



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

OPR, MNR, MNSD, MNDC, FF;
CNR, MNDC, OLC, ERP, RP, PSF, RR, FF, O

Introduction

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

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent, 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 its filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to 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 to the landlord to make repairs to the rental unit pursuant to section 32;
- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- authorization to recover his filing fee for this application from the landlord pursuant to section 72; and
- an "other" remedy.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Neither party raised any issue with service. The tenant's spouse attended the hearing as his agent (the co-tenant). The landlord was represented by its agent (the agent).

Scope of Hearing

These applications were originally set to be heard earlier in September. I determined that the issue of possession was a priority issue that was not related to the remainder of the hearing. I severed the remainder of the issues to be heard at a later date. After I severed the possession issue from the remaining issues, the parties entered into mutual end to tenancy as of 31 October 2015. As such, this hearing proceeds on the remaining issues.

The tenant did not set out any remedy he was seeking that was not encompassed in the remainder of his claim. Accordingly, I will not consider the tenant's claim for an "other" remedy.

Issue(s) to be Decided

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

Is the tenant entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement? Is the tenant entitled to an order to the landlord to make repairs to the rental unit? Is the tenant entitled to an order to the landlord to make emergency repairs to the rental unit? Is the tenant entitled to an order to the landlord to provide services or facilities required by law? Is the tenant entitled to an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided? Is the tenant entitled to authorization to recover his filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the 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.

This tenancy began 15 May 2010. The parties entered into a written tenancy agreement on 7 May 2010. Monthly rent over the entirety of the tenancy has been \$1,650.00. The landlord continues to hold the tenant's security deposit in the amount of \$825.00, which was collected on 7 May 2010.

On 8 July 2015, the landlord served the 10 Day Notice to the tenant. The 10 Day Notice set out that the tenant had failed to pay rent in the amount of \$3,300.00 that was due 1 July 2015. The rent amount included rent arrears for June and July. The 10 Day Notice set out an effective date of 18 July 2015.

The tenant admits that he withheld rent for June and July and that rent was not paid to the landlord for August and September. The tenant submits that he was entitled to deduct amounts from rent because of the condition of the rental unit.

The tenant provided lengthy testimony about the condition of the rental unit. The tenant testified that gas, liquids, and human solids will back up into the toilet. The tenant testified that both he and his wife are on constant alert for this and do their best to mitigate the flooding through plunging and bailing. The tenant testified that this has been an ongoing issue over the course of the tenancy.

The tenant provided video evidence of the effects of the plumbing problem. In one video the toilet is seen to be bubbling. In another video recording the toilet backs up with another human's raw sewage.

The tenant testified that the repeated back up of raw sewage over the years of the tenancy has caused the carpet to become a health hazard. The tenant alleges that the restoration workers hired by the landlord wrongly left the contaminated carpet in place. The cotenant reiterated the health concerns expressed by the tenant.

The agent agrees that there is an issue with the plumbing for the rental unit in that the toilet will back up intermittently. The agent testified that the plumbing issue is within the strata common area. The agent testified that he has attempted to secure repairs from the strata. The agent testified that he has made constant calls and emails to the strata

manager. The agent admitted that the issue is not resolved. The agent provided reports from plumbers and other professional services used. I was provided with correspondence between the strata and agent that indicate the agent was seeking a resolution.

The tenant submits that the landlord should have done more to secure the required repairs from the strata. The tenant alleges that the landlord and agent failed to diligently pursue the strata for the repairs.

I was provided with email correspondence between the tenants and agent over the course of the tenancy. The emails confirm that the issue has persisted over much of the tenancy. The intensity of the flooding activity appears to worsen over the course of the tenancy.

The landlord claims for \$6,600.00:

Item	Amount
Unpaid June Rent	\$1,650.00
Unpaid July Rent	1,650.00
Unpaid August Rent	1,650.00
Unpaid September Rent	1,650.00
Total Monetary Order Sought	\$6,600.00

The tenant claims for \$21,000.00, but has enumerated only \$16,456.00 of his claim:

Item	Amount
Cleaning Supplies (\$436.00/a * 5a)	\$2,180.00
Replacement Items	786.00
Time Spent Cleaning	3,240.00
Time Bailing and Unblocking (1,350/a * 5a)	6,750.00
Liaising and Communicating	1,100.00
Waiting for Plumbers	2,400.00
Total Monetary Order Sought	\$16,456.00

The tenant attributed the remaining \$ 6,724.00 of his claim to the diminished value of the tenancy.

Analysis

Landlord's Claim for Unpaid Rent

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.

Section 33 of the Act describes “emergency repairs” as those repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purposes of:

- repairing major leaks in pipes or the roof,
- damage or blocked water or sewer pipes or plumbing fixtures
- the primary heating system
- damaged or defective locks that give access to the rental unit
- the electrical systems
- in prescribed circumstances, a rental unit or residential property

If a tenant has attempted unsuccessfully to have the landlord complete emergency repairs, subsection 33(5) of the Act requires a landlord to reimburse a tenant for emergency repairs if, the tenant claims reimbursement from the landlord and provides the landlord a written account of the emergency repairs accompanied by receipts for the amounts claimed. If the landlord does not reimburse the tenant, then the tenant may deduct the amount from rent or otherwise recover the amount (Act, s. 33(7)).

