Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for compensation for loss of rent revenue, damage to the rental unit, to retain all or part of the security deposit and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The tenant applied requesting compensation for damage or loss under the Act; return of double the deposit paid and to recover the filing fee from the landlords for the cost of his Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Issues

At the start of the hearing I reviewed each application in relation to the monetary amounts claimed. Neither party attached a detailed calculation of the amount claimed, to the application that was served to the other. The parties confirmed receipt of evidence served by each and voluntarily agreed to proceed based upon the calculation of the claims made that were included in the evidence submissions.

The calculation provided by the landlord exceeded that indicated on the application. As the landlord did not serve the tenant with an amended application, the claim remained at $15,000.00 and the landlord adjusted the amount of loss of rent revenue downward in order to remain within the amount indicated on the application.

Issue(s) to be Decided

Is the landlord entitled to compensation for damage or loss under the Act in the sum of $15,000.00?

May the landlord retain the deposit in partial satisfaction of the claim for compensation?

Is the tenant entitled to return of double the $340.00 deposit paid?

Is the tenant entitled to compensation for damage or loss under the Act in the sum of $4,320.00?

Is either party entitled to filing fee costs?

Background and Evidence

At the start of the hearing the parties agreed to the following facts:

- The tenancy commenced February 1, 2005;
- Rent was $700.00 per month, due on the first day of each month;
- A deposit in the sum of $340.00 was paid on January 29, 2005;
- On July 30, 2010, the landlord issued a 1 Month Notice Ending Tenancy for Cause, that was received by the tenant on August 2, 2010;
- On August 3, 2010, the tenant gave written notice he would move out by August 9, 2010;
- That the landlord received the tenant's written forwarding address on August 3, 2010; and
- That the keys to the rental unit were returned on August 16, 2010.

The tenant did not pay August, 2010 rent and the landlord has not returned the deposit paid by the tenant.

The landlord applied, claiming against the deposit on March 10, 2011.

The tenant has made the flowing claim for compensation:

Storage costs August to December 2010	825.00
Loss of time at work/personal time moving	290.00
Loss of quiet enjoyment – illegal entry 4 times	280.00
Fuel bills due to forced move	1,800.00
Stress due to actions of landlord	1,075.00
TOTAL	4,270.00

The landlord has made the following claim for compensation:

Paint	72.78
Kitchen cabinets, faucet and sink	927.53
Cabinet hardware	34.97
Cabinet hardware	3.12
Medicine cabinet for bathroom	122.81
Mould removal supplies and equipment	54.40
Kitchen countertop and toe kick	150.25
Bathroom cabinet and faucet, light fixtures for kitchen	568.29
Bedroom carpet, kitchen linoleum and installation fee	1,655.29
Contractors' fees for renovation work and supplies	4,212.87
Contractor's fees for renovation work and supplies	2,764.37
Door stop for bathroom door, face plates for electrical outlets, bathroom mirror and hanging supplies, kitchen blind	78.64
Refrigerator	761.52
Loss of rent revenue August 2010 to March 2011	3,584.00
TOTAL	14,990.84

In December 2009, the tenant reported problems with water leaking into his rental unit.

The landlord stated that it was on January 25, 2010, that the tenant reported a problem with water entering his unit. On January 26, 2010 the septic field was dug up and inspected, resulting in a recommendation the tank be pumped out. On January 28, 2010 the sewer tank was pumped. The company suggested there were other problems and on February 10, 2010 the sewer lines were cleaned, with a follow-up to occur on February 15, 2010.

The tenant testified that after this work was completed the rental unit continued to experience problems with water pooling on the floor and that the hall closet carpet was removed due to water leaks. The tenant stated that the bathroom cupboard had mould and mildew and that he repeatedly asked the landlord to make the required repairs. The landlord did not respond to the tenants requests for repair.

