



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, OLC, LRE

Introduction

This hearing was reconvened in relation to the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70.

It was necessary to adjourn the original hearing as the tenant had provided her evidence to the landlord outside the prescribed time limits. I did not hear any testimony at the original hearing. At the first hearing, the parties entered into a mutual end to tenancy.

In the period between the first hearing and this reconvened hearing date, the landlord made a cross application. As such, this hearing also dealt with the landlord's application pursuant to the Act for:

- a monetary order for unpaid rent 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 tenant appeared. The landlord was represented at the hearing by her agent and her counsel.

Preliminary Issue – Amendment to Tenant's Application

The parties agree that the tenancy ended 31 May 2015. As the tenancy has ended, many issues raised in the tenant's application are now moot. At the hearing, I asked the tenant if she

wished to withdraw all of her claims except of the claim seeking a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement. The tenant confirmed that she sought this amendment.

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

As there is no prejudice to the landlord in amending the tenant's application to withdraw these claims, I amended the tenant's application.

Preliminary Issue – Service of Landlord's Evidence

At the first hearing, the tenant declined to provide her forwarding address to the landlord. With the consent of both parties, I made an order for substituted service by email:

I order that the landlord may serve any document required to be given in accordance with sections 88 or 89 of the Act by email to the email address provided at this hearing.

Documents served in this manner will be deemed served:

- *for documents delivered before 14 clear days of the reconvened hearing, 14 clear days before the hearing; and*
- *for documents served 13 clear days before the hearing to 7 clear days before the hearing, 7 clear days before the hearing.*

This order for substituted service will cease to be in effect seven days before the hearing.

Both parties were informed of the specifics of the order at the first hearing date.

At the beginning of the hearing, I confirmed with the parties that they had all the evidence in front of them. The tenant strenuously denied receiving the landlord's evidence. Counsel for the landlord provided an affidavit of service. Counsel stated that the landlord served the tenant with evidence to respond to the tenant's application on 30 June 2015.

I confirmed with landlord's counsel that he served the tenant in accordance with my substituted service order. Counsel for the landlord confirmed that he had sent the emails and stated that it is his invariable practice to confirm the documents attached by opening each attachment before sending. I asked the tenant to look on her computer. The tenant took some time to search her email. The tenant eventually found the email.

The tenant then stated that there were no attached documents. I confirmed with counsel for the landlord that he confirmed the attachment. Counsel so confirmed. I asked the tenant to please check the email. The tenant eventually found the attachment.

The tenant then viewed the attachment and stated that the attachment was a series of invoices. I confirmed with counsel for the landlord that he did not send the tenant a series of invoices.

Counsel so confirmed. I asked the tenant to please check her email attachment. The tenant eventually found the correct attachment.

In accordance with my order documents served 30 June 2015, were deemed received on 30 June 2015. I was not provided with any evidence by the tenant that would defeat this deeming provision. The hearing was not adjourned although I did ask the landlord to read into evidence any document that I was being asked to rely on.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent? 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?

Is the tenant entitled to a monetary award for compensation for damage or loss under the Act, regulation or tenancy agreement?

Background and Evidence

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

Because of the landlord's difficulties with spoken English, the landlord's evidence was introduced by way of sworn affidavit. The landlord confirmed that the evidence provided in her affidavit is true. Relevant portions of the affidavit were read into evidence. I asked any clarifying questions of the landlord on her evidence. The tenant cross examined the landlord on her evidence.

The landlord testified that monthly rent was \$900.00. The landlord testified that the tenant did not pay rent for April or May. The tenant testified that she is holding rent for April in May "in trust" pending the outcome of these applications. The tenant submits that she is legally withholding rent from the landlord by placing the rent amounts in trust. The tenant testified that the trust accounts are in her name. The tenant admitted on cross examination that she paid \$900.00 for February's rent and \$900.00 for March's rent. The tenant also admits to paying \$450.00 for rent for one half of January. The tenant testified that she began residing at the rental unit on or about the end of February.

