Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNSD MNDC O FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Landlord on November 14, 2014 seeking to obtain a Monetary Order for: damage to the unit, site or property; to keep all or part of the security deposit; for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement; and to recover the cost of the filing fee from the Tenants for this application.

The hearing was conducted via teleconference and was attended by the Owner's Agent, hereinafter referred to as Landlord, the female Tenant, and the Tenants' legal counsel, hereinafter referred to as Counsel. The Landlord and Tenant gave affirmed testimony.
Section 1 of the Act defines a landlord in relation to a rental unit, to include the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord permits occupation of the rental unit under a tenancy agreement, or exercises powers and performs duties under this Act, the tenancy agreement or a service agreement.
The application listed two applicants, the Landlord and the Owner, both of whom meet the definition as landlord under the *Act*. Therefore, for the remainder of this decision, terms or references to the Landlords importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

The Tenant affirmed that she was representing both herself and the male Tenant, G.R.M. in this matter. Therefore, for the remainder of this decision, terms or references to the Tenant importing the plural shall include the singular and vice versa, except where the context indicates otherwise

The Tenant arrived a few moments after the start of the hearing. She was informed that, prior to her arrival, the Landlord had already agreed to the affirmation and that the Tenants' legal counsel had been clarifying which of the Landlord's documentary evidence the Tenants had forwarded to him. Counsel confirmed that he had received a copy of the Landlord's typed document which included the spreadsheet listing the items claimed and 21 photographs. Counsel indicated that his client had not forwarded him a copy of the Contract of Purchase and Sale agreement that was served as evidence to the Residential Tenancy Branch (RTB) by the Landlord. Counsel stated that he suspected that contract would be relevant to this matter so had requested a copy of it from the Tenants' realtor.

Counsel submitted that he had two copies of the Contract of Purchase and Sale agreement before him. One contract was dated September 6, 2013 and the other dated September 11, 2013. The September 11, 2013 version had the same purchase price typed at clause (1), as the copy in RTB evidence; however the typed amount had been crossed out and a lower amount of $4,290,000.00 was hand written and initialed. The September 11, 2013 version was signed and accepted by R.M.'s Trustee.

Upon review of clause (7) "INCLUDED ITEMS" on page 2, Counsel confirmed that the September 11, 2013 version he had before him listed exactly the same thing as what was listed on the version that was held on the RTB file, as follows:

> 7. ***INCLUDED ITEMS:*** *The Purchase Price includes any buildings, improvements, fixtures, appurtenances and attach-ments thereto,* ***and*** *all blinds, awnings, screen doors and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and*

air conditioning fixtures and all appurtenances and attachments hereto as viewed by the Buyer at the date of inspection, INCLUDING:

Clothes Washer/Dryer/two Fridges/Stove/DW, all lights and window coverings, all garden furniture and plants in pots and in ground. Are all in good working condition.

[Reproduced as written]

On the page titled Contract of Purchase and Sale Addendum, labelled as page 6 of 6 of the Contract of Purchase and Sale, the following was hand written just above a signature:

THIS IS AN OFFER FROM THE SELLER TO SELL. THE SELLER HAS THE RIGHT TO RENT BACK THE PROPERTY, [address of property] BACK FOR A PERIOD OF 12 MONTHS AT AN ANNUAL RENT OF $42,000. THE SELLERS OBLIGATION WILL BE TO MAINTAIN THE HOUSE & GARDENS IN THE SAME CONDITION AS AT COMPLETION FOR THE 12 MONTHS.
THE ANNUAL RENT OF $42,000 TO BE DEDUCTED FROM THE PURCHASE PRICE AT CLOSING.
BUYER TO HAVE ACCESS FOR PLANS, SURVEYS, & PERMITS.

[Reproduced as written excluding the property address]

The Tenant affirmed that the Landlord had served her with copies of the same documents and pictures that were received on the RTB file. In consideration of the Counsel's submissions, I accept the Landlord's undisputed submission that he served the Tenants with the exact same evidence as he did the RTB, as required by the Act. Accordingly, I considered all relevant documentary evidence submitted by the Landlord.
It is not uncommon for parties to a contract of purchase and sale to continue to engage in last minute negotiations after the initial typed offer is made, such as agreeing upon a lower price. That being said, based on the undisputed submissions of the wording of clause (7), I am satisfied that on a balance of probabilities clause (7) remained unchanged and was worded as listed above.

The Tenants' evidence had not been received on the RTB hard copy file prior to this hearing. During the hearing, I determined that the RTB electronic record had been updated to show receipt of the Tenants' 16 page evidence submission which was received on June 16, 2015. That evidence included: Counsel's cover letter, the Tenant, L.M.'s sworn affidavit; exhibits labelled "A" through "J"; and a Tenant's Application for Dispute Resolution form listing the Landlord's file number.

