Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

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

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

The landlord seeks a total monetary order in the amount of $14,291.71 that she describes in her monetary order as follows:

Item	**Amount**
Rent Arrears	$5,433.70
Hot Tub Utilities	310.00
Extra Occupants Utilities	400.00
Removal Cost of Hot Tub	325.00
October and November Rent, Liquidated Damages and Damage Deposit	2,650.00
Labour GP	385.00
Labour NP	425.38
Labour DL	901.00
Locksmith	168.70
Newspaper Ad for Rerental	68.65
Filing Fee	100.00
Cleaning AB	120.00
Costs in Filing Application	68.31

Garbage Removal Labour (1.5h) and Fees	49.00
Painting Supply Store	63.36
Home Repair Store	1,405.27
Home Renovation Store	242.64
Repair Store	.45
Lumber for Fence	64.06
Renovation Store	73.19
Dryer Repair	300.00
Landlord's Labour Costs	738.00
Total Monetary Order Sought	**$14,291.71**

The tenant did not attend this hearing, although I waited until 1519 in order to enable the tenant to connect with this teleconference hearing scheduled for 1330. The landlord attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

Prior Hearings

This tenancy was the subject of two prior applications by the landlord.

The first hearing was held 1 October 2014 to hear the tenant's application. The tenant did not appear and her application was dismissed.

The second hearing was held 10 October 2014 to hear the landlord's application. That application was dismissed with leave to reapply as the landlord did not serve the dispute resolution package in accordance with the Act.

Preliminary Issue- Sufficiency of Particulars

Pursuant to paragraph 59(2)(b), an application of dispute resolution must include the full particulars of the dispute that is to be the subject of the dispute resolution proceedings. The purpose of the provision is to provide the responding party with enough information to know the applicant's case so that the respondent might defend him or herself.

I find that the landlord did not sufficiently set out the details of her dispute in relation to the following claims in such a way that the tenant would have known that she needed to respond to that claim:

Item	**Amount**
Labour GP	$385.00
Labour NP	425.38
Labour DL	901.00
[Name of Painting Supply Store]	63.36
[Name of Home Repair Store]	1,405.27
[Name of Home Renovation Store]	242.64
[Name of Repair Store]	.45
[Name of Renovation Store]	73.19

In particular, the claim fails to show the basis for the amounts; merely that the amounts are sought by reference to the provider of the goods or service. The landlord does not set out the damage to which they relate, for example, painting, broken door, cleaning. Further, the receipts provided do not match the amounts listed in the monetary order. Without knowing to what particular damage each item was in relation, the tenant would be unable to respond to the claim in any meaningful way.

Dismissing a portion of the landlord's claim engages the principle of cause of action estoppel. Cause of action estoppel is one branch of the doctrine of *res judicata*. The British Columbia Court of Appeal in *Erschbamer v Wallster*, 2013 BCCA 76 provided a comprehensive review of cause of action estoppel:

> [14] With respect to cause of action estoppel, Newbury J.A. quoted, at para. 13, from the seminal case of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 at 319 (Ch.):
>
> > In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, <u>but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.</u> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged

to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

She noted, at para. 14, that this language has been somewhat narrowed by the decision in *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321, where Mr. Justice Cromwell stated that the doctrine should apply to "issues which the parties had the opportunity to raise and, in all the circumstances, should have raised" (para. 37).

[15] Madam Justice Newbury set out the requirements of cause of action estoppel at para. 28 (from *Grandview v. Doering*, [1976] 2 S.C.R. 621, as summarized in *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, aff'd (1987), 45 D.L.R. (4th) 766 (Man. C.A.)):

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[emphasis added]

In this case, the landlord has not set out her case appropriately and it is through her own negligence and lack of diligence that this claim has been dismissed. Accordingly, I will not provide leave to reapply to the landlord in respect of these amounts.

I dismiss the landlord's application to recover these amounts without leave to reapply.

