



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF
 MNDC, OLC, RPP, OPT

Introduction

This hearing was convened by way of conference call concerning applications made by the landlord and by the tenants. The landlord has applied for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement and to recover the filing fee from the tenants for the cost of the application. The tenants have applied for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order that the landlord comply with the *Act*, regulation or tenancy agreement; for an order that the landlord return the tenants' personal property; and for an Order of Possession of the rental unit or site.

The landlord and one of the tenants attended and each gave affirmed testimony. The tenant represented both tenants and was assisted by an advocate. The landlord was also assisted by another party, with the consent of the tenant. The parties also provided evidentiary material in advance of the hearing to the Residential Tenancy Branch and to each other, which includes written submissions from both parties. The parties were given the opportunity to cross examine each other on the evidence and testimony provided, all of which has been reviewed and is considered in this Decision.

No issues with respect to service or delivery of documents or evidence were raised.

During the course of the hearing, the tenant withdrew the application for an order that the landlord return the tenants' personal property.

The landlord's application states that the *Residential Tenancy Act* does not apply, however if it is found that the Residential Tenancy Branch has jurisdiction, the landlord asks for the relief claimed.

Issue(s) to be Decided

The first issue to be decided is:

- Does this tenancy fall within the jurisdiction of the *Residential Tenancy Act*?

If jurisdiction is accepted, the issues remaining to be decided are:

- Has the landlord established a monetary claim as against the tenants for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for aggravated damages and loss of quiet enjoyment of the landlord's property?
- Have the tenants established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for aggravated damages for unlawful eviction and for loss of use of the rental unit?
- Have the tenants established that the landlord should be ordered to comply with the *Act*, regulation or tenancy agreement?
- Are the tenants entitled under the *Residential Tenancy Act* to an Order of Possession of the rental unit?

Background and Evidence

The tenant testified that this tenancy began on January 11, 2014 for rent in the amount of \$450.00 per month due on the 1st day of each month. At the commencement of the tenancy the tenant paid the landlord a pro-rated amount for January's rent and a security deposit in the amount of \$225.00 which is still held in trust by the landlord. The tenant's son, who is the other named tenant, moved into the rental unit in February, 2014. The rental unit is a basement suite and the landlord lives in the upper level.

The tenant further testified that the landlord had prepared several tenancy agreements for the parties to sign, and the tenant saw lots. Although the tenant did not testify what the difference in each of the agreements was, the only one signed by the parties is dated February 18, 2014.

On Mother's Day in 2004 the tenant lost his mother to cancer. The tenant had told the landlord that and that it was a bad day for the tenant and he was having friends over. The tenant had agreed at the outset of the tenancy to no guests after 11:00 pm. May 11, 2014 was Mother's Day and the tenants' guests arrived at about 9:30 a.m. The tenant's girlfriend used bathroom and saw the landlord eavesdropping at door and yelled. The tenant ran to the door between the rental unit and the landlord's unit and

told the landlord that she can't do that and that she had been told before. The tenant testified that he has been upset on many occasions about it and the landlord says it's part of the rental agreement, she owns the house and can do what she wants. On this occasion, the tenant told the landlord that the tenant is entitled to privacy. The landlord told the tenant to make the guests leave but it was 10:00 a.m. so the tenant refused and the landlord phoned police. When police arrived, the tenant was asked if the landlord cooks in the rental unit, and the tenant replied no, and that the landlord has no access. The police said that if she enters again call and let them know. About an hour after the police left, the tenant heard the fan start over his stove and found the landlord cooking noodles on the stove in the rental unit. The tenant asked her to leave, but the landlord ignored him. The tenant's girlfriend phoned police while the landlord continued to ignore requests to leave. When police arrived the landlord ran upstairs. The police scolded her and told her she would be charged with harassment and trespassing if it happened again, and that it was highly illegal. The landlord didn't return again.

