Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
A matter regarding PROLINE MANAGEMENT LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

Tenant: MNSD, MNDC, FF
Landlord: MNSD, MND, MNDC, FF

Introduction

This hearing was convened in response to cross-applications by the parties.

The tenant filed on October 06, 2014 pursuant to the *Residential Tenancy Act* (the Act) and amended their claim on December 22, 2014 for Orders as follows:

1. An Order for the return of *solely* their pet damage deposit - Section 38
2. A Monetary Order for compensation for damage or loss under the Act, regulation or tenancy agreement – Section 7 and 67

The landlord filed on October 15, 2014 pursuant to the Act for Orders as follows:

1. An Order to retain the security deposit and pet damage deposit - Section 38
2. A monetary Order for damage, and damage or loss under the Act, regulation or tenancy agreement – Section 7 and 67

Both parties requested recovery of their respective filing fees.

Both parties attended the hearing and were given opportunity to resolve their dispute, present relevant evidence and make relevant submissions, to cross-examine the other party, and make submissions to me. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. Neither party presented witnesses nor requested summons to testify.

All evidence provided pursuant to the Rules of Procedure for evidence was accepted. The landlord acknowledged receiving all of the evidence provided by the tenant, inclusive of an abundance of photographs and e-mail correspondence with the landlord.

The tenant testified that they had not picked up the landlord's latest submission of evidence dated December 31, 2014 although having received notice of the mail and that the other co-tenants had also received notices for registered mail to the same address. The landlord provided evidence of registered mail service to all tenants and tracking information for both packages of their evidence which was also received by this hearing. The parties were advised that all evidence sent pursuant to the provisions of the Act were deemed received pursuant to Section 90 of the Act: in respect to registered mail on the 5th day after it is mailed. It must be noted that failure to accept or collect registered mail is not a ground for review. The tenant was orally apprised of all the landlord's evidence and given opportunity to respond to it in testimony.

Issue(s) to be Decided

Is the landlord entitled to the monetary amounts claimed?
Is the tenant entitled to the monetary amounts claimed?

Background and Evidence

The tenancy began November 01, 2013 as a fixed-term tenancy agreement to October 31, 2014 with provision of reverting to a *month to month* tenancy thereafter. At the outset of the tenancy the landlord collected a security deposit and a pet damage deposit in respective amounts of $897.50, for a total of $1795.00, held in trust by the landlord. The tenant vacated September 21, 2014.

The landlord and tenant mutually conducted condition inspections at the start and end of the tenancy, which the landlord recorded on the requisite condition inspection reports (CIR), signed by both parties and provided into evidence. The tenant, by their signature placement, did not agree with the results of the move out inspection; however, they testified that they were not claiming the security deposit of $897.50 – solely the pet damage deposit – testifying they accepted the rental unit was returned to the landlord with certain deficiencies and possible issues, which the tenant described as, "things that were left undone or needed to be done at the end of the tenancy" - for which reasons the tenant testified the security deposit is unclaimed and surrendered to the landlord.

On May 15, 2014 the tenant provided the landlord with a letter describing the tenant's ongoing challenges, struggle and expense due to persistent ant (pest) intrusions into the residential property since February 2014 and despite the landlord's attempts to eradicate the ants through the efforts of a pest control contractor March 17 through to May 09, 2014. The tenant relies on the letter as their notice to the landlord of a failure to comply with a material term of the tenancy agreement and with view to end the tenancy. The tenant later used the term 'frustrated tenancy agreement' to describe the events in the tenancy. The landlord does not recognize the tenant's letter as a valid notice to end the fixed term tenancy and claims they accepted the tenant's e-mail of October 01, 2014 as the tenant's notice to legally end the tenancy: November 30, 2014. The landlord entered into a new tenancy agreement for the unit November 15, 2014.

Landlord's evidence

The landlord seeks $909.00 of the payable rent for the first half of November 2014. The landlord claims the tenant was legally responsible for November 2014 rent pursuant to a legal rent increase to $1834.00 effective November 01, 2014. The tenant disputes the landlord's claim pursuant to their claimed notice to end tenancy provided May 15, 2014.

The landlord seeks payment of unpaid water charges to October 10, 2014. The landlord provided the invoice stating an unpaid balance of $159.75. The tenant testified they made a (last) payment of $96.11 indicated on the invoice, totalling $255.86 for the billing period – adjusted for actual calculated water consumption charges.