Preliminary Issue – Order for Submission of Evidence After Hearing and Service

The landlord did not submit a copy of the Canada Post receipt for the registered mailing. The landlord could not locate the receipt at the hearing to provide me with the tracking number. I informed the landlord at the hearing that in order for her to prove service of the dispute resolution package, I required the tracking number as evidence of the mailing.

Rule 3.19 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) provides that I may direct that evidence be submitted after the commencement of a hearing.

I directed that the landlord provide a copy of the registered mailing receipt. I informed the landlord that she had one week from the date of the hearing to locate the tracking number and provide that number to me by fax. The landlord provided me with the Canada Post receipt including the tracking number within one week.

I informed the landlord that if she was unable to locate the receipt then she could provide me a witness statement; however, as the landlord was able to provide me with the tracking number, I did not need to consider the witness statement sent at the same time.

The landlord testified that she served the tenant with the dispute resolution package in mid-November by registered mail. The landlord provided me with a Canada Post customer receipt that showed she served the tenant 18 November 2014. The landlord testified that the dispute resolution package contained all documentary evidence before me.

The landlord testified that the tenant had left the rental unit and moved to a new residence that was next door to a friend of the landlord. The landlord testified that her friend knew of the landlord's claim against the tenant and informed the landlord that the tenant was residing at that address. The landlord testified that she sent the registered mailing to this address and that her friend saw Canada Post deliver it to the tenant.

On the basis of this evidence, I am satisfied that the tenant resided at the address to which the registered mailing was sent. Therefore, I find that the tenant was deemed served with the dispute resolution package pursuant to paragraphs 89(1)(c) and 90(a) of the Act.

Preliminary Issue – Amendment to Application

The landlord testified that she did not end up incurring the cost of disposing of the hot tub as she found someone who would dispose of the hot tub at no cost. As such the landlord asked to amend her application to withdraw this claim.

Paragraph 64(3)(c) allows me to amend an application for dispute resolution.

As there is no prejudice to the tenant in allowing the landlord to reduce the amount of her claim, I allowed it.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, damage and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

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

This tenancy began 19 October 2012. This tenancy ended in September 2014 when the tenant abandoned the rental unit. The parties entered into two successive fixed-term tenancies the last of which covered the term 30 April 2014 to 31 August 2014 and was entered into 30 April 2014. Monthly rent of $1,300.00 was due on the last day of the month. The tenancy agreement notes that water, electricity and heat are included. The tenancy agreement contains an addendum which includes the following terms:

> *Liquidated Damages – If a tenant ends a fixed term or is in breach of the Residential Tenancy Act or of a material term of this agreement that causes landlord to end tenancy before term, tenants will pay a fee of $300.00.*
>
> *…*
>
> *Landlord requires full payment of rent on the last day of each month. Late rent is subject to a $25.00 late fee payment on top of rent every month you are late. This rule is strictly enforced and payment will not be waived.*

The landlord testified that she continues to hold a security deposit in the amount of $650.00, which was collected at the beginning of the tenancy.

The landlord provided me with a copy of the condition move-in inspection report completed 19 October 2012. There is nothing remarkable about this report. The landlord issued a Notice of Final Opportunity to Schedule a Condition Inspection on 1 October 2014.

The landlord testified that the tenant would pay her rent in "drabs". The landlord testified that the most recent rent arrears began accruing in January or February 2014.

The landlord testified that at some point in the tenancy the tenant asked if she could install an outdoor hot tub. The landlord testified that she agreed to this on the condition that she was compensated for the increased utility use. As well, the landlord made it a condition that the fence that needed to be removed in order to install the hot tub would

be replaced at the end of the tenancy. The landlord testified that the parties entered into a subsequent agreement regarding the addition of a hot tub to the rental property. The landlord testified that the agreement was for $31.00 per month in order to compensate the landlord for the extra utility use. There is no written agreement.

The landlord provided an invoice dated 20 October 2014 for fence components from a lumber store in the amount of $64.06.

The landlord testified that the parties entered into a second subsequent agreement regarding additional occupants. The landlord testified that the tenant's partner moved in as well as another person. The landlord testified that the parties agreed to an extra $100.00 per month in compensation for the extra utility use. There is no written agreement.

