

DECISION

Dispute Codes:

For the landlord OPR, MNR, MNSD, MND, MNDC, FF
For the tenant CNR, MNSD, MNDC

Introduction

This hearing was convened in response to an application by the tenant and an application by the landlord.

Both parties attended the hearing and participated with their submissions and solemnly affirmed testimony, and were given opportunity to present evidence and make submissions. Both parties acknowledged receiving one another's evidence and submissions. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Preliminary Matters

The tenant sought more time to make an application to Dispute a Notice to End Tenancy, which was not necessary. The tenant explained they only seek to delay having to vacate the rental unit.

The tenants clarified that they did not seek to deny, suspend, or set conditions on, the landlord's right to enter the rental unit, thus this portion of their application is hereby **dismissed**.

By way of a notation on the tenant's evidence package submitted May 06, 2010, the tenant purported to have amended their application, claiming compensation of \$49,200.00 in rent abatement – representing all of rent for past 41 months. The tenant withdrew this claim amount, in exchange for the equivalent to their security deposit and accrued interest, or, simply the return of the security deposit and accrued interest.

The landlord verbally amended their claim in the aggregate quantum, not exceeding \$25,000.00

The applications proceeded on their merits.

The tenant's application sought:

- To Cancel a 10 Day Notice to End (NTE) Tenancy for Unpaid Rent,
- A monetary order for money owed in compensation under the Act, regulation or tenancy agreement: rent abatement for a leaking roof.
- Return of the security deposit.

The landlord sought:

- An Order of Possession for unpaid rent pursuant to a NTE for unpaid rent
- A monetary order for the unpaid rent: \$3600.
- A monetary order for damages to the rental unit: *costs to remediate damage caused by the tenant, but not covered by the landlord's insurer (difference between insurer's compensation and repair/ replacement cost estimate – depreciation costs): \$23,759.69*
- To keep the security deposit in partial satisfaction of the monetary claim
- Money owed or compensation for damage or loss under the Act, regulation or tenancy agreement - Restoration service deductible : \$1000

Issue(s) to be Decided

Is the Notice to End Tenancy valid?

Is the landlord entitled to an Order of Possession?

Is the landlord entitled to the monetary amounts claimed?

Is the tenant entitled to the monetary amounts claimed?

Background and Evidence

The parties' undisputed evidence is that the tenancy began on May 01, 1989. Rent in the amount of \$1200 is payable in advance on the first day of each month. At the outset of the tenancy, the landlord of the day collected a security deposit from the tenant in the

amount of \$500 – subsequently assumed by the present landlord. The tenant failed to pay rent in the month of March 2010 and on March 24, 2010 the landlord sent the tenant a Notice to End Tenancy (NTE) for non-payment of rent with an effective date ten (10) days after the tenant is deemed to have received the Notice to End (April 08, 2010). The tenant further failed to pay rent in the month of April and May 2010. The total of the landlord's monetary claim is for the unpaid rent of \$3600. The tenant testified they agree the rent has not been paid. The landlord's testimony requests an immediate Order of Possession effective no later than May 31, 2010.

The contrasting testimony is as follows. The tenant testified that in late 2006 they asked the landlord to repair a leak in the roof. The landlord's 'handyman' was dispatched whom made a temporary repair, and to return in drier weather. The tenant testified the roof continued to leak, and asked the landlord again to fix the roof. The tenant was advised by the landlord they could hire a contractor of choice and deduct the cost from rent or submit an invoice for re-imbusement. The tenant did not hire a contractor, but claims they continued asking the landlord to repair the leak and were ignored. The landlord strongly disputed the tenant's testimony, claiming a small leak was reported in February 2008 (over a year later) and that a fix of the reported leak was performed with a planned return during drier weather. The tenant was repeatedly not available for the return visit to gauge repairs and when finally contacted told the landlord that all was "fine" in relation to the leak. The tenant told them that he had fixed it himself and there would not be a charge. The landlord testified they were assured by the tenant, and told the tenant that if it became necessary, to hire a contractor, for what the tenant and landlord determined would be a small repair in the realm of \$200, and deduct the cost from rent or submit an invoice for re-imbusement.

The tenant provided some photographs claimed to be of the roof when the tenant went on to it, as well as photographs of the interior of the rental unit purported to be under the roof leak. The photos show some apparent dried water stains, and one photograph with an opening in the hall ceiling. The landlord countered that in the tenant's long tenancy they made many alterations to the house without the landlord's consent, including an extension at the rear of the house, complete with skylights.

Tenant seeks the return of their original security deposit. He testified that he has personally now left the rental unit, but that all of his possessions still remain in the house, and that he desires the return of the security deposit to allow him to vacate the house of his possessions. The landlord acknowledges holding the security deposit and applied to retain it, or plans to administer it in accordance with the Act at the end of the tenancy. Tenant still resides in the rental unit, but desires to vacate.

