Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MDSD & FF

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 including the oral testimony of the parties, the documents, photographs and the affidavits produced by the respondent.

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 sufficiently served on the respondent. .

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?

Background and Evidence

On March 23, 2013 the respondent and four other parents signed a residential tenancy agreement for the rental of the house that provided that the tenancy would start on

August 1, 2013 and continue for a fixed term of one year ending on July 30, 2014. The rent was $2700 per month payable on the first day of each month. The tenants paid a security deposit of $1350. The tenants are parents of 5 boys (student tenants) who were entering into second year at the University of Victoria.

Paragraph 9 of the tenancy agreement provides as follows:

> "The landlord must provide and maintain the residential premises and residential property in a reasonable state of decoration and repair, making the residential premises and residential property suitable for occupation by a reasonable tenant. The landlord must comply with health, safety and housing standards required by law. .."

The first son arrived on August 18, 2013 and a condition inspection of the rental property was conducted at that time. The sworn statement of one of the student tenants present states that the inspection was rushed and incomplete. The Condition Inspection Report was not given to the tenants following the inspection even the respondent asked for a copy of it on August 25, 2013 and again on August 30, 2013 (requested by another parent).

On August 22, 2013 the respondent visited the rental unit with her son and was shocked at the deficiencies. The respondent made a list of the deficiencies that was given to the landlord. The house did not have a working smoke alarm. The basement smelled musty. Gutters were not attached to the rental unit. There was a multitude of other deficiencies. The landlord told the student/tenants they must use a dehumidifier. The landlord submits this is evidence that the landlord was aware the rental property had a water and mould problem.

On August 22, 2013 two of the student tenants had a physical reaction to being inside the rental property. The respondent attached a letter from the physician for one of the student tenants linking his allergic reaction to mould. A letter from the physician of a

second student tenant confirming his reaction was in keeping with an allergic reaction to mold, which also triggered asthmas symptoms was also included..

The respondent became concerned that the rental property had health and safety issues beyond that which was immediately visible and identifiable, making it unsuitable for habitation.

On August 24, 2013 the respondent and her husband talked about early termination of the lease with the landlord. The landlord refused.

On August 25, 2013 the respondent conducted a search of the attic and discover extensive mold. The respondent took a number of photographs of the problem which were later given to a bylaw officer for inspection.

On August 26, 2013 another parent negotiated an early lease termination with the landlord. However the landlord refused to sign a written agreement. That tenant e-mailed the landlord confirming the agreement and attaching a form of settlement document for the landlord to sign. The affidavit states the landlord accepted the proposal as evidenced by the fact the landlord placed an advertisement in Craigslist on that date. The affidavit further states the parents and student tenants relied on that oral agreement by proceeding to secure other accommodation. The landlord subsequently refused to sign the settlement.

On August 31, 2013 the tenants provided the landlord with a Notice of Termination noting that the landlord failed to comply with section 9(a) of the tenancy agreement which purported to end the tenancy on September 30, 2013. The belongings of the student tenants were moved out on August 31, 2013.

On September 1, 2013 one of the tenants met with the landlord and provided him with the rent cheque for September. The rent cheque had a note on the back of it which read “Cashing of this cheque by JP acknowledges full and final releases of all joint and

several lease obligations of the tenant for ….." The agreement provided that the landlord could retain the security deposit. The keys were returned to the landlord on September 1, 2013. The landlord cashed this cheque on September 16, 2013.

The respondent testified the first time she became aware the landlord had not agreed to the settlement was when she received a copy of the Landlord's Application for Dispute Resolution in early October. At that time she checked with the District of Sannich and obtained a letter from the District of Sannich Inspection Services confirming that no building permits for any works had been issued since 1972.

The respondent produced a letter from a neighour dated October 21, 2013 stating that the house has been unoccupied from September to the date of the letter. It further states there has been sporadic work done on the property including repairs to the roof which were completed in early September. The letter states "Workmen and women have been seen almost daily, repairing the back porch, working indoors, delivering construction material including bundles of insulation. A vehicle with a drywall and painting label was seen in the driveway on October 18, 2013.

In October the respondent contacted MG, a Building Inspector (23 years experience) employed by the Corporation of Delta and asked him to review a series of photographs she had taken of the rental property and provide an opinion. His opinion includes the following:

> "The BC Building Code and the BC Electric Code set out regulations that establish minimum standards for health, safety, accessibility, fire and structural protection and energy. The above-mentioned photographs illustrate a building that does not meet these safety requirements. These photographs illustrate issues with egress which are critical to providing safe evacuation of a building in the case of fire, electrical issues which are potential fire hazards, poor long term maintenance of the buildings' exterior, which is the likely cause of the mould visible in the attic and likely present other areas of the house. While the Building Code has changed over time, it never permitted whit is illustrated in these photographs. This house does not meet health and safety standards required by

law, and I don't believe the house was habitable in the condition shown by the photographs.

