Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR MNSD MNDC FF
MNDC MNSD O FF

Preliminary Issues

Upon review of the applications and evidence submissions the Landlord confirmed that he did not serve the Tenant with his last package of evidence which included Canada Post receipts, a move out condition inspection report dated October 30, 2012 from a previous tenancy; and a receipt dated October 30, 2012 relating to a previous tenancy. His first submission of evidence was sent and confirmed received by the Tenant.

Evidence not served to the other party is a contravention of sections 3.1 and 4.1 of the *Residential Tenancy Branch Rules of Procedure.* Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the Tenant has not received copies of the Landlord's evidence, as listed above, I find that evidence cannot be considered in my decision. I did however consider the Landlord's testimony relating to the excluded evidence and I did consider all other evidence that was served upon the other party and the *Residential Tenancy Branch*.

Introduction

This hearing convened on March 14, 2013 for 75 minutes and for the present session April 17, 2013 for 45 minutes to hear matters pertaining to cross applications filed by the Landlord and the Tenant.

The Landlord filed their application for dispute resolution on March 5, 2013, seeking to obtain a Monetary Order for: damage to the unit site or property; for unpaid rent or utilities; to keep all or part of the security deposit; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed their application for dispute resolution on February 18, 2013, seeking to obtain a Monetary Order for: money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; for the return of all or part of the security deposit; for other reasons; and to recover the cost of the filing fee from the Landlord 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 the Landlord be awarded a Monetary Order?
2. Should the Tenant be awarded a Monetary Order?

Background and Evidence

The Landlord submitted documentary evidence to the Tenant and the *Residential Tenancy Branch* which included, among other things, copies of: a chronological listing of dates and events; information pertaining to a medical condition called Rhinitis; an itemized list of costs; a building inspection report including photos; and the tenancy agreement.

The Tenant submitted documentary evidence to the Landlord and the *Residential Tenancy Branch* which included, among other things, copies of: 13 photos; her typed statement; a letter from her medical doctor; and various receipts.

The parties confirmed they entered into a fixed term tenancy agreement that began on November 1, 2012, and was set to end on October 31, 2013. Rent was payable on the first of each month in the amount of $1,100.00 and on October 17, 2012 the Tenant paid $550.00 as the security deposit. A move in condition inspection report form was completed on November 1, 2012. The Tenant vacated the property sometime in February 2013 and gave the Landlord her forwarding address over the phone on February 28, 2013.

The Tenant stated that she had a friend view the rental unit on her behalf as she was out of town. She agreed to rent the unit based on his viewing and made arrangements to move in November 1, 2012. She attended the unit with the Landlord on November 1, 2012, walked through the unit and signed the tenancy agreement and the condition inspection report form. She confirmed that there were no deficiencies noted on the inspection form. She later pointed out a damaged wall to the Landlord and he told her to just hang a picture over it. She did not want to do this so she decided to hire a painter, who was referred by the Landlord, to repair and paint the wall. The Landlord did not stop her from having the wall painted nor did he agree to pay for the repairs or painting.

The Tenant argued that after she resided in the unit for awhile she began to experience what she called “severe” respiratory allergy symptoms. During this time she noticed that the bathroom fan would turn on regularly on its own as well as some type of air purifying unit that was located in the garage. She questioned the Landlord about this and he told her to leave them running as it takes the moisture out of the rental unit. The painter had told her that the unit was not installed properly and that those types of units are designed to remove moisture out of buildings that are not built properly.

The Tenant stated that she expressed her concerns about the allergies to the Landlord about two or three times per month. She said that when the air purifying unit was on it seemed to make her symptoms worse so she decided to keep it turned off. She noticed black stain marks above each air system vent and in early December 2012 when she pointed it out to the Landlord he advised her he had never had the system serviced. He looked at the system and could not find a company name for service so he looked inside and said he could not see any dirt or build up inside. She said she asked the Landlord to have the ducts cleaned but he refused.