In July 2010, the tenant again asked the landlord what plans they had to address the water issues in his unit. On July 19, 2010, the tenant gave the landlord permission to enter the unit to complete some exploratory work; holes were placed in some walls, which led to the discovery of water egress and mould.

On July 28, 2010, the tenant and landlord again talked about the repairs that would be required.

On July 30, 2010, the tenant left to go camping and when he returned home on August 2, 2010, he found a 1 Month Notice Ending Tenancy for Cause, issued on July 30,

2010, stating the tenant had put the landlord's property at significant risk. Attached to the Notice was a letter signed by the landlord that responded to the tenant's request made on July 28, 2010, outlining all of the repairs that would be required to the unit. The letter read, in part:

> *"As per your request of July 28th, 2010 please find below a list of anticipated construction work to be carried out in the suite in which you reside at the above address, commencing Friday 30th July, 2010. All the work which is deemed necessary to bring the suite up to acceptable living standard due to the presence of mould and mildew..."*

When the tenant entered his rental unit on August 2, 2010, he found that the landlord had taken down walls, removed the kitchen sink, turned off electrical services and placed his belongings in a bedroom. The unit was no longer fit for habitation and the tenant gave his written notice ending the tenancy by August 9, 2010. The tenant supplied photographs taken of the unit when he returned on August 2, 2010; which show mould on exposed walls, walls that had been removed and ceiling damage.

The tenant provided copies of storage invoices for August to December, 2010 in the sum of $748.27; plus costs for a deposit which was refunded and some supplies. The tenant was forced to move to his father's home and required storage for his belongings.

The tenant was forced to spend time moving and was unable to work while making arrangements and has claimed a loss in the sum of $290.00.

The tenant alleged that the landlord entered his home on one occasion without permission as he found the landlord's cat in his home. A copy of a letter written at that time to the landlord, requesting notice for entry, was submitted as evidence. The tenant stated that while he was away over the weekend of July 30, 2010, it is apparent that the landlord would have been repeatedly entering his unit; as so much demolition work had been completed in his unit. The tenant has claimed compensation for 4 illegal entries to his unit, in the sum of 10% of his monthly rent, totalling $280.00.

The tenant was forced to move from his home to live with his father, resulting in an additional 2 hour commute each day. The tenant submitted fuel receipts issued between August and December, 2010, totalling $1,855.85; he has claimed costs in the sum of $1,800.00. The tenant submitted that if he had not been forced to move he would not have incurred the additional fuel expenses. The tenant did not indicate how much he normally spent on fuel; however the distance travelled each day differed by 136 km.

The tenant has claimed an additional $1,075.00 in damages due to the stress of having to travel additional distances to work and all of the inconvenience and stress he experienced as a result of no longer being able to live in his home.

The landlord responded that they have always taken good care of the rental unit. Copies of invoices paid dating back to September 2008 for an electrical service call; a 2007 plumbing repair to the water heater; a 2006 septic pump out service call; and a 2004 water main leak repair due to a pinhole in the line, all point to the fact that the landlord has been conscientious in maintaining the home. Copies of the 2010 invoices for septic work were also supplied as evidence.

The landlord provided a copy of an unsigned letter written by the tenants who resided in the unit from October 2003 to October 2004; indicating that the landlord had always made required repairs. The letter provided a phone number if more information was required.

The landlord provided a copy of the 2003 residential property disclosure statement, issued at the time they purchased the home. The statement did not indicate any problems with water egress.

On July 1, 2010, the landlord went to the tenant's door to obtain the rent payment; the tenant told the landlord there were problems with moisture in the unit. The landlord entered and found water on the bathroom and closet floor, mould 3 feet up the wall, mould growing on the tenant's boots and mushrooms growing in the bathroom. The landlord offered to pay the tenant for damages and told the tenant, as he was going to be away, his father would respond as his agent between July 2 and 11, 2010. The landlord had last been in the unit on January 26, 2010, and was not aware of any of the moisture and mould problems until he entered the home on July 1, 2010.