The landlord testified that the tenant vacated the rental unit without notice. The landlord testified that the rental unit was left dirty and damaged.

The landlord testified that she had to remove garbage from the rental unit, including a stove that had been abandoned by the tenant. The landlord provided two receipts totalling $24.00. The landlord testified that she incurred $25.00 in labour costs for this removal.

The landlord testified that she was able to find new tenants for the rental unit. The new tenancy began 1 December 2014.

The landlord claims for AB's cleaning services. AB provided a description of the work she provided:

> *Cleaned for [landlord's] rental on 5th. It took 6 hours for a total of $120.00*
>
> [as written]

The landlord testified that she had to rekey the locks as she was concerned about the tenant coming back. The landlord provided an invoice dated 27 March 2014 in the amount of $168.70.

The landlord provided a receipt from a local newspaper. The landlord testified that this cost was incurred to place an advertisement in that paper. The receipt is in the amount of $68.65. The invoice sets out that the advertisement ran from 25 October 2014 to 1 November 2014. The landlord provided a listing from a free internet classified site. That listing was posted 8 October 2014. That advertisement sets out that the rental unit was "newly renovated".

The landlord provided a receipt from an office supply company for the cost of preparing for this application. The receipt is in the amount of $68.31.

The landlord provided me with photographs. The photographs show the tenant moving from the rental unit late at night, debris and dirt in the rental unit, two broken doors, putty filled holes, and a photo of the removed fence.

The landlord provided a ledger in narrative form of how she determined the outstanding rent arrears at $5,433.70. After reviewing the narrative ledger, it appears that there are amounts claimed within this heading that are not rent arrears. As well, one payment in June in the amount of $600.00 appears to have been excluded.

After review of the narrative ledger and the receipts for payment issued I identified $3,595.00 in rent arrears:

Item	**Owed**	**Paid**
January Rent Arrears	$145.00	
February Rent	1,300.00	
Payment (Feb)		1,300.00
March Rent	1,300.00	
18.Mar.2014 Payment		800.00
25.Mar.2014 Payment		2,000.00
April Rent	1,300.00	
May Rent	1,300.00	
21.May.2014		1,500.00
June Rent	1,300.00	
Payment (Jun)		750.00
Payment (Jun)		600.00
July Rent	1,300.00	
August Rent	1,300.00	
September Rent	1,300.00	
Subtotal	**$10,545.00**	**$6,950.00**
Total Rent Arrears	**$3,595.00**	

Payments I have excluded from the “rent arrears” calculation that were contained within the rent narrative include:

Item	**Amount**
Late Fee ($25.00 x 6)	$150.00
Change Locks	168.70
Hot Tub Utilities	310.00
Bank Charges	430.00

Yard Cleaning	180.00
Total Monetary Order Sought	**$1,238.70**

Analysis

I find, on the basis of the landlord's sworn and uncontested testimony and the documentary evidence before me that the tenant had rent arrears in the amount of $3,595.00. The landlord is entitled to recover these rent arrears from the tenant.

Paragraph 7(1)(d) of the *Residential Tenancy Regulations* (the Regulations) provides that a landlord may charge an administration fee of $25.00 for late payment of rent. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee. The tenancy agreement provides for this in the addendum. I find that the landlord is entitled to charge the fee. I find that the tenant has paid rent late on six occasions. The landlord is entitled to recover $25.00 per occasion or $150.00.

The remainder of the claim within the "rent arrear" category dismissed as it amount to an attempt at double collection or, in the alternative, the particulars provided by the landlord were insufficient to allow the tenant to respond.

The landlord claims for $310.00 and $400.00 in additional utility fees for the tenant's hot tub and extra occupants. The landlord submitted a tenancy agreement in respect of this tenancy. There are no written agreements with respect to these additional utility payments. The parol evidence rule is a common law rule that prevents a party to a written contract from presenting extrinsic evidence that adds to the written terms of the contract that appears to be whole. I find that the contract governing this tenancy is the tenancy agreement dated 30 April 2014. Importantly, this contract was entered into after the alleged bargains in respect of the hot tub and extra occupants were struck; yet, this agreement makes no mention of these amounts. I find that the extent of the tenant's obligations was set out in the tenancy agreement dated 30 April 2014. Accordingly, the landlord's application for utility payments totaling $710.00 is dismissed.