The Tenant said that in early January 2013, as her symptoms continued she looked around the unit and after lifting her curtains and blinds she noticed heaving condensation and mold on her bedroom window. She had seen a medical doctor on December 29, 2012 and was referred to a respiratory specialist which she saw on February 12, 2013, as supported by the medical letter provided in evidence.

The Tenant stated that the medical specialist told her that her symptoms were being caused by the mold and that she needed to move. She said that she moved out of her unit that day, February 13, 2013, and sent the Landlord a letter that same date, by regular mail, advising him she had to move due to the presence of mold in her unit.

She is seeking compensation for the return of three month’s rent, for being exposed to the mold like substance that was in her unit; the return of her full damage deposit; $107.19 for medications; movers costs of $252.00; storage costs for March and April totaling $209.58; Canada Post address changes of $84.00; $200.00 for having to wash all her clothing; and $332.00 for paint and labour to paint the wall.

The Landlord advised that he is a builder / developer and he has worked in the building industry for over 40 years. This rental unit was built in 1992 and the majority of it is above grade with some back fill in the back. It was built as an energy efficient sealed unit with electric heat which requires an air exchange dehumidifying unit to run automatically to circulate the air and remove excess humidity.

The Landlord confirmed that the Tenant had contacted him about her symptoms and her concern about the bathroom fan running on it own and that he instructed her to leave the humidistat and fan running automatically as they are designed to remove the humidity.

The Landlord stated that when he attended the unit on January 17, 2013, he found that the Tenant had disconnected the bathroom fan from the air recovery unit. She told him at that time that she did not want the fan running all the time. He checked the air vents and there was some black dust on the wall / ceiling but the units themselves looked clean. He also noted that the Tenant had placed cardboard under the curtain and blind up against the window pain in her window which created an increase in the amount of moisture / humidity in her bedroom.

The Landlord stated that on February 20, 2013, he received two envelopes from the Tenant. One in his regular mail which had the letter she wrote about canceling her tenancy and the other came registered mail and included the notice of hearing documents and her application for dispute resolution. The Landlord read the Tenant's letter into evidence and stated it was dated February 15, 2013, and that she was ending her tenancy as of March 1, 2013.

The Landlord disputed the Tenant's testimony that she vacated the rental unit by February 13, 2013, pointing to his evidence of the building inspection which was not done until February 22, 2013 and which includes pictures that clearly show the Tenant's furniture still inside the unit. In addition, he noted that on February 13, 2013, around 12:30 p.m., he met the Tenant at one of his new buildings and showed her a unit she could rent for $1,500.00 per month or she could purchase and have mortgage payments lower than that. During that meeting the Tenant asked him to set up a meeting for her with a mortgage broker which he had arranged for the 15th of the month. He found out later that she cancelled that appointment.

The Landlord advised that from about February 16th, 2013 onward the Tenant refused to answer their calls and did not return their messages. They left several messages and after receiving her notice to end tenancy they left a message on February 27, 2013 to arrange the move out inspection. She did not return their call and when they attended the unit on February 28, 2013 at 10:10 a.m. they found the unit empty with the keys and remote left inside.

The Landlord point to the Tenant's evidence and stated that she claimed to have no symptoms prior to occupying the rental unit yet her doctor's note states she had a pre-existing condition of rhinitis symptoms before moving there. He also wanted it noted that she is a nurse and may be using her medical knowledge to cause him problems.

At this time the hearing time was about to expire. I noted that the Landlord had indicated in his submission that given the short time frame between their application date and the hearing that he was not able to submit all the invoices as he had not received them from some of the contractors. Given the circumstances presented, I gave the Landlord leave to serve the Tenant and the *Residential Tenancy Branch* the receipts that pertained to the amounts he had claimed as long as that evidence was received a minimum of ten days prior to the reconvened hearing. I instructed the Landlord that no other evidence would be accept from him and I instructed the Tenant that I would not accept additional or new documentary evidence from her.

I advised the parties that we would be opening the reconvened hearing with their closing remarks and then would move onto the submissions pertaining to the Landlord's claim. At that point the Tenant wanted to make it clear again that she had vacated the rental unit by February 12, 2013, and not any later as indicated by the Landlord. The Landlord's evidence was forthright and credit.