The landlord testified that on the evening of February 16, 2010 tenant and sub-tenant caused a fire in the rental unit which resulted in considerable damage to the house, primarily the kitchen, but that the tenants determined to still occupy the unit and will not allow the landlord access to repair the house. The landlord provided document evidence from the insurance's adjuster (e-mail) which states tenant advised him that his actions, along with the actions of others that evening, allowed a pot of oil to be left unattended on the stove, which ignited causing a fire in the home. The tenant's evidence is that the, "kitchen was destroyed", and testified it was, "an accident" and not wilful. The tenant submitted the Fire Department determined the fire was accidental. The tenant did not dispute the landlord's testimony and submissions that the tenant's actions or those of his subtenants were at the root of the fire, nonetheless. The landlord submitted correspondence from the insurance adjuster in relation to the fire damage, including an accounting of the estimated costs to remediate the fire-damaged portion of the house to a state comparable to its condition before the fire. The landlord testified that the accounting is an estimate as the tenants have yet to vacate to allow a proper assessment of the damage and the consequent repairs. The landlord submitted that the insurance company will only pay for a depreciated portion of the repairs to an estimated standard based on prior to the loss, and that the repairs will not place the landlord in a better position than before the loss. The landlord submitted a ledger from the insurance's adjuster, accounting for the estimated repair replacement costs, the depreciated amount for the loss, and the settlement total to be paid to the landlord. The landlord is claiming the *depreciation portion* of the repairs, for which the insurance will not pay. The landlord's evidence indicates this portion to be \$23,759.69. The tenant disputes the landlord's claim and testified they do not intend to pay it.

The landlord further seeks compensation for the deductible portion of the Restoration Service employed on the night of the fire on February 16, 2010, in the amount of \$1000, for which the landlord has provided an invoice.

Analysis

Based on the testimony of both parties, and on the preponderance of the evidence, I find that the tenant was served with a notice to end tenancy for non-payment of rent and I find that notice to be valid. The tenant has not paid the outstanding rent, and despite their application to dispute the notice to end, they have no acceptable evidence upon which to dispute the landlord's entitlement to the rent. As a result, the tenant's application to cancel the Notice to End for unpaid rent dated February 05, 2010 **is dismissed** – the landlord's Notice is upheld.

Section 55 of the Residential Tenancy Act (the Act), in part, states as follows:

Order of possession for the landlord

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,

(a) the landlord makes an oral request for an order of possession,
and

(b) the director dismisses the tenant's application or upholds the
landlord's notice.

Based on the above facts I find that the landlord is entitled to an **Order of Possession**. I further find that the landlord has established a claim for **\$3600** in unpaid rent.

In relation to the leak in the roof, I find that at all times it was available to the tenant to have the leak repaired by a contractor of their choice and for the tenant to deduct any cost from rent, or for the tenant to apply for dispute resolution to have it repaired, but did neither. I decline to accept the tenant's position that they were forced to endure a

leaking roof for 41 months. **I prefer** the landlord's testimony that when notified of the leak in the roof the landlord responded and tried to repair the leak, with plans to ensure the leak in drier weather, and soon after was relieved of concern and from carrying out additional repairs by the tenant's dismissal of the leak. As a result, **I dismiss** the tenant's claim for compensation for this portion of their claim, without leave to reapply.

As the tenant has not vacated the rental unit, their request on application for the return of the security deposit was, and remains, premature pending its administration at the end of the tenancy in accordance with section 38 of the Act. Nonetheless, as I have already found the landlord entitled to a monetary claim well in excess of the security deposit, the Act allows the Director to offset the landlord's claim utilizing the security deposit. Therefore, the tenant's claim to the security deposit is **dismissed** without leave to reapply. As a result, the tenant's application **is dismissed** in its entirety.

As to the landlord's claims:

Section 7 of the Residential Tenancy Act states as follows:

7. Liability for not complying with this Act or a tenancy agreement

- 7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
- 7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Section **32** of the Residential Tenancy Act, in part, states as follows:

Landlord and tenant obligations to repair and maintain

- 32** (3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

The Regulations, in part, state as follows:

Repairs

8 (2) Tenant's obligations:

(a) The tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. The tenant must take the necessary steps to repair damage to the residential property caused by the actions or neglect of the tenant or a person permitted on the residential property by that tenant. The tenant is not responsible for repairs for reasonable wear and tear to the residential property.

I must emphasize that in accordance with Section 7 of the *Act*, 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 (the landlord) must satisfy each component of the following test:

1. Proof the damage or loss exists,
2. Proof the damage or loss were the result, solely, 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 the claimant followed section 7(2) of the *Act* by taking reasonable steps to mitigate or minimize the loss or damage.

Also , if a claim is made by the landlord for damage to property, the normal measure of damage is the cost of repairs (with some allowance for loss of rent or occupation during the repair), or replacement, whichever is less. The onus is on the tenant to show that the expenditure is unreasonable.

Therefore, the claimant bears the burden of establishing their claim on the balance of probabilities. The claimant must prove the existence of the damage or 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.

On preponderance of the evidence, the testimony of the parties and on the balance of probabilities **I find** the landlord has sufficiently met the test for damage and loss in this matter, and that the cost of repairs / replacement is to a standard which renders the landlord whole in respect to the loss incurred, and no more. I grant the landlord the difference between the cost of repairs / replacement costs for the damage and the amount the insurance company will pay the landlord for the loss: the difference being the *depreciation portion*, in the amount of **\$23,759.69**.

I also find the landlord is entitled to be compensated for the deductible portion of the restoration service employed on the night of the fire, in the amount of **\$1000**.

As the landlord's claim has merit, I grant the landlord recovery of the filing fee in the amount of **\$100**.

As to the landlord's Monetary Order - the landlord's entitlements exceed the provisions under the Act, however the landlord verbally amended their claim not to exceed the aggregate amount of \$25000. In finding as to the landlord's entitlement I grant the landlord the amount of **\$25000, without leave to reapply**.

Conclusion

The tenant's application is **dismissed** without leave to reapply.

I grant an Order of Possession to the landlord effective **on or before May 31, 2010**.

The landlord is being given this Order. The tenant must be served with this Order of Possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

I Order that the landlord retain the deposit and accrued interest total of \$804.31 in partial satisfaction of the claim and I grant the landlord an order under Section 67 of the

Act for the balance due of **\$24,195.61**. If necessary, this order may be filed in the Small Claims 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*.