The landlord seeks liquidated damages. The second fixed-term tenancy ended 31 August 2014. The tenancy ended in September 2014. The liquidated damages clause provides that it applies where the tenancy ends before the term. As the tenancy did not end before the expiration of the fixed term, the landlord is not entitled to liquidated damages.

The landlord claims for rent losses for October and November 2014.

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.

I find that by abandoning the rental unit and by leaving the rental unit in an un-rentable state, the tenant failed to comply with the Act and thus caused the landlord to experience a rental loss for October.

The landlord testified that the tenant abandoned the rental unit in September. The tenancy was a periodic tenancy at this point. As such the tenant could have given a one month notice to end the tenancy effective the end of October. I find that this limits the loss the landlord could claim for the tenant's improper notice. From the landlord's internet posting it appears that the work was substantially complete by early October. I accept that some delay to bring the rental unit into a rentable condition was necessary, but I cannot find that the tenant's improper notice or the state of the rental unit was the proximate cause of the landlord's rental loss for November. Accordingly, the landlord is entitled to a rent loss for October only. The landlord's application for November's rent loss is dismissed as the tenant did not cause this loss.

The landlord claims for the cost of placing the newspaper advertisement to rerent the rental unit. The cost of rerental, including the cost of attracting new tenants, is the normal cost of doing business as a landlord. There is no provision for recovery of this amount and no wrongful act of the tenant resulted in this loss. Accordingly, I find that this amount is not compensable.

The landlord claims for the costs of rekeying the locks at the end of the tenancy. The landlord stated that the change was necessary as she was concerned the tenant's would come back to the rental unit. Section 25 of the Act places the responsibility for changing the locks at the beginning of a new tenancy on the landlord. Thus, the landlord's claim for the cost associated with rekeying the suite is denied.

The landlord did not provide a receipt for the dryer repair. As such, the landlord has failed to prove the costs, if any, that she incurred. The landlord is not entitled to claim the $300.00 for the dryer repair.

It is clear from the landlord's photographs, the landlord's testimony, and the statement of AB that the tenant failed to return the rental unit to the landlord in a condition that complied with the tenant's obligations under the Act. The landlord provided evidence that she incurred costs of $120.00 for cleaning, $49.00 for removing garbage, and $64.06 for the cost of lumber for a fence. I find the landlord has proven her entitlement to these amounts.

The landlord has claimed for $68.31 in costs associated with preparing for these proceedings. These costs are best characterized as "disbursements" incurred in the course of these proceedings.

Section 72 of the Act allows for repayment of fees for starting dispute resolution proceedings and charged by the Residential Tenancy Branch. While provisions regarding costs are provided for in court proceedings, they are specifically not included in the Act. I conclude that this exclusion is intentional and includes disbursement costs. Furthermore, I find that disbursements are not properly compensable pursuant to section 67 of the Act as the tenant's contravention of the Act is not the proximate cause of the expense.

I find that the landlord is not entitled to compensation for the landlord's disbursement costs as disbursements are not a cost that is compensable under the Act.

The landlord has shown her entitlement to compensation in the amount of $5,278.06.

As the landlord has been successful in her application, she is entitled to recover her filing fee from the tenant.

The landlord applied to keep the tenant's security deposit. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

Conclusion

I issue a monetary order in the landlord's favour in the amount of $4,728.06 under the following terms:

Item	**Amount**
Rent Arrears	$3,595.00
Late Fees	150.00
October Rent Loss	1,300.00
Fence Materials	64.06

Cleaning Costs	120.00
Garbage Removal	49.00
Offset Security Deposit Amount	-650.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order	**$4,728.06**

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(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: June 19, 2015

Residential Tenancy Branch