At the outset of the reconvened hearing the Tenant confirmed receipt of Landlord's evidence consisting of seven pages with receipts for the items he was claiming.

The Tenant provided closing remarks for her claim arguing that once she saw her doctor she left the rental unit. She indicated she left for health reasons on February 13, 2013. She stated that the Landlord's submission was all lies because she did not disconnect the humidistat, she did not have someone disconnect it for her, and she never had cardboard in her windows. She also confirmed that she had her possessions moved from the rental unit directly into her storage unit.

The Landlord submitted that he was claiming for his losses as follows:

$450.00	For the cost to have the home inspection completed on February 22, 2013, as supported by the report and invoice provided in his evidence. He noted that the inspector did not find mold in the unit.
$240.80	For repairs completed by the carpenter which included replacing the toilet paper holder which the tenant removed; repair bedroom wall that was damaged when duct tape was used to hold up a blanket over the window; broken cover of garage door light that was damaged by movers; electrician costs to reconnect the humidistat.
$120.00	Cleaning of garage floor and windows that were left with the black substance and moisture caused by the Tenant covering windows with cardboard.
$150.00	Which is an estimated cost of the tower fan which the Landlord lent to the Tenant and which she took when moving out.
$50.00	For the filing fee to make this claim.
$1,100.00	For loss of rent for March 2013 because they were not able to re-rent the unit until April 1, 2013.
$120.00	For the estimated cost of utilities for March 2013 because they had to be put in the Landlord's name. The Landlord argued that he was claiming this amount because if the Tenant provided proper notice he would have been able to re-rent the unit and not suffer the cost of utilities.

The Tenant responded to the Landlord's claim stating it was all lies. She claims the bedroom wall was damaged at the outset of her tenancy and that the Landlord told her to put a picture up on it. She never disconnected anything and she never removed the toilet paper roller because she would not know how to do that. She claims the Landlord removed the toilet paper roller, he caused the damage or it was pre-existing, and that

the Landlord has the fan. She confirmed that the move in inspection report did not list any of these damages. She then pointed to her evidence which included copies of the utility bills and stated that she was required to pay those huge bills which were not $120.00 as estimated by the Landlord.

The Tenant stated that her family packed her possessions for her because she could not be in the rental unit for health reasons. Then she stated that she was in the unit and watched as the movers loaded her stuff. I asked how she could manage to be in the unit with the movers yet she could not be in the unit while her possessions were being packed due to her ill health. At this point she changed her testimony to say she was in and out of the unit during packing and loading and that she stood in the garage. She argued that she went back into the unit once everything was moved out and she left the fan in the spare bedroom. She confirmed that her possessions were still in storage at this time.

The Tenant submitted that she was under a lot of stress and was exhausted due to her recent move and starting a new job. She stated that rental unit just exacerbated the condition of her health so she had to move out.

In closing the Landlord stated that he found the fan box in the garbage along with a blanket that had duct tape attached to it which matched the damage to the wall in the bedroom. He confirmed that he never saw the blanket up on the wall over the window but he most definitely saw the cardboard up against the window. He stated the Tenant told him that she had the painter disconnect the humidistat because she did not want to pay those huge electricity bills.

Analysis

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement;
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation;
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

I favor the evidence of the Landlord over the evidence of the Tenant because the Tenant continued to contradict her own evidence, specifically about when she vacated the rental unit . First she was insistent that she vacated on February 12, 2013, then, she stated it was on February 13, 2012. This also contradicts the date of the receipt she provided in evidence from her moving company dated February 21, 2012. The moving company receipt indicates the possessions went straight into storage and was done on February 21, 2013. Furthermore, the Tenant's own testimony indicated she was under

extreme stress and was exhausted due to her recent move and starting a new job which leads me to question if it was that stress and not the rental unit that exacerbated her health condition. The Landlord's evidence was forthright and credible and supported by the building inspection report dated February 22, 2013, which clearly displays the Tenant's possessions inside the unit and no presence of mold.

