

# Dispute Resolution Services

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

## **DECISION**

### **Dispute Codes:**

MNDC, MNSD, MNR, FF

### **Introduction**

This hearing was convened in response to an application filed by the tenant and an application filed by the landlord. Both parties were represented in the hearing and each was given an opportunity to participate in the hearing and each provided submissions and affirmed testimony to this process.

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*.

Both parties were permitted to amend their applications in the hearing to make them relevant, and valid claims as well as to clarify their respective applications.

The tenant seeks a monetary order for:

- money owed or compensation for damage or loss under the Act, regulation or tenancy agreement (\$3125)
- return of the security deposit and pet damage deposits, and double the deposits as per compensation under Section 38 of the Residential Tenancy Act (the Act) (Security deposit paid \$625. Pet damage deposit paid \$500)
- to recover the filing fee from the landlord for this application in amount of \$50

The landlord seeks a monetary order for:

- money owed or compensation for damage or loss under the Act, regulation or tenancy agreement (\$1250 in loss of revenue)
- keep all or part of the security deposit in partial satisfaction of the monetary claims

- unpaid rent and utilities ( $\$1028.49 + 206.63 = \$1235.12$ )
- to recover the filing fee from the landlord for this application in amount of \$50

### **Issue(s) to be Decided**

Has the tenant / landlord established, on a balance of probabilities, that they have suffered a loss due to the landlord's / tenant's neglect or failure to comply with the Act? And, if so established, did the tenant / landlord take reasonable steps to mitigate the loss?

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

Is the tenant / landlord entitled to the monetary amounts claimed?

### **Background and Evidence**

The written Tenancy Agreement submitted by the landlord is dated September 30, 2008, and this is disputed by the tenant who claims the parties did not enter into a tenancy agreement until mid December 2008, and that the landlord backdated page 1 of the agreement to state September 30, 2008 – another issue disputed by the tenant is that the agreement was to stipulate the tenant would only pay 50% of the utilities.

Regardless, both parties agree the tenancy started September 30, 2008 and ended March 01, 2009. Rent in the amount of \$1,250 was payable in advance on the first day of each month, and a security deposit of \$625 and a pet damage deposit of \$500 were collected at the outset of the tenancy.

The TENANT submits, and it is undisputed by the landlord, that there was no move-in inspection done at the outset of the tenancy. The tenant further testified that on March 07, 2009 the landlord and tenant did a move out inspection and that they recorded the results of the move out inspection written on a lined piece of paper in which all areas of the rental unit were identified as simply 'okay' or 'okayed' by all parties, and this record

of inspection was signed by all parties. A copy of this inspection record was submitted into evidence. The tenant further testified that she provided the landlord with her forwarding address on February 01, 2009 in an e-mail to the landlord. The landlord denies receiving the e-mail the tenant purports was sent to them.

The tenant further testified that during the entire time of the tenancy (five months) there was no heat provided to her rental unit. The tenant's explanation is that the house has a forced-air furnace (vents) but that she was forced to block these vents, or otherwise not use the forced air heating system, as the furnace ducts also provided a means for cigarette smoke to enter her rental unit from the tenancy downstairs – to which, she testified, she is highly allergic and asthmatic. The tenant testified that the smoke free environment was a material term of the tenancy agreement in it's reference to," No smoking in the house. Outside the house only"; and, that the landlord was advised of this breach of the tenancy agreement by the downstairs tenants. The tenant testified she relied on electric heating (baseboard and auxiliary electric heat) for a source of heat over the winter months. The tenant seeks compensation for lack of heating, in a sizeable amount of \$625 per month for each month of the tenancy (\$3125).

The LANDLORD testified he has had to pay an outstanding electric bill to the City of New Westminster in the amount of \$1028.49 which was the responsibility of the tenant and should have been paid by the tenant – and in whose name the bill appears. The tenant's responsibility for this bill is according to the formula stipulated in the tenancy agreement. The landlord supplied a paid copy of the electric bill, and the tenancy agreement.

The landlord is also claiming unpaid rent during the tenancy in the amount of \$206.63. The landlord's undisputed testimony is that the tenant held back this amount from the rent so as to pay a portion of utilities, but did not do so.

