



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding RE/MAX KELOWNA PROPERTY MANAGEMENT  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNSD, MNDC, FF

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the “Application”) made by the Landlord to keep all or part of the security and pet damage deposit; for money owed or compensation for damage or loss under the *Residential Tenancy Act* (the “Act”), regulation or tenancy agreement; and, to recover the filing fee from the Tenant for the cost of the Application.

An agent for the Landlord and the Tenant appeared for the hearing and no issues were raised by any of the parties in relation to the service of the hearing documents and evidence in accordance with the Act and Rules of Procedure.

The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed the evidence and testimony before me that met the requirements of the Rules of Procedure; however, I refer to only the relevant facts and issues in this decision.

### Issue(s) to be Decided

- Was the Tenant justified in breaking the fixed term tenancy?
- Has the Landlord breached a material term of the tenancy?
- Is the Landlord entitled to liquidated damages and loss of rent?
- Is the Landlord entitled to keep the Tenant’s security and pet damage deposits in partial satisfaction of the Landlord’s claim?

### Background and Evidence

Both parties agreed that this tenancy of a rental suite in a strata building started on March 29, 2011. Written tenancy agreements were completed each year and the latest agreement, which was provided as evidence, shows the tenancy was renewed to start on May 1, 2013 for a fixed term of one year, due to end on April 30, 2014. Rent was payable by the Tenant in the amount of \$1,550.00 on the first day of each month. At the start of the tenancy the Tenant paid a security deposit in the amount of \$750.00 and a pet damage deposit in the amount of \$300.00. The Landlord still retains these deposits.

The Landlord's agent testified that the Tenant had provided written notice (the "Notice") on October 1, 2013 to end the fixed term tenancy at the end of November, 2013. The Landlord testified the Tenant had broken the fixed term tenancy because of mold remediation work that was completed on the building by the strata corporation which had resulted in disruption to the Tenant.

The Landlord referred to a previous hearing that was held on November 21, 2013 (the file number for which is detailed on the front page of this decision). As a result of the hearing, the arbitrator sided with the Tenant who was awarded some monetary compensation for the loss of quiet enjoyment of the tenancy because of this work. The Landlord's agent testified that the Tenant had already been provided with a remedy for the disruption she experienced during the previous hearing, but this did not give her the right to break the fixed term tenancy, a Notice for which she had provided before the previous hearing had taken place.

In addition, the Landlord's agent claimed that the Tenant's reasoning for leaving the tenancy was associated with anticipated noise from another remediation project that the Tenant had claimed was to take place in the building.

The Landlord's agent testified that as a result of receiving the Tenant's Notice on October 31, 2013, the property was advertised for re-rental. The Landlord provided a number of advertisements which had been posted to seven on-line rental sites the next day. The Tenant left on November 28, 2013 as per the Notice and provided the Landlord with a forwarding address in writing on this date. The Landlord was able to re-rent the suite for January, 2014 and provided the new renter's tenancy agreement as evidence to support the Landlord's attempt to mitigate the loss. As a result, the Landlord claims the lost rent for December, 2013 in the amount of \$1,550.00.

In addition, the Landlord's agent pointed to Section 5 of the written tenancy agreement which states that the Tenant is responsible for paying \$625.00 as liquidated damages

(and not as a penalty) for breaking the fixed term tenancy. As a result, the Landlord also claims this amount from the Tenant.

The Tenant testified that she had provided the Notice to the Landlord during the time the work was still ongoing and that it was based on the fact that she could not bear to continue living in the tenancy with such noise going on. The tenant submitted documentary evidence including an audio CD of the noise that she had experienced from the remediation work taking place in the building. This evidence was also submitted and discussed in the previous hearing.

The Tenant stated that she had been a good Tenant for a long period of time and had every intention to honor the fixed term tenancy. The Tenant testified that she followed every protocol including alerting the Landlord to the noise in writing for which the Landlord did not respond adequately.

The Notice was provided as evidence for this hearing and I have detailed some relevant portions of the Notice below:

“Considering the current and forthcoming intrusion of noise in my apartment related to the concrete demolition... It appears that another extensive project will be commencing with similar noise and vibration associated with drilling the concrete on the P1 level. I can't place myself in yet another situation where I will be once again be caused the mental and physical stress along with massive inconvenience and expense of relocating while these projects are being done.”

[Reproduced as written.]

The Tenant testified that, while her Notice stated that she was leaving the tenancy based on the potential future projects, her reasoning was that the work was still ongoing at the time the Notice was provided to the Landlord.

The Landlord and Tenant agreed that the demolition work started in early October, 2013 and finished in the middle of November, 2013, and during this time the work was completed during fixed hours in the day. The Tenant testified however, at the time the Notice was given, the building manager advised that they were not sure how long the work could take and could potentially go into December, 2013. The Landlord submitted that during the latter stage of the project, the noise levels had reduced as the demolition of concrete had been completed in the first month. The Tenant rebutted this, submitting that the removal of the concrete still resulted in major disruption in her daily life as she worked from home.

