



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with cross applications. The landlord applied for a Monetary Order for unpaid rent; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. The tenants applied for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; and, double the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Due to time limitations the original hearing had to be adjourned after both parties made submissions with respect to the landlord's Application. The parties were informed that the hearing would be reconvened at a later date in order to hear the tenants' Application. Since the tenant had expressed concerns that she received late evidence from the landlord with respect to the tenants' claims, I authorized the parties to submit additional or rebuttal evidence during the period of adjournment. I encouraged the parties to serve any additional evidence as soon as possible so as to avoid late evidence issues at the reconvened hearing.

At the reconvened hearing the tenants' representative submitted that additional evidence was received from the landlord only days before the reconvened hearing and that it should be excluded from consideration. Upon enquiry, I determined that the tenants had waited to send their additional evidence and submissions to the landlord until May 31, 2013 via registered mail despite my suggestions to avoid delay. The landlord received the tenants' last submission June 3, 2013 and mailed a response to the tenants on June 5, 2013. I was satisfied that the landlord had responded to the tenants' additional evidence without unreasonable delay. Therefore, I accepted and considered all of the evidence submitted by both parties in reaching this decision.

Issue(s) to be Decided

1. Is the landlord entitled to compensation for the amounts claimed against the tenants?
2. Are the tenants entitled to compensation for the amounts they claimed against the landlord?
3. Should the security deposit be doubled?
4. Disposition of the security deposit.

Background and Evidence

The tenants paid a security deposit of \$875.00 to the landlord on October 3, 2012 although a written tenancy agreement was not executed until October 26, 2012. The tenants were provided possession of the rental unit on October 26, 2013 and the tenants gave the landlord pro-rated rent of \$280.00. Monthly rent of \$1,750.00 was payable starting November 1, 2012 and on the 1st day of every month thereafter for a fixed term of one year. The landlord did not prepare a move-in inspection report.

The tenants withheld a portion of the rent due for December 2012 and the landlord sent the tenants a 10 Day Notice to End Tenancy for Unpaid Rent via registered mail on December 19, 2012. On January 4, 2013 the landlord sent the tenants notification via registered mail sent at the rental unit that she was applying for an Order of Possession. The landlord was granted an Order of Possession on January 24, 2013 which the landlord sent to the tenants via registered mail using the rental unit address. The Supreme Court of British Columbia issued a Writ of Possession on February 8, 2013.

The tenants did not check their mail box during the tenancy until February 12, 2013 when they found the decision granting the Order of Possession. The tenants filed an Application for Review Consideration on February 13, 2013 but their Application for Review was subsequently dismissed. Also on February 13, 2013 the court bailiff attended the rental unit and proceeded to remove the tenants' property from the rental unit and return possession of the unit to the landlord.

Landlord's Application

The landlord seeks compensation totalling \$4,282.18 from the tenants; less, credit for the security deposit held by the landlord, credits provided to the landlord by the bailiff, and refund of rent paid for days after February 13, 2013. After applying credits, the landlord's net claim against the tenants is: \$1,355.47.

I noted that the landlords' claim of \$4,282.18 included mailing and faxing costs for documents served upon the tenants and the Residential Tenancy Branch. Costs incurred to serve the other party, or prepare for and participate in a dispute resolution proceeding are not recoverable under the Act. Therefore, I dismissed these claims summarily during the hearing.

I noted that the landlord also included a filing fee she paid for the previous Application for Dispute Resolution she filed to obtain the Order of Possession. As I cannot change or alter a decision previously issued by another Arbitrator I cannot consider this part of the landlord's claim further.

Below, I have summarized the remainder of the landlord's claims and the tenant's responses:

Unpaid rent

Although the tenants withheld \$305.00 from rent for December 2012 the landlord had authorized a deduction of \$75.00, leaving an unauthorized deduction from rent in the amount of \$230.00. The landlord seeks to recover the unpaid rent of \$230.00 for the month of December 2012.

The tenants acknowledged that they withheld \$230.00 from rent for December 2012. The tenants were of the position the landlord should have paid for the cost to change the locks due to unauthorized entry into their unit.

The tenants submitted that on November 7, 2012 a tradesman hired to remediate the bathroom entered the rental unit using a key and they were not given any prior notice of an entry. The landlord acknowledged that the tradesmen entered using a key obtained from the strata manager; however, the landlord testified that she had not received advance notice that there would be entry into the rental unit.

