



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNR, OPR, MNR, MNSD, MNDC, RR, FF

Introduction

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

The landlord filed pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. An Order of Possession for unpaid rent - Section 55
2. A Monetary Order for unpaid rent - Section 67
3. An Order to retain the security deposit - Section 38
4. An Order to recover the filing fee for this application (\$100) - Section 72

The tenant filed pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. To cancel an 10 Day Notice to End for Unpaid Rent - Section 46
2. Allow tenant to reduce rent for repairs for services agreed upon – Section 65
3. A Monetary Order for compensation for loss – (rent abatement) - Section 67
4. An Order to recover the filing fee for this application (\$100) - Section 72

The landlord's agent testified they were acting with full authority of the landlord and owner. Both parties appeared in the conference call hearing and participated with their submissions and testimony and were given opportunity to settle their dispute during the hearing. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The tenant acknowledged receipt of the landlord's document evidence package including the tenancy agreement, Notice to End,

and acknowledged not submitting document evidence of their own, but wished to provide oral evidence.

The tenant advised they are still residing in the rental unit. The landlord orally requested an Order of Possession to be effective February 29, 2012.

Issue(s) to be Decided

- Should the Notice to End be cancelled? Effectively, is the landlord entitled to an Order of Possession?
- Is the tenant entitled to a rent abatement for services agreed upon but not provided, or compensation for loss; and, if so, in what amount?
- Is the landlord entitled to the monetary amount claimed?

Background and Evidence

The testimony of the landlord and the tenant is that this tenancy has been the subject of previous dispute resolution proceedings and to this date remains acrimonious and in dispute.

This tenancy started September 1, 2010 and was renewed August 01, 2011. Rent in the amount of \$5000 is payable by the tenant in advance on the first day of each month. At the outset of the tenancy, the landlord collected a security deposit from the tenant in the amount of \$2500. The tenant failed to pay rent in the month of December 2012 and the landlord served the tenant with a Notice to End for Unpaid rent. The tenant disputed that Notice and it was cancelled as it was deemed not to be effective.

On January 24, 2012 the tenant was deemed served by registered mail with a Notice to End Tenancy for non-payment of rent dated January 19, 2012 - for rent arrears of \$10,000 for the months of December 2011 and January 2012. The landlord provided evidence of the registered mail sent on January 19, 2012, which the tenant agrees was received. The tenant further failed to pay rent in the month of February 2012. On February 01, 2012 the tenant filed an application for dispute resolution to dispute the

Notice to End as well as seeking monetary compensation. The landlord testified the rent has not been paid. The sum of the landlord's monetary claim is for the unpaid rent of \$15,000.

The tenant testified they have not paid the outstanding rent of \$15,000 and have not turned their mind to vacating the rental unit. The tenant verbally and generally amended their application from their original claim of \$15,000. The tenant claims that during the tenancy they have encountered a series of issues which they claim have impacted on their quiet enjoyment of the property and for which they seek compensation.

- The tenant claims there has been a lack of heat (the heating issue) to the top floor master bedroom and en-suite – during period requiring heat - since the beginning of the tenancy which began 18 months prior. The tenant claims they have had to compensate via the use of space heaters when required.
- The tenant claims that yard maintenance (the yard work) has suffered during the tenancy despite the landlord's periodic provision of a yard maintenance contractor. The landlord has also not provided a lawn mower, as stipulated in the tenancy agreement.
- The tenant claims that the landlord neglected to clean gutters (the gutters) – causing water flow issues leading to safety issues due to frozen water build-up adjacent to foot traffic, as well as an interruption in mail delivery due to the resulting unsafe condition.
- The tenant claims that water ingress from a skylight (the skylight problem) has caused some leaking into the unit during periods of rain.

The parties disagree with one another respecting the particulars associated with the tenant's claims.

The tenant testified that the landlord has made some efforts to resolve the heating issue but that the lack of heat to the top floor areas persists and that they have had to use space heaters to compensate. The landlord testified they resolved the issue. The landlord provided a witness;

Witness (CL) – licensed plumber and gas fitter

The witness testified under oath that they inspected the heating system and serviced it in September 2011, and made some modifications to improve air flow to the top floor, but acknowledged that the top floor still suffers from some reduced air flow, yet undetermined. The witness testified that at the time of servicing the heating system had a dirty filter and was evidently in need of maintenance. The witness also testified that they had made an effort to clean the problem gutter(s) which the tenant identified as being problematic, but that the tenant told them to ignore the problem and they heard no more of the issue thereafter.

The landlord provided an e-mail assessment from a heating system contractor dated February 07, 2012 respecting the heating issue, which identified a loss of air flow to the top floor requiring further investigation, with the view to subsequently remediate any problem found.

The tenant testified that the landlord has not performed yard and other maintenance, including servicing the furnace, in accordance with the tenancy agreement – Section 4 SS.i – all respecting conditions agreed to by the parties to be performed *prior* to the tenancy. The tenant agrees the landlord has provided some yard maintenance at their own cost since the tenancy began. The landlord testified that the tenancy agreement provides that the tenant will be responsible for yard work – Section 4 K. The tenant claims that their responsibility of the yard work would have been aided by the provision of a lawn mower by the landlord as required by the tenancy agreement – Section 2. The landlord acknowledged not providing a lawn mower.