The tenant further testified that his son went to bed early, and tenant's girlfriend went home, leaving the tenant and his son's friend in the rental unit. The tenant's son had to be at work at 5:00 a.m., so the tenant woke him up early and the 3 went to get pizza. They returned at about 3:30 or 3:45 a.m. to find all of their belongings in driveway and testified that the key to the rental unit wouldn't work. Windows were barred with sticks and there was no way for the tenants to get in. The police were called again and within a minute the officer who had been at the rental unit earlier called the tenant back. The tenant told the officer what had happened and the officer attended. The landlord admitted to the officer that she removed the belongings and changed the lock and he arrested her. She struggled but was put in car. Other officer asked if the tenants had a way to move my belongings and the tenant's son got his uniform for work. He also testified that among the belongings removed by the landlord was food, and some perishable – the meat was easily a cost of \$100.00.

The arresting officer told the tenant that the landlord wanted to talk to him and she said that if the tenant dropped charges the landlord would pay for a hotel stay for one night and give the tenants \$100.00 and would allow the tenants to put their belongings in the landlord's garage. The tenant talked to his son and they felt bad for her. The tenant stated that he should have pressed charges, but agreed. The police then said it was a civil matter.

The tenant couldn't find his identification so his sons' friend went with him to the hotel, although the landlord's statement says that she rented the hotel for the tenant and his friend. The tenant testified that it was for the tenant and his son, who ended up in tent city from May 13, 2014 for almost a month. After 2 weeks the tenant's son couldn't

handle living there anymore due to a lot of crazy things going on and a lot of stuff being stolen, and bad sleeping patterns. The tenants went to Langley thinking they could stay with a friend there but that didn't happen and the tenant didn't want his son living on the street, so the tenant came up with money to send his son back Regina, where he has been for 3 weeks now. The tenant got some clothes back from the landlord but couldn't leave belongings in his tent because they would be stolen; the tenants have lost a bike, silver, clothing, and electronics.

The tenant also testified that he paid rent in full for the month of May, 2014 and claims that back from the landlord. The tenant also claims aggravated damages for loss of quiet enjoyment of the rental unit due to the landlord constantly entering the rental unit, turning down heat, ordering the tenant to compost, and that's none of her business. The landlord's constant intrusions are very annoying. The tenant denies that the landlord has any right to enter the rental unit. The landlord has dishes in the rental unit, but so does the tenant. The tenant rented a 2 bedroom unit in the basement of the landlord's house. The tenant intended to also have his other son move in as well, but the landlord wanted extra money for extra tenants. The tenant stated that the *Residential Tenancy Act* applies, and asks for possession of the rental unit.

The tenant also testified that he had, at the landlord's request, picked up the landlord's son from school and babysat for about 40 minutes each time for about 3 weeks. The landlord had told the tenant he would be paid \$200.00 per month, but the tenant has not received any money from the landlord.

The tenant's written submissions also state that the tenant's son lost his job as a result of the inability to care for his personal hygiene, clothing and sleep due to living in a tent.

The tenants claim \$90.00 for the replacement of 2 used bikes, \$45.00 for a stolen LG phone, \$100.00 for a stolen silver necklace, \$500.00 for lost clothing, \$100.00 for spoiled food, \$450.00 for recovery of May's rent, \$5,000.00 for aggravated damages, and \$900.00 for loss of quiet enjoyment of the rental unit.

The landlord testified that the tenants did not rent the entire unit, but only the 2 bedrooms and testified that the tenancy agreement, a copy of which has been provided clearly shows rooms 1 and 3 only. The copy provided by the landlord shows an address of rooms #1 and 3, and is signed by both parties on February 18, 2014 for a tenancy to commence on February 18, 2014 on a month-to-month basis. The landlord's written submissions explain that the tenancy agreement was back-dated. The rental amount is \$900.00 per month payable on the 1st day of each month. Included in the rent are: water, electricity, heat, furniture, stove, oven, refrigerator, carpets, window

coverings, cablevision, free laundry limited to 2 loads per week, and garbage collection. The document is on a pre-printed form provided by the Residential Tenancy Branch and does not contain an Addendum.