On July 19, 2010, with the tenant's permission, work began in the unit. Mould was discovered and a sock was found tied around the kitchen sink plumbing; the sink was disconnected and leaking.

On July 26, 2010, the landlord's insurance agent inspected the home and determined that the tenant's failure to report the problem was negligent and it would be unlikely insurance would cover remediation. The landlord provided a copy of a letter from his insurer, dated August 19, 2010, which indicated, in part:

> *"All water damage incidents carry an inherent risk of resulting mould contamination, particularly if the water damage is not remediated promptly and in a competent manner."*

The insurer declined coverage, as a result of the failure of the landlord to mitigate the loss by promptly reporting the problem. The landlord stated he could not report the problem in a timely manner as the tenant had not informed them of the problems that had been developing in the unit.

The landlord supplied copies of receipts in support of each of the claims made for repair work that was required. The home is approximately 40 years old and the lower suite was likely developed 15 years ago. All fixtures in the suite would have been

approximately 15 years of age; however, the landlord estimated that the carpet might be 10 years old.

The landlord stated that they have acted in good faith, did not wish to interfere with the tenant and if they had been in the suite and discovered the problems earlier, they would have responded appropriately.

The landlord supplied a number of photographs of mouldy walls, walls that had been removed, a broken plumbing fixture, a sock tied around the kitchen sink plumbing and the tenant's mouldy boots.

The landlord testified that the Notice ending tenancy was issued as the tenant had not reported the water problems, resulting in serious damage to the rental unit. The landlord acknowledged having entered the unit while the tenant was away over the weekend of July 30, 2010, and did not disagree that once the work had begun the rental unit was effectively rendered uninhabitable. The landlord felt that the tenant had thwarted their efforts to make repairs, by refusing them entry to the unit, and felt that the repairs constituted an emergency.

Analysis

When making a claim against another party it is incumbent upon the applicant to provide evidence of communication made in relation to complaints, as the burden of proving a loss of quiet enjoyment or a lack of access falls to the applicant. Written reports of complaints and concerns may form the best record and provide each party with clarity. The respondent also must be provided with a reasonable period of time to investigate and respond to allegations.

In relation to the tenant's claim that he made repeated complaints to the landlord between January and July 2010, I find, on the balance of probabilities, from the testimony and evidence before me, that this submission is not supported. I have considered the evidence provided by the landlord that demonstrates maintenance to the suite up to February 2010, which leads me to accept the landlord's version of events, that they had an interest in maintaining their investment and had always made repairs.

The tenant provided no evidence of any complaints made to the landlord, such as letters or witnesses who could support his testimony. The tenant did write a letter in relation to the cat being found in his unit; so it is not unreasonable to have expected the tenant would place concerns regarding water egress and, what came to be a serious mould problem, to the landlord in writing.

Therefore, I find that the tenant was, at some point, negligent in bringing the need for repair to the landlord's attention. The tenant's work boots had mould growing on them, walls were mouldy and mushrooms were growing in the bathroom; which points to a moisture problem that was likely present for some time.

However, I find there is insufficient evidence before me to determine at what point in time the tenant was responsible for the mould that was found once walls were removed. There is evidence that the home did have some water egress problems in early 2010,

and I cannot find with any confidence that mould did not originate with that leak. What I find appears to be clear, is that on July 1, 2010, the problem with mould and water egress was clearly visible and the landlord had not been made aware of the issue prior to entering the unit on that date.

Section 7 of the Act provides:

> ***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.*
>
> *(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.***
>
> (Emphasis added)

There is an absence of evidence indicating the point at which the rental unit became so ridden with mould as to have resulted in the landlord's insurer to deny coverage, due to a lack of mitigation, however; I find that the tenant failed to mitigate the loss suffered by the landlord by not notifying the landlord of the growth of mould prior to July 1, 2010.

When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Residential Tenancy Branch policy suggests that a dispute resolution officer may also award "nominal damages", which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right. I have considered nominal damages in relation to some of the compensation claimed by the landlord.