Landlord's Evidence:

The applicant seeks a monetary order in the sum of $10,300 which includes the full rent of $2700 for the months of October and November and the loss the landlord has suffered for the balance of the term ($600 per month for December to July 2013). The landlord re-rented the rental unit on November 14, 2013 at a rent of $2100 per month with the new tenants taking possession on December 1, 2013.

The landlord testified the tenants rented the rental unit in March and had ample time to inspect the rent unit. He conducted a condition inspection at the start of the fourth week of August with one of the student tenants. He testified the Condition Inspection report was not given the tenant as the tenants did not provide a forwarding address until September 13, 2013.

The landlord testified the majority of the repairs including the replacement of the roof were completed in four days in early September. The mould problem was remediated at that time and the roof was properly ventilated. The other repairs were made at that time. The landlord testified that the witness who testified that work continued until the October 21, 2013 should be discounted because that neighbor is upset with him for renting the rental unit. He testified that he came to the rental regularly as it was unoccupied but most of the work was completed in September.

The landlord testified he advertised on Craigslist and Kajiji commencing the end of August and on a regular basis until the rental unit was rented on November 14, 2013 for the reduced rent of $2100.

Relevant Law:

The landlord is entitled to claim any loss of rent incurred for the balance of the fixed term subject to the landlord's obligation to mitigate and the tenant's right to terminate the tenancy if the landlord has breached a material term of the tenancy.

Section 32(1) (a) of the Residential Tenancy Act provides as follows:

Landlord and tenant obligations to repair and maintain

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 45(3) of the Residential Tenancy Act provides as follows:

Tenant's notice

45 (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 includes the following:

During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties. For example, during the fixed term a landlord may end the tenancy if the tenant fails to pay the rent when due**.** A proper Notice to End Tenancy must be served on the tenant. During the fixed term a tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation). Breach of a material term involves a breach which is so serious that it goes to the heart of the tenancy agreement.

Policy Guideline #6 provides as follows:

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:

….

- 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.

It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Substantial interference that would give sufficient cause to warrant the tenant leaving the rented premises would constitute a breach of the covenant of quiet enjoyment, where such a result was either intended or reasonably foreseeable.

A tenant does not have to end the tenancy to show that there has been sufficient interference so as to breach the covenant of quiet enjoyment, however it would ordinarily be necessary to show a course of repeated or persistent threatening or intimidating behaviour. A tenant may file a claim for damages if a landlord either engages in such conduct, or fails to take reasonable steps to prevent such conduct by employees or other tenants.

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it. A landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy.

In the British Columbia Supreme Court's decision of Lawrence v. Kaveh, 2010 BCSC 1403 the Court set aside the decision of a dispute resolution officer which had granted the landlord a monetary order. In that case the rental unit was advertised as "no

smoking, no pets." The parties entered into a one year fixed term tenancy commencing on August 1, 2008. The tenancy agreement did not include term relating to "no smoking." After the tenant took possession on August 23, 2008 it became apparent that the downstairs tenant was a smoker. The tenancy agreement for the downstairs tenant who had lived there for 2 years did not prohibit smoking. The tenant complained to the landlord. The landlord talked to the downstairs tenant the next day and they refused to stop smoking. After the tenant was advised of this refusal she contacted the Residential Tenancy Branch and received advice that the downstairs tenants were entitled to take this position. The tenant moved out on September 4, 2008. She then gave the landlord a letter advising she was moving out because of the adverse effects of the second hand smoke on her and her children and she placed a stop payment on the rent cheque, and asked that the security and pet deposit be returned to her.

The Dispute Resolution Officer who originally heard the case granted the landlord's application for a monetary order on the basis that the tenancy agreement between the landlord and the tenant did not include a term that this was to be a non-smoking unit and because "the tenant did not end the tenancy as required by the legislation…"

On judicial review the tenant argued there was an implied term this was to be a smoke free unit. Secondly, the tenancy agreement included a provision that the tenant was entitled to quiet enjoyment and freedom from unreasonable disturbance.

The Supreme Court justice quoted parts of Policy Guideline #6 referred to above and determined the decision of the dispute resolution officer was patently unreasonable because it did not consider whether the present of second hand smoke could be considered the breach of the covenant of quiet enjoyment.

Of significance is that the court overturned the decision of the dispute resolution officer despite the fact that the tenant failed to follow all of the requirements under section 45(3) (i.e. providing the landlord with a reasonable time to rectify the breach of a material term). In Lawrence the tenant vacated the rental unit and then gave the

landlord notice. In the case before me the landlord had over a month to rectify the situation as the tenants paid the rent for September. In my view Lawrence v Kaveh is authority for the principle that it is possible for a tenant to end a tenancy if there has been a breach of a material term of the tenancy agreement even though the tenant has not fully complied with section 45(3) by giving the landlord a reasonable opportunity to rectify the breach.

