



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- a monetary order equivalent to the amount of her pet damage deposit and security deposits (the deposits) as a result of the landlord's failure to comply with the provisions of section 38 of the Act;
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

The landlord did not attend this hearing, although I waited until 1426 in order to enable the landlord to connect with this teleconference hearing scheduled for 1330. The tenant attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The tenant's sister (the witness) provided evidence at the hearing.

Preliminary Issue – Service of Dispute Resolution Package

The address for service on the tenancy agreement was the landlord's residence on Vancouver Island. The tenant testified that at some point prior to filing her application she drove by the landlord's home and noted that it had been sold. The tenant testified that her contacts informed her that the landlord had moved from Vancouver Island to the Lower Mainland. The tenant conducted an internet search and found that the landlord had transferred realty offices.

The tenant used the landlord's business address as an address for service. On 2 December 2014, the tenant sent the dispute resolution package (including all evidence before me) to the landlord's business address by registered mail. The tenant provided

me with a tracking number that showed someone (initials LK) at that address signed for the package. The witness testified that on 13 May 2015 she telephoned the office located at the business address. The witness testified that she spoke to “K” who told the witness that any mail sent to that address would be forwarded to the landlord. The witness testified that K said that the landlord had been working from that office since October or November 2014.

Service of the dispute resolution package in an application such as the tenant’s must be carried out in accordance with section 89 of the Act:

- (1) An application for dispute resolution ... when required to be given to one party by another, must be given in one of the following ways:
 - (a) by leaving a copy with the person;
 - (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
 - (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;...

The tenant did not send the package to the landlord’s residence or the address at which she carries on business as a landlord. The tenant has not complied with the subsection 89(1); however, paragraph 71(2)(c) allows me to order that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act.

Based on the evidence provided by the tenant and the witness, I find, on a balance of probabilities, that the landlord would have received the registered mailing sent to her office address. As such, I order that the dispute resolution package is sufficiently served for the purposes of the Act pursuant to paragraph 71(2)(c).

Issue(s) to be Decided

Is the tenant entitled to a monetary award for losses arising out of this tenancy? Is the tenant entitled to a monetary award equivalent to the amount of her pet damage deposit and security deposits as a result of the landlord’s failure to comply with the provisions of section 38 of the Act? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the tenant and witness, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

This tenancy began 15 May 2011. The parties entered into a written tenancy agreement on 27 April 2011. The tenancy agreement was for an initial fixed term of one year after which time the tenancy carried on as a month-to-month tenancy. Monthly rent of \$950.00 was due on the first. The landlord collected a security deposit in the amount of \$475.00 and a pet damage deposit in the amount of \$200.00 (the deposits).

On 21 January 2013, the upstairs occupant of the residential property caused a fire. As a result of the fire, the tenant was ordered to vacate the rental unit for 72 hours. The tenant testified that as a result of the fire the home was rendered uninhabitable. The tenant testified that the rental unit required extensive renovations as a result of water damage and smoke damage. The tenant testified that the electrical appliances in the kitchen were damaged as a result of water. The tenant provided photographs of the rental unit as it was undergoing repairs. The photographs show all the fixtures removed from the kitchen.

The tenant testified that she provided her forwarding address to the landlord's agent in person on 7 February 2013. The tenant was provided with the agent's contact information by the landlord in or around November 2012. The tenant testified that she saw the agent scan and email that letter to the landlord. By email on 12 February 2013, the agent confirmed that the landlord was in receipt of the letter. I was provided with a copy of the letter dated 6 February 2013:

*[tenant]
[tenant's forwarding address]*

*[landlord]
[rental unit address]*

February 6, 2013

Dear [landlord];

Due to the recent house fire, at [rental unit address], I have been in contact with the Residential Tenancy Board, where I was advised to provide in writing a request to have my Damage Deposit, and Pet deposit, with interest, as well as the 10 days of lost rent. Where in you have 15 days to respond. The 30 Days'

Notice you have requested I provide, does not apply in this situation, as my Tenancy was "Frustrated".

I have provided a breakdown of my damage deposit, pet deposit and rent owing below. As well as a forwarding address to send owing monies too.

