

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNDC MNR FF

Introduction

This is a cross-application by the tenant and the landlord heard at RTB Burnaby.

The tenant's application seeks a monetary order for money owed or compensation for damage or loss under the Act, Regulation or Tenancy Agreement. Specifically, the tenant's claim is compensation for loss and damages to a quantum amount of \$5000 stemming from the following:

- 1). alleged intrusion by the landlord in December 2007, breaching Section 29 of the Residential Tenancy Act (the Act) resulting in a monetary loss of \$1530,
- 2). alleged overpayment of subsidized rent due to calculation errors by the landlord for 3 months (September, October, November of 2008) resulting in a total loss of \$810 (or \$270 x 3).
- 3). Losses of a non-monetary nature: mental and physical distress, loss of trust, stress and discomfort.

The landlord's application seeks a monetary order for unpaid rent. Specifically, the landlord's claim is lost revenue of \$576 for the month of December, 2008. The tenant vacated the rental unit and ceased payment of rent on November 30, 2008. The landlord claims to have received the tenant's notice to end the tenancy, with a premature effective date in breach of Section 45 of the Act. The landlord's application is also inclusive of a request for recovery of the filing fee from the tenant for the cost of this application.

Both the tenant and landlord were represented in the hearing. Both parties previously provided documentary evidence and submissions.

Attempts at settlement were not fruitful so both applications proceeded on their merits.

Issues to be decided

Has the tenant established, on a balance of probabilities, that they have suffered a loss due to the landlord's neglect or failure to comply with the Act?

If so established, did the tenant take reasonable steps to mitigate the loss?

Is the tenant entitled to the monetary amount claimed?

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The burden of proving loss and damage rests on the respective claimants, and as already stated, there is an obligation upon the claimants to act reasonably to mitigate or minimize the loss.

Background and Evidence

The evidence and undisputed facts before me on the landlord's application are as follows.

The tenant gave the landlord a notice to end the tenancy dated November 7, 2008 with an effective date of November 30, 2008. In response, by a letter from the landlord dated November 11, 2008, the landlord advised the tenant that they received the tenant's notice on November 7, 2008, and stated that under the tenancy's agreement the effective date was at the end of the following month and that the tenant would be held financially responsible until the end of December 2008. The tenant vacated the rental unit on November 30, 2008 and ceased all payments related to the rental unit to that date.

The landlord testified they manage residential properties under an agreement with BC Housing (the BCHMC) for subsidized rental units. Following receipt of the tenant's

notice to vacate, they immediately consulted their internal wait list for subsidized rental housing and processed the next eligible tenant candidate on that internal wait list. That eligible person accepted the rental unit and given the practicalities and requirements of their active tenancy, the earliest time the rental unit could be occupied was January 1, 2009. The tenant argued they disagree with how the landlord allocated the rental unit and that anyone qualifying for subsidized housing should have been given access to the rental unit as early as December 1, 2008. The landlord then testified that the system of rental unit allocation prescribed by the tenant is not realistic, and just doesn't work that way.

The tenant's claims are not as straightforward. The evidence before me on the tenant's application comes by way of written statements and details submitted by the tenant which set out:

1. A history of family dysfunction, senior's abuse by family members and deep family division, which is particularly true as it all dovetails with the tenant, and which I was apprised exists to this day, having direct bearing on this dispute.
2. the tenant's allegations and details of how the landlord violated her rights as a tenant and how on December 27, 2007 the landlord's contravention of section 29 (Landlord's right to enter rental unit restricted) left her victimized by an intrusion enabled by the landlord, and left her feeling violated and in danger of dying. The tenant further submitted that the above experience left her traumatized and fearful of returning to her rental unit for five (5) months after the incident of December 27, 2007. For this period of time the tenant claims she was paying for, but could not use and enjoy her home. The tenant and the landlord both provided written testimonies from a number of individuals, in part surrounding pertinent events of December 26 and 27, 2007.
3. The tenant's allegations and details of how the landlord miscalculated the amount of subsidized rent on an annual review for this benefit which effectively increased the rent from \$306 per month to \$576 per month beginning September 1, 2008, for 3 months until the tenant vacated the rental unit.

