# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Metrix Capital Corporation
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes MND MNSD, MNDC, RR, O, FF

Introduction

In the first application, as amended, the landlord seeks compensation for replacement of various appliances and items, fixtures and furnishings and for removal of debris and for re-keying of the premises.

In the second application the tenant seeks reimbursement for the cost of improvements or repairs done to the property and for a retroactive rent rebate based on the alleged substandard condition of the premises.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing of this matter show on a balance of probabilities that either party is entitled to any of the relief claimed?

Background and Evidence

The rental unit is a two bedroom apartment in an eight unit apartment building. The building was constructed approximately in 1980.

The tenant moved in during the month of April 2006, initially for a one year term and then month to month. The most recent monthly rent was $1410.00.

This tenancy ended as the result of a ten day Notice to End Tenancy for unpaid rent, issued and served January 8, 2015. The tenant unsuccessfully sought to cancel the

Notice (see related file numbers on front page). An order of possession pursuant to the Notice was issued on February 12 2015.

An application for review of that earlier decision was refused.

The tenant vacated the premises on February 15th.

The landlord received a $640.00 security deposit at the start of the tenancy. Though he claims it as a credit in this proceeding, it would normally have been applied against the monetary award for unpaid rent that the landlord received along with the order of possession in earlier proceeding. I consider it to have been applied to that award. The landlord is no longer holding a security deposit.

The principles of the landlord corporation are Mr. and Ms. R.. Both gave evidence at the hearing.

Ms. R. testifies that when the tenant left he took a number of cabinets, the washer and dryer, a sink, a stove and a fridge that the tenant had replaced himself during the tenancy. She says he also took two interior doors.

She says the tenant delivered three keys when he left but none of them worked on the front entrance door to the building.

On being questioned she says she had not been in the suite in many years.

Mr. R. confirms the missing appliances and says he has no idea where they went. He denies given the tenant any permission to remove them.

He says it will cost $2435.00 for new cabinets. The missing ones were of a 1980 vintage.

He indicates that he thinks the appliances had been replaced twice since the unit was first rented and that “some” were of a year 2000 vintage. The total cost of putting new cabinets in will be $4935.00. He says he has paid a $2500.00 deposit towards that work and the work will start in about one or one and a half weeks.

He says the counter tops will cost $650.00 plus tax.

He hasn’t spent any money on new keys for the front door.

He says the two doors will cost $200.00 for frames and hardware and that he will do the work himself.

On being questioned by Mr. W., Mr. R. denies that he knew the tenant had conducted a renovation of the apartment. He denies that the tenant gave the old appliances back to him. He says prior to the tenant vacating he had been in the suite once four years ago to fix a pipe under the sink. He denies any agreement with the tenant whereby the tenant would renovate the interior of the rental unit and the landlord would repair the exterior against water ingress into the unit.

On further questioning he agrees he did drywall work in the back bedroom about three years ago.

In response to a clarifying question he says he was in the rental unit two and one half years ago to re-spray the ceiling but at that time had no discussion with the tenant about the renovations though the old appliances were no longer there.

On questioning he denies there is any local government order to clean up mould in the building or the rental unit. On further questioning he admits that he has received a local government letter dated January 21, 2015 ordering the landlord to conduct mould and water related clean up and repairs to the building and to this rental unit is particular.

The tenant's position is that the interior renovations he obviously conducted were part of an agreement with Mr. R. and that in return the landlord would seal off and repair the exterior of the building as there was water leaking into the apartment and causing moisture related issues.

Over the years 2011-2012, the tenant replaced all the kitchen cabinets with new. He replaced the kitchen counter with a stone slab and sink. He replaced the old kitchen appliances but for the dishwasher. He also redid the bathroom, with a new toilet and cabinet.

The tenant's witness Mr. C.S. testifies that he was one of the original occupants under this tenancy and that there were moisture problems from early on. Though he left in 2006, he visited in 2013 and saw the tenant's improvements to the unit. He told the tenant he was "crazy" to make the improvement and the tenant told him about the arrangement with the landlord to do outside work. He was there in February 2014 and saw the shower was leaking and the drywall in the shower was "rotten with mould."

The tenant's witness Mr. W. E. testifies that he is a certified architect and has been an expert witness in the province of Quebec. about mould and water infiltration. He says the tenant asked him to look and the rental unit in January 2015. He attended January 29 and gave a letter as a report. He says there was an overwhelming case of mould in the building. Worst was the bedroom carpet. It was wet and saturated with mould. He says the mould had crept to the interior walls. He says the outside of the building has some of its woodframe portion below ground level, contrary to standard building practice and such construction permits water ingress.