Damage Deposit - \$475.00 (half month rent)

Pet Deposit - \$237.50 (half of half month rent)

10 days of lost rent from January 21/2013 up to and including January 31/2013. Calculated by taking sum total of \$950.00 (full month rent) and dividing this by total number of days = \$30.65 per day, and multiplying this total by 10 days = \$306.50....

The tenant testified that she received return of the deposits from the landlord on 27 March 2013 by mail. The tenant testified that there was no covering letter in the envelope, just a cheque.

The tenant claims for her increased cellular costs as a result of the terminated tenancy. The tenant testified that she had a home phone and internet for a home computer at the rental unit. The tenant testified that when she lost use of these items she incurred extra cellular costs. The tenant testified that she also incurred unexpected costs in relation to mail forwarding and disposing of damaged personal property.

The tenant testified that she felt harassed by the landlord. The tenant testified that she felt harassed by the landlord's emails. The tenant testified that she felt harassed by the landlord's insurance adjuster. The tenant provided me with copies of emails exchanged between the landlord and tenant. Below are some of these emails:

Sent from Landlord to Tenant on 23 January 2013:

I am just out of the hospital and understand there was a fire at the house.. I'm not sure the extent of the damage but I understand that you did not have content insurance. The adjuster will be over to asses but I understand you are out of a place to live.. We have a house on [street] coming available on the 1st of Feb if you can make arrangements until then.. The rent is 1000 plus utilities but if you take it temporarily we will includet he utilities til we get back....It is a lovely character home and I can send you pics if you would like... Let me know how you are and any info you can give me as to how the fire started and any damage if you know anything...Thanks and I'm so sorry for the disruption.

[as written]

Sent from Landlord to Tenant on 31 January 2013 @0729:

I am back beginning of the month...Please let me know what your plan is..I am turning off the household services for the 1st to ensure that they will be moving upstairs as they have not paid rent and the fire inspector has deemed upstairs non habitable.....As you are not living there this wont affect you but please let me know if you plan to move in so that it wont.. I have room rentals if you are looking for something temporary also and if you tell me what you are looking for I'll keep my eye out...Also if you let me know what was reunited perhaps when I'm back I can see what extra furniture etc I may have to help you get re set up...

[as written]

Sent from Landlord to Tenant on 23 January 2013 @0739:

Why don't we just see what will happen as we can get you some new items etc...My insurance policy will hopefully cover some of the rent lossed so maybe it will help for you not to have to pay the first months rent but still stay so you don't have to find another place yet... Also to allow the to work around you and put in a new floor..I plan to put in tile if possible as it will not warp with the humidity and while they are there I'm hoping to fix some of the other issues...

So if you can hang tight for the moment we will work it out...I do realize that this has come as a huge shock and I feel terribly although there was ofcourse no way of me knowing that this would happen ofcourse and I'm just glad no one was hurt.

[as written]

Sent from Landlord to Tenant on 1 February 2013 @0743:

I appreciate your email [tenant]...Unfortunately I cannot send you the deposit back as you haven't given any notice yet to vacate..The work is being done on the apartment and I agreed to even have you stay rent free in exchange and we have an agreement for the rental until May so I'm not sure what to tell you other than I understand you are upset about what happened but in exchange for he situation I was willing to work with you on offering free rent for a time to get yourself back on track..I am back March 1st and at that time I can deal with damage deposit and legal stuff but I would at least consider this 30 days notice and then that would put us to March 15th so that would give me a chance to help out and also follow all the proper protocol.. I know this wont be the best news but there is not much I can do from here unfortunately.

[as written]

Sent from Landlord to Tenant on 2 February 2013 @700:

I am not sure what you mean by Inhabitable as I have a statement from the fire department that you can live in the unit..I have even offered you a break in rent to accomodate the new flooring and as much as I know this was tramatic for you I'm sure I think that your life has changed and that you may be using this opportunity to find a cheaper option for rent... You had made the commitment to stay until May and so if you are not staying you are breaking your agreement please just be honest with the reason why...I have worked together with you as best I can and thought that you have done the same... The insurance company is claiming that you have still been in your place and so I'm not sure how that works with the rent this month but I will email them to ask...I will be back the weekend after March 1st and so I will check in with you then.