Counsel asserted that a second submission had been made on June 21, 2015 via fax to the RTB and to the Landlord. This second submission included a letter indicating that the Tenants were willing to return some of the claimed items. There was no record of the Tenants' second submission on the electronic or hard copy RTB files.

The Landlord confirmed receipt of both submissions of evidence from the Tenants via fax and courier on or before June 21, 2015. Therefore, as all of the Tenants' evidence had been received by the Landlord within the required timeframes, I considered all of the Tenants' documentary evidence and written submissions that were before me. Counsel was granted leave to read the June 21, 2015 letter into evidence as it had not yet been uploaded into the RTB electronic record.

Section 59(2) of the Act stipulates that an application for dispute resolution must be in the applicable approved form; include full particulars of the dispute that is to be the subject of the dispute resolution proceedings; and be accompanied by the fee prescribed in the regulations.

Residential Tenancy Branch Rule of Procedure 2.6 provides that an application for dispute resolution has been filed when it has been submitted and the fee is paid or all documents for a fee waiver are submitted to the Residential Tenancy Branch directly or at a Service BC office.

Section 59(5)(c) provides that the director may refuse to accept an application for dispute resolution if the application does not comply with subsection (2).

Counsel acknowledged that the document titled "Tenant's Application for Dispute Resolution" was not filed separately at the RTB and no filing fee had been paid by the Tenants. There was no record of an application for a fee waiver made by the Tenants. The Tenants simply submitted the application as part of their evidence and wrote the Landlord's file number on the top of their application form.

Based on the above, I find the Tenants had not taken the required steps to properly file an application for Dispute Resolution. Therefore, I declined to hear matters pertaining to the Tenants' application, pursuant to section 59(5)(c) of the Act. The Tenants are at liberty to take the proper steps to file an application for Dispute Resolution, in accordance with the Act, if they wish to proceed with bringing a claim forward.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. Following is a summary of the submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Have the Landlords met the burden to prove the Tenants took the Owner's property when the Tenants vacated the rental unit?
2. If so, are the Landlords entitled to the return of that property?
3. Are the Landlords entitled to monetary compensation to re-install the returned property?
4. Are the Landlords entitled to monetary compensation for items not returned, if so at what amount?

Background and Evidence

It was undisputed that the respondent Tenants were the previous owners of the single detached house which was being sold by their Trustee. The applicant Landlord, J.L., is the current Owner who purchased the rental property effective October 31, 2013. The parties mutually agreed that the previous owners would remain occupying the property, as Tenants, for a period of one year commencing on November 1, 2013 and ending October 31, 2014, as per the Contract of Purchase and Sale Addendum (page 6 of 6). The annual rent was $42,000.00 and the Tenants paid $1,750.00 as the security deposit, which the Landlord is currently holding. The Tenants have not served the Landlords with their forwarding address in writing.

The Landlord testified that when the current Owner purchased the house they took pictures of the inside and outside, as provided in their evidence. He argued that when the Tenants moved out the Tenants had taken and replaced numerous antique fixtures on the inside and taken items from the exterior, as listed on the spreadsheet provided in his evidence.

The Landlord argued that the house was built sometime around 1940 and when the Owner purchased the property there were a lot of antique fixtures and "furnitures" in the garden which became the Owner's property. The Landlord asserted that if the items are returned the Owner wants to get her "damage" back from the Tenant to put everything back together. Upon further clarification the Landlord confirmed that the Owner wants all of the original items returned and have the Tenants ordered to pay to re-install those items. The items sought, as listed in the Landlord's evidence included:

1) The foyer medieval chandelier - $3000
2) Master bedroom light fixture - $900
3) Master bedroom curtain drapes for 12 windows - $6000
4) Master ensuite Victorian chandelier - $8000
5) Rear yard gazebo statue and pots - $1600
6) Rear yard fountain - $4500

The Tenant testified and confirmed that the she had taken the items listed above. She clarified that not all of the windows had drapes on them at the time the house was purchased by the Owner. The Tenant provided a brief response to the Landlord's submission while referencing her sworn affidavit provided in evidence. The Tenant asserted that she has "worked in antiques" for about 25 years as "interior design and decoration" and she currently has an antique store.

The Tenant argued that the values attributed to the items claimed by the Landlord were grossly excessive or exaggerated. She also argued that some of the items were chattels and not fixtures; therefore, she was entitled to take them with her when she moved out.

The Tenant submitted that she was willing to return some of the items and in fact those items were currently in Counsel's office. Specifically, the Tenants were willing to return item (2) master bedroom light fixture less the glass globe which became broken; item (3) 6 master bedroom valances; item (4) the master ensuite Victorian chandelier; and item (5) one empty flower pot.

