

DECISION

Dispute Codes MND MNSD MNDC
 MNSD OLC RPP FF

Introduction

This hearing dealt with cross applications for Dispute Resolution.

The landlord applied to obtain a Monetary Order for damage to the unit, to keep all or part of the pet and security deposits, and for money owed or compensation for damage or loss under the *Act*.

The tenants applied to obtain a Monetary Order for the return of their security and pet deposits and for an Order to have the landlord comply with the act, return the tenants' personal property, and to recover the cost of the filing fee from the landlord.

The landlord testified that service of the hearing documents to the tenants was done via registered mail and provided a tracking number in his verbal testimony.

Service of the hearing documents, by the tenants to the landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on March 20, 2009. Mail receipt numbers were provided in the tenant's verbal testimony. The landlord was deemed to be served the hearing documents on March 25, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The landlord and tenants appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

Issues(s) to be Decided

1) The issues to be decided based on the testimony and the evidence are:

- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for damage to the unit and for money owed or compensation for damage or loss
- Whether the landlord is entitled to a Monetary Order to keep all or part of the security and pet deposits pursuant to section 38 of the *Act*

2) The issues to be decided based on the testimony and the evidence are:

- Whether the tenants are entitled to a Monetary Order under section 38 of the *Act* for the return of their pet and security deposits
- Whether the tenants are entitled to an Order to have the landlord comply with the *Act* and to Order the landlord to return the tenants' property under section 65 of the *Act*
- Whether the tenants are entitled to a Monetary Order under section 72 of the *Act* to recover the cost of the filing fee from the landlord for their application

Background and Evidence

The tenancy was a month to month tenancy which began on January 1, 2008 and ended February 28, 2009 with rent payable on the first of each month in the amount of \$850.00. The tenants paid a security deposit of \$425.00 and a pet deposit of \$425.00 prior to move in on January 1, 2008. Both the landlord and tenants testified that they did not know the exact date the deposits were paid but that they knew they were paid prior to taking possession of the rental unit.

The landlord testified that he did not complete a move-in inspection report at the onset of the tenancy because, while the tenants were moving in, the previous tenant was moving out and the landlord was in the midst of painting the living room and bathroom.

The landlord testified that he completed the move-in inspection portion of the report on the same day he completed the move-out inspection, at the end of the tenancy.

The landlord testified that a move-out inspection report was completed in the absence of the tenants because when the landlord attended the rental unit just after 7:00 pm on February 28, 2009, the tenants were still moving and cleaning. The landlord stated that he told the tenants that he would be back the next morning to conduct the move-out inspection but that the tenants told the landlord that they would not be around as they were leaving town early the next morning. The landlord stated that he did not return that evening but that he did return to the rental unit around noon the next day and the tenants were gone.

The tenants testified that the landlord did attend the rental unit the evening of February 28, 2009 and that they did tell the landlord they were leaving early the next morning, but that the landlord did complete the move-out inspection form and the one he submitted to the tenants in their evidence package is different than the one they saw at the rental unit. The tenants testified that they wrote their forwarding address on both the move-out inspection form and on the form the landlord had the tenants sign agreeing that the landlord could keep \$100.00 of the security deposit, until after the snow melted.

The landlord confirmed that he had requested the tenants to sign a document allowing the landlord to keep \$100.00 of the pet deposit until the landlord could determine the state of the yard after the snow melted. The landlord stated that there was several feet of snow on the ground when the tenants vacated the rental unit, so it was impossible to determine what was under the snow. The landlord said that the tenants were lying when they said there was a different move-out inspection report and that the landlord contends that the report was completed on March 1, 2009, after the tenants had left town.

1) Landlord's claim

The landlord is claiming \$425.00 for lost revenue which represents two weeks during which the landlord stated that he cleaned and repaired the rental unit after the tenants

moved out. The landlord testified that they had a prospective renter but that this renter would not agree to rent the unit until after she saw that it was cleaned and repaired.

The landlord testified that the tenants gave him verbal notice sometime at the end of January or beginning of February, that they would be ending the tenancy. The landlord testified that he advertised the rental unit in the free press and showed it to the prospective tenant on February 22, 2009. This prospective tenant is the current tenant, who occupied the rental unit in mid March 2009.

The landlord testified that he had to hire a professional painter, at a cost of \$602.70, to repair drywall around window sills, to deal with mould that the tenants had allowed to accumulate in the rental unit, to repaint the entire rental unit, and that the landlord had to clean the unit before the new tenant could move in.

The tenants testified that the mould and damage to the drywall was a result of the hot water tank breaking and the landlord's refusal to fix the hot water tank in a timely fashion. The tenants stated that they were out of town for a few days and when they returned all of the windows were steamed up. When they entered the rental unit they found that steam was leaking from the hot water tank. The tenants stated that they informed the landlord of the problem with the hot water tank, that the landlord came and inspected the tank, but that it wasn't until days later when the tenants called the landlord a second time, did the landlord attend the rental unit to repair the hot water tank.