The tenant's witness Mr. M.K. testifies that he is a long time friend of the tenant and was one of the people who helped the tenant "restore" the unit. He says that he worked with Mr. R. at the unit and that Mr. R. knew what was being renovated in the tenant's unit. He says that Mr. R. approved the carpet the tenant installed and helped with some of the plastering.

On being questioned by Mr. M., Mr. M.K. testifies that all the cabinets and appliances removed by the tenant during the renovation were "returned to the landlord" by putting them in a particular parking space and indeed, Mr. R. had told him where to put the items that had been removed.

The tenant testified after his witnesses. He says the landlord paid him to clean the suite when the tenancy started in 2006. He says that he noticed "mould or black tile grouting" at that time and Mr. R. had told him to use bleach.

He says that in 2006 or 2007 he noticed that some of the drywall in his suite was wet, the carpet was wet and there was water in the hallway.

The tenant says that the appliances were old when he moved in. He says the fridge and stove were "antique colours from 1970" and that the landlord had replaced them with used ones.

He says the washer and dryer broke down and so he replaced them with his own in 2006 and then replaced them again with his more recent renovation. He put the original washer and dryer in a location in the parking garage that the landlord had pointed out to him for that purpose.

The tenant says that in 2011 he decided to replace the cabinets in his suite. Mr. R. saw what he was doing and said that he would "fix the outside" if the tenant continued with his renovation of the inside. The tenant replaced all the electrical outlets and switches, repaired some drywall, removed a carpet and put new tile in the bathroom, hall and

kitchen. He says the landlord paid for new carpet in the bedroom and living room (though the tenant complains there are still no transition strips installed).

The tenant says that as part of the landlord's side of the bargain, the landlord hired a crew to dig up the outside wall and install a vapour barrier. He says the landlord never completed the job by refilling a hole and that water leaked in. He says that no permit was obtained to do the work.

The tenant submitted a number of photographs of both the outside work and the renovations he conducted inside the rental unit as well as areas he claimed were wet from water ingress.

The tenant submitted a list of receipts he claims show the various out of pocket expenses he incurred during 2011-2012, in conducting his renovation. They total $6819.27. He claims $4497.31 of those expenses after deduction for various things he removed before vacating the premises.

The tenant says he liked his rental unit but the mould forced him out.

On being questioned by Mr. M. the tenant acknowledges that he rented out a bedroom in the rental unit and "always had co-tenants." He acknowledges that he never gave the landlord any written notice or complaint about the moisture issues or defects. He was asked about ever having the premises inspected before the two inspections in January 2015 (the architect and a local government inspection) but his answer was non-responsive. He says that his delay in taking action was because he was waiting for the landlord to repair the outside wall.

Mr. B. M. who had provided a testimonial letter, joined the hearing after the tenant's testimony and testified that he has personal knowledge of the state of the rental unit and that the spare bedroom that the tenant rented out to others was completely unhealthy and uninhabitable. He says it was this way in April 2012 when he came and contributed $1500.00 worth of his labour to the tenant's renovation and that it remains in that state because of the landlord's failure to prevent water ingress from outside the building. He describes the landlord's efforts to seal the exterior walls as "laughable."

Mr. B.M. says that he helped remove some drywall and that he helped the landlord's representative Mr. R. while Mr. R. was working in the unit. He says he was there when the landlord and the tenant agreed that the tenant "would do the inside" and the landlord "would do the outside." He says that a prior occupant of the bedroom had moved because the room was unhealthy.

On being questioned by Mr. M., Mr. B.M. admitted that he was not a “professional tradesman” as stated in his written testimony, but was an audio engineer, though he had worked in the “trades” for thirty years.

Neither Mr. R. nor Ms. R. chose to testify in response to the testimony of the tenant or his witnesses.

Analysis

It is apparent that the tenant carried out a significant renovation of the rental unit in the years 2011-2012 and the evidence establishes that the landlord’s representative Mr. R. knew about it.

I consider it most likely that the tenant was prepared to undertake the work and absorb the cost of renovating his suite because he intended to live in the rental unit well into the future. The apartment appears to be in a popular and convenient location in the city and the rent being charged appears to have been very reasonable.

I find that there was a moisture problem in the apartment prior to the renovation and that the landlord’s representative Mr. R. knew about it. Mr. R.’s testimony was not credible. Mr. W.’s cross examination showed Mr. R. to be less than forthright about events.

In addition, I consider that the tenant would not reasonably embark on his renovation project without some assurance that the moisture issue would be dealt with. I accept the evidence of the tenant and his witnesses that there was, at least, an understanding between the tenant and Mr. R. that if the tenant was going to make improvements to the suite then Mr. R. would attend to repairing the leaky exterior wall.