The landlord also testified that the tenants paid rent for the month of April by way of \$450.00 from the Ministry and \$330.00 from the other tenant, leaving a balance outstanding of \$120.00. The landlord received only the \$450.00 from the Ministry for the month of May, 2014 but nothing from the other tenant.

The landlord testified that the *Residential Tenancy Act* does not apply because the landlord shares the kitchen and bathroom with the tenants even though the landlord has a kitchen in the upper unit of the house. The tenants are permitted to use the kitchen in the rental unit. The landlord needed a tenancy agreement for insurance purposes and used the form because it's a standard rental form. The tenants only rent the bedrooms and are permitted to use the rest of the suite. The bedrooms have locks on the doors and the landlord has spare keys. The landlord testified that she cooked in the rental unit when the last tenants lived there, but not often during this tenancy. The tenants were upset about it, but the landlord doesn't know the reason. She testified that the tenant swore at her and told her to leave and that she wasn't allowed to go into the basement suite. She testified that she cleaned the rental unit every day or every other day and cooked there but only about a couple of times per month.

The landlord testified that she kicked out the tenants for good reason and read a statement that she had prepared for this hearing. On May 11, 2014 at 6:30 a.m. the tenants' loud music woke the landlord. The landlord attended the rental unit and told the tenants to turn off the music. The landlord returned at about noon to check the cleanliness of the rental unit and saw a cot open in the living room, indicating that the tenants' friends had been there overnight without the landlord's permission. The landlord asked the tenant when the guests would be leaving but the tenant became angry, raising his voice stating that he had a right to have friends visit and the landlord had no right to restrict that.

The landlord further testified that by 3:30 a.m. the landlord felt very uncomfortable so went to the rental unit again but couldn't open the door between the 2 units. The landlord does not deny that the tenants' belongings were removed from the rental unit when they were not at home and does not deny changing the locks to the rental unit, however, the landlord denies that the police told her that she wasn't allowed to enter the first 2 times they attended the rental unit, but told the landlord to call the Residential Tenancy Branch. When the landlord was arrested, the police told her it was for break and enter.

The landlord paid for the tenants' stay in a hotel and gave the tenant \$100.00. When the landlord returned to the hotel, the customer service representative advised that an additional \$100.00 was charged against her credit card for cleaning costs. The landlord claims that amount back from the tenants and has provided evidentiary material to support that claim.

The landlord also testified that she served the tenants with a 1 Month Notice to End Tenancy for Cause, using the form under the *Residential Tenancy Act*, because the tenants were smoking in the rental unit. The landlord didn't realize at the time that the *Act* didn't apply. The notice was served on April 16, 2014 and the landlord didn't learn that the document didn't apply to this tenancy until the end of April. A copy of the notice has also been provided.

On May 23, 2014 the tenant returned to the landlord's garage to pick up his stuff and in the mail that day the landlord received the rent from the Ministry for June. The landlord told the tenant that she would give it back to the Ministry, but the tenant was holding the cheque and told the landlord to cash it, give him \$300.00 and keep the remaining \$150.00 for damage to the rental unit, but the landlord refused because the tenant doesn't live there anymore. The tenant ripped it into pieces. Later, the Ministry called the landlord asking why she had not cashed it, and the landlord replied that the tenant had ripped it up. The Ministry personnel asked the landlord to sign the loss form, which she did. The Ministry did not re-send the cheque because the landlord told them she didn't have any reason to keep the money.

The landlord claims \$100.00 for hotel cleaning charges which were charged to the landlord's credit card, \$30.00 for a personal loan to the tenant on May 8, 2014, \$2,000.00 for compensation for smoking inside the rental unit, \$2,000.00 for harassment and using foul language to harass the landlord, \$800.00 for the landlord's loss of quiet enjoyment of the landlord's home.

