



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNR; MND; MNDC, MNSD; FF

Introduction

This is the Landlord's application for a Monetary Order for damage to the rental unit, unpaid rent; for compensation for damage or loss under the Act, regulation or tenancy agreement; to retain the security deposit in partial satisfaction of his monetary award; and to recover the cost of the filing fee from the Tenants.

The parties gave affirmed testimony at the Hearings.

Preliminary Matters

1. The Landlord's Application for Dispute Resolution named an additional Respondent (the "Tenant CO"). It was established that the Tenant CO received the Notice of Hearing documents on April 16, 2012, in accordance with the provisions of Section 89 of the Act.

The Tenant CO stated that he moved out of the rental unit in April, 2008, and that therefore he did not believe he remained a Tenant under the tenancy agreement and should not be properly named as a Respondent. The Landlord's agent disagreed and stated that the Tenant CO did not give the Landlord notice to end the tenancy. He submitted that parties cannot unilaterally remove themselves from a contract. The Tenant CO replied that the Landlord and the Tenant SB changed the terms of the tenancy agreement after he moved out, by reducing the amount of rent that was payable, and that therefore a new tenancy agreement was created between the Tenant SB and the Landlord. He acknowledged that he did not give the Landlord notice that he was ending the tenancy, but stated that the Landlord was aware that he had moved out of the rental unit and other occupants had moved in.

The Act defines a "tenancy agreement" as follows:

"tenancy agreement" means an agreement, whether **written or oral**, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

(emphasis added)

The Landlord's agent did not dispute that rent had been changed after the Tenant CO moved out of the rental unit. I find that a term in a tenancy agreement with respect to the payment of rent is a material term of the agreement and that the Tenant SB and the Landlord entered into a new month-to-month oral tenancy agreement in September 2009, when the amount of rent was changed. I find that the Tenant CO was not a party to the new tenancy agreement and I have amended the Landlord's application to remove him as a Respondent.

2. Included in the Landlord's Application for Dispute Resolution filed April 5, 2012, was an application to be allowed to serve the Tenant SB in a manner different from the service provisions of the Act. This portion of the Landlord's application was successful and on April 12, 2012, the Landlord was provided an order that the Landlord could serve the Tenant SB with the Hearing documents and any evidence, at her e-mail address.

The Landlord's agent testified that the Landlord served the Tenant SB with the Notice of Hearing documents on April 16, 2012, in accordance with the provisions of the substituted service order. The Tenant SB stated that she did not know about the Hearing until May 27, 2012 when she found the Landlord's e-mail of April 16, 2012, in her "junk" e-mail folder with no attachments. She stated that the Tenant CO sent her the documents by e-mail on May 27, 2012. The Landlord's agent stated that he also sent her the documents again on May 27, 2012.

I find that the Tenant SB was sufficiently served with the Notice of Hearing documents on April 16, 2012, in accordance with the provisions of the substituted service order. However, I accept the Tenant SB's testimony that she was not able to open the attachments to the e-mail and that she did not see the documents attached to the e-mail until May 27, 2012.

3. The Tenant SB requested an adjournment in order to allow her more time to prepare for the Hearing and arrange for a witness to attend. The Landlord's agent opposed the adjournment but asked that if I grant the adjournment, I make an Order that the Tenant SB provide the Landlord a document outlining what the Tenant's witness will say at the reconvened Hearing. I found that I was able to reschedule the Hearing within four days and that therefore the adjournment posed no prejudice to the Landlord. I also ordered the Tenant to provide the "will say" statement to the Landlord's agent. The Tenant SB did not provide a "will say" statement and did not call a witness at the reconvened Hearing.

4. The Landlord's agent asked to amend the Landlord's Application for Dispute Resolution to include a claim of \$632.80 for the cost of repairs to a door and walls. He stated that when the Application was filed the cost was omitted in error from the list of damages claimed.

The Landlord's documentary evidence made it clear that the Landlord was seeking to recover the cost of these repairs. The Tenant received the Landlord's documentary evidence and was aware that the Landlord intended to include this cost in his claim for damages. Therefore I amended the Application to include this claim.

5. The Landlord's agent testified that the Tenant did not serve the Landlord with copies of her documentary evidence until June 4, 2012, less than 24 hours before the Hearing.

The Residential Tenancy Branch received two packages of evidence from the Tenant: one on May 30, 2012; and one on May 31, 2012. When asked why the Tenant waited so long to provide copies of her documents to the Landlord, she stated that she was not able to get the documents to the Landlord before June 4, 2012, because she was too busy. I do not accept this submission. The parties have a history of communicating by e-mail and I find that the Tenant could have forwarded the documents to the Landlord by e-mail on May 30, 2012, and on May 31, 2012. Therefore, I have not considered the Tenant's documentary evidence when arriving at my Decision.