The Tenant submitted an unsigned letter dated June 9, 2015 listing a person's name followed by the initials CPPA, along with a copy of a "Fair Market Value Appraisal" document listing two items. The first item had a value listed as 60 and was described in part as a modern domed ceiling light fixture. The second item had a value listed as 100 and was described in part, as a modern four branch ceiling light fixture. The Tenant submitted that the first item on this appraisal was the master bedroom light fixture and the second item was the master ensuite chandelier. The Tenant argued that she had sourced these items and argued that the two light fixtures were not antiques as supported by the appraisal.

The Tenant asserted that the foyer chandelier was not antique either and that she had purchased it from a local lighting warehouse in 2007 for $302.90, as supported by the invoice provided in evidence. She also submitted evidence that this type of chandelier, or a similar chandelier, was available to be purchased off of the internet at a lower price.

The lighting warehouse invoice submitted into evidence is dated 02/21/07 and lists three items. The first item has been written over and lines drawn above and below listing a price of $302.90. The Tenant asserted that the hand written item number listed on this invoice matched the item number listed on an information sheet printed from the internet.

Upon review of the claim for curtain drapes, the Tenant clarified that she calls drapes "decorated pieces or valances" and therefore, she was of the opinion that they would remain her property and could be taken when she moved out. The Tenant testified that only 8 of the master bedroom windows had valances and not all 12 windows. Upon further clarification, the Tenant said she referred to each curtain side panel as one valance and that each of the 8 windows had two valances or panels, one on each side of the window.

The Tenant stated that she has sourced out the same valances on the internet and has been able to retrieve a total of 6 valances out of the required 8, off of the internet. She argued that those items were purchased at an approximate cost of $11 or $12 per panel or per valance from a store that had been going out of business. She submitted that they were the same as the internet advertisement she provided in evidence which lists the item for $9.99.

In response to the claim for the gazebo statue and pots, the Tenant argued that those items were decorative and not attached to the ground. She asserted that she was told they were considered chattels and were her property to take. The Tenant stated that she would return the two pots if ordered to do so and that she believes they were both made of fibreglass.

In describing the outdoor items, the Tenant testified that she had purchased the statue used for $150 and she purchased the fountain for $200. She submitted that she had priced out a new fountain and it would

be approximately $1,100. She argued that the fountain was detachable and was not fixed to the ground; therefore, it remained her property.

Counsel argued that the amounts claimed by the Landlord were grossly inflated. He noted that the Tenants had offered to return some of the items, delivered to the residence; however, that offer had not yet been taken up by the Landlord or Owner. Counsel asserted that any award granted to the Landlord and Owner should be offset against the security deposit.

In closing, the Landlord submitted that he is not an antique expert to be able to respond to the actual values of the items claimed. He argued that normally on a property sale fixtures remain. He said the Owner wants the property back and noted that swapping out items for a cheaper version is an act of theft. He noted that his photos clearly show before and after of what was inside and in the yard at the time they purchased the property.

Upon review of the physical location of all items claimed by the Landlord, the Tenant submitted that she gave item (1) he foyer medieval chandelier to her friend who is still in possession of it; item (2) the master bedroom light fixture, less the broken glass is ready to be returned to the Owner; item (3) Master bedroom curtain drapes she has retrieved 6 valances ready to be returned; item (4) Master ensuite chandelier ready to be returned; item (5) Rear yard gazebo statue and pots – one pot is ready to be returned and the Tenant has the statue and one pot; and item (6) rear yard fountain the Tenant gave to a friend.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Section 7 of the Act provides as follows in respect to claims for monetary losses and for damages made herein:

7. Liability for not complying with this Act or a tenancy agreement

7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Section 32(4) of the Act stipulates that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Residential Tenancy Policy Guideline 1 states that for the purposes of determining whether chattels annexed to realty remain personal property or become realty, chattels are divided into two classes:

1. Chattels, such as brick, stone and plaster placed on the walls of a building, become realty after annexation. In other words, where personal property does not retain its original character after it is annexed to the realty or becomes an integral part of the realty, or is immovable without practically destroying the personal property, or if all or a part of it is essential to support the structure to which it is attached then it is a fixture.
2. Other personal property that does not lose its original character after attachment may continue to be personal property of the owner.