The tenants testified that the stains on all of the walls were actually wood stain running off the window sills. The tenants advised that when the house was filled with steam from the damaged hot water tank that the stain started running off the window stills and down the walls. The tenants stated that the windows in the laundry room had white glue on them to frost them over and that when the steam was throughout the house this glue started to run down the windows and onto the walls.

The landlord confirmed that the stains and what appears to be coffee dripping down the walls was actually stain from the window sills. The landlord testified that the hot water tank did have a problem which caused steam to be emitted into the house, but that the landlord had repaired the problem with the hot water tank.

The landlord testified that the house was built in the late 1960's and that the landlord had purchased the house with three other people in January 2004. The landlord stated that the living room and bathroom were painted in January 2008, the kitchen was painted in approximately November 2007, the loft bedroom, main floor bedroom, front and back entrances were painted in 2005.

The landlord is claiming \$400.00 for cleaning the rental unit. The landlord testified that the tenants left the interior and exterior of the property filthy and junk scattered inside and out which took the landlord 20 hours to clean. The landlords testified that when they attended the rental unit on the evening of February 28, 2009 that the tenants told them that they would stay late and clean the rental unit before departing early the next morning. The landlords said that when they returned to the rental unit on March 1, 2009 and found it a complete mess that they called the tenants and that they were told that the female tenant had an insulin reaction and that she had to spend the evening in the hospital so they could not clean the rental unit. The landlords stated that they provided pictures of the rental unit prior to the tenants taking occupancy, during their occupancy, and after the tenants vacated the rental unit showing the filth, and that the basement was filled with dog hair and cobwebs.

The tenants testified that the landlord took the pictures while they were still in the rental unit on February 22, 2009, a week before they began cleaning. The tenants stated that the basement is just dirt and partial concrete and that it was in the same condition when they left as it was when they took occupancy.

The landlord testified that the basement was a dirt floor with partial $\frac{3}{4}$ concrete walls then $\frac{1}{4}$ exposed dirt. The landlord confirmed that the basement was completely unfinished and that nothing was down in the basement.

The female tenant testified that she forgot to remove the cleaning products from one of the cupboards and that the saran wrap was in the drawer when they occupied the rental unit so she left it behind.

The tenants' witness testified that she was at the rental unit while the tenants were packing and cleaning. The witness stated that she wiped and scrubbed down the kitchen counter and swept the floors. The witness stated that she had to leave prior to 6:00 pm on February 28, 2009 to go baby-sit and at that time the tenants were still busy moving items out of the house and had not finished cleaning.

The landlord is requesting to retain the security deposit, pet deposit, and interest in partial satisfaction of their claim.

2) Tenants' Claim

The tenants are requesting an order to have their security and pet deposits returned. They claim, as stated above, that they cleaned the rental unit and that they should be refunded their full deposits plus interest.

The tenants contend that the damage to the walls, window sills, and drywall is a direct result of the hot water tank not working properly and emitting steam in to the rental unit.

As documented above the landlords testified that the tenants did not clean the rental unit and that they left the unit in a "filthy mess" with garbage and junk left both inside and outside the rental unit.

The tenants are requesting an Order to have the landlord comply with the *Act* and Ordered to return their computer hard drive. The male tenant testified that he forgot the

computer hard drive inside the rental unit, beside the door when they were vacating the rental unit.

The landlord testified that he does not remember seeing a computer hard drive in the rental unit, that it may have been thrown out, or it is possible that it may still be around.

The tenant is requesting to recover the filing fee from the landlord for the cost of their application.

Analysis

1) Landlord's Claim

I find that the landlord has failed to provide documentation to prove that each tenant was served notice of the dispute resolution hearing in accordance with the *Residential Tenancy Act*. The landlord testified that the tenants were sent the notice on March 13, 2009 via registered mail and provided a Canada Post tracking number in his verbal testimony. The number provided by the landlord shows that the package was sent on March 9, 2009 yet the notice of dispute resolution letters were not issued until March 26, 2009.

Both tenants attended the hearing and confirmed that they each received a notice of dispute resolution and a copy of the picture evidence, within the required time frames set out by the *Act* and so I find that service of the hearing documents and evidence from the landlord to the tenant was effected according to the *Act*.

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant landlord would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant landlord pursuant to section 7. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the landlord, bears the burden of

proof and the evidence furnished by the Applicant landlord must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement
3. Verification of the Actual amount required to compensate for loss or to rectify the damage
4. Proof that the claimant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage

In regards to the landlord's right to claim damages from the tenant, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the *Act* grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that the landlord has contravened section 23 of the *Act* which stipulates that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day and that the landlord is required to give the tenant a copy of the move-in inspection report.

I find that the landlord has not completed the move-out inspection report in compliance of section 35 of the *Act* which stipulates that the inspection must be done at a time that is agreed upon by both parties. The landlord testified that when he told the tenants he would return the next day to conduct the inspection that the tenants advised him that they would be leaving town really early in the morning and would not be available. I find that the landlord could have conducted the move out inspection report the evening of February 28, 2009 and requested that the tenants sign the report.