[as written]

Sent from Landlord to Tenant on 4 February 2013 @1558:

I have received a full report and it indicates that the only damage in your suite was to the flooring therefore I feel that your notice was given because perhaps your situation has changed..I do appreciate your cooperation and will contact you upon my return.

[as written]

Sent from Landlord to Tenant on 15 February 2013 @0634:

I mean that the insurance company said that the upstairs tenants had to move out but you did not but they now have said that you both needed to move..There are apparently alot of things in the carport and not sure what is left in the house...I just wanted you to know that.

[as written]

Sent from Landlord to Tenant on 3 March 2013:

This is the first email I have received from you regarding your patience level? I have just arrived this weekend as I explained I would...As far as your things I am meeting the adjuster at the house...I also have reference to my emails offering you accomodations both temporary and the house on [street] at the same rental rate to help with the issue... The fire was caused by the upstairs tenant and I realize was a hardship to you but in all fairness I will provide you all the emails off these offers...With the last one being free rent in the current suite while being repaired..What else are you expecting? As far as your damage deposit returned and pet deposit I will be speaking with the insurance company in regards to that and also will be needing to dispose of the garbage at my expense which will need to come from somewhere...I appreciate your situation but basically you have to choices here. You can go to Arbitration and wait 2 months for a hearing

and so on and so on or you can give me a change to sort it out..It is obvious that you already had accomodations to go to and that you did not give proper notice as I had provided you another home to live and and will advice the arbitrator of this should we go that route..I'm hoping not and I hope that you will have a little more patience as I too have never dealt with a home that has been in a fire of what happens next.

[as written]

Sent from Landlord to Tenant on 23 March 2013:

Also this email still does not have a forwarding address and so can you tell me please how I am supposed to guess this in order to return anything?

[as written]

Sent from Landlord to Tenant on 25 March 2013:

Are you going to answer [tenant] or are you just playing games? You seem to have it out for me and I really don't know why... You knew I was away and I have now been back for 10 days and have resolved all the issues from the fire etc and have been trying to negotiate with you about your deposit..I have asked for your address and you refuse to give it so that tells me that you are just hoping for a double payment? Is this some sort of way for you to do that? Really I feel you are being completely unfair about this and I ask again please for you address so that I can send your deposit to you..If I do not get a response I will mail them to [street] and you can check your mail as it was your last known address..

[as written]

Sent from Landlord to Tenant on 26 March 2013:

I never received any forwarding letter...I have been communicating with you this entire time...

You are a piece of work..I will get in touch with your previous landlord as a witness then if you decide to proceed with this..Also I hope you are enjoying your cat tower..Unbelievable...

[as written]

Sent from Landlord to Tenant on 5 April 2013:

I see you chased your cheque so I presume all is good. I was in the suite cleaning things and came across a letter from [name] that your daughter is on the honor role how cool. Just hope there are no hard feelings and that you are settling g in to your new home. I'm sorry that this had happen to you and I wish you all the best. I've always known you to be a good persona and a good mom and I wish you well.

[as written]

The tenant seeks a total monetary order in the amount of \$2,633.45:

Item	Amount
Subsection 38(6) Compensation Security Deposit	\$475.00
Subsection 38(6) Compensation Pet Damage Deposit	200.00
Reimbursement of Ten Days' Rent (Doubled)	612.90
Increased Cellular Costs	275.85
Mail Forwarding Costs	53.70
Disposal Fees	66.00
Harassment	950.00
Total Monetary Order Sought	\$2,633.45

Analysis

Compensation for Reduced Value of Tenancy

Residential Tenancy Policy Guideline, "34. Frustration" provides guidance in situations such as the tenant's:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned.

The *Frustrated Contract Act* deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

The alleged frustrating event was a fire caused by the occupant of the upstairs rental unit. The emails exchanged between the tenant and landlord indicated that this fact is commonly held to be true. I find that the fire was not caused by the acts of either the tenant or the landlord. The tenant testified that as a result of the fire the rental unit was uninhabitable. The landlord's email of 15 February 2015 confirms that the rental unit was not able to be occupied. As the rental unit was no longer fit for use as a rental unit the tenancy agreement, I find that the tenancy agreement was frustrated as of 21 January 2014.