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 Tenant's explanation that she moved her entire household out of the rental unit on the same day she attended her doctor's appointment to be improbable. She did not provide evidence to support her testimony and simply resorted to attacking the veracity of the Landlord. Rather, I find the Landlord's submission on when he received the Tenant's letters, when she vacated the property, and the damage caused to the unit, to be plausible given the circumstances presented to me during the hearing.

Landlord's Application

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

Based on the aforementioned I find the Tenant has breached sections 32(3) and 37(2) of the Act, leaving the rental unit unclean and with some damage, including disconnection of the humidistat, at the time she vacated the unit. Accordingly I award the Landlord compensation in the amount of **$360.80** ($240.80 + $120.00).

The evidence supports that the Tenant made allegations that the rental unit was contaminated with mold and the carpets were unhealthy. Upon review of the Tenant's evidence I find her allegations to be unsupported and unfounded. Although the Tenant provided a letter from her doctor, this letter clearly indicated she had a pre-existing condition as well as the Tenant reporting to the doctor that there was a dog and mold at

her rental unit. These allegations caused the Landlord to suffer the costs of having a building inspection only to prove that there was no mold in the rental unit. Therefore, I award the Landlord recovery of the cost of the building inspection in the amount of **$450.00**.

Section 45 (2) of the Act stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

> (a) is not earlier than one month after the date the landlord receives the notice,
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> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
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> (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this case the Tenant would be required to provide the Landlord written notice no later than September 30, 2013, to end her tenancy effective October 31, 2013, the end of the fixed term, in accordance with the Act.

Notwithstanding the Tenant's unfounded argument that she had to leave due to health reasons, I find the Tenant breached section 45 of the Act by vacating the rental unit, without proper notice and ending her tenancy in breach of the Act. The Tenant's actions caused the Landlord to suffer a loss of rent for March 2013 plus an estimate cost of utilities in the amount of $120.00. Accordingly, I award the Landlord loss of rent for March 2013 plus utilities in the amount of **$1,220.00.**

The Landlord has claimed $150.00 for the cost of a fan which he alleges the Tenant took. Upon review of the evidence I accept the Landlord's submission that the fan was taken by the Tenant or her movers and the box was left outside with the garbage. That being said, I find there to be insufficient evidence to support a claim of $150.00 for the fan as no receipts or estimates were provided by the Landlord to prove the actual cost or the age of the fan. Accordingly, I dismiss the amount claimed for the fan, without leave to reapply.

The Landlord has been successful with their application; therefore I award recovery of the **$50.00** filing fee

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit plus interest as follows:

Repairs and cleaning	$ 360.80
Building Inspection costs	450.00
Loss of rent and utilities for March 2013	1,220.00
Filing Fee	50.00
SUBTOTAL	$2,080.80
LESS: Security Deposit $550.00.00 + Interest 0.00	-550.00

Offset amount due to the Landlord **$1,530.80**

Tenant's Application

The Tenant has claimed $5,034.77 which is comprised of: the return of three month's rent, for being exposed to the mold like substance that was in her unit; the return of her full damage deposit; $107.19 for medications; movers costs of $252.00; storage costs for March and April totaling $209.58; Canada Post address changes of $84.00; $200.00 for having to wash all her clothing; and $332.00 for paint and labour to paint the wall.

After careful consideration of the foregoing I find the Tenant provided insufficient evidence to prove the Landlord breached the Act. Furthermore, there is no evidence to support that the Tenant mitigated her losses as there is no proof she requested repairs in writing or sought assistance to resolve these issues, through dispute resolution, prior to her ending the tenancy in breach of the Act. Accordingly, I dismiss the Tenant's claim in its entirety, without leave to reapply.

The Tenant has not been successful with her claim; therefore I find the Tenant must bear the burden of the cost of her application.

Conclusion

The Landlord has been awarded a Monetary Order in the amount of **$1,530.80**. This Order is legally binding and must be served upon the Tenant. In the event that the Tenant does not comply with this Order it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

I HEREBY DISMISS the Tenant's claim, 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: April 17, 2013

Residential Tenancy Branch