The tenant alleges that rent is actually \$850.00 per month. The tenant submits that the advertisement for the unit advertised rents of \$900.00 for a furnished unit and \$850.00 for an unfurnished unit.

The tenant testified that she has suffered a loss of quite enjoyment. In particular the tenant makes the following allegations:

- the power has been cut to the bedroom;
- the pathways have been blocked;
- hazards have been left in the common areas including rusty nails, thorns and broken clay pieces;
- an alleged entry between 29 April 2015 and 3 May 2015;
- the landlord vandalized the car;
- the landlord spat on the tenant, threatened the tenant and tried to force her way into the suite;
- the landlord demanded \$10,000.00 from the tenant;
- the landlord threatened the tenant's dog by throwing a lawnmower near the dog;
- the landlord sent her dogs out to taunt the tenant's dog;
- the suite and stove were dirty on move in;
- the suite is poorly insulated;
- the landlord entered into unit with two different people on two different occasions;
- the landlord took a spool thread from the table;
- the landlord took belongings from the tenant including a frying pan, a decanter, eight wine glasses, a challis, children's cycling helmets, wood clamps, sailing boots, and other items.

The tenant alleges that the landlord has harassed the tenant. The tenant submits that the harassment occurred for three of the four months of the tenancy. The tenant testified that the police were called to the rental unit. The tenant alleges that the police gave the landlord a verbal warning. The tenant determined that charges were not necessary. The tenant did not provide me with any copies of police reports. The tenant alleges that a lawyer from Victoria called on behalf of the landlord and harassed her. When I asked the tenant what the lawyer said, the tenant indicated that the lawyer demanded rent payment.

The tenant testified that the landlord entered the rental unit without notice on two occasions. The tenant alleges that on one occasion the landlord took belongings from a bowl in the kitchen counter. The tenant testified that before she began residing in the rental unit she set up a motion activated camera, which was intermittently active. The tenant testified that the only times that the landlord were recorded by the camera were the two events provided.

The tenant provided photographs of the rental unit. The tenant testified that the photographs were taken when she resided in the suite. The tenant submits that the type of dirt shown in the photographs could not accumulate within the ninety days the tenant occupied the rental unit.

The tenant provided me with video recordings:

Recording 1: The landlord is seen with a worker in the entry way of the rental unit. The landlord stands in this area supervising the worker does not enter further into the unit for the duration of the recording, which lasts over six minutes.

Recording 2: The landlord is seen plugging in a cord by the tenant's television. The landlord walks into the kitchen. This recording is approximately three minutes long.

Recording 3: The landlord is seen with a worker wearing a baseball hat in the front entry way of the rental unit. The landlord largely stands around with her arms crossed as the worker performs his tasks. The landlord is seeing picking up a spool of yellow thread and holding it. The landlord carries out a vacuum cleaner with the thread in her hand. The recording does not show the landlord placing the spool of thread back. The recording lasts approximately 4.5 minutes.

The landlord provides the following responses to the tenant's allegations:

- the power was not cut, but a light bulb did burn out;
- no items were placed in the back yard to block the tenant's path;
- no items were placed in the back yard that were a risk to the dogs as the landlord's dogs use the same yard;
- neither the landlord nor any member of the landlord's family entered the suite between 29 April 2015 and 3 May 2015;
- neither the landlord nor any member of the landlord's family touched the tenant's car;
- the landlord did not spit on or yell at the tenant;
- the landlord did not demand \$10,000.00 from the tenant;
- the landlord has only retained JY as counsel;
- the landlord has not thrown a lawnmower at the tenant's dog;
- the landlord's dogs are toy poodles;
- the rental unit and stove were clean when the tenant moved in;
- the rental unit is not sound proofed, but that is not a reasonable expectation;
- the landlord did not take any items from the tenant; and
- the landlord did not damage any of the tenant's items.

