heard. The landlord applied under the *Residential Tenancy Act ("Act")* for:

- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67;
- Authorization to recover the filing fee for this application from the tenant pursuant to section 72;
- A monetary Order for Damages and authorization to retain a security deposit pursuant to sections 38 and 67; and
- A monetary order for rent and/or utilities and authorization to retain a security deposit pursuant to sections 38 and 67.

Issue(s) to be Decided

Is the landlord entitled to a monetary order, as sought?
Can the landlord retain all or a portion of the tenant's security deposit?
Is the landlord entitled to recover the filing fee?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. Only those brought to my attention during testimony would be considered. While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The landlord gave the following testimony. She was once a realtor and she owned this rental unit. The fixed one-year tenancy began on October 22, 2018 and was set to expire on October 31, 2019. Rent was set at $1,995.00 per month, payable on the first day of the month. Post-dated cheques were exchanged until the end of the tenancy. A condition inspection report was done at the commencement of the tenancy and a security deposit of $997.50 was collected by the landlord which she still holds. There is an addendum to the tenancy which states that the tenant is to pay $100.00 move in and move out fees charged by the strata association and a $25.00 fee each time a cheque is returned with insufficient funds, amongst other terms.

The landlord testified that rent cheques for the months of June and July 2019 were returned to her as insufficient funds. Copies of the advice letters from the landlord's bank were provided as evidence. The landlord testified she sent the tenant demand letters in June and July, demanding arrears in rent. The landlord testified that because rent wasn't coming in, she decided to list the rental unit for sale on June 12, 2019. She had no intention of selling the rental unit but was frustrated because the tenant wasn't paying rent.

The landlord testified she contacted the tenant's mother who verified the tenant was still living in the rental unit on July 18th. On August 2, 2019, the landlord gave the tenant a 24-hour notice that she would be inspecting the rental unit and discovered the tenant had 'abandoned' the unit. The landlord seeks compensation for the balance of the fixed term, until October 31, 2019.

The landlord seeks to recover $100.00 for the move out fee charged by the strata. She testified she paid it in her closing costs but did not provide a receipt for the payment or a copy of the final accounting from the sale of the rental unit. She seeks $125.00 for a replacement remote control that she says wasn't returned to her. The landlord testified she bought another one from the strata association but did not provide the receipt. The

landlord seeks $90.00 to rekey a mailbox and $60.00 to rekey a storage locker. She testified she hired a locksmith to rekey the mailbox and storage locker she says was changed by the tenant however no receipt was provided. For the two rent payments in June and July that were returned as insufficient funds, the landlord seeks a total of $50.00 to cover the NSF fees charged by her bank.

The landlord testified she sent a letter to the tenant on August 31, 2019 to do a condition inspection report with her on September 6, 2019. That letter was not responded to, so she sent a *Notice of Final Opportunity to Schedule a Condition Inspection* by registered mail to the tenant on September 6th for a condition inspection on September 12th. The tenant did not respond to this Notice. The landlord conducted the final inspection without the tenant on September 12th and provided a copy as evidence.

The landlord testified the rental unit was sold on September 23, 2019.

The tenant provided the following testimony. She does not acknowledge signing the lease with the landlord but does acknowledge that the copy provided as evidence by the landlord does appear to depict her initials and signature on it. She testified that she verbally told the landlord in May of 2019 that she was planning on moving out. On May 18, 2019, the tenant sent the landlord notice that she would be vacating the rental unit as of the end of May 2019. No forwarding address is provided on the letter and the letter was sent to the landlord at the email address of c……s@hotmail.com. The landlord testified she uses the email address of c…..s123@hotmail.com. The tenant countered that the other email address was used for corresponding in the past and that the landlord still used it, even though she may have a ‘secondary’ email now.

The tenant testified she provided the landlord with her forwarding address in writing in February, 2020, many months after the landlord filed her Application for Dispute Resolution. The tenant denies her mother provided her address to the landlord, as the landlord said she did.

The tenant submits that the landlord’s application is fraudulent as the landlord knew the tenant was gone but didn’t choose to re-rent the unit as of the effective date of her notice. The tenant points to the lack of any evidence from the landlord indicating attempts at re-rental as proof. The tenant also provided the MLS listing for the unit, which shows a listing date of June 12, 2019 and a Sale date of August 6, 2019. The tenant points out that the MLS listing indicates “Quick” possession is available, meaning the landlord knew it was vacant when she listed it for sale. The tenant also submits that

in order for the landlord to list it, photographs of the rental unit were taken, however the tenant was unable to verify this statement. There is also a BC Assessment roll for the property, provided as evidence by the tenant which shows the property sold on August 2, 2019. Lastly, the tenant points to a letter from the landlord's notary public dated August 23, 2019 indicating the sale of the property transaction completed on August 23, 2019. The notary encloses the final cheque for the sale of the property, and copies of the executed documents.

Based on this evidence, the tenant submits that the landlord could not have invited the tenant to take part in a condition inspection report on September 6th or a final opportunity to do a condition inspection report on September 12th, as the landlord no longer owned the property.

The tenant testified that she paid a $50.00 refundable deposit to the strata building manager when she moved out. The building manager put up curtains in the elevator to assist the tenant in her move out. All remotes were returned to the landlord and the landlord was provided with keys to the rental unit when she left.

