



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNSD, MNDC, FF

### Introduction

This was an application by the landlords for loss of revenue, utilities and maintenance expenses as a result of the breach of a fixed term tenancy. The tenants have also applied for recovery of their security and pet deposit. All parties attended the hearing.

### Issue(s) to be Decided

Was there a valid tenancy agreement?

Are the landlords entitled to recover for the loss of revenue and expenses?

Are the tenants entitled to recover their security and pet deposit?

### Background and Evidence

The parties admitted service of their respective applications. The tenants had not received the landlords' second package of evidence and accordingly I have not relied upon any of it unless it was a document admitted by the parties to be in mutual possession.

AB and SB the landlords, testified that the tenant LL met with SB on May 3, 2014 to discuss renting the unit. LL stayed over night and was joined by his wife TH on May 4, 2014. After both tenants inspected the unit they signed a tenancy agreement, a move in

inspection report and began renting the unit. The tenants paid \$ 3,000.00 for the pet and security deposit on May 2, 2014. The rent was \$ 3,000.00 per month for a fixed term ending on January 31, 2015. They signed the tenancy agreement on May 4, 2014. The tenancy agreement required the tenants to maintain the yard, and pay all utilities.

The landlords testified that on May 12, 2014 they received two emails one dated May 7 another May 12, 2014. The May 7 email stated that TH the tenant was severely allergic to something in the unit and requested that the tenants "have a conversation" with the landlords to resolve the issue. The May 12, 2014 email stated that the landlords failed to remedy the notice of a material breach contained in their May 7 email and therefore the tenants were ending the tenancy agreement effective May 18, 2014. The tenants advised that the problems were: black mould, only one working smoke detector, and an odour of rotten eggs in the kitchen. The landlords testified that they did not receive the letter of May 28, 2014 and only learned of the tenants' forwarding address from the Application for Dispute Resolution.

SB testified that he met with the tenants on May 12 to attempt to resolve the issue. They walked through the house and discussed TH's allergies. He offered to purchase an air filter but was advised that the tenants were leaving "no matter what." The landlords testified that the tenants vacated before the end of May without any further notice. AB testified that she immediately advertised the unit to be re-rented on the internet on May 12 and in local papers on May 16, 2014. AB testified that she also placed posters in coffee shops, hospitals and police stations but was only able to re-rent the unit for August 1, 2014 at exactly the same rent. The landlords are claiming loss of revenue for June and July totalling \$ 6,000.00, hydro \$ 88.21, gas \$ 56.40 and the cost of yard maintenance at \$ 400.00 for those two months.

The tenant TH testified that they rented the unit on May 4, 2014 after inspecting it although both TH and LH testified they never received or participated in a formal Move in Inspection. TH admitted not alerting the landlords that she had severe allergies before renting the unit although she did advise that she was allergic to the air fresheners they had used. TH testified that she has severe allergies to mould and pet dander although the tenants own dogs and a cat. TH testified that after spending a few nights in the unit she had severe allergy reactions making breathing and sleeping difficult. She testified that on May 9, 2104 she left a message for AB to call her and then after not hearing anything sent the email of May 7, 2014. TH testified that after no reply she sent the email of May 12 2014 putting the landlords on notice of the breach and ending the tenancy agreement. The tenants also testified that they hand delivered a letter of May 28 advising the landlords that they were ending the tenancy effective

May 31. They moved out May 31. They submit that their forwarding address was contained in that letter.

The tenants admit they did not have an expert conduct an inspection to find any health hazards. They contend that the landlords have breached section 32(1) of the Act by not providing a unit that met health and safety standards. The tenants submit that the landlords are therefore in breach of a material term pursuant to section 45(3) of the Act entitling them to end the tenancy. The tenants submit that the landlords did not mitigate their loss as they referred prospective tenants and allege they were turned away. The tenants submit they owe the landlords nothing and claim for the recovery of their deposits.

### Analysis

Section 16 of the Act states:

**16** The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

Section 44 of the Act states

**44** (1) A tenancy ends only if one or more of the following applies:  
agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;  
(c) the landlord and tenant agree in writing to end the tenancy;

I find that the parties entered into a valid tenancy agreement on May 4, 2014.

Section 32(1) of the Act states 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 (2) and (3) of the Act states:

### Tenant's notice

**45** (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(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.

Section 8 of Residential Tenancy Policy Guideline states:

#### **Material Terms**

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- **that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and**
- **that if the problem is not fixed by the deadline, the party will end the tenancy.**

**Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.** (my emphasis added)

I find that section 32(1) of the Act that *a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law* is a material term implied into the tenancy agreement between the parties. The tenants allege that there was “something” in the unit that caused severe allergies to one of them. They admit not putting the landlords on notice of any special concerns. They have not provided any medical or expert evidence as to what it was and that what caused the allergic reactions. I find that the

tenants who have the burden of proof, have not provided sufficient or any evidence that the landlords breached section 32 of the Act. In other words the tenants failed to prove the causal connection between the alleged allergies and the condition of the unit.

In the alternative even if there was a breach of a material term, which I have already found there was not, the tenants failed to give the landlords reasonable notice of the breach with sufficient time to remedy it. Their emails of May 7 and 12, 2014 put the landlords on notice of the problem for the first time, but only give them a few days to investigate and remedy it. Furthermore the tenants at the meeting of May 12, 2014 advised the landlords that they wished to end the tenancy regardless, effectively repudiating the agreement.

For all of the above reasons I have rejected the tenants' submission that they ended the tenancy because of a breach of a material term. I find that they have breached their fixed term tenancy by not giving proper notice pursuant to section 44(1).

The leading authority on damages for the repudiation of a tenancy is *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.* [1971] S.C.R. 562 which is partially restated in Section 3 of Residential Tenancy Policy Guideline:

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the Act or tenancy agreement.

In this case the tenants have repudiated the contract. The landlords have accepted that the breach ended the tenancy and are claiming the loss of revenue for the two months delay in re-renting the unit plus expenses. I find that the landlords mitigated their loss by taking prompt and reasonable measures to re-rent the unit. I reject the tenants' submission that they turned away prospective tenants as unsubstantiated and speculative. I therefore find that the landlords have proven a loss of revenue of \$ 6,000.00 for two months, \$ 400.00 for yard maintenance expenses, \$ 56.40 for gas utilities and \$ 88.21 for hydro utilities.

## Conclusion

In summary, I ordered that the tenants pay to the applicants the sum of \$ 6,544.61 in respect of this claim plus the sum of \$ 100.00 representing the filing fee for a total of \$ 6,644.61. I order that the landlords retain the security deposit amounting to

\$ 3,000.00 inclusive of interest. I therefore grant the landlords a Monetary Order in the amount of **\$ 3,644.61** and a copy of it must be served on the tenants. If the tenants do not pay the amount, the Order may be filed in the Provincial (Small Claims) Court of British Columbia and enforced as an Order of that Court. I have dismissed all claims by the tenants without leave to reapply. The tenants will not recover their filing fee.

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: September 23, 2014

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Residential Tenancy Branch