The evidence does not establish that there was an enforceable agreement between the parties about who was to do what. Such an agreement, between a landlord and a tenant, would form a part of a tenancy agreement generally, even if made verbally. Section 6 of the *Residential Tenancy Act* (the “*Act*”) requires that a term in a tenancy agreement is not enforceable unless “expressed in a manner that clearly communicates the rights and obligations under it.” It is far from clear that the tenant ever described to the landlord the renovation work that he contemplated, the cost, or the time frame for its completion. Similarly, there appears to be no description of the work the landlord agreed to undertake, more than the idea that he would “take care of the outside” or seal the exterior wall from water ingress.

Whether or not there was an enforceable agreement, the landlord continued to be obliged to carry out the statutory obligation imposed by s. 32(1) of the *Act*, which provides:

> (1) A landlord must provide and maintain residential property in a state of decoration and repair that
>
> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The elimination of water ingress into a rental unit or common area due to building failure is an essential obligation of a landlord.

It is apparent that the landlord carried out some repairs on the exterior wall but the tenant's evidence makes it equally apparent that those repairs were not adequate. The local government inspector's January 2015 letter and the testimony of Mr. W.E. fully corroborate the fact that moisture continued to enter the suite.

The Tenant's Claim

Improvement Expenses

At hearing the landlord's representative claimed that the tenant had already made this claim, unsuccessfully, in the prior dispute resolution hearing and so the matter was "*res judicata*," the tenant could not have the same issue between the same parties litigated over again.

> The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. Relitigation may be precluded in relation to an entire cause of action or with respect to a discrete issue. The essential principles of *res judicata* apply, albeit with modifications, to defences previously litigated as well: *Tylon Steepe,* at para. 53.
>
> There are three criteria which must be satisfied in order to successfully invoke issue estoppel:
> (a) that the same question has been decided and was fundamental, as opposed to collateral or incidental, to the decision;
> (b) that the decision in the first proceeding said to create the estoppel was final; and
> (c) the parties to both proceedings must be the same or their privies.
> (See *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Grdic v. The Queen*, [1985] 1 S.C.R. 810; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44)

-*Lougheed v. Wilson,* 2012 BCSC 169, per Dardi, J.

I have reviewed February 12, 2015 decision from the prior dispute carefully. The tenant's claim in that dispute appears to have been framed as a request for recovery of "emergency repairs." While the same material and similar testimony may have been presented by the tenant at that hearing, and while the decision may have dismissed "the tenant's claim for a monetary award," the reasons show that the tenant had failed to substantiate that the work he did or had done was an "emergency repair."

The claim the tenant makes in this proceeding, though perhaps for the same money, is based on the landlord's alleged breach of an agreement, or, alternatively, a "*quantum meruit*" basis or unjust enrichment. It is a different question and a different issue.

I find that the tenant's claim to recover renovation expenses is not barred by the principle *res judicata*.

I find that the tenant initially made his renovation expenditures with no thought of requiring the landlord to reimburse him for any of them.

The tenant made the improvements on the expectation of a long term stay and on the understanding that the landlord would attend to the moisture problems. As noted above, the landlord failed to reasonably attend to the moisture problems.

The landlord's failure in this regard did not give the tenant the right to claim all the renovation costs. His proper remedy was to enforce the landlord's obligation to repair and to claim damages resulting from the landlord's failure.

The tenant will not enjoy the benefit of his renovation work because this tenancy has ended. The tenant asserts that he was forced out because of the mold. I do not accept this as a lawful reason for his ending the tenancy.

Firstly, this tenancy ended as the result of the tenant's failure pay the full rent for January 2015. The landlord received an order of possession on February 12, 2015 because of that non-payment.

The tenant implies that he withheld rent because of the mould issue, but s. 26(1) of the *Act* states that a tenant must continue to pay rent even when a landlord is in breach of landlord obligations under the law or the tenancy agreement.

The tenant might argue that mould issue was so bad it was a breach of a material term of the tenancy agreement entitling him to end it, but s. 45(3) of the *Act* requires him to

give the landlord written notice of the breach and a reasonable time to correct it and the tenant did not do so. Section 45(3) states:

> (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

I find that the tenant is not entitled to recover the cost for any of his renovation work. He has lost the benefit of it because of his own failure to pay rent not because of any act or inaction of the landlord.

Rental Rebate

The tenant has failed to prove damages relating to the moisture and mould issues. He has shown the existence of a moisture and mould issue and it is clear that its cause, or at least the primary cause, is the ingress of water through the building membrane; either the roof or subground structure or both. Yet the times when the problem arose or was a "problem" and for how long or to what extent, had not been shown. The problem was most significant in the second bedroom. The tenant testified that he "always had co-tenants." He has not shown that he lost rental income for any particular time as a result of the moisture and mold issues. He has not shown that his own use of the room was particularly impinged upon by the moisture and mould issues.