Analysis

Pursuant to section 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]*;
ii. (i.1) section 45.1 *[tenant's notice: family violence or long-term care]*;
iii. section 46 *[landlord's notice: non-payment of rent]*;
iv. section 47 *[landlord's notice: cause]*;
v. section 48 *[landlord's notice: end of employment]*;
vi. section 49 *[landlord's notice: landlord's use of property]*;
vii. section 49.1 *[landlord's notice: tenant ceases to qualify]*;
viii. 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

A notice to end tenancy [tenant's notice] must be served in accordance with sections 45 and 88 of the *Act*. Section 88 does not allow for service by email. Based on the fact that the tenant did not serve a notice to end tenancy as required by sections 45 and 88, I determine that the tenancy ended pursuant to section 44(1)(d) when she vacated or abandoned the rental unit. I conclude the tenancy ended on May 31, 2019.

The parties disagree on when the landlord knew the tenant left the unit. 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. While the landlord testified she was unaware the tenant had moved out until she inspected the unit on August 3rd, I find the evidence does not support this. I turn to the BC Assessment roll for the property that indicates the property sold on August 2, 2019 in making this finding.

Further, the tenant provided the MLS listing indicating the property sold on August 6th. The same MLS listing also shows the landlord listed the property on June 12, 2019. The tenant specifically noted that the listing indicated a 'quick possession' for the unit. The '*quick possession'* aspect of the MLS listing provides compelling evidence that the landlord knew the property she had listed for sale was vacant. Given that the landlord is an experienced realtor, I find the landlord had a full understanding of what '*quick possession'* meant. Also, the timing of putting the property on the market on June 12th leads me to believe the landlord was aware by as early as June 12th that the tenant was no longer occupying the rental unit. It's reasonable that the landlord's realtor would have noticed the property was vacant between June 12th and August 3rd, as it's implausible she would be able to show unencumbered it while it was tenanted. There is no evidence from either party that the landlord ever communicated with the tenant seeking entry to show the property. Based on this evidence, I find the plausibility that the tenant told the landlord she would end the tenancy by May 31st to be more accurate than the landlord's account that she was unaware until August 3rd.

Despite this, the tenant is still in breach of the tenancy agreement by ending the fixed term tenancy before the end date. Residential Tenancy Branch Policy Guideline PG-3 [Claims for Rent and Damages for Loss of Rent] provides guidance in situations where a tenant has abandoned a rental unit. (excerpts below)

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. *Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;*
2. *Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.*

…

> *The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy.*
>
> *In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by rerenting 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. (emphasis added)***

As stated previously, I found the landlord was aware the tenant vacated the rental unit by May 31st. I find the landlord continued to try to collect rent from the tenant for June and July with the knowledge that the tenant had already vacated the rental unit. Instead of re-renting the property, the landlord chose to put the property on the market for sale. The landlord has not met her statutory duty to mitigate the loss in this case.

Despite this, the tenant still breached the tenancy agreement and the *Act* by ending the tenancy before the end of the fixed term. For this breach, I find the landlord is entitled to compensation for one month's rent, in the amount of $1,995.00. Pursuant to section 67 of the *Act*, the landlord is awarded **$1,995.00.**

The landlord also seeks strata move out fees of $100.00, $125.00 for the remote to the garage parking garage, the sum of $150.00 for changing mailbox keys and a storage locker. Lastly, the landlord seeks to recover $200.00 she paid to her son for 'damages' he repaired.

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim. The standard of proof is on a balance of probabilities. If the applicant is successful in proving it is more likely than not the facts occurred as claimed, the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;

2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

First, the landlord testified she sent a letter to the tenant on August 31, 2019 to do a condition inspection report with her on September 6, 2019. As I have already found the property sold as late as August 23rd, based on the landlord's notary's letter, it is inconceivable the landlord could ask the tenant to attend for a condition inspection report when she was no longer the owner of the property. I find the landlord's testimony lacks credibility in regard to her claim for the above items sought. Second, the landlord's only evidence regarding each of the above claims is her testimony, all of which was contradicted by the tenant. The landlord acknowledged during testimony that she did not provide receipts to corroborate he claim for any of the above items. Without any documentation to corroborate her claim, I find the landlord has not satisfied the burden of proof to satisfy me the existence of the damage or loss (point 1) or the value of the damage or loss (point 3). For these reasons, those portions of the landlord's claim are dismissed.

The landlord also seeks to recover $$50.00 ($25.00 x 2) for rent cheques being returned from her bank for insufficient funds. As I have found the landlord knew the tenant was no longer occupying the rental unit as of June 1st, the landlord ought to have known, or at least suspected the post-dated cheques given to her at the commencement of the tenancy would be cancelled. I find the tenant has not breached the tenancy agreement and this portion of the landlord's claim is also dismissed.

As the landlord was only partially successful in her claim, the filing fee will not be recovered.

The landlord continues to hold the tenant's security deposit in the amount of $997.50. In accordance with the offsetting provisions of section 72 of the Act, I order the landlord to retain the tenant's entire security deposit in partial satisfaction of the monetary claim.

Item	**Amount**
1 month rent compensation	$1,995.00
Less security deposit	($997.50)
Total	**$997.50**

Conclusion

I issue a monetary order in the landlord's favour in the amount of **$997.50**. The tenant must be served with this Order as soon as possible. Should the tenants 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 09, 2020

Residential Tenancy Branch