The tenants notified the landlord of the unexpected entry on November 7, 2012 via email. The landlord responded the same day but did not indicate she would change the locks, only that she would talk to the strata representative. The tenants proceeded to hire a locksmith to change the locks on November 8, 2012 at a cost of nearly \$230.00. The tenants were of the position the landlord should pay for the cost of the new locks because 1) their right to quiet enjoyment had been breached and 2) a landlord is required to change the locks upon request at the beginning of every new tenancy.

Email correspondence between the parties indicates the landlord communicated to the tenants that she did not agree that she was obligated to pay for the cost of new locks

although she would allow them to install new locks as long as she was provided a copy of the key and they reinstalled the old lock at the end of the tenancy. The tenants did not file an Application for Dispute Resolution seeking authorization to change the locks and be compensated for such or authorization to deduct the cost from rent.

Court costs and Bailiff fees

The landlord applied for and obtained a Writ of Possession upon paying a filing fee to the court in the amount of \$120.00.

The landlord acquired the services of a court bailiff in order to execute the Writ of Possession. The landlord paid \$3,500.00 to the bailiff initially and then was subsequently refunded \$526.37 and \$587.84 by the bailiff including cash taken from the rental unit by the bailiff on February 13, 2013. The net amount paid to the bailiff is \$2,385.79.

The landlord seeks to recover the above court costs and bailiff fees from the tenants as they were legally evicted.

The tenants objected to paying the court costs or bailiff fees on the basis the landlord did not make reasonable efforts to mitigate the loss by avoiding execution of the Writ of Possession. Firstly, the landlord used the rental unit address to serve documents to the tenants when their service address was that of a home they own elsewhere. Secondly, after receiving the decision in their mailbox on February 12, 2013 the tenants had their lawyer contact the landlord to try to negotiate a mutually agreeable outcome that would avoid the execution of the Writ of Possession. The landlord's response was that it was too late.

The landlord responded by stating that she was aware the tenants owed a home and that the address of that home appeared on their tenancy application; however, the tenants did not indicate that the address of that home was to be their service address. Rather, she was told by the tenants that they were renting out their home and with the tenants moving in to the rental unit the landlord had no reason to think the home they owned would continue to be their service address.

The landlord acknowledged receiving a telephone call from the tenants' lawyer while she was at work. She explained that the Writ of Possession went directly to the court bailiff from the court and the landlord was unaware of the date and time of the eviction until the morning it happened.

Cleaning and move-out costs

The landlord submitted that she paid \$250.00 to the strata manager on February 14, 2013 which is comprised of a \$150.00 cleaning charge and a \$100.00 move-out fee that is charged by the strata. The landlord has requested recovery of the \$250.00 paid to the strata manager.

The tenant's representative questioned the veracity of the invoice provided by the landlord as evidence as the invoice includes a "move-in door monitor" service and suggested that a charge for a move-in or move-out fee by the strata would be accompanied by a receipt issued by the strata corporation.

The landlord acknowledged that she did move into the rental unit after the tenants were removed.

Storage locker lock

The landlord submitted that the tenants retained one set of keys for the storage locker and as a result the landlord purchased a new lock at a cost of \$6.70 that she seeks to recover from the tenants.

The tenants submitted that the bailiff took all keys that they were given by the landlord.

Security deposit and rent refund

The landlord seeks authorization to retain the security deposit in partial satisfaction of the amounts owed to the landlord, thus, reducing the claim by \$875.00. The tenants were of the position the landlord extinguished her right to claim against the security deposit and requested return of double the security deposit in their Application for Dispute Resolution, as described below.

The tenants deposited \$1,750.00 into the landlord's bank account on February 1, 2013. As the tenants no longer had possession of the unit after February 13, 2013 and the landlord moved into the unit the landlord applied a credit for a rent refund of \$937.50 to her claim. The tenants were agreeable to the landlord's calculation and had included this same amount in their claim.

Tenants' Application

Below, I have summarized the tenants' claims against the landlord and the landlord's responses, where appropriate.

Double security deposit

The tenants seek recovery of double the security deposit on the basis the landlord extinguished her right to make a claim against the deposit by failing to complete a move-in inspection report.

The tenants had provided their forwarding address to the landlord in writing on February 19, 2013 and the landlord filed an Application for Dispute Resolution seeking retention of the security deposit on February 21, 2013.

