



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Cornerstone Properties Ltd.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      For the landlord: MNR, MNDC, MNSD, FF  
For the tenant: MNDC, MNSD, 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 landlord applied for authority to retain the tenant’s security deposit, a monetary order for unpaid rent and for money owed or compensation for damage or loss, and for recovery of the filing fee.

The tenant applied for a return of her security deposit, a monetary order for money owed or compensation for damage or loss, and for recovery of the filing fee.

The landlord’s agent (hereafter “landlord”) and the tenant attended, the hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter both parties were provided the opportunity to present their evidence orally, refer to documentary evidence submitted prior to the hearing, and make submissions to me.

At the outset of the hearing, neither party raised any issues regarding service of the application or the evidence.

I have reviewed the oral and written evidence of the parties before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

### Issue(s) to be Decided

1. Is the landlord entitled to retain the tenant’s security deposit, further monetary compensation, and to recover the filing fee?
2. Is the tenant entitled to a return of her security deposit, further monetary compensation, and to recover the filing fee?

### Background and Evidence

The undisputed evidence shows that this tenancy began on July 15, 2013, was for a fixed term through July 31, 2014, monthly rent was \$1100, and the tenant paid a security deposit of \$550 at the beginning of the tenancy.

The landlord submitted that the tenant vacated the rental unit on September 5, 2013, and the tenant submitted that she moved out on August 31, 2013.

The rental unit is one in a multi unit condominium building.

The listed landlord is a property management company.

#### *Landlord's application-*

The landlord's monetary claim listed in their application was \$2600, comprised of loss of rent revenue for September 2013, in the amount of \$1100 and for October 2013, of \$1100, and liquidated damages of \$400.

At the hearing, the landlord amended their monetary claim to exclude a request for October loss of rent revenue, as the rental unit was re-rented for October 2013.

The landlord submitted that they are entitled to loss of rent revenue as the tenant ended the fixed term tenancy early, as the tenant chose to vacate prior to the end of the fixed term.

The landlord submitted that they are entitled to \$400 as liquidated damages, due to the agreed upon term in the tenancy agreement requiring the tenant to pay the same in the event the tenant ended the tenancy earlier than the fixed term. The landlord stated that the liquidated damages clause was explained to the tenant.

The landlord's relevant documentary evidence included the tenancy agreement and a condition report, showing the occupancy date, but not the date of the final inspection.

#### *Tenant's application-*

The tenant's monetary claim is \$1915, comprised of \$500 for move in to the rental unit, \$500 for move out of the rental unit, \$365 for research to prepare for dispute resolution, and the security deposit of \$550.

In support of her application, the tenant said that she only agreed to lease the rental unit due to the landlord's agent assurance, when viewing the rental unit, that the building was constructed with concrete blocks and that she would "not hear a thing" from surrounding rental units in the building. The tenant stated that having a quiet rental unit

was of the utmost importance as she has a stressful job, required a very quiet place, and had just endured a year's lease at another rental unit, which was quite noisy.

The tenant submitted that within 24 hours of moving in, she began hearing noises from the unit above her, which included footsteps, something being dragged across the floor, visitor noises, and washroom activities.

The tenant researched and discovered that the building was not a concrete structure, as shown by her documentary evidence, which included a report from the municipality giving the construction specifics of the building, such as age and composition. The report states that the parkade was concrete and the building above was a wood frame.

The tenant testified that since the landlord's agent misrepresented the construction of the building and the noise level, she gave her notice to the landlord on July 31, 2013, that she was vacating by August 31, 2013.

The tenant submitted that due to the landlord's misrepresentations, she is entitled to moving costs for her sudden move.

I must note that the landlord's agent dealing with this tenant and this tenancy at the beginning of the tenancy and for several weeks thereafter was not the same agent attending the hearing. The agent attending the hearing said that the landlord's agent who initially dealt with the tenant was no longer with the company.

The tenant's additional relevant documentary evidence included email communication between the tenant and this landlord's agent, regarding the final inspection of the rental unit and reminders to the landlord that she, the tenant, was moving out on August 31, email communication between the tenant and the landlord's agent at the time, most particularly, informing that agent of the noise from the above unit, and the full report from the municipality regarding the construction of the condominium building.

In response, the landlord's agent submitted that the tenant was not entitled to break the fixed term lease, as the landlord was never given an opportunity to resolve the noise issue with the neighbour above the tenant.

The landlord agreed that the landlord would not have immediately began advertising the rental unit as the tenancy agreement was for a fixed term and there was no opportunity to resolve the noise complaints.

### Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act, which falls in sections 7 and 67, or tenancy agreement, the claiming party, both parties in this case, has to prove, with a balance of probabilities, four different elements:

**First**, proof that the damage or loss exists, **second**, that the damage or loss occurred due to the actions or neglect of the respondent in violation of the Act or agreement, **third**, verification of the actual loss or damage claimed and **fourth**, proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

### **Landlord's Application**

I find the evidence supports that the tenancy ended on August 31, 2013, when the tenant vacated the rental unit, not on September 5, 2013, when the parties mutually agreed to a final inspection.

Section 45 (3) of the Residential Tenancy Act authorizes a tenant to end a tenancy by giving proper notice if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure.

In the case before me, the landlord disputes that the tenant was entitled to end the tenancy early as the landlord was never given an opportunity to resolve the noise complaints regarding the neighbour living in the rental unit above the tenant.

The tenant submitted that she relied on the assertions of the landlord's agent at the time that the building was a concrete structure and that she would not hear any noises from any neighbours. The tenant also argued that she was entitled to end this tenancy early due to the landlord's misrepresentations as to the construction of the building, which led to an immediate loss of quiet enjoyment, a material term of the tenancy agreement.

To determine the materiality of the term in the tenancy agreement, I must determine the importance of the construction of the building in the overall scheme of the tenancy agreement. A material term is a term that is of such importance that the most trivial breach of the term gives the other party the right to end the tenancy.

As the burden of proof is upon the landlord, I find that the landlord failed to substantiate that the declaration of the landlord's agent that the tenant would hear no noise and that the building was concrete was not a material term of the agreement and I find that the tenant's hearing noise from the unit above to be a ground to end this tenancy.

In reaching this conclusion I was strongly influenced by the fact that the tenant provided undisputed evidence that she was moving from another building, which was noisy, and that she required a quiet environment due to stresses in her job.

I accept the tenant's arguments as I found her evidence to be clear, consistent and compelling. I also relied on the fact that the landlord's agent attending the hearing was not present during the showing of the rental unit and throughout the initial stages of the tenancy, and therefore could not refute any of the evidence of the tenant. I also considered that the tenant provided documentary evidence that the building was a wood frame building.

I find that the tenant detrimentally relied on the assertions of the landlord's agent of the composition of the building and I further find, upon a balance of probabilities, that the tenant substantiated her position that the term was a material term.

As I have determined that the term in the tenancy agreement referring to noise level and composition of the building was a material term, I must further look to ensure that the tenant gave proper written notice. Upon a review, I find that tenant complied with the Act as I find that it would not be possible for the landlord to correct the situation after receiving written notice, due to the composition of the building. The issue was not one of excessive noise, as argued by the landlord.

I therefore find the tenant had grounds to end the tenancy and that the tenancy has ended by the landlord's breach of a material term. I therefore find the landlord has failed to meet the second step in their burden of proof.

I therefore find that the landlord is not entitled to monetary compensation and I dismiss the landlord's application for loss of rent revenue for September and for liquidated damages, without leave to reapply.

### **Tenant's application-**

As I have dismissed the landlord's application claiming against the tenant's security deposit, I find the tenant is entitled to a return of her security deposit of \$550.

As to the tenant's claim for \$500 for a move in and move out, I find the tenant submitted insufficient evidence to support her request for this amount. In reaching this conclusion, I find the tenant failed to explain her request for this specific amount in that she failed to provide receipts or time records. I therefore dismiss her claim for \$1000.

As to the tenant's request for \$365 for research time, I also find that I do not have authority to award an applicant for costs associated with preparing paperwork or research as these are not costs enumerated as recoverable under the Act. I therefore dismiss her monetary claim for \$365.

I find the tenant's application had merit and I award her recovery of the filing fee of \$50.

Due to the above, I find the tenant is entitled to a total monetary award of \$600, comprised of a return of her security deposit of \$550 and the filing fee of \$50.

### Conclusion

The landlord's application for monetary compensation is dismissed.

The tenant's application for monetary compensation is granted in part.

I grant the tenant a final, legally binding monetary order pursuant to section 67 of the Act for the amount of \$600, which I have enclosed with the tenant's Decision.

Should the landlord fail to pay the tenant this amount without delay after being served the order, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court. The landlord is advised that costs of such enforcement are recoverable from the landlord.

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* and is being mailed to both the applicant and the respondent.

Dated: December 30, 2013

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Residential Tenancy Branch

