



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding COVERT INVESTMENTS  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, FF

### Introduction

This hearing convened as a result of cross applications. In the Landlord's Application for Dispute Resolution he sought an Order of Possession based on a Notice to End Tenancy for Unpaid rent or Utilities issued on November 2, 2015 (the "November Notice"), a Monetary Order for unpaid rent, an order to retain the security deposit in partial satisfaction of the claim and to recover the filing fee for the Application. The Tenant sought an Order cancelling the Notice to End Tenancy for Unpaid Rent or Utilities issued on October 2, 2015 (the "October Notice") and a monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, or the tenancy agreement.

Both parties appeared at the hearing. The Landlord was represented by S.H. who identified himself as the Caretaker and agent. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Preliminary Matter

The Landlord advised that the Tenant vacated the rental unit on November 3, 2015 such that an Order of Possession was no longer required. The Tenant confirmed this

information and agreed that she no longer sought an Order canceling the October Notice.

#### Issues to be Decided

1. Has the Tenant breached the Act or tenancy agreement, entitling the Landlord to monetary relief?
2. Is the Tenant entitled to monetary compensation from the Landlord for the cost of her storage unit for the months, August, September, October and November 2015?
3. What should happen with the Tenant's security deposit?
4. Should the Landlord recover the filing fee?

#### Background and Evidence

Introduced in evidence was a copy of the residential tenancy agreement, which provided as follows: a month to month tenancy began August 1, 2015; monthly rent was payable in the amount of \$700.00; and, the Tenant paid a security deposit in the amount of \$350.00 on July 21, 2015.

The Tenant failed to pay rent for the month of October 2015 and in response the Landlord issued a 10 day Notice to End Tenancy for non-payment of rent in October. The Tenant also failed to pay the November 2015 rent and the Landlord issued the November Notice.

The Landlord testified that the Tenant vacated the rental unit on November 3, 2015. The Tenant testified that she vacated the rental unit either November 3 or November 4, 2015.

The Landlord testified that he was not able to re-rent the rental unit for November 2015 as the Tenant had not vacated the rental until November 3, 2015. As set out in the Landlord's Monetary Order Worksheet, the Landlord seeks compensation for October and November outstanding rent as well as recovery of the filing fee for a total of \$1,450.00.

The Tenant testified on her own behalf. She stated that she moved into the rental unit shortly before the beginning of August 2015. She further testified that in September

2015 she advised the Landlord that she had found bedbug carcasses. She said that she brought this to the Landlord's attention at the time and told him that she would not be able to live in the rental unit if it had bed bugs. The Tenant stated that the Landlord's response was that she need not worry as her unit had been "treated" and the unit had been vacant for a significant period of time.

On October 1, 2015 the Tenant captured live bed bugs and brought them to the Landlord to show him. She testified that at this time she then started "scrambling" and looking for another place to live. The Landlord then issued the October Notice. She testified that by the end of October she had moved out most of her items however she stated that she had completely moved out on November 3, 2015.

She testified that she did not move her "big stuff", including her bed and couch into the rental unit because she was waiting for the unit to be treated and "livable". She further stated that she liked the unit, she liked her neighbours and had it not been for the bed bugs she would have stayed in the rental unit and paid her rent.

The Tenant further testified that she had to treat all of her personal possessions, including washing, and baking some of the items in the oven. She also testified that she had to dispose of all of her plants. Further, she stated that her cardboard boxes were not able to be brought into the rental unit as she was worried about bringing the bed bugs into the rental unit. These costs were not part of her claim before me.

The Tenant stated that on October 8, 2015 the Landlord brought in a pest control company to treat the unit. She said that two days later she had bites up one leg; on the 11<sup>th</sup> she had bites up the other leg.

She submitted that she should not be responsible for paying any outstanding rent as she believes she moved in under "false pretenses" as the Landlord told her there were no bugs and he clearly knew the rental unit had pest issues.

She further submitted that when she moved out the Landlord told her not to keep cleaning as they were renovating the unit. She further stated that from her perspective the Landlord had no interest in renting the unit, as he did not show it to prospective renters while she was there, and had intended to renovate it.

The Tenant sought the sum of \$252.00 in monetary compensation for storage which was included in her tenancy agreement yet not provided to her. She stated that this sum represented her storage fees of \$63.00 per month for the months August, September, October and November.

In brief reply the Landlord admitted that there was previously a significant bed bug problem with the rental unit. He testified that from September of 2014 to August 2015 the rental was left vacant as a precaution as he was informed that if they don't "feed for 6-8 months" they die.

The Landlord further testified that he was surprised when this Tenant advised him bed bugs continued to exist in the rental unit as he believed that the time it was vacant would have resolved the problem.