The landlord denies spitting on the tenant. The landlord testified that on 7 April 2015 she went to the rental unit to demand payment of April's rent. The landlord admits that she tried to stop the tenant from shutting the door on her by placing her foot in the door. The landlord submits that there has been no investigation into or finding of wrong doing by the landlord.

The landlord testified that in mid to late January she was contacted by an inspector from a utility company. The landlord testified that she was provided short notice as to the inspection and was only told the day before the inspector arrived. The landlord admits that she did not attempt to provide notice to the tenant through written notice or telephone. The landlord testified that she was told by the inspector that the furnace had to be cleaned as soon as possible as there was a risk of a fire. The landlord testified that the second entry was for the purpose of cleaning the

furnace as directed by the utility company. The landlord testified that the entry occurred later that day between 1700 and 1800. The landlord submits that this was an emergency repair.

The tenant seeks compensation in the amount of \$4,300.00. The landlord submits that this amount is not itemised and disproportionate given that the tenant has only paid \$2,700.00 towards her rent and damage deposit.

Analysis

For the purposes of this application, the tenant is alleging largely uncorroborated causes as to damage. In particular, the tenant alleges that the landlord took or damaged various items and that the landlord has infringed upon the tenant's right to quiet enjoyment through various behaviours. The landlord has denied all of the unsupported allegations. Where I have two sets of conflicting testimony with little corroborating evidence for either version of events, it is necessary to make a finding of the parties' credibility.

In this case, I find the tenant's version of events improbable. She did not provide evidence that she ought to have. When asked why she did not provide police reports she was aggressive. When asked relevant questions on cross examination regarding the motion sensor camera she was combative and refused to answer. The tenant was cavalier in her approach to the case. In particular, the tenant vehemently denied receiving an email of which she was in possession. The tenant vehemently denied there was an attachment. There was such an attachment that she later admitted. The tenant vehemently denied the content of the attachment and suggested it was invoices for storage and not the evidence provided to this branch. On review the tenant admitted she had correct evidence. The tenant has proven unreliable. On this basis, where the tenant's and landlord's testimonies conflict, I prefer the evidence of the landlord over that of the tenant.

Landlord's Claim

The landlord claims for the unpaid rent amounts for April and May. On the basis of the above credibility finding and on the basis of the tenant's previous payments, I find that monthly rent is \$900.00 and is due on the first.

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

There are various provisions of the Act that permit a tenant to deduct amounts from rent:

- Subsection 19(2) permits a tenant to deduct amounts from rent to recover the excess amounts of a security deposit that did not comply with the Act.
- Subsection 33(7) permits a tenant to deduct amounts from rent for the costs of emergency repairs.

- Subsection 43(5) permits a tenant to deduct the amount of a rent increase which did not comply with the Act from rent.
- Subsection 51(1.1) permits a tenant to deduct one month rent where the landlord has issued a notice to end tenancy pursuant to section 49.
- Subsection 65(1) and subsection 72(2) permit a tenant to deduct rent to recover an amount awarded in an application before this Branch.

There are no other deductions from rent permitted under the Act or regulations. The tenant has not provided any evidence that she was entitled to deduct any amount from rent.

The only provisions under the Act for paying an amount of rent into trust is set out in section 65 of the Act. That provision provides for trust accounts to be established by the director, not a tenant. There is no provision in the Act that authorized a tenant to set up trust accounts of his or her own creation. The tenant was not entitled to withhold rent in this way and, accordingly, has acted unlawfully.

The tenant admits that she did not pay any amount in rent to the landlord for April or May. The landlord is entitled to recover these amounts 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.

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

I issue a monetary award in the landlord's favour in the amount of \$1,400.00 under the following terms:

Item	Amount
Unpaid April Rent	\$900.00
Unpaid May Rent	900.00
Offset Security Deposit Amount	-450.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Award	\$1,400.00

Tenant's Claim

The tenant claims for losses associated with breach of the covenant of quiet enjoyment. The tenant also sets out a claim for loss or damage to various items.