Issues to be Decided

- Is the Landlord entitled to a monetary award for unpaid rent and loss of revenue for the months of November and December, 2011, in the total amount of \$3,100.00?
- Is the Landlord entitled to recover the costs of an air quality test in the amount of \$504.00 from the Tenant?
- Is the Landlord entitled to a monetary award for cleaning and repairs to the rental unit and common property in the amount of \$3,784.80?
- Is the Landlord entitled to recover the cost of replacing the blinds in the estimated amount of \$3,000.00 from the Tenant?
- Is the Landlord entitled to recover the cost of replacing fobs and a garage pass in the amount of \$450.00 from the Tenant?

Background and Evidence

This tenancy began on January 1, 2007. Rent at the beginning of the tenancy was \$2,200.00 per month and was reduced to \$1,800.00 per month in January, 2008, and reduced again to \$1,550.00 per month in September, 2009. A security deposit in the amount of \$1,100.00 was paid on January 1, 2007.

The Landlord does not reside in British Columbia.

The rental unit is a condominium in a building run by a strata corporation.

The Landlord's agent gave the following testimony and evidence:

The Landlord's agent stated that the Tenant abandoned the rental unit on November 14, 2011, without paying any rent for the month of November. The Landlord seeks a monetary award for unpaid rent for November, 2011, and loss of revenue for December, 2011.

He stated that the Landlord received an e-mail from the Tenant on November 13, 2011, alleging that there was mould in the rental unit that was compromising her health and that she would be moving out of the rental unit. He stated that the Landlord asked the Tenant for proof that there was mould and that it was negatively impacting her health, but the Tenant did not provide any such proof.

The Landlord's agent testified that a representative of the strata corporation sent an e-mail to the Landlord on November 14, 2011, advising that the Tenant had scheduled a move-out for 10:00 a.m. the following day. He stated that on November 15, 2011, the Landlord received an e-mail from the Tenant attaching a notice to end the tenancy dated November 14, 2011. The notice indicated that the Tenant was ending the tenancy immediately because of the mould in the rental unit.

The Landlord's agent testified that the Tenant moved out on November 15, 2011 and in the course of moving damaged a door and walls in the hallway common area. He stated that the Tenant assured the Landlord that she would pay for the damage, but has not. The Landlord seeks a monetary award in the amount of \$632.80 for the cost of repairing the door, door jamb and three walls. A copy of the invoice was provided in evidence.

The Landlord's agent stated that the Landlord returned to the rental unit on December 17, 2011, to attempt to ascertain the validity of the Tenant's claims about the mould. On January 10, 2012, he had a professional mould inspection performed and provided a copy of the report in evidence. The Landlord seeks to recover the cost of the report in the amount of \$504.00 from the Tenant. A copy of the invoice was provided.

The Landlord's agent testified that the Tenant painted a wall purple, another wall blue and put up wallpaper without the Landlord's permission. He stated that there were many holes in the walls and that the Landlord had to fill the holes and repaint the rental unit. In addition, he stated that the rental unit was very dusty and dirty and had to be completely cleaned; the blinds were dirty and bent; and the fridge had broken and missing pieces. The Landlord's agent testified that the rental unit was pristine when the tenancy started and that had been painted within a year of the start of the tenancy. The Landlord's agent stated that he was not certain whether or not a move-in Condition Inspection Report was completed, but that no move-out Condition Inspection was done because the Tenant abandoned the rental unit. The Landlord seeks an award in the amount of \$3,152.00 for the cost of cleaning, repairing and painting the rental unit. A copy of the invoice was provided in evidence. The Landlord also seeks a monetary award in the amount of \$3,360.00 to replace the blinds in the rental unit. The Landlord's agent stated that he is not sure if the Landlord has replaced the blinds, but believes the cost would be approximately \$3,000.00 plus HST based on an estimate (copy of e-mail provided).

The Landlord's agent stated that the rental unit is currently listed for sale.

The Landlord's agent stated that the Tenant did not return 4 fobs and the parking pass to the rental unit at the end of the tenancy. The Landlord seeks a monetary award in the amount of \$450.00 for the replacement cost of these items. Copies of e-mails from the strata representative to the Landlord were provided which indicate the replacement costs.

The Tenant gave the following testimony:

The Tenant stated that the dishwasher had leaked on a couple of occasions during the latter part of the tenancy and that the water had caused mould to grow in the walls of the rental unit. She stated that on October 12, 2011, a restoration company was called by the building manager to assess damages from the most recent leak. She stated that the representative from the restoration company who attended advised her that it was not safe to live in the rental unit because of the exposed mould. The Tenant stated that the restoration company prepared a report, but she was not allowed to have a copy of it because she was not an owner.

The Tenant stated that she e-mailed the Landlord on October 12, 2011, to tell him about the exposed mould, but he would not agree to pay for a mould inspection of the rental unit and told her she would have to deal with his brother-in law. She stated that the Landlord asked her to provide proof that there was mould in the rental unit and that it was causing her medical problems.

