

## **DECISION**

Dispute Codes      MNSD MND FF  
                             MNDC MNSD FF

### **Introduction**

This hearing dealt with cross Applications for Dispute Resolution by the Landlord and Tenant.

The Landlord applied on March 30, 2009 to obtain a Monetary Order to keep all or part of the security deposit, for damage to the unit, and to recover the cost of the filing fee from the Tenant for this application.

The Tenant applied on March 17, 2009 to obtain a Monetary Order for the return of her security deposit, for money owed or compensation for damage or loss under the *Act* and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, sent via registered mail on April 2, 2009. Mail receipt numbers were provided in the Landlord's documentary evidence. The Tenant was deemed to be served the hearing documents on April 7, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Service of the hearing documents, by the Tenant to the Landlord, was done in accordance with section 89 of the *Act*, served to the Landlord's property manager on March 20, 2009 at approximately 3:30 p.m. by the Tenant at the property manager's office.

The Landlord, his agent, and the Tenant 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

Has the Tenant proven her entitlement to a Monetary Order pursuant to sections 38, 67 and 72 of the *Residential Tenancy Act*?

Has the Landlord proven his entitlement to a Monetary Order pursuant to sections 38, 67 and 72 of the *Residential Tenancy Act*?

#### Background and Evidence

The tenancy was a fixed term tenancy which commenced on July 1, 2008 and scheduled to expire on June 30, 2009. The Tenant vacated the rental unit sometime in March 2009 and turned over possession of the rental unit to the Landlord on March 24, 2009. Rent was payable in the amount of \$2,300.00 per month however the tenant prepaid the rent for the entire lease period. The Tenant paid a security deposit of \$1,150.00 on June 11, 2008.

The Tenant testified that she knew the building was going through a complete renovation and that she had agreed to move into the rental unit prior to the completion of the construction and renovations. The Tenant argued that she was told the renovations were scheduled to be completed within a month after her move in date and that in fact they lasted several months longer.

The Tenant testified that it was horrible to live through the construction and renovations and that she was continuously interrupted with contractors wanting to come into her rental unit to complete the work. The Tenant argued that the on one occasion she didn't answer the door and the painter had a master key and entered into her suite without her permission to do so. The Tenant is seeking compensation for having to live in the

complex during all of this construction stating that it lasted longer than she was told it would and that it caused her a great deal of concern as the doors were always propped open, and on one occasion the exterior door was broken, which decreased her security.

In addition to the lessened security, the Tenant stated that she had to deal with an infestation of mice. The Tenant advised that she dealt with the property manager on a regular basis and that she was constantly finding dead mice in her rental unit and that at one point she realized the mice had chewed and destroyed her Yoga mat.

The Landlord testified that they had hired two separate professional pest control companies who attended the rental unit on a regular basis to provide the occupants with rodent traps and pest control substances to clear up the rodent infestation. The Landlord argued that he and his staff worked diligently with the tenants and the pest control companies to resolve the issue however with the ongoing construction and cold weather of the winter months, the rodents kept finding ways into the rental unit. The property manager advised that they put steel wool in any openings to prevent the rodents from entering the building.

The Tenant referred to the e-mails submitted in her evidence and confirmed that the Landlord offered her a \$500.00 rent abatement for January 2009 "in lieu of issues you face" and that the Tenant received the refund.

The Tenant testified that she gave notice to end the tenancy as evident by her e-mail on January 20, 2009, whereby she wrote "Have someone call us or come to see us because we need to resolve the ending our lease, to finalize our proposed lease ending agreement."

The Landlord argued that he never received a written notice to end the tenancy from the Tenant and that they knew she was vacating the rental unit only after the property manager saw the Tenant move items out of her apartment at the end of February 2009 which was followed up by a discussion with the Tenant and the property manager.

The Tenant is claiming the return of prepaid rent from March 1, 2009 to June 30, 2009 and confirmed that she did not return possession of the rental unit and keys to the Landlord until March 24, 2009 after the final walk through inspection. The Tenant advised that she provided the Landlord with her forwarding address at the time of the walk through. The Tenant stated that the property manager had entered the rental unit prior to the final walk through on March 24, 2009 and completed the move-out inspection form. The Tenant confirmed that she had allowed the Landlord access to the rental unit to show the suite so they could re-rent the unit as soon as possible but that the Tenant did not attend a walk through inspection prior to March 24, 2009 so the report should not have been pre-completed.

The property manager testified that the report was partially completed during a time when she was showing the rental unit to a prospective tenant but that it was not completed fully until the final walk through on March 24, 2009.

