



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF, MNDC, MNSD, MND

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was filed by each party was sufficiently served on the other. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the landlord is entitled to A Monetary Order and if so how much?
- b. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- c. Whether the landlord is entitled to recover the cost of the filing fee?
- d. Whether the Tenant is entitled to a monetary order and if so how much?
- e. Whether the Tenant is entitled to recover the cost of the filing fee?

Background and Evidence

The parties entered into a one year fixed term written tenancy agreement that provided that the tenancy would start on August 31, 2012 and end on August 31, 2013. The rent was \$750 per month payable on the first day of each month. The tenant paid a security deposit of \$375 at the start of the tenancy.

In a letter dated April 5, 2013 the tenant advised the landlord that she wished to terminate the Tenancy Agreement as of May 31, 2013. The letter outlined the problems with the tenancy agreement in detail including the following:

- She was subjected to monthly inspections for condensation
- The landlord was unreasonably harassing her including
 - The landlord was demanding that she deal with the condensation problem when it was the landlord's responsibility
 - The landlord kept reminding her to deal with the condensation problem including constantly e-mailing her when she was doing everything she could to deal with the problem
 - By calling her to turn the shower fan off when she inadvertently forget to turn it off that morning
 - Knocking on her door when the laundry spin cycle fell out of balance.
 - Changing her mind with regard to the parking of her family's van when her family visited her.
 - Complaints regarding increase in her water consumption
 - Complaints and restrictions of her boyfriend's visits thereby breaching section 1 of the Addendum to the tenancy agreement.

At the hearing the tenant raised the following as examples of breach of the covenant of quiet enjoyment

- The manner in which the landlord dealt with hearing early in the tenancy when family members visited late at night after they became aware of the death of her boyfriend's father.
- Refusing to let her family park in her parking spot

- Questioning her about the presence of her guests
- Always feeling that the landlord was watching her
- Calling her to turn off the fan
- Feeling the landlord was bullying her.

The landlord denies the complaints of the tenant. Briefly the landlord responded as follows:

- She was not aware of the death of her boyfriend's father as nobody told her.
- The inspections started in January after being told by her insurance company that she should carry out an inspection. At that time it was apparent there was a condensation problem and she wanted to ensure it was being properly dealt with. There were 3 inspections during the course of the 8 month tenancy.
- A problem occurred on occasion when the tenant failed to balance the load in the laundry. She would attend because of the noise and to see if she could help.
- Early in the tenancy the tenant agreed with the landlord that her boyfriend would be staying over only on weekends. It became apparent that he was staying over often during the weekdays and the reference to the water bill was evidence that he was staying over.
- She talked to the tenant only 3 occasions only about the presence of her boyfriend.
- Her boyfriend's mail was being delivered to the rental unit and he was often in the suite even when the tenant was out.
- She was concerned about the parking of the motor home on the gravel.

The tenant vacated the rental unit in early May. However, she retained the keys. Her agent and landlord conducted a Condition Inspection at the end of May 2013. They disagreed as to the condition of the tenancy. The tenant paid the rent for May. The landlord testified that she placed running advertisement in Craigslist in early April after

she received the tenant's written notice but she was not able to rent the rental unit until August 1, 2013.

Landlord's Claim:

Section 45 of the Residential Tenancy Act provides as follows:

Tenant's notice

45 (2) 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,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(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.

(3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Policy Guideline #30 dealing with fixed term tenancies includes the following paragraph

A tenant may not use the one month notice provisions of the Legislation to end the tenancy prior to the end of the fixed term. Any one month notice will take effect not sooner than the end of the fixed term.

Policy Guideline #6 includes the following:

Ending Tenancy for Breach of a Material Term

A breach of the covenant of quiet enjoyment has been found by the courts to be a breach of a material term of the tenancy agreement. A tenant may elect to treat the tenancy agreement as ended, however the tenant must first so notify the landlord in writing. The standard of proof is high – it is necessary to find that there has been a significant interference with the use of the premises. An award for damages may be more appropriate, depending on the circumstances.

In summary the tenant is responsible for paying the rent until the end of the fixed term unless the tenant can end the tenancy under section 45(3) because the landlord has breached a material term of the tenancy agreement and has not corrected the situation within a reasonable period of time after the tenant gives the landlord written notice of the failure.

It may be that the tenant is entitled to compensation for the landlord's breach of the covenant of quiet enjoyment. However, in order for the tenant to end the tenancy before the expiry of the fixed term the tenant must give the landlord written notice of the breach and a reasonable opportunity to correct the situation. In the letter of April 5, 2013 the tenant purports to end the tenancy as of May 31, 2013. This is not a form of notice where the tenant advises the landlord that she feels the landlord has breached a material term and then provides the landlord with a reasonable opportunity to rectify the breach. I determined the landlord has sufficiently attempted to mitigate her loss. She testified that she advertised the rental unit on Craigslist and on-line sites. These are the methods she has always used. I determined this is reasonable mitigation.

Analysis - Monetary Order and Cost of Filing fee

With respect to each of the landlord's claims I find as follows:

- a. I determined the landlord is entitled to \$1500 for loss of rent for June 2013 (\$750 is owed) and July 2013 (\$750 is owed). The tenant was responsible to pay the rent until the end of the fixed term which was August 31, 2013. The tenant failed to comply with section 45(3) and has not ended the tenancy on the basis of the breach of a material term of the tenancy. The landlord has

sufficiently attempted to mitigate her loss and was successful to the extent that a new tenant was found who took possession on August 1, 2013.