I have not placed any weight on the tenant's testimony that he did not tie a sock around the broken kitchen plumbing; and find, on the balance of probabilities, weighed against the landlord's history of maintaining the property, that the tenant's testimony did not have the ring of truth.

The landlord suffered a loss, but has also completely renovated an older suite, replacing original fixtures, carpeting and cabinets with new items. Depreciation over a fifteen year period would render most of the fixtures as being outside of their useful lifespan, as determined by Residential Tenancy Branch Policy; which I find to be a reasonable

stance. However, I accept there is a loss which could have been mitigated by the tenant and find that the landlord is entitled to the higher range of nominal compensation in the sum of $500.00 for the cost of renovation as the result of the negligence of the tenant. I have made this decision based on the absence of evidence which demonstrated the point in time that the unit became damaged by mould, and in recognition that the tenant had responsibility to inform the landlord prior to July 1, 2010.

I find that the balance of the landlord's monetary claim is dismissed.

Section 47 of the Act provides:

> *(2) A notice under this section must end the tenancy effective on a date that is*
>
> > *(a) not earlier than one month after the date the notice is received, and*
> > *(b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

Therefore, I find that the Notice ending tenancy issued as provided by section 47 of the Act, on July 30 and served to the tenant effective August 2, 2010, was effective on September 30, 2010. I have made this finding as it is a factor in determining the period of time during which compensation to the tenant might be considered.

The parties have both agreed that once the landlord began remediation work in the unit on the weekend of July 30, 2010, the rental unit was effectively rendered uninhabitable. If the landlord had wished more immediate possession due to what they believed was the need for emergency repairs and the neglect of the tenant, the landlord was at liberty to submit an application requesting an early end to the tenancy. The landlord chose to issue a 1 Month Notice Ending Tenancy for Cause, and then took possession of the rental unit without the legal authority to do so.

Once the tenant returned to the home and discovered the amount of demolition that had occurred he chose to give notice that he would leave. I find that this notice given was not required as, by the landlord's actions, the unit had become uninhabitable. Even though the tenant holds some responsibility for the state of the rental unit, the landlord required legal authority to take possession of the unit. I find that the removal of walls, the kitchen sink and cabinets was the equivalent of possession by the landlord.

Therefore, pursuant to section 62(3) of the Act, I find that the tenant did not have use of the rental unit in August 2010 and that rent is not owed for that month or any month beyond August, 2010.

In relation to the claim made by the tenant for compensation and damages, I find that the sudden move required as a result of the landlord failing to obtain an Order of possession, entitled the tenant to some compensation as follows:

	Claimed	Accepted	
Storage costs August to December 2010	825.00	281.23	August & September 2010
Loss of time at work/personal time moving	290.00	0	
Loss of quiet enjoyment – illegal entry 4 times	280.00	0	
Fuel bills due to forced move	1,800.00	128.75	August & September fuel receipts totalling 643.75 @ 20%
Stress due to actions of landlord	1,075.00	100.00	
TOTAL	4,270.00	509.98	

I find that if the landlord had allowed the tenancy to end by leaving the unit in a habitable state while renovations occurred, until the effective date of the Notice ending tenancy, the tenant would not have incurred storage costs or been forced to move to a location further removed from his place of employment. The parties also had the option of reaching a mutual agreement to end the tenancy; this did not occur.

I have calculated the amount of fuel costs owed to the tenant, based on the difference in kilometers driven, discounted for non-work related driving during August and September, 2010, only.

The tenant did not dispute the notice ending tenancy, as the unit was in an uninhabitable state. However, even if the move had occurred at the end of September, the tenant would have been required to take time to move; therefore, I dismiss the claim for moving costs. Further, the tenant provided no verification of any loss of wages.

I find that the tenant would have been expected to locate a new residence by September 30, 2010, at the latest and that no costs are due to the tenant beyond that date.