With respect to the Tenant's claim, she is requesting the return of her damage deposit, as she felt the living conditions were unbearable, reimbursement of her hydro bill for three months (December 2008 to February 2009) as the Tenant feels the rental unit was not constructed properly, causing her to use more electric heat than normal. The Tenant is seeking \$8,957.82 which represents the difference between what she paid for rent and what the unit was rented for, after she vacated the rental unit, and monies owed for unsafe conditions and overall suffering of \$4,000.00. The Tenant stated that she had to endure people operating picket lines outside protesting against the renovation and that the Tenant regularly communicated with the property managers with respect to these issues. The Tenant stated that the e-mails submitted into evidence were the only written communications which took place between herself and her landlord with respect to these issues.

A discussion took place whereby both parties agreed that the Tenant's car was damaged during the building renovations. The Landlord confirmed that he has not paid

the Tenant money towards the repair of her car and the Tenant confirmed that she has not had the repairs completed as of yet.

The property manager confirmed that they had agreed to pay for the replacement of the Tenant's Yoga Mat in the amount of \$336.00.

With respect to the Landlord's application, the Landlord testified that he was present at the move out inspection, along with his property manager, and that there was damage to the hardwood floor and on approximately  $\frac{3}{4}$  of the walls in the rental unit as supported by the pictures submitted into evidence. A discussion followed whereby the Tenant confirmed that there was damage to the hardwood floor in the master bedroom, and that this damage was caused by her bed but that she did not agree to there being damage throughout the rest of the apartment.

The Tenant later testified that she agreed that the entire apartment needed to be painted after she vacated the rental unit and that there was damage caused to the hardwood floor in her bedroom.

The Tenant confirmed receiving a payment of \$5,358.11 on April 5, 2009. The Landlord testified that he was instructed to return this amount by the *Residential Tenancy Branch* as a refund of her prepaid rent; less the damages the Landlord was claiming were caused by the Tenant, to the rental unit.

The Landlord is seeking liquidated damages of \$1,150.00 as the Tenant broke the lease early.

Both parties have requested to recover the cost of the filing fee from the other.

### Analysis

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant 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 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 bears the burden of proof and the evidence furnished by 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 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

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.

Landlord's Claim

**Repair to Hardwood Floor** – The Landlord submitted an invoice in support of his claim of \$262.50 to repair the hardwood floor. Based on the testimony and evidence before me I find that there was damage to the hardwood floor during the Tenant's tenancy. I find that the Landlord has proven the test for damages, as listed above, and I hereby approve his claim for \$262.50.

**Repair and Repaint Rental Unit** – The Tenant provided contradictory testimony in relation to the condition of the rental unit walls when she vacated the unit. A significant factor in my considerations is the credibility of the Tenant's testimony. In assessing credibility I am guided by the following:

In *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 demeanour 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 provided by the Landlord to be highly probable given the conditions that existed at the time. Considered in its totality, I favour the evidence of the Landlord over the Tenant.

Based on the above I find that the rental unit needed to be repaired and painted after the Tenant occupied the unit for only 8 ½ months and I hereby find in favour of the Landlord's claim of \$1,575.00.

**Liquidated Damages** – The Tenant entered into a tenancy agreement for a fixed term lease which stipulates that if the Tenant breaks the fixed term she will be required to pay the Landlord liquidated damages in the amount of \$1,150.00. Based on the evidence and testimony before me I find that the Landlord allowed the Tenant to end the tenancy early, that the Landlord was able to re-rent the unit in a timely fashion but for a lower amount than what the Tenant was paying, causing the Landlord to suffer a loss. Based on the above, I find that the Landlord has proven the test for damages and loss and I hereby approve the Landlord's claim of \$1,150.00.

**Filing Fee** – I find that the Landlord has been successful in his claim and is entitled to recover the cost of the filing fee from the Tenant for this application.

**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 deposit and claim, and that the Landlord is entitled to recover the filing fee from the Tenant as follows:

Repair to Hardwood Floor	\$262.50
Repair and Repaint Walls in rental unit	1,575.00
Liquidated Damages	1,150.00
Filing fee	50.00
<b>Sub total (Monetary Order in favor of the Landlord)</b>	<b><del>\$1,614.25</del></b>
	<b>\$3037.50</b>
Less Security Deposit \$1,150.00 + Interest of \$9.61	-1,159.61
<b>OFF SET AMOUNT DUE TO THE LANDLORD</b>	<b><del>454.64</del></b>
	<b>\$1,877.89</b>

