



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNR MNDC RP LRE RR FF

### Preliminary Issues

At the outset of the hearing the owner S.D. advised that as co-owner of the property she would be speaking on behalf of the Landlord A.S. as he cannot speak English that well. The Tenants refuted this statement advising that A.S. spoke and understood English just fine and that most of their dealings pertaining to these matters involved A.S.

In response to the above I requested to speak with A.S. who was listening to the aforementioned conversation. A.S. confirmed the following: he was listed as the Landlord on the tenancy agreement; S.D. was his spouse and co-owner of the rental unit; he resided fulltime in the basement suite, below the rental unit located on the upper floor of the house, and that both he and S.D. dealt directly with the Tenants regarding tenancy matters. I note that during this conversation A.S. appeared to understand English well, he never asked me to restate any of my questions, and he was able to provide intelligent answers in English. Based on the foregoing, I advised the Landlords that S.D. could provide her evidence along with A.S. who would be required to provide testimony in response to anything he was directly involved in.

The Tenants stated they wished to amend their application to include a request to cancel the 10 Day Notice issued November 5, 2012. The Landlords were in agreement to discuss the aforementioned Notice during this proceeding.

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to cancel a 10 Day Notice issued for unpaid rent, to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement and to obtain Orders to have the Landlords make repairs to the unit, site or property; suspend or set conditions on the Landlords' right to enter the rental unit, allow the Tenants reduced rent for repairs, services or facilities agreed upon but not provided, and to recover the cost of the filing fee from the Landlords for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

#### Issue(s) to be Decided

1. Should this fixed term tenancy agreement be ended?
2. Should the Tenants be granted a rent reduction?
3. Should the Tenants be awarded monetary compensation?

#### Background and Evidence

The parties agreed they entered into a fixed term tenancy agreement that began on August 1, 2012 and is set to end July 31, 2013. Rent is payable on the first of each month in the amount of \$1,575.00 and on August 2, 2012 the Tenants paid \$785.00 as the security deposit.

The Tenants submitted evidence in support of their claim which included, among other things, copies of: 23 photos of the deck stair railing; the Tenants' written request for compensation; a letter from the Tenants' mother; proof of J.M.'s wages (the male Tenant); a 10 Day Notice issued November 5, 2012; J.M.'s medical reports (the female Tenant).

The Tenants submitted that they are seeking to end their tenancy effective December 1, 2012, plus monetary compensation of \$5,000.00 for losses suffered after the female Tenant was injured from a fall off of the rental unit deck stairs on October 3, 2012 as follows:

- \$3,800.00 for the male Tenant's lost wages for 1 Month
- 800.00 for the female Tenant's lost wages
- 400.00 for the cost of gas to travel from the rental unit to the hospital where the female Tenant was being treated

The female Tenant stated that on October 3, 2012 she was going to do laundry and was carrying a laundry basket out the deck door and was about to go down the deck stairs to the laundry room when she had to go back inside to attend to her child. She stated that she set the laundry basket down on the deck and walked back inside. When she came back outside she tripped on the laundry basket and fell into the deck which gave way and caused her to fall onto the concrete below. She advised that she hit her head on the way down and suffered a concussion. She pointed to her medical evidence which indicated that she was not able to stay at home alone for one month so her spouse stayed home to care for her and the children which caused them to suffer one month's lost wages.

The Tenants submitted that they had met with the Landlords on October 13, 2012 where they requested reduced rent due to her injury. Nothing was agreed to in that first meeting so they had a verbal agreement to meet again on October 20<sup>th</sup> to discuss further. Then on October 15, 2012 A.S. demanded their rent payment and served them with a 10 Day Notice for unpaid rent. On October 17, 2012 they paid A.S. \$1,800.00 cash which included October 2012 rent in full plus \$225.00 towards November 2012 rent. They argued that the Landlord refused to provide them with a receipt so they wrote one on a piece of paper and requested that he sign it.

The Tenants stated that they met with both Landlords on October 20, 2012 however nothing was resolved. They were served another 10 Day Notice on November 5, 2012 and on November 7, 2012 they paid the Landlord \$1,030.00 in cash but again the Landlord refused to give them a receipt. They acknowledged that they short paid the November rent by \$320.00 (\$1,575.00 – 225.00 – 1,030.00) because they lost the use of the deck and a room after the municipality issued a no occupancy order after the female Tenant's fall.