As well, evidence was forwarded by solemnly affirmed testimony from the tenant as to events of the early morning of December 27, 2007, essentially the only confirmed incident of entry by the landlord, and which the landlord does not deny occurred.

The landlord submitted their own written statements and details from employees, and a family member involved in the incidents of December 26 and 27, 2007, as well as solemnly affirmed testimony from the individual who opened the tenant's door and thus directly involved in the entry to the tenant's suite. The landlord also submitted document evidence which was in contrast to the tenant's allegations of impropriety respecting the manner in which calculation of subsidized rent was conducted.

The hearing heard from the tenant through the interpreter. She relayed a story of how in the awakening hours of December 27, 2007, at approximately 8:00 a.m. she awoke in her bed, and observed she was flanked by several members of her family whom she considers do not have her best interest and present a danger to her. She did not know how they came to be in her apartment that morning. From her experience the previous night she was certain her door was locked and she had placed a chair behind her door as she knew these same relatives had tried to gain access to her the night before when they came to her door pressuring her to allow them in. She did not want them to enter; she had refused them entry and, in her recollection, was barely successful in keeping herself secure from them. She recalls that from the moment she awakened on December 27 these unwelcome family members prevented her from getting dressed, eating, taking her insulin or leaving her apartment. They confined her, searched through her personal effects and disturbed her belongings. She described the incident as being held hostage and during her testimony she broke down crying and became emotional. After what seemed to be more than several hours with the relatives she felt ill and confused. She recalls the Police arriving and the relatives were forced to leave. She felt she had been liberated from them but the incident left her weak and believing to this day that she was close to dying. She was taken to the hospital by ambulance for medical attention and then went to live with her daughter for 5 months to recuperate, both physically and mentally. She stated that to this day she feels she was very let down by the landlord for allowing these harmful relatives to enter her suite and abuse her. Also, she claims she later came to learn these same relatives allegedly stole several of her private belongings, namely some diaries and valuable watches of her late husband, which are the subject of a Police investigation.

The hearing then heard from an employee of the landlord: the maintenance man who held the keys to all of the tenant's apartments. His testimony is as follows.

He has worked for the landlord for four (4) years. At 8:00 a.m. on December 27, 2007 he held a 'master key' to the apartments and attended to the tenant's door with family. "I was told by the head nurse to let the family members in "(to the tenant's suite). "The family asked me to open the door ... they were concerned for grandma . .so I was concerned, too . . so I opened the door", "I knocked on the door 4 times . . I called her name, and no answer ", "So I opened the door with the key. I pushed on the door but it had a chair behind it. I said, "are you OK and I heard her say YES", "I did not go in . . we are not allowed to go into any of the suites", "The family went in and I left", "I did not see her (the tenant), I just let the family in because they wanted to see her".

On the question as to why he opened the door and allowed the family in, he simply stated several times that , " this is her family ", and he arrived at saying that he did what his heart, and not his head, told him was the right thing to do. In his words, he said he felt he, "was helping the family".

The landlord does not deny the maintenance man opened the tenant's door and allowed the family access to the suite, and the tenant. The landlord's position is that the entry was justified under Section 29(1)(a) and (f) of the Act:

Landlord's right to enter rental unit restricted

29(1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

> (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

- (i) the purpose for entering, which must be reasonable;
- (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;

(d) the landlord has an order of the director authorizing the entry;

(e) the tenant has abandoned the rental unit;

- > **(f) an emergency exists and the entry is necessary to protect life or property.**

The landlord submits they were entitled to enter the apartment where there was, "an emergency necessary to protect life", "family members with urgent concerns for the health and safety of the tenant", "the landlord acted reasonably and in good faith based on urgent needs necessary for the health and safety of the tenant", (citing section 33 of the Act's definition of 'emergency' under, Emergency Repairs).