The landlord seeks $22.05 for cleaning of the kitchen blinds, with which the tenant agrees. The landlord provided an invoice.

The landlord seeks $120.00 for cleaning the carport and driveway areas for which they provided an invoice identified for "Remove moss from/Tidy Driveway". The landlord provided evidence of the CIR and a photograph of rubbish reportedly left in the carport. The tenant generally disputes the claim as unreasonable and without merit. They testified the rubbish was there from the outset of the tenancy left behind by the *previous* tenant, and left by the respondent tenant in protest. It must be noted the tenant provided 2 photographs which appear to show a portion of the driveway with some perimeter grass growth. The tenant also testified they attended to some yard work during the tenancy.

The landlord claims $136.50 for carpet cleaning, with which the tenant agrees. The landlord provided an invoice.

The landlord seeks general cleaning charges totalling $247.50, for which they provided a payment demand e-mail for cleaning and replacement of light bulbs, and which also described the cleaning provided. The landlord provided evidence of the CIR and a series of photographs depicting areas of the rental unit which the landlord determined were left less than reasonably clean as prescribed by the Act. The tenant testified that they did not agree with the landlord's entire claim for general cleaning, however, testified they did not contest the landlord's claim to retain the security deposit to offset such end of tenancy claims by the landlord.

The landlord's claim on application:

Loss of revenue – November 2014	$909.00
Water charges / bill	159.75
Kitchen blind cleaning	22.05
Cleaning carport and driveway	120.00
Carpet cleaning	136.50
Cleaning / general / bulb replacement	247.50
Filing fee	*50.00*
Landlord's monetary claim on application total	$1644.80

Tenant's evidence

The tenant and landlord agree the tenant satisfied the rent amount for October 2014. The tenant claims the return of that rent: $1795.00. The tenant argues they were in a legal position to end the tenancy after providing the landlord with their letter of May 15, 2014. They testified that any delay in vacating the rental unit resulted from personal/medical complications and inability to secure suitable alternate accommodations sooner. The tenant provided a series of e-mail correspondence with the landlord in respect to ingress of ants into the rental unit -(beginning March 13, 2014 to May 07, 2014 - with a visit from a pest control contractor on March 17, 2014. They testified that a second return of a pest control contractor occurred May 09, 2014.

The evidence is that on June 05, 2014, the landlord was again notified by the tenant of a continued ant problem in the master bedroom and the landlord replied to the tenant to expect a call from the pest control contractor to schedule a visit, which by June 12, 2014 did not materialize, therefore the tenant again asked for help and reminded the landlord the ants were reportedly re-entering the master bedroom to which the landlord replied, "where are you seeing the ants now?". On June 18, 2014 the tenant again reminded the landlord the pest control contractor had not called, to which the landlord replied, "I'll follow up with them". The tenant testified the ant problem persisted thereafter but the tenant's e-mail evidence does not address the state of the problem after June 18, 2014. The landlord did not provided evidence disputing the tenant's testimony.

The tenant claims for the return of *solely* the pet damage deposit of $897.50, as the landlord has not provided evidence of pet damage.

The tenant claims all the rent they paid May to September 2014 in the sum of $8975.00. The tenant submitted a series of "50 e-mails" and 162 photographs in support of this claim, stating that in combination with the ant problem, additional ongoing issues of the rental unit contributed to ongoing frustration and stress, inconvenience and general discomfort. The tenant testified that their letter of May 15, 2014 spoke for itself as to the "emotional toll" endured by them. The tenant testified they felt they were not receiving what they were paying for each month, and that "$1000.00 per month" better represented fair amount of rent for the period in question. The tenant effectively claims for a reduction in the value of the tenancy agreement, resulting from,

> a persistent ant ingress problem
>
> an inoperative furnace system and a resulting loss of heating for several days and then again months later – with added concern the tenant was told the heating system was improperly installed.
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> broken washing machine in first month of tenancy - replaced by a refurbished model, with an odour.
>
> repeatedly malfunctioning/broken dishwasher, repeatedly repaired throughout tenancy, and eventually replaced.
>
> malfunctioning electrical system in parts of the house

leaking hot water tank with resulting water damage to carpeting and moisture issues

black mould throughout certain areas of the house

sealed / rotted wood windows with odour of rotted wood

deck not repaired before the start of the tenancy as was agreed

house unclean when tenant moved in. A contractor left debris and construction waste before the tenant moved in. The landlord compensated the tenant for cleaning

tenant claims unprofessional conduct on the part of agent for the rental unit

general inattention to areas of the house and residential property as a whole

The landlord submitted that the evidence reflects, "efficient responses to normal maintenance items for a house built in 1953." The landlord provided invoices in support of their response to the tenant's claims for maintenance and repairs.