The landlord has also provided copies of Decisions of the director, Residential Tenancy Branch and testified that they are copies obtained from the website that support the landlord's claim that the *Residential Tenancy Act* does not apply.

The landlord also submits that the tenant has not mitigated his situation, in that he has not attempted to find another place to live.

Analysis

Firstly, with respect to jurisdiction, the *Residential Tenancy Act* states that the *Act* does not apply to rental units wherein the owner shares kitchen or bathroom facilities with the

tenant. The landlord submits that the tenancy agreement clearly shows Rooms #1 and 3 of the rental unit, and the landlord shares the kitchen and bathroom, but allows the tenants to use the remainder of the rental unit. The landlord has also provided copies of other cases to substantiate the position that the *Act* does not apply. The tenant denies that there was ever such an agreement that the parties share the kitchen or the bathroom.

I have reviewed the documentation provided, including the numerous pages of submission provided by the landlord. In all cases that the landlord has provided of previous Decisions of the director except one state that there was no written tenancy agreement. The other states that the one-page tenancy agreement specifies a shared arrangement.

In this case, the parties entered into a written agreement which states that the *Residential Tenancy Act* applies. It also sets out several Sections of the *Act* and states that those sections apply to the tenancy. Paragraph 1 of the Tenancy Agreement specifically states:

1. APPLICATION OF THE RESIDENTIAL TENANCY ACT

- 1) The terms of this tenancy agreement and any changes or additions to the terms may not contradict or change any right or obligation under the Residential Tenancy Act or a regulation made under that Act, or any standard terms. If a term of this tenancy agreement does contradict or change such a right, obligation or standard term, the term of the tenancy agreement is void.
- 2) Any change or addition to this tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. If a change is not agreed to in writing, is not initialed by both the landlord and the tenant or is unconscionable, it is not enforceable.

The document continues to cite sections of the *Residential Tenancy Act*, and also specifically states under Section 17, Additional Terms, "...Any addition to this tenancy agreement must comply with the Residential Tenancy Act and regulations and must clearly communicate the rights and obligations under it." There is no Addendum, and there is no indication whatsoever that the parties entered into an agreement for the bedrooms only for \$450.00 per month each with common kitchen and bathroom facilities to be shared with the landlord. I further find that there is no evidence that sharing accommodation with the landlord was never articulated to the tenants.

In the circumstances, I find that the *Residential Tenancy Act* applies.

Dealing with the balance of the landlord's claim, I am satisfied that the tenants caused the landlord to incur hotel cleaning charges in the amount of \$100.00. Also, the tenant

did not dispute the landlord's testimony that \$120.00 is still owing to the landlord for April's rent, and I grant that amount in favour of the landlord.

I am not satisfied that the landlord has established a \$30.00 personal loan to the tenant, and I have no jurisdiction to deal with personal loans under the *Residential Tenancy Act*, and that portion of the landlord's application is hereby dismissed.

I further find that there is nothing in the tenancy agreement that prohibits smoking, and the landlord's application for \$2,000.00 for smoking in the rental unit is hereby dismissed.

I further find that the landlord has failed to establish that the landlord was harassed at all by the tenants other than on occasions when the landlord entered the rental unit contrary to the *Act* and the tenancy agreement and the landlord's application for \$2,000.00 for foul language to harass the landlord is hereby dismissed.

The *Act* requires a landlord to provide a tenant with the tenant's right to quiet enjoyment of the rental unit. There is no such provision respecting a landlord's right to quiet enjoyment. A landlord may issue a notice to end tenancy if a tenant disturbs other occupants or the landlord. Therefore, the landlord's application for \$800.00 for loss of quiet enjoyment is hereby dismissed.