The Tenants advised that they have found another place to live and are requesting to end this tenancy effective December 1, 2012. They noted that they are concerned about how they are going to move their large furniture out of the rental unit because they have to take it out on the deck.

The Landlords submitted evidence which included, among other things, copies of the tenancy agreement and the move in condition inspection report form. They argued that the Tenants inspected the property and there was no mention of problems with the railing at the move in inspection or at any time during the tenancy.

The Landlords argued that the Tenants have been late with their rent payment every month from the beginning and questioned if the female Tenant was actually hurt at the rental property as this alleged occurrence was only two months into their tenancy.

A.S. confirmed receipt of the cash for payment of October 2012 rent and a partial pre-payment of November rent and stated that he did provide the Tenants with a hand written receipt as provided in their evidence. He stated that no cash was received for November rent which is why no receipt was issued.

During a review of the photos provided in the Tenant's evidence the Landlords stated the deck railing had never been painted during the ten years they had owned this property. They claimed that they had power washed the deck railing each year to keep it looking clean but that they never painted it. Then S.D. stated that it is possible that a previous tenant may have painted the railing.

A discussion followed where the parties were given the opportunity to settle these matters. The only matter which both parties were willing to agree upon was to mutually agree to end this tenancy effective December 1, 2012. At that point I explained to the parties that I would be making a decision based on the evidence before me.

The Tenants raised the issue of not being able to move all of their large furniture out of the rental property if they could not access the back deck and stairs. They stated that their large furniture could not be taken out through the front door because of the wall and landing area.

The Landlord argued that furniture can be moved in and out of that front door and that they had done so in the past.

In closing the Tenants argued that they told the Landlord, A.S., on two separate occasions, about their concerns with the wobbly deck railing and requested that he have it repaired. They said that they first noticed the wobbly railing when they moved into the unit and that it was so loose they were concerned that it may be dangerous. They confirmed that they continued to use the back stairs to access the laundry area as it seemed the most logical way to access the laundry room, even though the railing had not been fixed. The Tenants confirmed that they did not seek a remedy through dispute resolution as the Landlord had fixed other issues they had with the house.

The Landlords denied ever being told about a problem with the deck railing and stated they did not conduct repairs on the unit during this tenancy. The Landlords later confirmed that they had repaired or attended to a leak issue relating to the chimney and

roof during this tenancy. The Landlords confirmed that their municipality has issued them a No Occupancy Order until the enclosed room and deck railing has been repaired. The Landlords stated that they have not acted on these orders as they are contemplating building a larger deck.

At the end of the hearing I instructed the Landlords to conduct repairs to the back railing immediately so that the Tenants could remove their large furniture from the rental unit by December 1, 2012.

### Analysis

I have carefully considered the aforementioned and all documentary evidence before me. Upon review I favor the evidence of the Tenants, who stated they paid their November rent in cash, but were not given a receipt.

I favored the evidence of the Tenants over the Landlords, in part, because the Tenants' evidence was forthright and credible. The Tenants readily acknowledged that they paid the November rent late and that they short paid it by \$320.00 because they lost the use of the deck and one of the enclosed rooms which had originally been part of their rental unit. In my view the Tenants willingness to admit fault when they could easily have stated they paid the November 2012 rent in full, lends credibility to their evidence. Furthermore, I found that the Landlords contradicted themselves during the hearing as follows:

- at the beginning S. D. claimed that she needed to speak on behalf of A.S. because he did not speak or understand English very well, yet throughout the hearing A.S. spoke and understood English without problem; and
- the Landlords claimed they did not conduct repairs to the rental unit during the course of this tenancy and later confirmed they repaired a roof/chimney leak; and
- the Landlords claimed the deck railing had never been painted during the ten years they owned the property and upon further discussion they thought that maybe a previous tenant painted the railing, an event that would be reasonable for an owner to know if they resided at the property, not to mention the photographic evidence clearly displayed wood that had been painted within the past couple of years.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

*The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Landlord's explanation that November rent remained unpaid to be improbable given that the Landlords had served the Tenants with a proper 10 Day Notice to end the tenancy for the full rent amount of \$1,575.00, even though the Tenants prepaid \$225.00 of the November rent, and the Landlords took no further action to seek possession of the unit. I find that the Landlords' explanation that they simply did not want to proceed with a claim to get possession of the unit to be improbable, not to mention does not meet the requirement under section 7 of the Act for mitigation. Rather, I find the Tenants' explanation that they paid a total of \$1,255.00 (\$225.00 + \$1,030.00) towards November 2012 rent, in cash, short paying the rent by \$320.00 due to the no occupancy order, to be plausible given the circumstances presented to me during the hearing.