I find that the obligations of both the tenant and landlord under the tenancy agreement ended 21 January 2014 when the tenancy was frustrated by the fire.

Statutory restitution is available to parties pursuant to the *Frustrated Contracts Act*:

- 5 (1) In this section, "benefit" means something done in the fulfillment of contractual obligations, whether or not the person for whose benefit it was done received the benefit.
- (2) Subject to section 6, every party to a contract to which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by the party's performance or part performance of the contract.
- (3) Every party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed before the frustration or avoidance but were not performed, except in so far as some other party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfil those obligations.
- (4) If the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution under subsection (2), that loss must be apportioned equally between the party required to make restitution and the party to whom the restitution is required to be made.

The tenant performed her obligation under the tenancy agreement by paying her rent for January. The tenancy agreement ended as of 21 January 2014. The landlord was discharged from her obligation to provide a rental unit after the frustrating event. The landlord did not provide a rental unit fit for use as a rental unit from 22 January 2014 to 31 January 2014. As such, the tenant was entitled to statutory restitution for these ten days of rent paid and for which the tenant did not receive use of the rental unit. The tenant's restitutionary entitlement under the frustrated tenancy agreement is \$306.45.

The tenant has applied for double this amount. There is no basis under the Act for awarding double.

The tenant is entitled to reimbursement of \$306.45 for the rent paid for the period 22 January 2014 to 31 January 2014.

Subsection 38(6) Compensation

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the security deposit. However, pursuant to paragraph 38(4)(a) of the Act, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy.

The tenancy ended 21 January 2014. The tenant provided her forwarding address in writing to the landlord's agent. Section 88 of the Act prescribes the methods of service for documents generally. Pursuant to paragraph 88(b) of the Act a document may be served to the landlord by delivering a copy to the landlord's agent. The tenant delivered this letter on 7 February 2014. It was the agent's responsibility to forward this letter to the landlord. Accordingly, the landlord had until 22 February 2014 to return the deposits. The tenant's testimony and the landlord's emails show that the landlord did not return the tenant's deposits until late March. On the basis of this evidence, I find that the tenant has shown, on a balance of probabilities, that the landlord did not return the deposits within fifteen days as required by subsection 38(6). Accordingly, the tenant is entitled to compensation equivalent to the value of the deposits, \$675.00.

Compensation for Costs

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

The tenant seeks compensation for the costs of her increased cellular use, mail forwarding, and disposal fees for damaged belongings. As stated earlier, the fire was caused by the upstairs occupant. It is not alleged that the landlord caused this fire in anyway. The tenant has failed to show that she incurred these costs as a result of the landlord's breach of the Act, regulations or tenancy agreement. The direct cause of her losses was the fire, which was caused by the upstairs occupant. The tenant is not entitled to recover for the costs of her increased cellular use, mail forwarding, or disposal fees from the landlord.

Harassment Claim

The tenant alleges that the landlord harassed her and asks for compensation for this harassment.

Residential Tenancy Policy Guideline, "6. Right to Quiet Enjoyment" provides helpful guidance in the definition of harassment:

Harassment is defined in the Dictionary of Canadian Law as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome". As such, what is commonly referred to as harassment of a tenant by a landlord may well constitute a breach of the covenant of quiet enjoyment. There are a number of other definitions, however all reflect the element of ongoing or repeated activity by the harasser.

The landlord's emails express concern, frustration, sympathy and assistance. I find that these emails were completely within the scope of acceptable communication under the circumstances and were not vexatious. Accordingly, I find that the landlord's conduct does not amount to harassment. The tenant is not entitled to compensation for allegations of harassment.

Filing Fee

As the tenant was successful in this application, I find that the tenant is entitled to recover the \$50.00 filing fee paid for this application.

Conclusion

I issue a monetary order in the tenant's favour in the amount of \$1,031.45 under the following terms:

Item	Amount
Subsection 38(6) Compensation Security Deposit	\$475.00
Subsection 38(6) Compensation Pet Damage Deposit	200.00
Reimbursement of Ten Days' Rent	306.45
Recover of Filing Fee	50.00
Total Monetary Order	\$1,031.45

The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: May 27, 2015

Residential Tenancy Branch