Analysis:

I determined the landlord has failed to establish he is entitled to the relief claimed for the following reasons:

Firstly, I determined paragraph 9 of the tenancy agreement (which is a standard term of incorporated into all tenancy agreements as set out in the Schedule to the Residential Tenancy Act Regulations) and the obligations set out in section 32(1)(a) of the Residential Tenancy Act is a material term of the tenancy agreement as the obligation to provide a habitable rental unit goes to the heart of the tenancy agreement. Further, the Residential Tenancy Act and Policy Guideline #30 provide an obligation on the landlord has an obligation to ensure the quiet enjoyment of the rental unit. This includes an obligation to ensure the rental unit does not fall into disrepair so the tenant cannot safely continue to live there. The habitability of a rental unit is the essence of what is being contracted for.

I determined the landlord was aware of the water ingress problem as evidence by the fact he told the student tenants they would have to run a humidifier and he withheld that information. This amounts to a latent defect which the landlord was aware of that was not apparent with the original inspection. This constitutes a breach of the covenant of quiet enjoyment as set out in Policy Guideline #6 which is quoted above.

I determined the landlord breached a material term in the tenancy agreement by failing to make the rental unit habitable based on the following evidence:

- The photographs show significant problems with mold, the electrical system and safety issues relating to the rental unit.
- A building Inspector of 23 years experience has provided an opinion that based on the photographs he saw the rental unit was not habitable.
- Two of the student tenants suffered health problems relating to the presence of mold after they were in the rental unit for a short period of time.
- The landlord took at least 7 weeks to effect repairs.
- The testimony of the respondent who viewed the rental property gave an extensive list of significant deficiencies.

The difficult issue is whether the tenant can end a tenancy agreement where the landlord has breached a material term without giving the landlord written notice and a reasonable opportunity to rectify the breach as set out in section 45(3) of the Residential Tenancy Act.. Policy Guideline #6 above includes the following statement “a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy. The Supreme Court of British Columbia’s decision in Lawrence v. Keveh is authority for the principle that it is possible for a tenant to end a tenancy if there has been a breach of a material term of the tenancy agreement even though the tenant has not fully complied with section 45(3) by giving the landlord a reasonable opportunity to rectify the breach.

Secondly, even if I am wrong in my interpretation of the Lawrence case I determined I determined the landlord had Notice of the problems and failed to fix them within a reasonable time after receiving written notice to do so. I do not accept the testimony of the landlord that all of the repairs were completed within 4 days in early September. The landlord made an insufficient effort to communicate with the tenants that he was intending to make the repairs promptly. The repairs were urgent and necessary. The health of two of the student tenants was significantly affected by the mould. I

determined based on the evidence presented that the repairs were not completed until after October 21, 2013.

Thirdly, I determined the landlord failed to mitigate his loss. Section 7(2) of the Residential Tenancy Act imposes provides as follows:

> **Liability for not complying with this Act or a tenancy agreement**
>
> **7** (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Even if the tenants breached the fixed term tenancy agreement (which I have not determined) I determined the landlord failed to do whatever is reasonable to minimize the damage or loss. The landlord failed to sufficiently communicate with the tenants what steps he intended to take to rectify the situation. The landlord failed to rectify the situation within a reasonable period of time as required by the principle of mitigation. The keys were return to the landlord and the landlord regained possession of the rental unit at the end of August. I do not accept the testimony of the landlord the majority of the repairs were completed in 4 days. The evidence of the neighbor indicates that as of October 21, 2013 repairs were still to be completed. The landlord failed to complete the repairs in a timely manner and the law provides that the tenants ought not to be responsible for the landlord's delays in dealing with these issues.

Summary:

For the reasons set out above I determined the landlord failed to prove its claim and accordingly the claims of the landlord for a monetary order, to retain the security deposit and for the cost of the filing fee is dismissed without leave to re-apply.

Policy Guideline #17 includes the following:

RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH ARBITRATION

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit, or
- a tenant's application for the return of the deposit unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

The landlord right to claim against the tenants' deposit has been dismissed. Policy Guideline #17 provides that the arbitrator will order the return of the security deposit in such a situation even whether or not the tenant has applied for arbitration. **As a result I ordered that the landlord pay to the tenants the security deposit in the sum of $1350.** The Application for Dispute Resolution filed by the Landlord claimed against one of the tenants only. Any deposit money received by the respondent from the landlord is to be held as trustee for all tenants.

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

Should the applicant 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: December 16, 2013

Residential Tenancy Branch