The tenant claims their receipted costs for retail items in order to managing the ant problem, with which the landlord agrees.

The tenant's claim on application:

October 2014 rent - return		$1795.00
Return of *solely* pet damage deposit		897.50
Rent paid May to September 2014		8975.00
Receipted retail costs agreed for ant management		*approx 150.00*
Filing fee		50.00
Tenant's monetary claim on application	total	$11867.50

Analysis

On the preponderance of the evidence and on balance of probabilities I have reached a Decision on findings as follows.

A full version of references to the Act and policy guidelines can be accessed at, http://www.gov.bc.ca/landlordtenant.

Tenant's claim

I find that the tenant's use of "frustrated tenancy agreement" is purportedly pursuant to

the doctrine of *frustration of contract* under the Frustrated Contract Act – which also applies to tenancy agreements (contracts). However, I find that in this matter the

doctrine of *frustration* does not apply as none of the events in the tenancy were fatal to the continuation of the tenancy. *Frustration* of a contract only occurs if an event makes it impossible for the contract to be satisfied as intended by the parties due to circumstances beyond the reasonable control of either party – which I find is not the case.

Rather, I find the tenant gave the landlord their written notice on May 15, 2014 addressing a failure to deal with an ant intrusion of the rental unit, inside a 2 months period ending May 15, 2014. The letter details the constant presence of ants and the tenant's ongoing attempts and expense to fend off the ants, and clearly stating the resulting consequences and negative effects on herself and the tenancy overall. I find subsequent evidence the landlord was then alerted 3 times, and was reminded, to a continued ant problem in the 5 weeks following, without an effective response from the landlord nor attention to the problem.

In this matter I find the respondent must prove they gave the landlord a valid notice to end the tenancy in accordance with Section 45 of the Act. The evidence is that the landlord solely recognizes the respondent's Notice to End as *late notice* contrary to Section 45(1) of the Act. However, I find the respondent's letter of May 15, 2014 effectively claims a breach pursuant to **Section 43(3)** of the Act - of the *covenant of quiet enjoyment*, with reasons and explanation why the tenancy became compromised and disturbing to the tenant.

I find that **Section 45(3)** of the Act operates as follows.

1) the claimed failure to comply on the part of the landlord must be of a material term of the tenancy agreement.
2) it permits a tenant to end a tenancy on a date after they have given the landlord written notice of a failure to comply with a material term of the tenancy agreement, if the landlord has not corrected the situation within a reasonable period after the tenant gives written notice of the failure.

It must be noted that a *material term* is a term that both parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. The following must also be noted.

***Residential Tenancy Policy Guideline 6*. Right to Quiet Enjoyment,** in relevant parts, states:

> At common law, the covenant of quiet enjoyment "promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy."
>
> Every tenancy agreement contains an implied covenant of quiet enjoyment. . . . . common law protects the renter from substantial interference with the enjoyment of the premises for all usual purposes.

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.

Ending Tenancy for Breach of a Material Term

A breach of the covenant of quiet enjoyment has been found by the courts to be a breach of *a material term* of the tenancy agreement. A tenant may elect to treat the tenancy agreement as ended, however the tenant must first so notify the landlord in writing. The standard of proof is high – it is necessary to find that there has been a significant interference with the use of the premises. An award for damages may be more appropriate, depending on the circumstances.

I accept the evidence of the tenant that the events in respect to the ant intrusion over the 2 months period prior to the May 15, 2014 letter/notice to the landlord were sufficiently disruptive and upsetting to the tenant so as to significantly, negatively interfere with her ongoing use of the rental unit. I find the tenant's right to quiet enjoyment - right to freedom from unreasonable disturbance, as afforded by **Section 28** of the Act, was breached. I find the respondent gave the landlord written notice of the material breach under **Section 45(3)** of the Act and I find the landlord did not correct the situation within a reasonable period thereafter. As a result, I find it was available to the tenant to legally end the tenancy on a subsequent date after the landlord received the notice of May 15, 2014, without the requirement of a tenant's Notice pursuant to Section 45(1) or (2) – which they chose to do September 21, 2014. I find the tenant is not responsible for the payment of rent after they vacated. Therefore I grant the tenant the corresponding amount of rent paid for October 2014 of **$1795.00.** As the rental period is monthly, the tenant is not entitled to any pro-rated rent for September 2014.

