



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **Decision**

### **Dispute Codes:**

MNDC, MND, MNSD, FF

### **Introduction**

This Dispute Resolution hearing is convened to re-hear a dispute that was originally heard on December 2, 2013 in which the landlord was successful in being granted a monetary order for loss of rent for a portion of the fixed term. The respondent tenant made a successful application seeking Review Consideration and a rehearing was scheduled to hear the landlord's application for an Order of Possession and monetary order based on a Ten Day Notice to End Tenancy for Unpaid Rent, today.

At the outset of the hearing, the parties testified that the tenant has since vacated the rental unit and therefore, the issue of the Order of Possession is now moot.

The portion of the landlord's application seeking monetary compensation for unpaid rent and loss of rent is still before me and will be heard.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

### **Issue(s) to be Decided**

Is the landlord entitled to monetary compensation under section 67 of the *Act* for rental arrears and damages?

### **Background and Evidence**

The tenancy began on September 15, 2013 as a one year fixed term ending on September 30, 2014, and a security deposit of \$450.00 was paid.

Submitted into evidence by the landlord was a copy of the tenancy agreement, a copy of a 10-Day Notice to End Tenancy for Unpaid Rent dated October 11, 2013 and affidavit of service.

The landlord testified that the tenant paid the rent for September and paid half of the rent for October 2013. The landlord testified that early in the tenancy the tenant complained of an allergic reaction suffered by her daughter, which she attributed to the furnace in the unit. The landlord testified that on October 7, 2013, the tenant let the landlord know that she would be terminating the fixed term tenancy early, effective October 31, 2013..

According to the landlord, the parties had a discussion about terminating the tenancy on mutually agreeable terms. A copy of a text message is in evidence stating,

*"If you are also willing to resolve this peacefully I will accept the remaining 50% on this month's rent and you can stay until noon on October 31 as is usual with the tenancy branch. We will then inspect your unit together and I will refund you your damage deposit."*

(Reproduced as written)

The landlord pointed out that the agreement fell through when the tenant refused to pay the remaining rent owed for the month of October, 2014, by suddenly placing a stop pay on her post-dated cheque for the second half of October. The landlord's position is that the offer to permit the tenant to vacate on October 31, 2013 was no longer in effect due to the tenant's failure to pay the remaining 50% of the rent for October.

The landlord testified that they never agreed to allocate the tenant's security deposit towards the remaining rent for October. The landlord testified that, because the tenant defaulted on the rent, they then served the tenant with a 10-Day Notice to End Tenancy for Unpaid Rent on October 12, 2013 with an effective date of October 21, 2013. The landlord is claiming compensation for rent owed for the second half of October 2013.

The landlord testified that the tenant vacated at the end of October 2013. According to the landlord, they advertised and showed the rental unit to replacement tenants beginning in late October 2013, but were not successful in re-renting the unit. No evidence was submitted to confirm the marketing of the unit. The landlord is claiming compensation for loss of revenue for the month of November 2013 and part of December 2013 for a total claim of \$1,350.00 for loss of revenue.

The tenant acknowledged that they had signed a fixed term agreement and were intending to remain living there for the term agreed upon. However, according to the tenant, they were forced to end the tenancy for health reasons. The tenant testified that

her daughter had a severe allergic reaction to the forced air being blown into the rental unit and the unit was contaminated by mould. The tenant testified that there were a substantial number of other deficiencies in the rental unit that were not dealt with by the landlord in a timely manner including the fact that there were problems with the washing machine, flooding, an entry door that did not latch and the shower head which suddenly “exploded”. The tenant stated that the landlord did not repair the problems in a timely manner.

### **Analysis**

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. I find that the landlord provided evidence showing that the tenant failed to pay rent for the second half of October 2013.

I find that, when a tenant fails to comply with section 26, section 46 of the Act permits the landlord to end the tenancy by issuing a Ten-Day Notice effective on a date that is not earlier than 10 days after the date the tenant receives it. The landlord issued a 10-Day Notice to End Tenancy for Unpaid Rent terminating the tenancy effective October 21, 2013. I find that the tenant did vacate in accordance with the Notice, but overheld until October 31, 2013.

Given the above, I find that under the Act the tenant owes the landlord \$450.00 rental arrears for the latter portion of the month of October 2013.

With respect to the loss of rent being claimed by the landlord for November and December 2013, I find that section 7 of the Act states that, if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

### **Test For Damage and Loss Claims**

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,

3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage, and
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

The burden of proof is on the claimant, that being the landlord.

I accept that the landlord did suffer a loss due to the tenant's failure to pay rent and the decision to vacate before the expiry of the fixed term. I find that the tenant intentionally withheld rent owed for the second half of October 2013 because the tenant was terminating the tenancy on October 31, 2013, prior to the expiry date of the contract

With respect to the tenant's position that they were justified in terminating the tenancy, I find that, although section 45 (2) does not permit a tenant to end a fixed term tenancy earlier than the expiry of the fixed term, section 45(3), provides that:

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, the tenant may end the tenancy earlier than the fixed term expiry date after the landlord receives the notice.

I find that the landlord may have been in violation of section 32 of the Act which requires the landlord to provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, However the breach that justifies ending a fixed term tenancy must relate to a **material term** of the tenancy.

To establish that a breach of a material term in the tenancy has occurred, the tenant must prove that the following three components exist:

There must be a clear term contained in the tenancy agreement,

This term must fit the definition of being "*material*",

There must be a genuine breach of the material term.

A material term is a term that the parties had both agreed from the start was so important that the most trivial breach of that term would give the other party the right to end the agreement. This question goes to the root of the contract.

Even if I accept that the landlord's failure to address the various problems identified by the tenant could constitute a breach of a material term, I find that the tenant did not give the landlord a reasonable amount of time to rectify the problems after reporting them.

This is a requirement under section 45(3) of the Act. Instead, the tenant chose to almost immediately terminate the tenancy in a manner not in compliance with the Act or the agreement.

In this regard, I find that the tenant clearly did violate both the Act and the tenancy agreement which could give rise to damages, given that the landlord also did suffer a monetary loss. In fact, I find that the landlord's claim for compensation has met elements 1, 2, and 3 of the above test for damages.

However, in order to satisfy element 4 of the test for damages, I find that the landlord is required to provide proof that they reasonably mitigated the loss by advertising the rental unit as soon as possible to find a replacement renter. I find that the landlord only provided verbal testimony of their marketing efforts and neglected to submit sufficient evidentiary support for this testimony.

Accordingly, I find that the landlord's claim for damages has not satisfied all elements of the test and therefore the landlord is not entitled to compensation for loss of rent being claimed. I hereby dismiss this portion of the landlord's application.

Based on the evidence and testimony, I find that the landlord is entitled to total monetary compensation of \$500.00 comprised of \$450.00 rent owed for October 2013 and the \$50.00 cost of the application. I order that the landlord retain the tenant's \$450.00 security deposit in partial satisfaction of the claim and grant a monetary order in favour of the landlord for the remainder of \$50.00.

This order must be served on the tenant and may be enforced through BC Small Claims Court, if necessary.

The remainder of the landlord's application is dismissed without leave

### **Conclusion**

The landlord is partly successful in the application and is granted a Monetary Order for rent owed and the remainder of the monetary claim is dismissed without leave.

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 18, 2014