Based on the above, I accept the Tenants' argument that the items claimed by the Landlords meet the definition of personal chattels. That being said, it was undisputed that the Contract of Purchase and Sale

at item 7, listed items which meet the definition as personal chattels that were included in the purchase price and which transferred ownership to the buyer effective October 31, 2013, as follows:

> *7.* ***INCLUDED ITEMS:*** *The Purchase Price includes any buildings, improvements, fixtures, appurtenances and attach-ments thereto,* ***and*** *all blinds, awnings, screen doors and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and air conditioning fixtures and all appurtenances and attachments hereto as viewed by the Buyer at the date of inspection, INCLUDING:*
>
> *Clothes Washer/Dryer/two Fridges/Stove/DW, all lights and window coverings, all garden furniture and plants in pots and in ground. Are all in good working condition.*
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> [Reproduced as written with my emphasis added by underlining]

Accordingly, as of October 31, 2013, all items listed above in clause (7) were no longer the Tenants' possessions and were in fact the Landlords' possessions.

The Tenants did not dispute the fact that they took the items claimed by the Landlords when they vacated the property. Upon review of the Tenants' submissions I give very little weight to the Tenants' submission that she can determine if an item is an antique and can determine its value based on her experience working in interior design and decoration. While she may have an opinion based on her work experience, there was no evidence before me that would indicate the Tenant was adequately trained or licensed to determine the difference between an antique or non-antique or determine its value.

In regards to the June 9, 2015 letter listing a name followed by the initials CPPA and the Fair Market Value Appraisal document, I find that evidence to be hearsay evidence and give it very little weight. I made those findings, in part, do the following: the letter was unsigned and was not printed on any formal letterhead; there were no photographs included in the appraisal submission therefore, the Landlord could not confirm if the items which were appraised and listed in this document were in fact the items that had been removed from the rental property; and the appraiser was not present at the hearing for the Landlord to cross examine.

In addition to the above, I find it presumptuously suspicious that the Tenants would not have had all of the items they removed from the property appraised, especially when they were arguing that none of the items were antiques.

Based on the foregoing I conclude that the Tenants breached section 32 of the Act and Policy Guideline 1, by removing fixtures and items which became the Owner's property upon completion of the sale on October 31, 2013. Accordingly, I issue the following Orders:

1) The Tenants are hereby Ordered to retrieve and deliver to the Landlords, at the Tenants' cost, **all original** fixtures (not sourced out replacements) appurtenances and attachments thereto, curtain rods, tracks and valances, all lights and window coverings, all garden furniture and plants in pots and in ground, that were removed from the subject property and as claimed here by the Landlords. All **original** items, not replacement items, are to be in good working condition and returned, no later than **July 30, 2015.**

2) I Order that all reasonable costs incurred by the Landlords to re-install the above listed items to be the responsibility of the Tenants, pursuant to section 7(2) of the Act. The Landlord must issue a written demand for payment of those costs and serve it upon the Tenants, along with a copy of all receipts for the work claimed. The Tenants are Order to remit payment to the Landlords within 30 days of receipt of the demand for payment and invoices.

I caution the Tenants that Section 94.1(1) of the Act stipulates that subject to the regulations, the director may order a person to pay a monetary penalty if the director is satisfied on a balance of probabilities that the person has

(a) contravened a provision of this Act or the regulations, or
(b) failed to comply with a decision or order of the director.

If the Tenants fail to comply with the above listed Orders, the Landlords will be at liberty to file another application and evidence to seek compensation for any unreturned items as well as aggravated damages.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

I accept the Landlord's submission that he is not an antique dealer or appraiser; therefore, he cannot determine the actual value of the items that were taken. Furthermore, it is reasonable to conclude that the Landlords cannot obtain the actual appraised value of those items if the actual item is not physically before the appraiser.

Based on the foregoing, if the Tenants fail to comply with my orders and the Landlords have to file another application to seek compensation for any unreturned original items and aggravated damages, I grant the Landlords leave to obtain a written appraisal from a licensed appraiser, based on the Landlords' photographs and their oral descriptions of the items. That appraisal, along with this Decision, may be served as evidence by the Landlords, in any future claim. The Tenants are responsible for any costs incurred to obtain such appraisal and those costs are to be offset against the security deposit at the future hearing.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Landlords have primarily succeeded with their application; therefore, I award recovery of the **$100.00** filing fee, pursuant to section 72(1) of the Act.

Conclusion

The Landlords have primarily succeeded with their application. The Tenants have been issued orders to return all original items as described above, no later than **July 30, 2015.** In addition, the Tenants have been ordered to pay all reasonable costs incurred to re-install those items, as listed above.

The Landlords have been awarded monetary compensation of $100.00. The Landlords may deduct the one time award of **$100.00** from the Tenants' security deposit as full recovery of their filing fee.

The Landlords are Ordered to retain the balance of the security deposit in the amount of $1,750.00, until such time that all final costs have been determined and/or offset against the deposit.

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 03, 2015

Residential Tenancy Branch