In respect to the tenant's claim of a devalued tenancy agreement and their application for return of the entire rent for the last 5 months of their tenancy, I find the monetary claim is extravagant. However, I prefer the evidence of the tenant over that of the landlord. On the evidence on balance of probabilities, I find the tenant experienced inordinate frustration and stress, inconvenience and general discomfort related to ongoing ant problem and other problems during the tenancy. I find that the global nature of the issues lend appropriately to global compensation representing a reduction in the value of the overall tenancy agreement. I find compensation in the amount of **$750.00** reasonably represents the reduction in the value of the tenancy agreement for the claimed period.

In respect to the tenant's claim for receipted costs for management of the ant problem and the landlord's agreement to those costs, I grant the tenant the sum of **$157.85.**

I find that the tenant's deposits are held by the landlord in trust – that is, the deposits belong to the tenant, unless the tenant surrenders them to the landlord or until their disposition is guided by an Arbitrator. In this matter the tenant has repeatedly testified that they are not claiming the security deposit portion of their deposits as the landlord is permitted to retain this deposit for end of tenancy costs. I find this means the tenant

surrenders their entire security deposit of $897.50 to the landlord as full and final satisfaction for all end of tenancy claims by the landlord, irrespective of balance.

The tenant has established a total award in the amount of **$2702.85**. The balance of the tenant's other claims are **dismissed**, or otherwise offset as Ordered.

As the tenant has been partially successful in their claim, the tenant is entitled to recovery of their filing fee, which I set at the original pre-amendment amount.

Landlord's claim

I have found that the tenant is not responsible for the payment of rent after the last rental period ending September 30, 2014. As a result, the landlord's claim for loss of revenue for November 2014 effectively is **dismissed**.

In respect to the water charges/bill, I find that the tenant was responsible for water charges to September 30, 2014. I deduct 10 days from the calculated claimed consumption charges of $255.86, and arrive at a prorated amount to September 30, 2014 of $210.17. Upon deduction of the amount paid of $96.11, I find the tenant owes the landlord the sum of **$114.06**, and I grant this to the landlord.

As per the tenant's agreement I grant the landlord **$22.05** for cleaning kitchen blinds.

In respect to the landlord's claim for cleaning the carport and driveway, I find the landlord's evidence is sufficient to support this claim. The CIR does not address the condition of the 'garage, parking area' on move-out, however, I find that Residential ***Tenancy Policy Guideline 1*** **– Responsibility for Residential Premises** states as follows:

PROPERTY MAINTENANCE

3. Generally the tenant who lives in a single-family dwelling is responsible for routine yard maintenance, which includes cutting grass, and clearing snow. The tenant is responsible for a reasonable amount of weeding the flower beds if the tenancy agreement requires a tenant to maintain the flower beds.

The landlord also provided an invoice respecting the cleaning. Therefore, I grant the landlord their claim in the amount of **$120.00**.

As per the tenant's agreement respecting the cost for carpet cleaning I grant the landlord **$136.50.**

In respect to the landlord's claim for general cleaning and bulb replacement, I find that the landlord has provided sufficient document and photographic evidence in support of this portion of their claim. As a result, I grant the landlord their claim of **$247.50.**

The landlord has established a total award in the amount of **$640.11**. The balance of the landlord's claims is **dismissed**.

As both parties have been partially successful in their claims they are both entitled to recover their respective filing fees, which effectively cancel out, and are not factored.

Calculation for Monetary Order

Landlord's award – total	$640.11
Minus security deposit held by landlord	- 897.50
balance waived by tenant and retained by landlord	*< $257.39 >*
Tenant's award - total	$2702.85
Pet damage deposit held in trust by landlord	897.50
Monetary Order to tenant	**$3600.35**

Conclusion

The parties' respective applications in part have been allowed with the remainder of their claims dismissed.

I Order that the landlord may retain the entire security deposit of $897.50.

I grant the tenant an Order under Section 67 of the Act for the amount of **$3600.35**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

This Decision is final and binding on both parties.

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: February 10, 2015

Residential Tenancy Branch