The Tenant testified that the Landlord was having difficulties with his brother-in-law, who was co-owner of the rental unit. She stated that the Landlord's brother-in-law started leaving threatening calls on her answering machine and said he would enter the rental unit without due notice, or her permission, and change the locks.

The Tenant testified that for the next month, she and her roommate were sick, as was her pet. She stated that she went to her doctor who did chest x-rays. She stated that the doctor told her that her problems could be related to the mould in the rental unit.

The Tenant testified that she was happy in the rental unit until October, 2011, but when she, her roommate and her pet got sick from the effects of the mould, and when it became clear that the Landlord or his brother-in-law were not going to remedy the situation, they decided they would have to move out.

The Tenant stated that there was no move-in Condition Inspection Report done at the beginning of the tenancy. She stated that she left the rental unit reasonably clean at the end of the tenancy.

The Tenant testified that on November 16, 2011, she gave all of the keys she had back to the building manager. The Tenant acknowledged that she was short one grey fob, which is worth \$50.00. The Tenant stated that she gave the parking pass to "Shane" when he was at the rental unit to work on repairing the damaged baseboards after the leak.

The Tenant stated that the rental unit was not painted just before she moved in and that the blinds appeared to be the original blinds. She stated that the rental unit was 10 years old when she moved in.

The Tenant did not dispute that the walls and door were damaged during the move-out. She stated that she did not repaint the purple and blue walls or take down the wallpaper because it was not safe to work in the rental unit because of the mould.

She stated that the Landlord did not have the mould inspection done until three months after she reported that there was dangerous mould in the rental unit. The Tenant submitted that the Landlord could have had the rental unit "cleaned up" between the time she moved out and the time the inspection was done.

Analysis

This is the Landlord's claim for a monetary award and therefore the Landlord has the burden of proof to establish his claim on the civil standard, the balance of probabilities.

To prove a loss and have the Tenant pay for the loss requires the Landlord to satisfy four different elements:

1. Proof that the damage or loss exists,
2. Proof that the damage or loss occurred due to the actions or neglect of the Tenant in violation of the Act,
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage, and
4. Proof that the Landlord followed Section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Is the Landlord entitled to a monetary award for unpaid rent and loss of revenue for the months of November and December, 2011, in the total amount of \$3,100.00?

The Tenant submits that she ended the tenancy because the Landlord failed to repair and maintain the rental unit. Section 45(3) of the Act states that a tenant may end a tenancy effective on a date that is after the date the landlord receives a notice to end the tenancy if the landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure.

I accept the Tenant's testimony that she advised the Landlord about her concerns about mould in the rental unit on October 12, 2011. The Landlord provided a copy of an e-mail dated November 13, 2011, wherein he states, "I do not believe there is a(n) issue of mould considering [the restoration company] removed the damaged particles and then the construction person replaced the gyrock (sic), base boards and repainted..... I am assuming you completed a mold test to make such grave allegations? Please provide us with the result to support your claims."

While I recognize that the Landlord has an obligation under Section 32 of the Act to provide and maintain a reasonable state of repair to the rental unit, I find that there is insufficient evidence that there was mould in the rental unit. Therefore I do find that the tenancy ended in accordance with the provisions of Section 45(3) of the Act.

The Tenant advised the Landlord of her concern about possible mould in the rental unit on October 12, 2011. The Landlord's response was to insist that the Tenant prove that there was mould in the rental unit. In so doing, the Landlord treated the Tenant as his agent rather than his Tenant.

When I questioned the Landlord's agent whether the Landlord had received a copy of the restoration company's October 12, 2011 report, he stated that no report had been provided to the Landlord and that the Landlord had not requested it. The Tenant testified that she was not able to get a copy of the report because she was not an owner and therefore was not entitled to a copy.

The Landlord had access to the corroboration that he sought from the Tenant, but chose not to request a copy of the report from the restoration company. His response to the Tenant's concerns was to deny that a problem existed. I find that the Tenant had reason to believe that the Landlord would do nothing to investigate her legitimate concerns about mould in the rental unit. I accept the Tenant's testimony that she was ill and that she believed her illness was related to the mould in the rental unit.

Paragraph 10 of the tenancy agreement provides that the Landlord must provide and maintain the residential property in a reasonable state of decoration and repair. This term is supported by Section 32 of the Act. A material term of a tenancy agreement is a term that is so important that the slightest breach of that term may give a party cause to end the tenancy agreement. I find that this term in the tenancy agreement is a material term of the agreement.

I find that the Landlord fundamentally breached a material term of the tenancy agreement and Section 32 of the Act. **I find that the Tenancy ended on November 14, 2011** due to the Landlord's breach of the tenancy agreement and the Act. I make these findings pursuant to the provisions of Sections 62 and 44(1)(f) of the Act.