Generally, the landlord wants me to believe, "the landlord acted in good faith, on reasonable grounds and in the best interest of the tenant".

I reviewed the statutory declaration of the tenant's son-in-law. He was forthright in trying to gain access to the tenant's suite with the aid of Police officers on December 26, 2007, and subsequently was given access to the tenant's suite by the landlord on December 27, 2007.

A submission by the landlord of a statement by one of the landlord's employees on duty on December 26, 2007 essentially reflects that the police officers lost interest in the family's and staff's attempts to enter the tenant's suite and left the scene: especially when someone inside the suite apparently pushed back and refused entry. I am left to think that no emergency situation was thus perceived by the Police Officers and they thought it might not be appropriate to press the assertions of the son-in-law and his family, and left.

The tenant submits that on December 27, 2007 the landlord, via a lack of due diligence, illegally entered the suite, under pretences based "in lies" and only to appease "unwelcome" family members, whom now came back as promised the night before, to again try to gain access to the tenant. "There was no emergency, or pending emergency, or indication of danger", "and the tenant did not give her consent". The tenant further submitted that after the landlord opened the door, there was no visual contact with the tenant, no assessment of the tenant – nothing to assist the landlord in determining if there was truly a problem, an emergency or a situation requiring an escalated response.

Analysis

As to the Landlord's claim.

Section 45 and 53 of the Act speak to the requirements and the form of how a tenant's notice may end a periodic tenancy, and on the required elements of a tenant's notice to the landlord. I find the tenant did not comply with these requirements. However, while the Act automatically adjusts the effective date of an inadequate notice to the landlord, the landlord must show they made reasonable attempt to mitigate revenue loss for the full period up to the effective date of the tenant's notice to end the tenancy. I accept the landlord's explanation as a reasonable one, as to why the landlord was not able to rent the unit for the month following the tenant's move. Therefore, I find the landlord is entitled to their claim pertaining to this period of lost revenue up to the effective date of the Tenant's Notice of December 01, 2008, in the amount of **\$576**.

As to the Tenant's claims.

I have reviewed all the document evidence and explanations forwarded by both the tenant and the landlord in respect to the calculations for subsidized rent.

I find all the material supplied by both the tenant and the landlord in respect to this portion of the tenant's application may not be simple to absorb at first glance, but becomes understandable. I can see the increase in subsidized rent is attributable to various factors and increases in the amounts used in its calculation, including a new calculation policy from BC Housing and new values in assets and income, all of which were easily verified with a calculator and basic information from BC Housing's own guidelines. I find the landlord's calculations are, at least, logical and generally accurate. BC Housing is the authority in this set of circumstances, and I do not have the benefit of a definitive ruling from their review – a simple 'yes' or 'no' from the authority on this matter may have made this claim a non-issue. However, in my capacity as the decision maker in this particular matter, I do not see negligence on the landlord's part.

Therefore, I find the tenant is not entitled to their claim of \$810, representing 3 months of increases, and I dismiss this portion of the tenant's application with leave to reapply, if necessary.

In respect to the landlord's entry of the suite, I found the testimony of both witnesses in the hearing, the tenant herself, and the maintenance man, to be genuine; aided by the fact that other than on one aspect they did not contradicted one another. The tenant simply picked up where the landlord's maintenance man left off. The only way they

differ is that the tenant vehemently denies any verbal exchange with the maintenance man, once he opened the door. She testified she wasn't even awake. The landlord insists the tenant affirmed the landlord's request to enter the suite. However, the testimony of the landlord's representative, the maintenance man, does not concur, saying only that the tenant responded "Yes" to his question of, "Are you Ok?".