The parties entered into a tenancy agreement, and the landlord removed the tenants contrary to the provisions of the *Residential Tenancy Act*. I find that the tenant has established an entitlement under the *Act* to possession of the rental unit under the tenancy agreement, but has not disputed the notice to end tenancy issued by the landlord. The *Act* states that a tenant must dispute a 1 Month Notice to End Tenancy within 10 days of receipt. The tenant did not dispute the landlord's testimony and has not applied to cancel the notice, and I find that the tenant is conclusively presumed to have accepted the end of the tenancy, and therefore the tenant's application for an Order of Possession is hereby dismissed without leave to reapply.

With respect to the tenant's application for a monetary order, I have no evidence of the existence of, or the replacement costs of the bikes, LG phone, necklace, clothing, or spoiled food, and that portion of the tenant's application is hereby dismissed.

With respect to the tenant's application for \$5,000.00 for aggravated damages, I am satisfied that the landlord threw the tenants and their belongings into the street without any right to do so. The landlord submits that the tenant did nothing to mitigate his situation because he hasn't looked for suitable accommodation however the landlord has provided no evidence of that. The tenant testified that he sought other

accommodation in Langley which didn't turn out, and then sent his son to live in Regina and the tenant is currently staying in a shelter. I find that aggravated damages should be related to the amount of rent payable under the tenancy agreement and the tenants have established a claim for each day that they didn't have a roof over their head from May 13, 2014 to July 31, 2014, the date of this hearing.

The tenants left the rental unit on May 11, 2014, and I accept that the landlord received \$450.00 from the Ministry for one tenant, but not the other \$450.00 that would usually have been paid by his son. Rent is \$900.00 per month, and the tenants had the benefit of a rental unit for 13 days, having paid half the rent for the month. Using the following calculation, I find that the tenants paid for 15 days, and had a roof over their head for 13 days: ($\$900/31$ days in the month = \$29.03 per day, x 13 days = \$377.41). The tenants paid the landlord \$450.00 and are entitled to compensation for the difference up to the 15th of May, 2014 in the amount of \$72.55. The tenants have not had the benefit of living in the rental unit they contracted for during the months of June or July, 2014, and although the notice to end tenancy issued by the landlord is effective May 31, 2014, the landlord ended the tenancy early without obtaining or applying for an Order of Possession and I find that the tenants are entitled to its monetary value of \$1,800.00, in addition to the \$72.55 for the unused portion of rent paid for May, 2014 and \$450.00 for the balance of May's rent.

The tenants have also claimed the equivalent of 1 month's rent for loss of quiet enjoyment of the rental unit, and I so order.

Since the tenancy has ended, I find it prudent to order that the parties comply with Section 38 of the *Act* (attached) as it relates to the security deposit.

In summary, I accept jurisdiction of this tenancy and this dispute, and I hereby dismiss the tenants' application for an Order of Possession. I hereby grant a monetary amount of \$220.00 to the landlord and \$3,222.55 to the tenants and order that the amounts be set off from one another, resulting in a monetary order in favour of the tenants in the amount of \$3,002.55. Since both parties have been partially successful with their applications, I decline to order recovery of the filing fee.

Conclusion

For the reasons set out above, the tenants' application for an Order of Possession of the rental unit is hereby dismissed without leave to reapply.

I further order that the awards described above in favour of the landlord and the tenants are hereby set off from one another, and I grant a monetary order in favour of the

tenants as against the landlord for the difference, pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$3,002.55.

I order the parties to comply with Section 38 of the *Residential Tenancy Act* (attached) as it relates to the security deposit currently held in trust by the landlord.

These orders are final and binding and may be enforced.

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: July 31, 2014

Residential Tenancy Branch

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must use a service method described in section 88 (c), (d) or (f) [*service of documents*] or give the deposit personally to the tenant.

Landlord may retain deposits if forwarding address not provided

39 Despite any other provision of this Act, if a tenant does not give a landlord a forwarding address in writing within one year after the end of the tenancy,

(a) the landlord may keep the security deposit or the pet damage deposit, or both, and

(b) the right of the tenant to the return of the security deposit or pet damage deposit is extinguished.