In relation to the claim for illegal entry into the unit; there is no evidence as to how the landlord's cat entered the tenant's unit. The entry made over the weekend of July 30, 2010, has been considered as part of the claim for aggravated damages.

In relation to the claim for stress, or aggravated damages as the result of a non-pecuniary loss, caused by the unexpected move, I find, despite the failure of the tenant to notify the landlord of the moisture problems, that the landlord commenced

remediation work in the unit without ensuring the tenant could continue to reside in the unit until the tenancy ended as provided by the Act.

I find that from the period of August 2, 2010, when the tenant returned home and the time the tenant vacated the unit on August 9, 2010, that the tenant did suffer inconvenience and I accept that he found this stressful.

Residential Tenancy Branch policy suggests that in order to award aggravated damages there must be evidence that the tenant has been wronged as the result of reckless or indifferent behaviour of the landlord. Compensation is measured by the wronged person's suffering.

- The damage must be caused by the deliberate or negligent act or omission of the wrongdoer;
- The damage must also be of the type that the wrongdoer should reasonably have foreseen in tort cases, or in contract cases, that the parties had in contemplation at the time they entered into the contract that the breach complained of would cause the distress claimed; and
- They must also be sufficiently significant in depth, or duration, or both, that they represent a significant influence on the wronged person's life. They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses.

I find this to be a reasonable stance.

The landlord has acknowledged the remediation work that commenced while the tenant was away, rendered the rental unit in an uninhabitable state. Even if the landlord had not acknowledged this, I would find that that over the weekend of July 30, 2010, the unit was put in a state that could no longer accommodate the tenant.

The tenant has been partially successful in his claim for damages for out-of-pocket expenses. I have found that the tenant had some role, by his own negligence, in placing the property at risk by not informing the landlord of the need to address water egress issues. However, the landlord has committed a breach of the Act, by essentially taking possession of the rental unit without the benefit of an Order of possession.

Even if the repairs had been considered an emergency and necessary as provided by section 33 of the Act, the landlord has breached the Act by failing to obtain legal possession of the unit.

Therefore, as the tenant was forced to vacate the rental unit before the effective date of the 1 Month Notice ending tenancy, I find that he is entitled to a nominal award in the sum of $100.00 in damages.

The balance of the tenant's claim for compensation is dismissed.

In relation to the tenant's claim for return of the deposit paid; the landlord confirmed receipt of the written forwarding address on August 3, 2010. The landlord applied to retain the deposit outside of the 15 day time period provided by section 38 of the Act.

Section 38(1) of the Act determines that the landlord must, within 15 days after the later of the date the tenancy ends and the date the landlord received the tenant's forwarding address in writing, repay the deposit or make an application for dispute resolution claiming against the deposit. If the landlord does not make a claim against the deposit paid, section 38(6) of the Act determines that a landlord must pay the tenant double the amount of security deposit.

Therefore, I find that the tenant is entitled to return of double the $340.00 deposit, plus interest in the sum of $12.03; totaling $692.03.

As each application has some merit I decline filing fee costs to either party.

Pursuant to section 72(2) of the Act, I find that the landlord is entitled to retain the tenant's security deposit in the amount of $500.00**,** in satisfaction of the landlord's monetary claim.

Conclusion

I find that the landlord has established a monetary claim, in the amount of $500.00, which is comprised of nominal damages.

The landlord will be retaining $500.00 of the tenant's security deposit in satisfaction of the monetary claim.

I find that the tenant has established a monetary claim in the amount of $1,202.01, which is comprised of return of double the deposit plus interest in the sum of $692.03, plus compensation for damage or loss in the sum of $509.98.

As the landlord will retain $500.00 of the deposit in satisfaction of their claim, I grant the tenant a monetary Order for the balance owed of $702.01**.** In the event that the landlord does not comply with this Order, it may be served on the landlord, filed with the Province of British Columbia 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*.

Dated: May 2, 2011.

Residential Tenancy Branch