A tenant is entitled to quiet enjoyment of the rental unit. Quiet enjoyment includes:

- reasonable privacy;
- freedom from unreasonable disturbance;

- exclusive possession of the rental unit, subject to the landlord's rights contained in section 29; and
- use of common areas for reasonable and lawful purposes, free from significant interference.

Section 29 of the Act addresses a landlord's right to enter a rental unit. It states that a landlord must not enter a rental unit for any purpose unless one of the following applies:

- (a) the tenant gives permission at the time of entry or not more than 30 days before the entry;
- (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the purpose for entering, and the date and time of entry; or
- (f) an emergency exists and the entry is necessary to protect life or property.

The tenant sets out various events that she points to as harassment. On the basis of the credibility finding above, I find the following:

- the power was not cut, a light bulb was burned out;
- no items were placed in the back yard to block the tenant's path;
- no items were placed in the back yard that were a risk to the dogs as the landlord's dogs use the same yard;
- neither the landlord nor any member of the landlord's family entered the suite between 29 April 2015 and 3 May 2015;
- neither the landlord nor any member of the landlord's family touched the tenant's car;
- the landlord did not spit on or yell at the tenant;
- the landlord did not demand \$10,000.00 from the tenant;
- the landlord's lawyer did not harass the tenant;
- the landlord has not thrown a lawnmower at the tenant's dog or cause the landlord's dogs to taunt the tenant's dog;
- the rental unit and stove were clean when the tenant moved in;
- the landlord did not take any items from the tenant; and
- the landlord did not damage any of the tenant's items.

I agree with the landlord's submission that a sound-proofed rental unit is not required by the standards of the Act. The tenant did not provide any supporting evidence of the amount of sound trespass. Accordingly, I find that the tenant has failed to establish that the amount of insulation resulted in compensable damage.

The landlord should not have touched the tenant's thread, but, on the basis of the above credibility finding, I accept the landlord's testimony that she did not take the spool of thread or any other belongings from the rental unit. I find that the minor or *de minimis* intrusion of picking up a spool of thread and replacing it does not constitute a breach of the tenant's right to quiet enjoyment.

The landlord admits that she entered the rental unit on two occasions without providing the tenant with notice. I find that the first entry was not an emergency as the state of the furnace could have not been known at the time. As such, the tenant was entitled to notice of entry. By failing to provide notice of the entry the landlord has breached section 28 of the Act. I find, on the basis of the landlord's testimony, that the second entry was made on an emergency basis at the direction of the utility company employee. I accept the landlord's testimony that the utility company employee told her that the emergency cleaning was necessary to prevent fire. Accordingly, the entry without notice was permitted.

The landlord did enter into the rental unit in contravention of the Act on the first occasion. The tenant was entitled to possession of the rental unit; however the tenant was not occupying the rental unit. As the tenant has failed to prove any quantifiable loss arising from the illegal entry or itemized her loss in respect of this particular breach, I award the tenant \$50.00 as nominal damages as compensation for the landlord's breach. The remainder of the tenant's claim is dismissed without leave to reapply.

The tenant seeks to recover her filing fee from the landlord. Subsection 72(1) permits an arbitrator to make a discretionary award of repayment of a filing fee from one party to another. Generally this repayment is ordered where a party has been successful in its application. In this case, as the tenant has experienced marginal success in her application, I am excising my discretion to refuse to award recovery of the filing fee from the tenant.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$1,350.00 under the following terms:

Item	Amount
Unpaid April Rent	\$900.00
Unpaid May Rent	900.00
Offset Security Deposit Amount	-450.00
Recovery of Filing Fee for this Application	50.00
Offset Tenant's Award	-50.00
Total Monetary Order	\$1,350.00

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: July 28, 2015

Residential Tenancy Branch