I noted that the landlord's claims against the security deposit included amounts other than damage to the rental unit and I indicated that a response from the landlord was not necessary.

Rent refund

As described previously, the tenants seek recovery of the rent paid for the period of February 14 – 28, 2013.

Cash given to Bailiff

The bailiff took cash belonging to the tenants during the execution of the Writ of Possession and forwarded it to the landlord. The tenants seek recovery of the cash given to the landlord by the bailiff on the basis the landlord could have avoided the execution of the Writ of Possession and the services of the bailiff as explained previously in this decision.

Moving fees

Although the bailiff's invoice includes a charge for the cost of movers, the tenants claim that they paid a further \$500.00 to the bailiff's movers to deliver their possessions to the home that they own.

The landlord submitted that that there was discussion with the bailiff as to the possibility that the bailiff may take the tenants' possessions to a storage facility. It was suggested that it was possible the tenants paid the bailiff's movers additional money if the tenants requested their possessions be taken somewhere other than the storage facility. Ultimately, the landlord is of the position that she is not responsible for the tenants' moving costs as the tenants' actions, or lack thereof, resulted in the eviction.

Loss of quiet enjoyment

Between October 3, 2013 when the security deposit was paid and October 26, 2013 when the tenants took possession of the unit and signed the tenancy agreement, a water leak occurred in an upper unit, necessitating the removal of the drywall, mirror and toilet in the main bathroom of the rental unit. It was undisputed that the bathroom

was largely non-functional from the start of the tenancy until January 2013 although the exact date the bathroom was repairs was under dispute.

The landlord had presented evidence from the strata representative indicating the toilet was re-installed January 4, 2013. The tenants submitted that there were still deficiencies with the bathroom until nearly the end of January 2013 such as installation of the mirror and other touch ups.

The tenants are seeking compensation for loss of use of one of the bathrooms for three months (November, December and January) at \$500.00 per month. The tenants' representative argued that a bathroom is a principle room and having two bathrooms was an important consideration in the tenants' decision to rent this particular unit.

The landlord submitted that the tenants' monetary claim for loss of use of the bathroom was high considering the square footage of the bathroom was approximately 40 square feet in relation to the entire unit. Further, the evidence shows the bathroom repairs were completed by January 4, 2013 so the tenants should not be compensated for days after January 4, 2013.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons with respect to each of the Applications before me.

Landlord's Application

Unpaid rent

Under the Act, a tenant is required to pay the rent due under their tenancy agreement even if the landlord violates the Act, regulations or tenancy agreement; unless, the tenant has a legal right to withhold rent payable. The Act provides specific and limited circumstances when a tenant has a legal right to withhold rent. Generally speaking, unless a tenant pays for an emergency repair in the circumstances described under the Act, or overpays rent or a security deposit, the tenant must have the authorization of the landlord or an Arbitrator to make a deduction from rent. An Arbitrator's authorization to make deductions from rent is obtained by proving one's entitlement by way of filing an Application for Dispute Resolution.

As the existing locks on the door of the rental unit were not defective, replacement of the locks did not meet the criteria for an emergency repair as provided under section 33 of the Act. Since the landlord did not authorize a deduction for the cost of the new locks

the tenants' remedy was to file an Application for Dispute Resolution seeking an order for the landlord to change the lock, or authorization for them to change the lock and deduct the cost from rent. The tenants failed to pursue this remedy and did not have the legal right to deduct \$230.00 from rent. Therefore, I find the landlord entitled to recover the rent she was legally entitled to receive and I grant her request to recover this amount from the tenants.

Court costs and bailiff fees

The tenants objected to paying this portion of the claim on the basis the landlord did not mitigate her loss. Section 7 of the Act provides that any party that makes a monetary claim against another party for their breach of the Act, regulations or tenancy agreement must take reasonable steps to mitigate their loss. It is important to note that the Act does not require the party making the claim to take every possible step to mitigate the loss. Whether a person's actions are reasonable is dependent on the circumstances.

Where a tenant fails to pay rent the landlord's remedy is to serve a 10 Day Notice to End Tenancy for Unpaid Rent. If the tenant fails to pay the outstanding rent or dispute the Notice the tenancy ends 10 days later and the tenant is required to vacate the rental unit. If the tenant does not vacate the rental unit by the effective date of the 10 Day Notice, the landlord's remedy is to request an Order of Possession from the Residential Tenancy Branch. If the tenant does not vacate the rental unit in spite of the Order of Possession, as in this case, the landlord's remedy is to seek a Writ of Possession and the court bailiff to remove the tenant(s) from the rental unit.