The tenant's testimony is that the landlord neglected to clean the gutters as promised by the tenancy agreement, and also when they identified the associated problems caused by their neglect. The landlord claims the tenant refused their contractor's (witness) attention to the problem.

The tenant testified they alerted the landlord to the matter of water entering through the closed skylight during rain. The landlord responded by sending 2 individuals during a dry period. Upon their inspection and discussion with the tenant, the individuals determined the skylight was not a cause for water ingress. The tenant claims that in the absence of water application to the skylight and in the absence of rain during the

inspection, they pointed to water marks about the skylight to show that water was evidently entering. The tenant testified that the water leaking persists to this date, and they compensate for the issue using towels below the skylight.

Analysis

On preponderance of all document evidence submitted and upon all oral evidence provided by both parties I have reached a decision on all portions of the respective applications by the parties.

The following portions, in part, of the *Act* and the *Regulations* are pertinent to the matters before this hearing. A complete copy of both statutes can be viewed at www.rto.gov.bc.ca

The ACT:

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.
- (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.

Rules about payment and non-payment of rent

- 26** (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Protection of tenant's right to quiet enjoyment

- 28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
- (a) reasonable privacy;
 - (b) freedom from unreasonable disturbance;

Landlord and tenant obligations to repair and maintain

- 32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
- (a) complies with the health, safety and housing standards required by law, and
 - (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.
- (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

Landlord's Notice: non-payment of rent (emphasis mine)

- 46** (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
- (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
- (4) Within 5 days after receiving a notice under this section, the tenant may
- (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
- (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
 - (b) must vacate the rental unit to which the notice relates by that date.

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.

The Regulations

Schedule - Repairs

8 (1) Landlord's obligations:

(a) The landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant. The landlord must comply with health, safety and housing standards required by law.

(b) If the landlord is required to make a repair to comply with the above obligations, the tenant may discuss it with the landlord. If the landlord refuses to make the repair, the tenant may make an application for dispute resolution under the *Residential Tenancy Act* seeking an order of the director for the completion and costs of the repair.

I find the evidence is that landlord was at least on notice the heating system required maintenance when the tenancy agreement was renewed in August 2012. Despite their efforts in September 2011 to address the lack of heat to the top floor portion, the heating issue has persisted and the landlord did not again address the matter until late January 2012 – well into the colder season. I accept that the tenant had to compensate using their own source of supplement heating. The heating system is the responsibility of the landlord. As a result, on this portion of their claim I find the tenant is entitled to an award of compensation. I grant the tenant a set compensation amount of **\$400**, without leave to reapply.

I find that the landlord did not provide the tenant with a lawn mower, as contracted by the parties. I accept that as a result the tenant's responsibility to perform the yard work, on balance of probabilities, was hampered. I accept the evidence of both parties that the landlord provided some professional yard maintenance on a periodic basis. As the tenancy agreement (contract) called for a lawn mower to be provided, and it was not, I find that as a result, on this portion of their claim, the tenant is entitled to an award of compensation. I grant the tenant a set compensation amount of **\$300**, without leave to reapply.

I find that the cleaning of the gutters is a responsibility of the landlord and that cleaning of the gutters, primarily in the area affecting pedestrian safety and mail delivery was not performed by the landlord, and as a result, I accept the tenant suffered an inconvenience and loss of quiet enjoyment. I grant the tenant a set compensation amount of **\$400**, without leave to reapply.

I find that the maintenance and integrity of the skylights is a responsibility of the landlord and that having been alerted to a problem by the tenant, the landlord may have attended with a view to resolving the leaking skylight, but did not act effectively to prevent the skylight from leaking. As a result, I accept the tenant continued to suffer an inconvenience and loss of quiet enjoyment. I grant the tenant a set compensation amount of **\$600**, without leave to reapply.

Based on the testimony of both parties as well as the document evidence, I find that the tenant was served with a Notice to End tenancy for non-payment of rent. The tenant has not paid the outstanding rent of \$15,000 and despite having applied for Dispute Resolution to dispute the notice the tenant has not paid the rent as required by the Act, and they do not possess an Order allowing them to withhold the rent, or provided receipts they expended the equivalent of rent on emergency repairs. Therefore, based on the above facts I uphold the landlord's Notice to End for Unpaid Rent dated January 19, 2012. I find the notice to be valid – effectively dismissing the tenant's application to cancel the Notice to End. I find that the landlord is entitled to an **Order of Possession** as per Section 55 of the Act.

I find that the landlord has established a monetary claim for the unpaid rent of \$15,000.00. As both parties are entitled to recover their respective filing fees from the other, I decline to grant either party their filing fee. The security deposit of this tenancy will be off-set from awards made herein.

Calculation for Monetary Order

Rental Arrears to landlord for December 2011 and January and February 2012.	\$15000.00
Less Security Deposit held by landlord	-2500.00
Balance of Monetary Award to landlord	\$10800.00

Conclusion

The tenant has been granted an award in compensation. The tenant's application to cancel the Notice to End has been **dismissed**.

I grant an Order of Possession to the landlord effective **February 29, 2012**. 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. The landlord retains discretion.

I Order that the landlord retain the security deposit of \$2500.00 in partial satisfaction of the claim and I grant the landlord an Order under Section 67 of the Act for the balance of the landlord's monetary award of **\$10,800.00**. 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*.

Dated: February 22, 2012.

Residential Tenancy Branch