The Landlord's agent did not dispute the evidence the Tenant had provided in relation to the noise levels and the manner in which the Tenant addressed these issues with the Landlord. However, the Landlord's agent submitted that the Tenant had already received compensation for the disruption caused by the work.

### Analysis

In relation to the Landlord's claim for the deposits, I find that the Landlord made the Application to keep the deposits within the time limits afforded by Section 38(1) of the Act.

The undisputed evidence provided by the Tenant in this case relates to the noise levels she experienced during the remediation project. The Tenant made an Application to address the noise levels by seeking monetary compensation during a previous hearing where the arbitrator agreed that the Tenant had suffered a loss of quiet enjoyment.

However, this case does not question the Tenant's right to peaceful and quiet enjoyment but requires analysis on whether the Tenant had grounds to break the fixed term tenancy based on the remediation work that occurred in the building.

Fixed term tenancies are designed to strictly prohibit a Tenant or Landlord from ending the tenancy. However, the Act provides certain grounds under which such a tenancy may be ended. Section 45(3) of the Act states that a Tenant may end a fixed term tenancy 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 this case, I find that the breach of the material term claimed by the Tenant which led to her ending the tenancy was based on mold remediation work the strata management of the building was undertaking. Section 32(1) of the Act provides that a Landlord is required to maintain a rental suite in a state of repair that complies with the health, safety and housing standards required by law. In addition Policy Guideline 21 to the Act gives further guidance respecting strata repairs. This guideline states that the Strata Property Act requires strata corporations to repair and maintain common property. The guideline also provides that if the Tenant's enjoyment is adversely affected by a problem originating in the common areas, the Tenant may be awarded an abatement of rent or damages. The policy guideline makes no reference to a Tenant ending a tenancy based on strata repairs.

In this case, I find that the Landlord had to balance the Tenant's right to quiet enjoyment of the rental suite with the need for these repairs which I find were necessary and a legal requirement of the strata corporation.

Under the circumstances and despite empathic evidence from the Tenant in relation to her experience with the remediation work, I find that the Landlord did not breach a material term of the Tenancy agreement. The Landlord was under a duty to ensure the Tenant received the rental suite free of mold exposure and in addition this work had to be done by the strata corporation in relation to their obligations under the Strata Property Act. The Landlord had no control over this work, which despite having a significant impact on the Tenant, was temporary, completed during reasonable hours of the day and was essential for the continuing obligations the Landlord had towards the tenancy. Therefore, I find that this does not constitute a breach of a material term by the Landlord.

The Tenant was awarded damages for the loss of peaceful and quiet enjoyment for the rental suite as required by the guideline and I accept the submission of the Landlord's agent that this was sufficient remedy for the Tenant, even though this remedy did not come from the Landlord. As a result, I find that this did not give the Tenant an automatic right to end the lease. It would have been a more appropriate course of action under the circumstances for the Tenant to have sought an arbitrator's decision to end the tenancy during the previous hearing or on Application of one, before ending the tenancy on her own reasoning.

As I have found that the Tenant was not entitled to break the fixed term tenancy, I continue to analyze the Landlord's claim as follows.

Policy Guideline 4 defines liquidated damages as "A clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into."

The Tenant signed the tenancy agreement which contained a liquidated damages clause for breaking the tenancy. Therefore, the Tenant is liable to pay to the Landlord the \$625.00 as required by the clause.

Section 7 of the Act states that a party not complying with the Act, the regulations or their tenancy agreement must compensate the other for damage or loss that results and if the party makes a claim, they must do whatever is reasonable to minimize the damage or loss.

In this case, I find that the Landlord had provided sufficient evidence of their loss from the Tenant leaving the tenancy and mitigated this loss by advertising the rental suite for re-rental at the earliest opportunity. As a result, I find that the Landlord is also entitled to \$1,550.00 for the lost rent relating to December, 2013.

As the Landlord has been successful in this matter, the Landlord is also entitled to recover from the Tenant the \$50.00 filing fee for the cost of this Application pursuant to Section 72(1) of the Act. Therefore, the total amount payable by the Tenant to the Landlord is \$2,225.00.

As the Landlord already holds \$1,050.00 in the Tenant's deposits, I order the Landlord to retain this amount in partial satisfaction of the claim awarded pursuant to Section 38(4) (b) of the Act. As a result, the landlord is awarded \$1,175.00.

### Conclusion

For the reasons set out above, I grant the Landlord a Monetary Order pursuant to Section 67 of the Act in the amount of **\$1,175.00**. This order must be served on the Tenant and may then be filed in the Provincial Court (Small Claims) and enforced as an order of that court if the Tenant fails to make the payment in accordance with the Landlord's instructions.

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: March 28, 2014

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Residential Tenancy Branch