The tenant has not hired any outside repair person to assist in repairing damage or blocked water or sewer pipes or plumbing fixtures. As the tenant has not incurred costs in relation to “emergency repairs” as defined in section 33 of the Act, the tenant was not entitled to deduct any amount from rent on this basis. I have not been provided with

any other evidence that would show an entitlement to deduct any amount from rent. On this basis, rent was payable when it was due under the tenancy agreement.

The tenant admits he has not paid rent for June, July, August and September. The tenant has breached section 26 of the Act. The landlord is entitled to recover rent for these months from the tenant in the amount of \$6,600.00.

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

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for this application.

Tenant's Claim for Damages

Cleaning Costs

The tenant seeks compensation for the costs associated with cleaning the rental unit and attending to the overflowing toilet. Liability for this amount is determined pursuant to section 67.

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

The British Columbia Supreme Court in *Parhar Investments & Consulting Ltd v Brontman*, 2015 BCSC 637 confirmed that in order to be compensable pursuant to section 67 a loss must be caused by the party from whom compensation is sought.

The tenant submits that the landlord failed to comply with the Act by failing to force the strata to complete repairs to the rental unit to return the unit to compliance with subsection 32(1) and section 28 of the Act.

The rental unit is strata held. Residential Tenancy Policy Guideline, “21. Repair Orders Respecting Strata Properties” (Guideline 21) provides assistance in considering orders with respect to strata held rental units:

An owner has no power to do work on the common areas of the development, save and except for areas of exclusive use common property or limited common property as required by the by-laws. The dividing line between the strata lot and the common areas is usually the mid point of the exterior walls of the strata lot. Any repairs such as the repair of water leaks originating in the common areas is the responsibility of the strata corporation.

I disagree with the tenant’s submission. The landlord acted diligently to try to secure the repairs but was thwarted because of the strata’s actions. Accordingly, the landlord is not liable for compensation for losses caused as a result of the breach of subsection 32(1) or section 28 of the Act as it did not cause the breach. The tenant’s losses were caused by the problem originating in the strata property.

The tenant’s claim for his costs associated with remediating the spills is dismissed without leave to reapply.

Order for Repairs and to Provide Service or Facility

I have no authority under the Act to order a strata corporation to undertake any repairs. As such, I decline to order the landlord to make any repairs or to provide a service or facility required by law. This portion of the tenant’s claim is dismissed without leave to reapply.

Diminishment in Value of Tenancy

The tenant claims for a rent abatement in the amount of \$6,724.00. Liability for this amount is governed by paragraph 65(1)(f) of the Act.

Paragraph 65(1)(f) of the Act allows me to issue an order the reduce past or future rent by an amount equivalent to a reduction in the value of a tenancy agreement. In this case, I find that as a result of breach of the tenant’s right to quiet enjoyment pursuant to section 28 and the breach of the landlord’s obligation to provide a rental unit that complies with subsection 32(1) of the Act the value of the tenancy agreement was reduced. For the purposes of paragraph 65(1)(f) of the Act, it does not matter whether or not the landlord was at fault. Rather, the focus is on whether the rental unit provided under the tenancy agreement was substantially the agreement that the landlord agreed

to provide. In this case, the continuing toilet overflow problem caused a material devaluation in the tenancy agreement.

Residential Tenancy Policy Guideline, “6. *Right to Quite Enjoyment*” provides me with guidance in determining the amount of the reduction in value. The policy establishes that I should take into consideration the seriousness of the situation and the length of time over which the situation has persisted. In this case, the nature of the situation was serious. The contaminated water entering the rental unit on a regular basis was distressing to the tenant. The tenant repeatedly had to clean the aftermath of the overflow. The length of time the problem went unsolved was also problematic. However, the tenant elected to stay in the rental unit for many years in spite of the issue. This militates in favour of a finding of reduced seriousness as if it was serious he would have vacated the rental unit.

In this situation, the assessment of damages is not a precise science; it is not even a calculation. With consideration of the nature of problem, and the duration of problem, but the tenant’s willingness to stay in the tenancy, I value the diminishment of the tenancy as \$100.00 per month. I find that the tenancy was devalued over sixty four months of the tenancy. The tenant is entitled to a past rent abatement in the amount of \$6,400.00. I consider this amount reasonable given the impact that the overflowing toilet had on the tenant.

Filing Fee

As the tenant has been successful in his claim, he is entitled to recover the cost of his filing fee from the landlord.

Summary of Awards

It is not necessary to issue a monetary award to either party:

Item	Amount
Landlord's Award For Rent	\$6,600.00
Landlord's Filing Fee	100.00
Offset Security Deposit Amount	-200.00
Offset Tenant's Award for Reduced Rent	-6,400.00
Offset Tenant's Filing Fee	-100.00
Total Monetary Order	\$0.00

Conclusion

The tenant is awarded \$6,500.00. The remainder of the tenant's claim is dismissed without leave to reapply.

The landlord is awarded \$6,700.00. The landlord is permitted to retain \$200.00 from the tenant's security deposit. The value of the tenant's security deposit is reduced to \$625.00.

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: October 28, 2015

Residential Tenancy Branch