#### Tenant's Claim

**Return of Prepaid Rent** – Based on the testimony and evidence I find that the Tenant retained occupancy of the rental unit until March 24, 2009 and that there was no formal written notice issued to the Landlord to end the tenancy. The Landlord was aware that the Tenant was ending the tenancy sometime near the end of February and the Landlord began to show the property in attempts to re-rent the unit as quickly as possible. The Landlord was able to re-rent the unit as of April 1, 2009. I find that the Tenant is not entitled to the return of rent paid for March 2009 as she was still in possession of the rental unit until March 25, 2009 and that her rent was payable on the 1<sup>st</sup> of March for the entire month. I find that the Tenant is entitled to the return of the prepaid rent which was paid for April, May and June 2009 at \$2,300.00 per month (3 x \$2,300.00 = \$6,900.00)

**Return of Damage Deposit** - The Landlord has filed a claim against the damage deposit in accordance with Section 38 of the *Act*. Based on the aforementioned the damage deposit amount will be reviewed under the analysis of the Landlord's application above.

**Hydro Bill** –The Tenant has claimed that the amount she incurred in electrical costs for heating the rental unit is the responsibility of the Landlord but did not provide evidence in support of this claim. Based on the aforementioned I find that the Tenant has failed to prove the test for damages, as listed above, and I hereby dismiss the Tenant's application without leave to reapply.

**Car Damage** – Based on the testimony and documentary evidence before me, I find that there was damage caused to the Tenant's car, that the Tenant provided the Landlord with an Estimate of repair in the amount of \$500.00 and that this amount has not yet been issued as compensation to the Tenant. Based on the above, I find that the Tenant has proven her claim award the Tenant \$500.00.

**Yoga Mat** – The parties had come to a previous agreement that the Yoga Mat in the amount of \$336.00 was damaged due to a rodent infestation and that the Landlord would reimburse the Tenant this amount.

**Rent Abatement** – The Tenant is claiming compensation for the difference between the monthly rent she had agreed to pay and an amount that she saw the rental unit advertised for after she vacated the unit. I find that the Tenant entered into a fixed term tenancy agreement with an agreed upon monthly rent amount. Based on the above I find that the Tenant has failed to prove the test for damages, as listed above, and I hereby dismiss her claim without leave to reapply.

**Damages for Suffering (Aggravated Damages)** – The Tenant is claiming \$4000.00 in aggravated damages for having to live in conditions directly related to construction and renovations. Based on the evidence and testimony before me I find that the Tenant willingly entered into a tenancy with an occupancy commencing on a date that was prior to the anticipated completion date of the renovations and construction. Based on the aforementioned I find that a reasonable person would have known that if they moved into a building during a construction and renovation project that the quiet enjoyment

normally associated with a rental unit would be affected or interrupted until the completion of the construction and renovation.

With respect to the issue of the rodent infestation, I find that the Landlord and his agents responded to the issue in a timely fashion and that they continued to work with professional pest control companies in an attempt to reduce and eliminate the problem as reasonably as could be expected given the prevailing circumstances.

The Tenant has claimed that her suffering was also caused by protesters who demonstrated outside of the rental building. I find that the Tenant has failed to prove the test for damage or loss and dismiss her claim of suffering.

Based on the above I hereby dismiss the Tenant's claim for aggravated damages, without leave to reapply.

**Filing Fee** – As the Tenant has not been primarily successful in her application, I hereby dismiss her request to recover the cost of the filing fee from the Landlord.

**Monetary Order** – I find that the Tenant is entitled to a monetary claim as follows:

Return of Prepaid Rent for April, May, June 2009	\$6,900.00
Damage caused to Tenant's Car	500.00
Yoga Mat replacement	<u>336.00</u>
<b>Sub total Due to Tenant</b>	<b>\$7,736.00</b>
Less payment made to Tenant by Landlord April 5, 2009	<u>-5,358.11</u>
<b>TOTAL OFF SET AMOUNT DUE TO THE TENANT</b>	<b>\$2,377.89</b>

#### Off-Set Claims

I hereby Order the Monetary Order owed to the Landlord in the amount of ~~\$454.64~~  
\$1,877.89 be deducted from the Monetary Order owed to the Tenant in the amount of

\$2,377.89 leaving a balance payable to the Tenant in the amount of ~~\$1,923.25~~ \$500.00  
(~~\$2,377.89 - \$454.64~~ \$1,877.89).

Conclusion

I HEREBY FIND in the Tenant is entitled to a Monetary Order. A copy of the Tenant's decision will be accompanied by a Monetary Order for ~~\$1,923.25~~ \$500.00. The order must be served on the Landlord and is enforceable through the Provincial Court 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: June 29, 2009.

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Dispute Resolution Officer