The Landlord denied that the rental unit was renovated after the Tenant moved out and maintained that he has in fact continued to attempt to rent it out.

The Landlord further testified that he did not receive written notice from the Tenant to end the tenancy and in fact did not receive the keys back from the Tenant until November 3, 2015. He submitted that he was not able to advertise or show the unit as the Tenant had not provided him with notice in accordance with the *Residential Tenancy Act*.

The Landlord testified that as he promised the Tenant a storage unit he was agreeable to provide compensation for the storage area for the month of September 2015. He was opposed to compensating her for any other months as he claimed August was only a partial month and she did not pay for the unit for October and November as she failed to pay rent. He further noted that the storage unit is only three feet by four feet by eight feet tall such that it wouldn't "make much of a difference".

The Landlord confirmed a move in condition inspection report was conducted, but he failed to perform a move out condition inspection. The Tenant stated that the Landlord did not offer to do one as he claimed they were renovating the unit.

### Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

Under section 26 of the Act, the Tenant must not withhold rent, even if the Landlord is in breach of the tenancy agreement or the Act, unless the Tenant has some authority under the Act to not pay rent. In this situation the Tenant had no authority under the Act to not pay rent.

A tenant may end a periodic tenancy by giving written notice

### **Tenant's notice**

**45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice, and

(b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(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.

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

### **Form and content of notice to end tenancy**

**52** In order to be effective, a notice to end a tenancy must be in writing and must

(a) be signed and dated by the landlord or tenant giving the notice,

(b) give the address of the rental unit,

(c) state the effective date of the notice,

(d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and

(e) when given by a landlord, be in the approved form.

I accept the Landlord's evidence that he did not receive written notice from the Tenant to end the tenancy as required by section 52. Further, the Tenant, in vacating the rental unit on November 3 or 4 2014 did not give the Landlord proper notice as required by section 45(1)(a). By failing to give proper notice and not vacating the unit until November 3, 2015, the Tenant prevented the Landlord from re-renting the unit for November 2014. Accordingly, I find that the Tenant is required to pay rent in the amount of \$700.00 for October and \$700.00 for November 2015 and accordingly I award the Landlord **\$1,400.00** in compensation for these amounts.

The Tenant argued that the contract was frustrated by the existence of bed bugs. The *Residential Tenancy Policy Guidelines* provide as follows:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

I find that the existence of bed bugs, while unfortunate, insufficient to relieve the Tenant of her obligation to provide notice in accordance with the *Residential Tenancy Act*.

The parties agree that the Tenant's rent was to include storage. As storage was not provided to her, I grant her **\$252.00** representing compensation for her storage fees of \$63.00 per month for the months August, September, October and November.

There was no evidence to show that the Tenant had agreed, in writing, that the Landlord could retain any portion of the security deposit.

By failing to perform the outgoing condition inspection report the Landlord has extinguished their right to claim against the security deposit, pursuant to section 36(2) of the *Residential Tenancy Act*. Accordingly, I find that the Landlord has breached section 38 of the Act.

The security deposit is held in trust for the Tenant by the Landlord. The Landlord may only keep all or a portion of the security deposit through the authority of the *Act*, such as written agreement of the Tenant or an order from an Arbitrator. Here the Landlord did not have any authority under the Act to keep any portion of the security deposit as they had extinguished their right to claim against it. Therefore, I find that the Landlord is not entitled to retain any portion of the security deposit.

Section 38(6) provides that if a Landlord does not comply with section 38(1), the Landlord must pay the tenant double the amount of the security deposit. The legislation does not provide any flexibility on this issue. Accordingly, I award the Tenant **\$700.00** representing double the \$350.00 security deposit paid.

Success has been divided and as such each party shall bear the cost of their filing fee.

As the Landlord is awarded \$1,400.00 and the Tenant has been awarded \$1,052.00 the amounts are offset against one another such that the Landlord is awarded a Monetary Order in the amount of **\$348.00**. This Order must be served on the Tenant by the Landlord and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

### Conclusion

The Tenant failed to provide notice to end the tenancy in accordance with the *Act*. She is therefore required to pay rent for October and November 2015. The Landlord failed to provide her with storage which the parties agreed was part of her tenancy. Accordingly, the Tenant is entitled to compensation for the storage fees she paid to an outside storage facility. The Landlord extinguished their right to claim against the security deposit by failing to perform a move out condition inspection and the Tenant is entitled to recovery of double the security deposit paid. Neither party is to recover the filing fee.

The amounts awarded are set off against the other such that the Landlord is entitled to a Monetary Order in the amount of **\$348.00**.

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: January 12, 2016

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Residential Tenancy Branch



