

DECISION

Dispute Codes

For the tenants: CNR MNDC OLC ERP RP RR FF SS

For the landlords: OPR MNR MNSD MNDC FF

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the *Residential Tenancy Act* (the “Act”).

The tenants applied to cancel at Notice to End Tenancy for Unpaid Rent or Utilities, for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, for an order directing the landlords to comply with the *Act*, regulation or tenancy agreement, to make emergency repairs for health or safety reasons, to make repairs to the unit, site or property, to allow the tenants to reduce rent for repairs, services or facilities agreed upon but not provided, to serve documents or evidence in a different way than required by the *Act*, and to recover the filing fee.

The landlords applied for an order of possession for unpaid rent, a monetary order for unpaid rent or utilities, authorization to keep all or part of the security deposit and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and to recover the filing fee.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their relevant evidence orally and in documentary form prior to the hearing, and make submissions to me. Both parties confirmed that they received the evidence package from the other party and had the opportunity to review the evidence prior to the hearing.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

At the outset of the hearing, the tenants confirmed that they vacated the rental unit on January 9, 2013. As a result, the tenants withdrew their request to dispute the notice to

end tenancy for unpaid rent, for an order directing the landlord comply with the *Act*, regulation or tenancy agreement, to make emergency repairs for health or safety reasons, to make repairs to the unit, site or property, to allow the tenants to reduce rent for repairs, services or facilities agreed upon but not provided as the tenancy has ended and are now moot.

The landlords immediately requested an order of possession which was granted pursuant to section 55 of the *Act* as the landlords applied for an order of possession in their application and they have not received all of the keys back from the tenants. The tenants stated they would return the keys to the landlords by January 21, 2013 at 4:00 p.m. The tenants did not dispute the landlords being issued an order of possession.

The landlords confirmed that they received the amended monetary claim from the tenants increasing their monetary claim from \$350.00 to \$3,250.00. As a result, the hearing continued with consideration of the tenants' monetary claim, and the landlords' monetary claim.

Issues to be Decided

- Is either party entitled to a monetary order under the *Act*?
- What should happen to the security deposit under the *Act*?

Background and Evidence

A month to month tenancy began on May 15, 2011. Rent in the amount of \$1,500.00 was due on the 15th day of each month. A security deposit of \$750.00 was paid by the tenants at the start of the tenancy.

The landlords served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "Notice") dated December 17, 2012 for \$1,500.00 in unpaid rent due December 15, 2012.

The tenants are claiming \$3,250.00 comprised of the following:

1. Refund for November 2012 rent	\$1,500.00
2. Loss of use of quiet enjoyment for 20 months calculated at 5% of the \$1,500.00 rent at \$75.00 per month times 20 months due to smells in rental unit related to septic problems.	\$1,500.00

3. Labour and time involved to dig out septic pump tank calculated at 2 hours of digging plus waiting time.	\$250.00
Total	\$3,250.00

The landlords are claiming \$3,000.00 comprised of the following:

1. Unpaid December 2012 rent	\$1,500.00
2. Loss of January 2013 rent	\$1,500.00
Total	\$3,000.00

The tenants testified that they have submitted no evidence regarding the cost of emergency repairs. The tenants did not pay rent for December 2012 due to problems relating to an ongoing “rotten fish smell” inside the rental unit. The tenants vacated the rental unit on January 9, 2013 after they could not use the toilet and there was flooding issues. The tenants submitted photos of the yard and exterior of the home but no photos of the inside of the rental unit.

The tenant confirmed during the hearing that they had never put any complaints in writing to the landlords during the tenancy advising of any concerns related to the tenancy. The tenants claim that in July 2011 they complained to the landlords about a “rotten fish smell” inside the rental unit.

The male landlord responded by stating that in July 2011, he attended the rental unit and walked around outside with a plumbing contractor and that neither of them could smell rotten fish. The landlord said the plumbing contractor suspected that the smell was coming from garbage stacked outside the rental unit and entering from the vent as the garbage was stacked near the vent. The tenants disputed that anyone attended to inspect regarding the smell or that they had garbage near the vent. The parties disputed the testimony of the other party regarding other complaints allegedly made during the tenancy related to problems at the rental unit.

The landlords stated that they never asked the tenants to dig or perform any work for them and as a result, are not responsible for the tenants claim for \$250.00 for his labour to dig or his waiting time. The landlords stated that the tenant should not have been digging as that went against advice from their plumber and that they did not ask for him to do any such work.

