

## **DECISION**

Dispute Codes      MNDC, FF, O

### Introduction

This hearing was scheduled to hear the tenant's application for compensation for damage or loss under the Act, regulations or tenancy agreement. Both parties appeared at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

### Issue(s) to be Decided

Has the tenant established an entitlement to compensation for damage or loss under the Act, regulations or tenancy agreement?

### Background and Evidence

The tenancy commenced in May or June 2010 and the tenant vacated the rental unit August 11, 2011. The tenant paid a \$900.00 security deposit and was required to pay rent of \$1,800.00 on the 1<sup>st</sup> day of every month.

It was undisputed that the hot water tank leaked and that during the remediation process the tenant moved her possessions into a steel storage container supplied by the landlord. There was a period of time when the tenant and her child did not live in the rental unit and the tenant moved back in when the remediation work was complete. The tenant continued to pay rent after the leak and during the remediation. The landlord filed an insurance claim and received proceeds for loss of rent. The tenant did not have tenant's insurance.

The parties were in dispute as to when the leak occurred and when the tenant was able to move back into the rental unit. The tenant submitted that the leak occurred April 17, 2011 and that she started staying with friends and family April 19, 2011 due to concerns of mould and asbestos. The tenant submitted the landlord's agent had knowledge of asbestos as the agent spoke with her and her parents about the presence of asbestos. The tenant submitted that approximately a month later the remediation contractor asked the tenant to remove her possessions from the rental unit to facilitate the remediation,

which she did. The tenant submitted that she moved back into the rental unit June 8, 2011.

The landlord submitted that the flood occurred May 17, 2011 and on May 24, 2011 the steel storage container was provided for the tenant's possessions. The landlord submitted that the rental unit was ready for occupancy on June 24, 2011. The landlord explained that he claimed two months of loss of revenue from the insurance company and was provided a cheque in the amount of \$3,600.00 by the insurance company; however, the insurance company then requested the landlord not deposit the cheque. The landlord submitted that the cheque of \$3,600.00 was returned to the insurance company and replaced with a cheque in the amount of \$1,800.00 representing one month of loss of rent.

The landlord suggested that the hot water tank was not old and that it likely leaked because the temperature setting was on its highest setting. The landlord's agent denied having a conversation with the tenant or her parents about the presence of asbestos in the rental unit.

I have summarized the tenant's claim to recover the following amounts from the landlord with respect to the flood and the landlord's responses:

Items	Amount	Tenant's reasons	Landlord's response
Packers & Movers	500.00	To move possessions to storage container during remediation.	Tenant had to move from house as she was making remediation difficult for contractor.
Packers & Movers	500.00	To move possessions back to house after remediation.	See above.
Electricity bill	251.71	Contractors powered their tools and fans using tenant's electricity.	Contractors used generator. Tenant has not provided copy of electricity bill to show usage during this time.
Claim related to flood	\$ 4,851.71		

In addition to the above claims, the tenant is also seeking compensation in the amount of \$4,984.43 due to having to move out of the rental unit in August 2011. The tenant requested compensation associated to a variety of moving costs including packers,

storage, and movers. The tenant also claimed compensation for alternative living accommodation for August 11 - 31, 2011; loss of wages for August 8 – 12, 2011; an NSF charge of \$40.00 with respect to August's rent cheque; and \$900.00 for the "damage deposit". The tenant did not provide any receipts, invoices or other documentary evidence to support the amounts claimed.

The tenant submitted that the landlord illegally evicted her due to unpaid rent and utilities when the landlord had previously agreed that the \$3,600.00 in insurance proceeds would be applied to the rent for August 2011 and the tenant would be refunded the balance of \$1,800.00. The landlord also had a post-dated rent cheque for August 2011. Despite the landlord's agreement and possession of a rent cheque, the landlord posted a 10 Day Notice to End Tenancy for Unpaid Rent on the tenant's door. The tenant did not dispute the Notice by filing an Application for Dispute Resolution but decided to accept the end of the tenancy and moved out of the rental unit August 11, 2011.

The landlord acknowledged there was a discussion with the tenant over the phone at the end of July 2011 while the tenant was in Calgary. The landlord submitted that the tenant informed him that she may be moving out of town due to a job offer. The landlord denied agreeing to apply insurance proceeds to August rent owed and explained that he intended to send the tenant a cheque once the insurance claim was finalized. The landlord tried cashing the tenant's rent cheque and it was declined for insufficient funds. The landlord submitted that the tenant advised him to serve her with an eviction notice for August's rent. The landlord then posted a 10 Day Notice which the tenant did not dispute.

The tenant acknowledged that she had not provided the landlord with a forwarding address for return of the security deposit prior to filing this Application for Dispute Resolution. The landlord has filed an Application for Dispute Resolution claiming against the security deposit which is set for hearing February 1, 2012.

### Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;

2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. Verification of the value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Since the applicant bears the burden to verify the value of the loss claimed I find it reasonable to expect the tenant to provide estimates, receipts or invoices to verify the amounts she claimed except in cases where documents are not obtainable, in which case another reasonable basis will be considered.

### ***Damages and loss due to flood***

Section 32 of the Act provides that a landlord has a statutory duty to provide and maintain a residential property so that it complies with health, safety and housing standards required by law.

Residential Tenancy Policy Guideline 16 provides for claims in damages. The guideline provides, in part,

#### **Claims in Tort**

A tort is a personal wrong caused either intentionally or unintentionally. An arbitrator may hear a claim in tort as long as it arises from a failure or obligation under the Legislation or the tenancy agreement. Failure to comply with the Legislation does not automatically give rise to a claim in tort. The Supreme Court of Canada decided that where there is a breach of a statutory duty, claims must be made under the law of negligence. In all cases the applicant must show that the respondent breached the care owed to him or her and that the loss claimed was a foreseeable result of the wrong.

[my emphasis added]

Where a rental unit is damaged by an unforeseen event, such as fire or flooding, it is upon the landlord to repair the rental unit and residential property. Damage to a tenant's property or other losses, other than the loss of use of the rental unit, are not the responsibility of the landlord unless the landlord has been negligent in the duty owed to the tenant. Tenant's insurance generally covers damages or loss a tenant may suffer as a result of an unforeseen event such as fire or flood.

In light of the above, it is upon the tenant to show that the flood was a result of the landlord's negligence or that the landlord was negligent in having the property repaired. Negligence is the failure to exercise the degree of care considered reasonable under the circumstances, resulting in an unintended injury to another party. Upon consideration of the evidence before me, I find the tenant has not satisfied me that the landlord knew or ought to have known that the hot water tank was about to leak. Nor do I find sufficient evidence the landlord was negligent in having the rental unit repaired sufficiently or in a timely manner.

Residential Tenancy Policy Guideline 16 does provide that a tenant may be entitled to compensation for loss of use of a rental unit, even if there is no negligence on part of the landlord. Therefore, I find the tenant entitled to compensation for the period of time she did not reside in the rental unit.

The parties were in dispute as to the time period for which the tenant was not residing in the rental unit. I find that both parties were remiss in providing documentary evidence to support their respective positions. For instance, it is reasonable to expect the tenant would have provided copies of the receipts for the movers to show when her possessions were moved into and out of the storage container. I find it reasonable to expect the landlord would have provided copies of the contractor's invoices and insurance claim papers to support the dates submitted by the landlord. In contrast to the evidence that was available to the parties, the only documentary evidence I was provided that provides any indication as to when the tenant moved her possessions out of the rental unit is the statement for the steel storage container. While the invoice for the storage container would have provided more pertinent information, the statement shows that an invoice was issued to the landlord May 24, 2011. Therefore, I base the tenant's award upon the landlord's version of events and find the tenant entitled to a rent abatement for the period of May 24, 2011 through June 24, 2011. The tenant is awarded \$1,800.00 for loss of use of the rental unit for one month.

In the absence of verification of the amounts paid to the movers or for electricity usage during the remediation, I find the tenant has failed to establish an entitlement to recover these amounts from the landlord.

### ***Damages and loss due to end of tenancy***

With respect to the tenant's claims for costs associated to moving out of the rental unit in August 2011 I find the tenant not entitled to such costs from the landlord. I accept that the tenant's rent cheque was declined for insufficient funds. There is insufficient evidence there was an agreement to apply the insurance proceeds to the rent owed for August 2011; however, upon receiving a 10 Day Notice to End Tenancy for Unpaid

Rent, the tenant's could have disputed the Notice or pay the outstanding rent, which she chose not to do. Since the tenant chose to accept the end of tenancy I do not hold the landlord responsible for the tenant's choice especially when she had other options available to her. Therefore, the tenant's claims for packing, moving, storage, alternative accommodation and loss of wages are dismissed.

I also dismiss the tenant's claim for NSF charges I find there is no basis under the Act to award this claim to the tenant.

Finally, I decline to consider the tenant's request for return of the security deposit as she did not identify such a request on the Application for Dispute Resolution and because such a claim is premature given she did not provide the landlord with her forwarding address prior to filing this Application for Dispute Resolution.

### ***Monetary Order***

Given the tenant's limited success in this application, I award the tenant \$20.00 for the filing fee she paid for this application.

I provide the tenant with a Monetary Order in the amount of \$1,820.00 to serve upon the landlord and enforce as necessary in Provincial Court (Small Claims).

### **Conclusion**

The tenant was successful in establishing an entitlement to compensation for loss of use of the rental unit and has been awarded \$1,820.00. The tenant's request for the security deposit was not considered as the request was not clearly identified on the Application for Dispute Resolution and because such a request was premature. The remainder of the tenant's claims have been dismissed without leave to reapply.

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: December 13, 2011.

---

Residential Tenancy Branch