As to the statutory declaration of the tenant's son-in-law, who was given access to the tenant's suite by the landlord. I could not determine the basis of his concerns for the tenant, which the landlord ultimately used to justify entering the tenant's unit. His declaration contains examples of innocuous problems with the tenancy and the tenant, in an effort to portray a crisis. He states as one of the concerns, the, "tenant is elderly and lives on her own". This is not a valid concern, especially when the tenant is paying to reside on her own, so as to have it exactly that way. Many people see this as a strength rather than a cause for concern. In the hearing the tenant certainly appeared alert, mentally competent, able to give direction, and was more than aptly mobile. Also, in all the submissions and testimony advanced by the landlord, (as well as the tenant), the son-in-law's declaration contains the only reference to the tenant as, "suffer(ing) from paranoia". Without corroboration or other reference, such a reference by the son-in-law stands on its own and disturbs what credibility I may have otherwise afforded his statement. Having heard from both parties that the son-in-law is also under Police investigation in relation to his role in the alleged confinement of the tenant, does not bolster his declaration or his credibility.

I find the landlord has alluded to an emergency in many ways, but has failed to identify any circumstances resembling an emergency existed, especially an emergency requiring intervention to "protect life", and thus necessitating entering the tenant's rental unit under Section 29(1)(f). By all definitions advanced, I find no emergency existed. I believe the tenant's testimony that she did not give her consent for anyone to enter her suite at the time of the entry; therefore, I do not find the landlord has proven they were entitled to enter the suite under Section 29 (1)(a), either.

I prefer the tenant's submission, that, if after opening the door the landlord had maintained control of the entry and made more enquiry of the tenant's situation, the landlord would not have found an emergency situation existed. The landlord could then

have backed off, could have denied the family entry, could subsequently have apologized for the intrusion, and could likely have avoided this hearing.

The tenant's testimony stated in several ways how the intrusion into her suite of December 27, 2007 left her traumatized. Her doctor wrote a note, submitted in evidence, stating the tenant's medical diagnoses of diabetes and hypertension and the importance of timely access to food and medication (Insulin). He states that the events of December 27, 2007, specifically the 4 hours before noon at which time she was denied food and medication (Insulin) placed the tenant in medical danger. Her consequent hospitalization via ambulance points to the consequences of her confinement.

I believe the tenant's submission that she was incapable of returning to her rental unit for a period of five (5) months, during which time she resided with her daughter. The tenant submits she paid for her rental unit during this absence so as not to lose her affordable home and independence, but returned to her suite sooner than she was ready because she was led to believe that otherwise the landlord could, and would end the tenancy. The tenant paid rent of \$306 per month for five (5) months for a total of \$1530 and any mitigation of this amount would likely have resulted in eviction. I find the tenant has established a claim for compensation for the payments she made for her rental unit for the period of January to May 2008, but for which she was denied its use and peaceful enjoyment resulting from the landlord's neglect or failure to comply with the Act. In this regard, I grant the tenant the amount of **\$1530**.

On reflection, if I believe the tenant's account of events for the morning of December 27, 2007, then I think I have an obligation to make a finding which fairly addresses the extent of her ordeal. The evidence from the tenant's doctor reveals the severity and magnitude of the situation the tenant was exposed to and the events in submission to this hearing certainly point to a preponderance of dire consequences if assistance to the tenant had not arrived and had not been provided when it was. There is no doubt in my thinking that this event significantly influenced the tenant's life thereafter.

I find that an award for aggravated damages is appropriate in these circumstances. Aggravated damages are damages awarded to compensate and take into account intangible injuries in addition to the normally assessed pecuniary or monetary damages

addressed previously. They are an award of compensatory damages for non-monetary losses. My finding for aggravated damages is not in any way meant to be punitive for the landlord. An Arbitrator does not have the authority to award punitive damages to punish a party. Rather, my award for aggravated damages is a reflection of my finding that the tenant is entitled to be compensated for her mental and physical distress, which was a direct consequence of the landlord's negligent behaviour. I grant the tenant **\$3470** for aggravated damages.

Conclusion

The **landlord** has established a claim from the tenant in the amount of \$576 and is further entitled to recovery of the filing fee for their application in the amount of \$50, for a total claim from the tenant in the amount of **\$626**.

The **tenant** has established a total claim from the landlord in the amount of **\$5000**.

I grant the tenant an order under section 67 for the difference in the respective entitlements in the amount of **\$4374**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated February 26, 2009