The landlord has claimed costs incurred to repair drywall, treat mouldy areas, and paint the entire rental unit. Documentary evidence and verbal testimony was provided by the landlords, tenants, and in the form of an e-mail from the existing tenant, which supports that there was an excessive amount of moisture and humidity in the rental unit. I find that the evidence proves the tenants' claim that the damage was a result of the steam or excessive moisture in the rental unit and that the increased humidity was the result of a broken or malfunctioning hot water tank.

The landlord testified that the rental unit was built in the late 1960's which supports the tenant's statement that rental unit has settled over the years causing cracks under the window sills.

Section 32 of the *Act* stipulates that a landlord must provide and maintain residential property in a state of decoration and repair that complies with health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In this instance I find that there is a preponderance of evidence that supports that the damaged drywall around the windows, the wood stain leaking off the window sills and down the walls, white glue leaking down the walls, and mould growing on the walls, window sills, and around doors, is a direct result of an excessive amount of humidity or steam inside a home during the winter months. Based on the aforementioned I find that the landlord has failed to prove the test for damages as there is no evidence to support that the rental unit needed repair and painting as a direct result of the actions or neglect of the tenants in violation of the *Act* or agreement. I hereby dismiss the landlord's claim of \$602.70 for painting and repairs to the walls and windows of the rental unit without leave to reapply.

The landlord claimed 20 hours for cleaning the rental unit after the tenants moved out. The evidence and testimony provided by the landlords is in direct contradiction to the

evidence and testimony provided by the tenants, and I find that the landlord directly attacked the veracity of the tenants by calling the tenants liars when they opposed the landlord's testimony.

I find that the credibility of both the landlords and the tenants is hard to assess. A significant factor for assessing the credibility of the landlords and tenants, I am guided by the following:

Bray Holdings Ltd. v. Black BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

In the circumstances before me, I find the version of events, in relation to the tenants cleaning the rental unit, provided by the landlord, to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the landlord over the tenant with respect to the amount of, or lack of, cleaning conducted by the tenants and find that the tenants left the rental unit unclean at the end of the tenancy. I find that the landlords have met the test for damage or loss in this claim and hereby approve their claim for cleaning the interior and exterior of the rental unit, in the amount of 20 hours at \$15.00 per hour for a total of \$300.00.

The landlord has claimed for two weeks of lost revenue. Based on the above, I have found that the need to repair and repaint the entire rental unit was not proven by the landlord to be required solely because of the actions or neglect of the tenants in violation of the *Act* or agreement. I have found that the landlord has proven that they required 20 hours to clean the rental unit which would result in 2 ½ days delay for a new

tenant moving in. Based on the above I hereby find in favor of the landlord's claim for loss of rent in the amount of 2 ½ days at \$27.95 per day for a total amount of \$69.88.

I find that the issues surrounding the condition of the exterior of the rental unit have now been dealt with and I hereby order that the statement that the tenants signed on February 28, 2009, allowing the landlords to hold \$100.00 from the pet deposit, is now cancelled and is of no force or effect.

Monetary Order – I find that the landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the tenant's security and pet deposits as follows:

Cleaning 20 hours @ \$15.00 per hour	\$300.00
Loss of rent for 20 hours = 2 ½ days x \$27.95 per day	69.88
Sub total (Monetary Order in favor of the landlord)	\$369.88
Less Security Deposit of \$425.00 Pet Deposit of \$425.00 plus interest of \$12.75	- 862.75
TOTAL OFF-SET AMOUNT DUE TO THE TENANTS	\$492.87

2) Tenants Claim

The tenants have requested that the landlord return their security deposit, pet deposit and interest. Based on the aforementioned I find in favor of a Monetary Order due to the tenants, from the landlord, in the amount of \$492.87.

The tenants have requested an Order to have the landlord comply with the *Act* to return their computer hard drive. While there is contradictory evidence and testimony in relation to the existence of a computer hard drive, based on a balance of probabilities I find that the landlord is most likely aware of the location of the tenants' hard drive. Based on the above, I hereby order the landlord to make arrangements with the tenants for the return of the tenants' computer hard drive that he may have in his possession or control.

The tenants have requested an order to recover the cost of the filing fee for their application. While the tenants have been partially successful in their claim, I find that the landlord has also been partially successful in his claim and given the fact that both parties paid the filing fee, I hereby dismiss the tenants' claim without leave to reapply.

Conclusion

I HEREBY FIND in favor of the landlord's monetary claim in the amount of \$369.88 and Order this amount to be deducted from the tenants' security deposit, pet deposit and interest with a balance payable to the tenants in the amount of \$492.87.

A copy of the tenant's decision will be accompanied by a Monetary Order for \$492.87. The order must be served on the landlord and is enforceable through the Provincial Court as an order of that Court.

I HEREBY ORDER the landlord to make arrangements with the tenants for the return of the tenants' computer hard drive that may be in his possession or control within two days of receipt of this decision.

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: May 26, 2009.

Dispute Resolution Officer