The evidence supports the Tenants were prevented from using a previously enclosed deck and the existing outside deck and stairway since the municipality issued a no occupancy order near the beginning of October 2012. Based on the aforementioned, I find the value of the tenancy has been reduced, due to the limitations placed on the space available for their use, and I award the Tenants rent reduction for October and November in the amount of \$320.00 (\$150.00 for October and \$170.00 for November, 2012).

Based on the foregoing, I find the Tenants have already been compensated for the reduced value of their tenancy by short paying their November 2012 rent. Accordingly, I find the Tenants' rent to be paid in full up to November 30, 2012.

During the course of this proceeding the parties mutually agreed to end this tenancy effective December 1, 2012. Accordingly, the fixed term tenancy will no longer be in force or effect as of December 1, 2012. The Tenants are required to vacate the property and return possession to the Landlords no later than December 1, 2012.

When a party makes a claim for damage or loss the burden of proof lies with the applicant to establish their claim. When seeking monetary awards as a result of an injury the applicant must prove the other party was negligent.

The Tenants argued that they verbally requested the Landlords repair the wobbly deck railing while the Landlords deny being told there was a problem with the deck railing. The Tenants acknowledged they did not put their requests for repairs in writing, they did not seek a remedy through dispute resolution when the railing was not repaired, and that they continued to use the deck stairs knowing that the railing was wobbly.

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.

In this case, the Tenants have the burden to prove damages occurred as a result of the Landlords failure to repair or maintain the rental property. The only evidence before me was verbal testimony that the Tenants requested the deck railing be repaired. That verbal testimony was disputed by the Landlords causing the evidence to be insufficient to meet the Tenants' burden of proof. Furthermore, there is insufficient evidence to prove the Tenants did what was reasonable to mitigate their loss, (as required by section 7 of the Act), as they continued to use the deck stairs knowing that the railing was wobbly and they made no effort to seek a remedy to have the repairs completed.

The Tenants seek compensation for the female Tenant's lost wages as well as for gas expenses; however, they did not provide evidence of the female Tenant being employed nor did they provide gas receipts. Furthermore, while they provided evidence that the Tenant could not stay home alone they did not provide evidence to support that they sought assistance from others who may have been able to assist with staying with the female Tenant so as to lessen the financial burden placed on them by having the male Tenant lose 100% of his wages.

As per the aforementioned I find there to be insufficient evidence to meet the burden of proof for the Tenants' claim for compensation. Accordingly, I hereby dismiss the claim for damages, without leave to reapply.

As noted above, I had ordered the Landlord to enact repairs to the rental unit to enable the Tenants to remove their large furniture from the rental property by December 1, 2012. Given the short time frame provided for this Order, I further Order that if the Landlord was not able to complete the repairs by December 1, 2012, then I Order the Landlords to pay movers to safely remove the Tenants' large furniture from the interior of the house and load it onto a vehicle that is provided by the Tenants and is at the rental property at a prearranged date and time, no later than December 15, 2012. The

Tenants are hereby Ordered to work with the Landlord and movers to find a mutually agreed upon date and time.

The Tenants have not been completely successful with their application; therefore I decline to award recovery of their filing fee.

### Conclusion

The fixed term tenancy is HEREBY CANCELLED and the tenancy is considered ended by mutual agreement effective December 1, 2012.

The Landlord is HEREBY ORDERED to repair the deck stairs to enable the Tenants to remove their large furniture by December 1, 2012, or arrange to have movers remove the Tenants large furniture from the house and into a truck provided by the Tenants, no later than December 15, 2012.

The Tenants' monetary claim for damages is HEREBY 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 03, 2012.

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Residential Tenancy Branch