- b. The landlord claimed the sum of \$160 for the cost of cleaning (5 hours @ \$20 per hour for general cleaning and 2 hours @\$30 per hour for oven cleaning). The landlord did the work herself. After carefully considering all of the evidence including the oral testimony of the parties and the photographs I determined the landlord is entitled to \$120 of this claim.
- c. I determined the landlord is entitled to \$40 for repair costs.
- d. I determined the landlord is entitled to \$10.27 for basic hydro cost for June and July.

In summary I determined the landlord has established a claim against the tenant in the sum of \$1670.27. I granted the landlord a monetary order in the sum of \$1670.27 plus the sum of \$50 in respect of the filing fee for a total of \$1720.27.

Security Deposit

I determined the security deposit plus interest totals the sum of \$375. I ordered the landlord may retain this sum thus reducing the amount outstanding under this monetary order to the sum of \$1345.27.

Tenant's Claim:

The tenant seeks a monetary order of \$1687.50 for breach of the covenant of quiet enjoyment. Section 28 of the Residential Tenancy Act provides as follows:

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

Section 30 of the Residential Tenancy Act provides as follows:

Tenant's right of access protected

30 (1) A landlord must not unreasonably restrict access to residential property by

- (a) the tenant of a rental unit that is part of the residential property, or
- (b) a person permitted on the residential property by that tenant.

Policy Guideline #6 includes the following:

Every tenancy agreement contains an implied covenant of quiet enjoyment. A covenant for quiet enjoyment may be spelled out in the tenancy agreement; however a written provision setting out the terms in the tenancy agreement pertaining to the provision of quiet enjoyment cannot be used to remove any of the rights of a tenant established under the Legislation. If no written provision exists, common law protects the renter from substantial interference with the enjoyment of the premises for all usual purposes.

• Basis for a finding of breach of quiet enjoyment

Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.

The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the

covenant of quiet enjoyment. Such interference might include serious examples of: ·
entering the rental premises frequently, or without notice or permission;

- persecution and intimidation; ·
- refusing the tenant access to parts of the rental premises; ·
- preventing the tenant from having guests without cause; ·
- intentionally removing or restricting services, or failing to pay bills so that services are cut off; ·
- forcing or coercing the tenant to sign an agreement which reduces the tenant's rights; or, ·
- allowing the property to fall into disrepair so the tenant cannot safely continue to live there.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

Harassment

Harassment is defined in the Dictionary of Canadian Law as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”.³ As such, what is commonly referred to as harassment of a tenant by a landlord may well constitute a breach of the covenant of quiet enjoyment. There are a number of other definitions, however all reflect the element of ongoing or repeated activity by the harasser.

Section 9 of the Schedule attached to the Residential Tenancy Act Regulations which is made a part of every tenancy agreement provides as follows:

Occupants and guests

- 9 (1) The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit.
- (2) The landlord must not impose restrictions on guests and must not require or accept any extra charge for daytime visits or overnight accommodation of guests.
- (3) If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end a tenancy. Disputes regarding the notice may be resolved by applying for dispute resolution under the *Residential Tenancy Act*.

Analysis:

Most of the complaints raised by the tenant do not amount to the breach of the covenant of quiet enjoyment for the following reasons

- The tenant complained about the landlord inspecting for condensation. The landlord conducted 3 inspections during the 8 months the tenant lived in the rental unit. The Residential Tenancy Act permits a landlord to inspect once a month. This is not a breach of the covenant of quiet enjoyment.
- The landlord's attendance when the tenant failed to properly balance the washing machine is not a breach of the covenant of quiet enjoyment. This is not significant or repeated. The landlord was disturbed by the noise and she was entitled to deal with it in the manner that she did.
- I do not accept the submission of the tenant that the telephone call asking the tenant to turn off her fan amounts to the breach of a covenant of quiet enjoyment. There are safety concerns as well as the disturbance that it was causing the upstairs landlord.
- The interaction between the landlord and the tenant's family relating to the parking of the motor home do not amount to the breach of the covenant of quiet enjoyment or harassment.
- The tenant failed to prove that the landlord used e-mail in a harassing or inappropriate way.

However, I determined the landlord's conduct with respect to the presence of the tenant's guest is sufficient for a claim for breach of the covenant of quiet enjoyment. I accept the evidence of the tenant that the boyfriend lived in residence at the University of Victoria and thus was not an occupant of the rental unit. The landlord was not happy about the continued presence of the boyfriend during the weekdays. I do not accept the submission of the landlord that she can restrict the access of the guest because the tenant had agreed he would only be there on weekends. The tenant is young. Such a provision is contrary to the Schedule attached to the Residential Act Rules which is made a part of every tenancy agreement. That provides that the landlord must not stop the tenant from having guests under

reasonable circumstances. The restriction to weekends is not a reasonable demand. The landlord testified that she talked to the tenant on 3 occasions only and she did not refuse his access. I am satisfied that the landlord disapproved and she made it clear to the tenant that his continued presence would create problems. In the circumstances I determined the tenant is entitled to \$300 in compensation plus the \$50 filing fee for a total of \$350.

Conclusion:

I determined that the landlord owes the tenant the sum of \$350. I determined the tenant owes the landlord the sum of \$1345.27 after deducting the security deposit. After setting off one claim against that of the other I ordered that the Tenant pay to the Landlord the sum of \$995.27.

It is further Ordered that this sum be paid forthwith. The Landlord is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the Tenant fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court 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: August 09, 2013

Residential Tenancy Branch