The Tenant did not pay any rent for the month of November, 2011, and therefore I find that the Landlord is entitled to prorated rent for the period of November 1 to 14, 2011, in the amount of **\$775.00**. The remainder of the Landlord's claim with respect to unpaid rent and loss of revenue is dismissed.

Is the Landlord entitled to recover the costs of an air quality test in the amount of \$504.00 from the Tenant?

I find that the Landlord is not entitled to recover this cost for the following reasons:

- There is no provision in the Act for tenants to pay for the cost of repairing and maintaining a rental unit unless damage is caused by the actions or neglect of the tenant. There is no evidence that the Tenant was responsible for the water leak in the rental unit.

- The report is irrelevant as it is not indicative of the state of the rental unit during or at the end of the tenancy.

This portion of the Landlord's application is dismissed.

Is the Landlord entitled to a monetary award for cleaning and repairs to the rental unit and common property in the amount of \$3,784.80?

I find that the Landlord provided sufficient evidence to support his claim in the amount of **\$632.80** for repairs to a door and walls of a common area in the rental property. The Tenant acknowledged her responsibility for the damage and the Landlord provided a copy of the invoice for the repairs. This portion of the Landlord's claim is granted.

I dismiss the Landlord's claim for the remaining \$3,152.00 for the following reasons:

- The invoice provided in evidence for this portion of the Landlord's claim includes items that I find the Tenant is not responsible for paying. There are charges for towing and impound costs for the worker's truck; parking meter charges; and the cost of taking a taxi to the pound. These charges add up to \$214.00.
- The remainder of the invoice is for the cost of preparing walls and baseboards for painting, patching/painting walls and for cleaning the rental unit. The total is \$2,600.00. I find that the Landlord did not provide sufficient documentary evidence to support this portion of his claim. The Residential Tenancy Branch Policy Guidelines provide a useful life for indoor paint of 4 years and I find that the rental unit was in need of painting at the end of the tenancy due to normal wear and tear. In addition, the Landlord is selling the rental unit and would likely have painted the walls in any event. The Landlord did not provide any photographs of the rental unit to support his claim that it was dirty. The Tenant testified that she left the rental unit in a reasonably clean condition. The onus is on the Landlord to prove his claim.
- HST of \$337.71 is calculated on the total of the two items above (\$214.00 + \$2,600.00), which does not make sense. Why would the painter/cleaner charge the customer HST on cab fare, and towing charges which are not his services to tax?

Is the Landlord entitled to recover the cost of replacing the blinds in the estimated amount of \$3,000.00 from the Tenant?

I find that the Landlord failed to provide sufficient evidence to support this portion of his claim. There was no Condition Inspection Report completed at the beginning of the tenancy, which is required under Section 23 of the Act. The onus is on the Landlord to arrange for such inspection to take place. The Landlord did not provide any documentary evidence (for example, photographs) to indicate the condition of the blinds

at the beginning and at the end of the tenancy. The Landlord did not provide evidence that he has replaced the blinds. For these reasons, I dismiss this portion of the Landlord's claim.

Is the Landlord entitled to recover the cost of replacing fobs and a garage pass in the amount of \$450.00 from the Tenant?

Section 37 of the Act requires tenants to give the **landlord** all keys or other means of access that are in the tenant's control. In this case, the Tenant gave three of the four fobs to the building manager, who is not an agent of the Landlord and gave the parking pass to a person who was working on the baseboards in the rental unit. I find that the Tenant did not return the fobs and parking pass to the Landlord at the end of the tenancy. The Landlord provided sufficient evidence of the cost of replacing these items and I allow this portion of his claim in the amount of **\$450.00**.

Pursuant to the provisions of Section 72(2)(b) of the Act, the Landlord may apply the security deposit towards partial satisfaction of the Landlord's monetary award. Interest in the amount of \$33.25 has accrued on the security deposit.

The Landlord has been only partially successful in his application and I find that he is entitled to recover ½ of the cost of the \$100.00 filing fee from the Tenant, in the amount of **\$50.00**.

The Landlord has established a monetary claim as follows:

Unpaid rent	\$775.00
Cost to repair door and three walls in common area	\$632.80
Cost of replacing fobs and parking pass	\$450.00
Partial recovery of the filing fee	<u>\$50.00</u>
Subtotal	\$1,907.80
Less security deposit and accrued interest	<u>- \$1,133.25</u>
TOTAL AMOUNT DUE TO THE LANDLORD AFTER SET-OFF	\$774.55

Conclusion

I hereby provide the Landlord a Monetary Order in the amount of **\$774.55** for service upon the Tenant. This Order may be filed in the Provincial Court of British Columbia (Small Claims) 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: June 14, 2012.

Residential Tenancy Branch