There is no dispute that rent for December 2012 and January 2013 was not received by the landlords. The tenants stated that they vacated the rental unit on January 9, 2013. The landlords testified that they have been unable rent the rental unit due to the tenants disputing the notice and the results of the hearing regarding whether an order of possession was granted. The landlords stated that they were advised by neighbours that the tenants vacated the rental unit, and were not advised by the tenants themselves of concerns prompting the tenants to vacate.

The landlords testified that when they were notified by local city officials of the sewage system repair required to stop the flow of sewage onto the rental property on December 19, 2012, the landlords paid over \$4,000.00 to rectify the concerns of local city officials which were resolved on or before December 22, 2012. The tenants did not dispute that the landlords had the sewer work completed within a few days of being advised by local city officials. The landlords do not believe they have violated the *Act*, regulation or tenancy agreement.

Analysis

Based on the oral testimony and documentary evidence before me, and on the balance of probabilities, I find the following.

Test for damages or loss

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 sections 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. 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.

Tenants' claim for compensation – The tenants have claimed \$3,250.00 comprised of refund for November 2012 rent, loss of quiet enjoyment calculated at \$1,500.00 for the 20 months of the tenancy, and \$250.00 as compensation for the tenant digging and time

involved related to the sewer system on the rental property. The landlords disputed that the tenant was ever asked to perform any work on the rental property and do not believe they have violated the *Act*, regulation or tenancy agreement.

The tenants testified that they have not written to the landlords or provided any concerns in writing to the landlords during the tenancy. There was dispute regarding when calls were allegedly made and the alleged response to those calls. As a result, **I find** the tenants have failed to meet the burden of proof by failing to prove that the landlords breached the *Act*, regulation or tenancy agreement.

At the very least, I would have expected the tenants to have written to the landlords at some point in the 20 month tenancy to advise of their concerns formally. The tenants did not. The parties dispute the testimony of the other party and without further evidence such as evidence from witnesses or other corroborating evidence to support their claims, **I find** the tenants have provided insufficient evidence to substantiate any of their claim. Therefore, **I dismiss** the tenants' application in full due to insufficient evidence, without leave to reapply.

Landlords' claim for unpaid rent and loss of rent – There was no dispute that rent for December 2012 and January 2013 had not been received by the landlords. Section 26 of the *Act* states:

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.

[emphasis added]

Given the above, and taking into account that I have dismissed the tenants' claim in full, I find that the tenants have breached section 26 of the *Act* by failing to pay rent when it was due. Also, by disputing the notice to end tenancy, I find the landlords were unable to rent the rental unit for January 2013 as they were unsure whether the tenants would be vacating. The tenants failed to provide notice pursuant to section 45 of the *Act* that they would be vacating.

Therefore, **I find** that the landlords have met the burden of proof by proving that the tenants violated the *Act* and owe rent in the amount of \$1,500.00 for December 2012 and \$1,500.00 for January 2013.

The landlord is entitled to an amount sufficient to put the landlord in the same position as if the tenants had not breached the tenancy agreement. This includes compensating the landlord for any loss of rent for January 2013 based on the tenants disputing the notice and then vacating on January 9, 2013 before rent was due on January 15, 2013 and not cancelling their request to dispute the notice prior to the dispute resolution hearing on January 21, 2013, after rent was due.

As the landlords were successful in their application, **I find** they are entitled to recover the filing fee of **\$50.00**.

I find that the landlords have established a monetary claim in the amount of **\$3,050.00** comprised of \$1,500.00 rent for December 2012, \$1,500.00 for January 2013, and the \$50.00 filing fee. The security deposit of \$750.00 has accrued \$0.00 interest to date.

I authorize the landlords to retain the full security deposit of \$750.00 in partial satisfaction of their monetary claim, leaving a balance owing of \$2,300.00. **I grant** the landlords a monetary order pursuant to section 67 of the *Act*, in the amount of **\$2,300.00**. This order must be served on the tenant and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

As mentioned earlier in my decision, **I grant** the landlords an order of possession pursuant to section 55 of the *Act*, effective **2 days** after service on the tenants, as the landlords have yet to receive all the keys to the rental unit and did not cancel their application to dispute the notice prior to the hearing. This order must be served on the tenants and may be enforced in the Supreme Court of British Columbia.

Conclusion

I find that the landlords have proven their claim and are, therefore, entitled to an order of possession effective **two days** after service upon the tenants. This order must be served on the tenants and may be enforced in the Supreme Court of British Columbia.

I find that the landlords have established a total monetary claim of **\$3,050.00**. I order that the landlords retain the security deposit of \$750.00 in partial satisfaction of the claim and I grant the landlords a monetary order under section 67 for the balance due of **\$2,300.00**. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: January 21, 2013