I find the tenants did not provide sufficient evidence that they had notified the landlord of an alternative service address. There is no notation of such on the tenancy agreement or any other document provided as evidence that would support the tenant's assertion. Rather, the documentary evidence supports the landlord's version of events that the tenants disclosed that they owed a home elsewhere, as indicated on their tenancy application, and I find it reasonable that where a tenant is moving away from their home and into a rental unit they would expect to receive mail and be served with documents at the rental unit.

In light of the above, I am satisfied the landlord took all the necessary and legal steps to seek resolution to the issue of unpaid rent and enforce the landlord's rights under the Act.

By the time the tenants' lawyer contacted her on February 12, 2013 the landlord had already retained the services of the bailiff, paid a substantial deposit to the bailiff, and had been granted a Writ of Possession. The standard practice is for the court to send

the Writ of Possession directly to the court bailiff and in this case that is what happened. Thus, when the landlord was contacted by the tenants' lawyer on February 12, 2013 the "wheels were in motion" and I find the landlord's response that it was too late to stop the eviction was reasonable in the circumstances.

When 10 days passed after serving the 10 Day Notice to End Tenancy the tenancy was legally at an end. Accordingly, the landlord was at liberty to start making plans for the future use of the rental unit. In this case, the landlord decided she would move into the rental unit after the tenants were removed. Even if the landlord could stop the bailiffs from attending the unit, and I am not certain she could since the bailiff has instructions from the court to return possession to the landlord, I find the landlord was not obligated to do so as she had a reasonable expectation to regain possession for her own use.

In light of the above, I am satisfied the tenants breached the Act and the tenancy agreement by failing to pay all of the rent due, the tenants did not vacate the rental unit when required to do so, the landlord regained possession of the unit legally and the landlord otherwise acted reasonably in enforcing her rights under the Act. Therefore, I grant the landlord's request to recover the court costs and bailiff fees from the tenants.

Cleaning and move-out costs

Upon review of the invoice provided by the landlord I note the invoice was created by a cleaning company and indicates the charge of \$250.00 includes "move in door monitor" and cleaning. As I heard the landlord moved in after the tenants were evicted I find I am not satisfied the charge relates to a move-out charge by the strata. As pointed out by the tenants' legal representative such a charge would be identified as such on a receipt most likely issued by the strata and not a cleaning company.

I do, however, accept that it is likely the rental unit was not left clean as the bailiff's charges do not include cleaning and the tenants had not prepared to move by February 13, 2013. Therefore, I award the landlord \$150.00 for cleaning as I find this amount reasonable.

Storage locker lock

I deny this portion of the landlord's claim as I am not satisfied the tenants are responsible for a replacement lock. I make this determination considering the tenants stated they returned all keys to the bailiff and their submission is consistent with the bailiff's invoice. The bailiff's invoice includes a charge for a locksmith and a statement that the Writ of Possession has been endorsed as "Returned in Full Peaceful Possession." I consider full possession to include the storage locker as that was included as part of the tenancy agreement.

Security deposit

Although the landlord did not prepare condition inspection reports and she lost the right to claim against the deposit for damage, the landlord is seeking recovery of amounts other than damage to the rental unit. The amounts awarded to the landlord with this decision for things other than damage exceed the security deposit. Also, the landlord filed her Application for Dispute Resolution within 15 days of receiving the tenant's forwarding address in writing which is in compliance with the Act. Therefore, I grant the landlord's request to retain the security deposit in partial satisfaction of the amounts awarded to the landlord.

Rent refund

I accept the undisputed calculation of pro-rated rent for the period of February 14 - 28, 2013 and since it is beneficial to the tenants I accept the landlord's request to offset the credit against the amounts awarded to the landlord.

Filing fee

As the landlord was largely successful in her Application I award the landlord the \$50.00 filing fee paid for her application.