Had the tenancy continued past the effective date of the ten day Notice to End Tenancy that the tenant received on January 8, 2015, he may well have suffered quantifiable damages as his tenancy continued, but that did not happen.

I conclude that the tenant is entitled to only nominal damages for the landlord's failure to properly maintain and repair the apartment building. I award him $100.00 in that regard.

The Landlord's Claim

Kitchen Cabinets and Countertop

Before he left, the tenant removed all of the kitchen cabinets he'd installed as well as the kitchen countertop. He removed the washer and dryer that he replaced during the tenancy, as well as the fridge, stove and range hood he had purchased. For some reason, not explained, the tenant also detached and took with him two interior doors.

Residential Tenancy Policy Guideline 1 “Landlord and Tenant – Responsibility for Residential Premises” provides:

> **RENOVATIONS AND CHANGES TO RENTAL UNIT**
> 1. Any changes to the rental unit and/or residential property not explicitly consented to by the landlord must be returned to the original condition.
> 2. If the tenant does not return the rental unit and/or residential property to its original condition before vacating, the landlord may return the rental unit and/or residential property to its original condition and claim the costs against the tenant. Where the landlord chooses not to return the unit or property to its original condition, the landlord may claim the amount by which the value of the premises falls short of the value it would otherwise have had.

There was no agreement, explicit or otherwise, that the tenant would take the kitchen cabinets with him when he left. I find that he was wrong to do so.

I find that the landlord knew of and consented to the tenant replacing the cabinets and may have expected the tenant to leave them, but at the least, the landlord was entitled to have the premises left with the old cabinets or their equivalent installed.

The cabinets and counter were not “tenant’s fixtures” as suggested by Mr. W. They were items attached to the premises as replacements for equivalent items provided by the landlord. They were attached not for the better use of them as cabinets or counters but as items attached for the better use of the kitchen area as a kitchen.

The tenant did not leave the premises as he got it and the landlord has suffered loss as a result.

On the evidence, I find that the cabinets the tenant removed during his renovation were of no value. They were original cabinets dating from 1980. According to Policy Guideline 40 “Useful Life of Building Elements” the useful life of kitchen cabinet and counters is 25 years. Thus, to award the landlord money for new cabinets would cause him to be put in a significantly better position than had the old cabinets been left up. I do not award the landlord any money for the cost of new cabinets.

However, the fact that an item in a rental unit may be beyond its useful life does not oblige a landlord to enter, remove it and update it if it is still functional.

While the cabinets themselves may have been on no particular value, the tenant’s action will oblige the landlord to go the expense of having new ones installed and for that the landlord is entitled to damages.

The landlord's bill for the new cabinets does not include a labour/materials breakdown for the total cost of $4935.00 for the cabinets and $650.00 plus tax for the countertop. In all the circumstances I consider $500.00 to be a reasonable apportionment for the labour cost for installing replacement cabinets and the countertop and I award the landlord that amount.

Re-Key

There was little evidence presented on this point. The landlord claims the tenant failed to return all his keys to the premises. The tenant denies it. On this competing evidence the landlord has not satisfied the initial burden of proof and I dismiss this item of the claim.

Appliances

The tenant replaced a number of appliances during the tenancy. I find that the landlord was well aware of it and did not object. I find that the old appliances were moved to a location designate by Mr. R. for that purpose. What became of them after that is not known, but in my view the old appliances then became the landlord's responsibility.

The tenant's appliances did not become part of the rental unit. I find the parties expected the tenant to take them with him when the tenancy ended and that the landlord expected to re-install the old ones or perhaps better ones at that time.

In any event, based on the tenant's description of them, I consider that the appliances were likely beyond their reasonable life expectancy of 15 years as noted in Guideline 40, above.

I dismiss this item of the landlord's claim.

Doors

The doors were part of the rental unit. Whether the tenant replaced them or not during the tenancy, he was obliged to either leave them or return the rental unit to its original condition. According to Guideline 40, above, doors have a useable life of 20 years. These doors were older and so were beyond their useable life.

As with the cupboards and countertop, though the doors' useable life has passed, the landlord will still be put to the expense of having to install two doors. Mr. R. indicated he

would conduct the installation himself and made no claim for this aspect. I therefore make no award for this item.

Removal of Fence Debris

This claim was referred to in the landlord's "Schedule A" monetary order request, however no testimony was given to support it. I dismiss this item of the claim.

Conclusion

The tenant is awarded nominal damages of $100.00. Given his lack of success I decline to award recovery of any filing fee.

The landlord's claim is allowed in the amount of $500.00. I grant the landlord recovery of $50.00 of the filing fee. There will be a monetary order against the tenant in the amount of $450.00.

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 20, 2015

Residential Tenancy Branch