The balance of the landlord's claim is for loss of revenue for the month of March 2009 in the amount of \$1250. The landlord's testimony is that the tenant did not move out, as agreed and stipulated in the tenancy agreement, on February 28, 2009 – but only did so

midway through the day on March 01, 2009. Further, the landlord and tenant concur that the landlord did receive only one key from the tenant on March 01, 2009, and received the remaining 6 keys issued to the tenant on March 07, 2009. The landlord claims that he had a bona fide tenancy agreement and a new tenant waiting outside the rental unit on March 01, 2009 with a truck full of belongings waiting to move into the rental unit. On information that there were still keys outstanding for the rental unit, the new tenant determined not to move in and the landlord had to give up the tenancy. The landlord is claiming loss of revenue for March 2009 due to the actions and neglect of the named tenant to vacate on February 28, 2009 and not returning all the keys until a week later. The landlord stated he could have provided evidence of the failed new tenancy, but did not provide such evidence to support his claim for loss of revenue.

### **Analysis**

I have reviewed all submissions and reflected on all the testimony and claims of the parties, and given full regard to all the parties' circumstances. It is remarkable the extent at which some of the evidence contrasts. In my review I find there are portions of the tenant's testimony which I favour over the landlord's testimony, and there are portions of the landlord's testimony that I favour of the tenant's.

The tenancy agreement leaves out considerable information which should be standard content of such an agreement. A better Tenancy Agreement can be obtained from the RTB website at <http://www.rto.gov.bc.ca/>

It must be emphasized that in order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. Moreover, the applicant 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 other party in violation of the *Act* or agreement
3. Verification of the actual amount required to compensate for the claimed 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.

Simply stated, the claimant bears the burden of establishing each claim on the balance of probabilities. 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. Finally the claimant must show that reasonable steps were taken to address the situation and to mitigate the damage or losses that were incurred.

As to the landlord's claims:

On reflection, **I dismiss** the landlord's claim of \$1250 for loss of revenue for the month of March 2009 in it's entirety due to lack of evidence.

**I find** the landlord is entitled to unpaid rent within the tenancy in the amount of **\$206.63**.

**I prefer** portions of the tenant's testimony and portions of the landlord's testimony in respect to the electric utility. On the preponderance of the evidence in respect to the heating of the rental unit and the electric bill, I find the tenant is responsible for 60% (average: landlord's claim of 70% - tenant's claim of 50%) of the electric utility as reflected in the landlord's claim. **I therefore find** that the landlord is entitled to **\$617.10**.

As the landlord is partially successful in their application, the landlord is entitled to partial recovery of the filing fee in the amount of **\$25** bringing the landlord's total entitlement to **\$848.73**.

As to the tenant's claims:

The tenant did not provide a copy of the e-mail to the landlord purporting to contain the tenant's forwarding address. Regardless, it is noteworthy that an e-mail forwarded to the landlord providing a forwarding address is not *written notification*. According to Section 38 of the Act, a forwarding address must be received, "in writing". Therefore, I find the tenant cannot rely on the provisions for *double* the security deposit, as per Section 38 of the Act, which states:

**Return of security deposit and pet damage deposit**

**38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

Further: (6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) **must pay** the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

None the less, **I find** that the undisputed evidence from the tenant and landlord in regards to the condition of the rental unit at the end of the tenancy indicates the tenant

is entitled to the return of the **original** security deposit and pet damage deposit, plus accrued interest in the quantum of **\$1129.29**

**I find** the tenant's claims for \$625 per month for five months, for lack of the forced-air heating is excessive, but more importantly, it is also not well supported by the tenant's testimony or by other evidence. There is an indication that the tenant blocked off available heating from the forced - air furnace to avoid smoke from the downstairs tenant. However, the smoking in the house was a breach of the tenancy agreement and the landlord's inability to remedy or mitigate this breach. In addition, the testimony of the parties further distorts any claim respecting the heating systems in this tenancy by then introducing that the responsibility for the electric bill was first at 70%, and then possibly reduced to 50% depending on which version of the tenancy agreement I accept. I find that the tenant has not provided evidence to fully meet the test for damage and loss; however, on the preponderance of the evidence and on the preponderance of probabilities, **I find** that the tenant is entitled to some compensation for loss of enjoyment in her need to manage and mitigate the heating systems available to her to gain heat. **I find** the tenant's claim of compensation is not reasonable, and that compensation of \$60 per month more fairly represents the tenant's entitlement in this regard. Therefore, **I grant** the tenant a total of **\$300** for this portion of her claim.

As the tenant is also partially successful in her application, the tenant is entitled to partial recovery of the filing fee in the amount of **\$25** bringing the tenant's total entitlement to **\$1454.29**.

The respective entitlements of the parties are reflected as follows:

Total of tenant's entitlements	\$1454.29
Total of landlord's entitlements (\$848.73)	-\$848.73

Owed to tenant	\$605.56
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### **Conclusion**

**I grant** the tenant a monetary order under Section 67 of the Act for **\$605.56**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated June 26 , 2009