In light of the above, the landlord has established an entitlement to recover the net amount of \$1,123.29, calculated as follows:

Unpaid rent: December 2012	\$ 230.00
Court costs and bailiff fees (\$120.00+ \$2,385.79)	2,505.79
Cleaning	150.00
Filing fee	50.00
Less: security deposit	(875.00)
Less: rent refund	<u>(937.50)</u>
Landlord's award	\$1,123.29

Tenant's Application**Double security deposit**

The Act provides that where a landlord fails to prepare condition inspection reports the landlord loses the right to claim against the deposit for damage to the rental unit. Although the landlord lost the right to claim against the security deposit for damage by failing to prepare condition inspection reports, the landlord retained the right to claim against the security deposit for other damages or losses within 15 days of receiving the forwarding address, which she did. I have authorized the landlord to retain the security

deposit for amounts awarded to the landlord with this decision, other than damage to the rental unit, as outlined in the previous section of this decision. Accordingly, I made no award for return of double the security deposit.

Rent refund

The landlord and tenants submitted the same amount be credited to the tenants for rent paid for the latter portion of February 2013. This credit has reduced the landlord's net award as reflected in the previous section and I do not credit the tenants again.

Cash taken by bailiff

The landlord's claim was reduced by the cash forwarded to the landlord by the bailiff and since I have awarded the landlord the net amount paid for the bailiff, I do not credit the tenants for this amount again.

Moving fees

As I have already found above, the tenants were legally evicted due to their own actions and, as such, I find that any moving costs they may have incurred to transport their possessions is their burden to bear. Therefore, I make no award to the tenants for moving costs.

Loss of use of the bathroom

It was undisputed that the tenants suffered a loss of use of one of the two bathrooms for a significant period of time although the exact date the bathroom was restored was in dispute. I find the best evidence as to the time the bathroom was largely functional is as reflected on the statement provided by the strata representative, which is January 4, 2013.

Residential Tenancy Policy Guideline 16: *Claims in Damages* provides that a tenant may be entitled to compensation where the rental unit is not provided to the tenants as agreed upon, even if it is not fault of the landlord. I find the tenancy formed on October 3, 2012 as the landlord accepted a security deposit on this date and the Act prohibits a landlord from accepting a security deposit before a tenancy forms. I am satisfied that both parties had agreed that the tenants would be provided two functional bathrooms on October 3, 2013 since the landlord was unaware that the bathroom would require significant repairs on that date. Since the parties had agreed the tenants would be provided two functional bathrooms in exchange for the monthly rent of \$1,750.00 and the landlord breached this part of their agreement, even though it was no fault of her own, I find the tenants entitled to compensation for breach of contract.

I find that a bathroom is a principal room and likely impacted the tenants' use and enjoyment of the rental unit in a significant way. However, I find the tenants' request for compensation of \$500.00 per month or 29% of the monthly rent is excessive when all of the rooms and amenities of the rental unit and residential property are factored into the monthly rent. I also find the landlord's suggestion that that compensation be based upon square footage is unreasonable as it does not take into consideration the importance of having a functional bathroom and that although the room may be small in area it is a principal room.

Taking the above into consideration I find a reasonable measure of the loss to be based upon the number of principle rooms in the rental unit. I estimate that the loss of one of the bathrooms warrants a 15% rent abatement assuming the bathroom is one of 7 principal rooms in the rental unit.

Based upon the above, I find the tenants entitled to compensation of \$600.87, calculated as follows:

$$\begin{aligned} & \$280.00 \times 15\% = \$42.00 \text{ (October 26 – 31, 2013)} \\ & + \$1,750.00 \times 15\% = \$262.50/\text{mo} \times 2 \text{ months} = \$525.00 \text{ (Nov and Dec 2012)} \\ & + \$1,750.00 \times 15\% \times 4/31 \text{ days} = \$33.87 \text{ (January 1 – 4, 2013)} \\ & = \$600.87 \end{aligned}$$

Filing fee

As the tenants were only partially successful in their claims against the landlord I award the tenants \$25.00 toward the filing fee they paid, bringing the total award to the tenants to \$625.87 for loss of use of the bathroom.

Monetary Order

Pursuant to section 72 of the Act, I offset the amounts awarded to the tenants against the amounts awarded to the landlord and provide the landlord with a Monetary Order in the net amount of \$497.42 [\$1,123.29 – 625.87]

To enforce the Monetary Order the landlord must serve it upon the tenants and the landlord may file it in Provincial Court (Small claims) to enforce as an Order of the court.

Conclusion

After offsetting amounts owed to the other party, the landlord has been provided a Monetary Order in the net amount of \$497.42 to serve upon the tenants and enforce as necessary.

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: July 09, 2013

Residential Tenancy Branch