Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding REMAX MANAGEMENT SOLUTIONS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

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

- a monetary order for unpaid rent, for damage to the rental unit, 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 tenants' security deposit and pet damage 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 tenants pursuant to section 72.

The tenants appeared. The landlord was represented by its agent. The landlord provided the evidence of the agent as well as one witness. The witness is the agent's business associate.

Preliminary Issue – Tenants' Evidence Excluded

The landlord's application was filed 14 October 2015 and served to the tenant AT by registered mail on 16 October 2015. The tenants sent their evidence to the landlord by mail on or after 1 February 2016. The landlord received the evidence 3 February 2016. This hearing was originally scheduled to be heard 9 February 2016.

Rule 3.15 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) sets out that an applicant must receive evidence from the respondent not less than seven days before the hearing. The definition section of the Rules contains the following definition:

> In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.15 and the definition of days, the last day for the tenants to file and serve evidence in reply to the landlord's application was 1 February 2016. The evidence was received by the landlord on 3 February 2016.

This evidence was not served within the timelines prescribed by rule 3.15 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

The agent maintained that as the evidence was received late he was not required to review it. There is certainly nothing in the Rules that sets out that if a party is late serving evidence the other party is absolved from reviewing it. In fact, rule 3.17 specifically provides me with the discretion to admit evidence not served in compliance with the Rules. While do not wish to be seen as rewarding this sharp practice, the tenants did not provide any adequate explanation as to why they served their evidence out of time. In particular the tenants had over three months in which to serve the landlord with evidence. On this basis, the tenants' evidence is excluded and I will not consider it.

Preliminary Issue – Scope of Hearing

Both parties raised issues outside the scope of the application.

The tenants brought up issues with enjoyment of property and compensation. The tenants were informed that this was beyond the scope of the landlord's application, but could form the basis of the tenants' own claim.

The agent and tenant AT are both licenced realtors. Each raised issues of professional misconduct.

The tenant AT expressed concern regarding the proper scope of the witness's activities at the condition move out inspection insofar as it relates to "property management" activity. The agent asked that I make certain findings of fact regarding the date of service for the tenants' evidence so that he may use the finding in a dispute before the Real Estate Council of British Columbia (the RECBC).

The purpose of this decision is to make findings of fact necessary for adjudicating the claim before me and no more. It is not to provide fodder for whatever professional

complaints may arise before the RECBC. The attempts to coopt the proceedings for other purposes are inappropriate.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, damage and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenants' 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 landlord entitled to an early end to this tenancy?

Background and Evidence

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

This tenancy began 1 October 2014 for a fixed term ending 30 September 2015. Monthly rent of $2,250.00 was due on the first. The landlord continues to hold the tenants' security deposit in the amount of $1,125.00 and the tenants' pet damage deposit in the amount of $1,125.00.

I was provided with a copy of the tenancy agreement. The tenancy agreement does not include any utilities in rent.

I was provided with a copy of the condition inspection report completed at the beginning and end of tenancy. Generally the report notes complaints regarding the cleanliness of the rental unit. The report is singed by the tenant AT indicating that she agrees that the report represents the state of the rental unit.

The agent testified that the tenancy was set to end 30 September 2015. The agent testified that the tenants were not prepared to vacate at that time and were not prepared for the move out inspection. The agent testified that the tenants decided to move out the next day. The agent testified that the tenants vacated the rental unit 1 October 2015.

The agent testified that the landlord incurred cleaning costs in the amount of $507.50. The agent testified that the rental unit took two days to clean the rental unit. The landlord provided photographs of the rental unit. The photographs are close ups of

various areas of the rental unit that require more detailed cleaning. I was provided with an invoice dated 3 and 4 October 2015 in the amount of $507.50.

The agent testified that the tenants left debris in the rental unit. I was provided with a photograph of the debris. The debris appears to have a volume of no more than three cubic metres (approximately the size of regular chesterfield). The agent testified that the landlord incurred $266.70 in costs to remove the debris. I was provided with a copy of the invoice dated 2 October 2015 in the amount of $266.70. The invoice states that it was rendered for a “large load”.

The agent testified that utilities were not included as part of rent. I was provided with a copy of an invoice for water for the period 1 July 2015 to 31 December 2015. The invoice is in the amount of $342.50. The agent testified that the tenants’ portion is $177.25.

The agent testified that the tenants returned keys, but that those keys did not work in the locks. The agent testified that the landlord incurred costs in the amount of $184.80 to rekey the locks. The agent testified that this was necessary because the keys did not work and because the tenant CN’s violent nature. In particular, the agent testified that the tenant CN became upset at the condition move out inspection when he learned the agent would not return the security deposit and pet damage deposit that day. The agent described the tenant CN actions of that of a “lunatic”. The agent testified that the RCMP advised changing the locks.

The agent denies providing permission to the tenants to keep the unit and states that he had no choice but to accede to the tenants’ request. The agent denies attending at the rental unit early on the agreed to inspection date.

The agent submits that overholding is just part of the claim for one month’s rent and that the remainder if because of the way the tenants maintained the rental unit while the landlord was attempting to rerent. The agent submits that he was “scared” to go in to the rental unit with prospective tenants and would have to ask those tenants to look past the “filth”.

The landlord claims for $2,250.00 for one month’s rent. The agent testified that this is for a lost month’s rent because of the condition of the rental unit during showings leading up to the end of the tenancy. The agent testified that he conducted seven showings and his partner conducted six showings. The agent testified that the rental unit smelled like cat urine and smoke and that there was evidence of smoking in the garage and back yard. The agent testified that there were beer cans visible. The agent

testified that there were four cats in the rental unit. The agent submitted that the rental unit was not appealing as a result of this condition. The agent admitted that this was the slow time of the year and that it is harder to find tenants; however, the agent testified that the condition in which the tenants kept the house was “disgusting”. The agent testified that he discussed the issue with the tenant AT on multiple occasions and asked her to make the rental unit more presentable.

The witness testified that the rental unit was dirty at the end of the tenancy and that items remained. The witness testified that it was necessary to hire cleaners and garbage removal. The witness testified that the keys that were returned were not the keys to the rental unit.

The witness testified that she conducted approximately ten showings of the rental unit. The witness testified that the rental unit was not very clean and that there were cats running around. The witness testified that there were cigarette remnants and beer cans in the back patio, which deterred from the view of the lake. The witness testified that the condition made it difficult to conduct showings and affected the landlord’s ability to rerent the unit for October. The witness testified that the rental unit remained vacant for November, December and January as it is difficult to rent during that time of the year.

The witness testified that she did not contact the tenants to ask for the keys the tenant CN was very angry at the end of the condition inspection and had to be asked to leave. The witness testified that the tenant CN slammed his fist on the counter and did not agree with the cost of cleaners. The witness testified that the RCMP advised changing the locks because of the tenant CN’s conduct.

The tenant AT testified that she spoke with the agent to ask for an extension to clean the unit. The tenant AT testified that the agent provided permission and did not put the tenants on notice that the landlord would seek compensation for the overholding.

The tenant AT testified that the tenants agree to pay $507.50 for the cleaning costs and agree to pay $171.25 for the utilities amounts; however, the tenant AT testified that the tenants had not received a copy of the invoice and were not notified of the amount owed prior to this application.

The tenant AT testified that the tenants provided all of the keys to the rental unit in their possession.

The tenant AT testified that the agent did not mention any need for rubbish removal at the condition move out inspection. The tenant AT agreed that the tenants did leave

belongings behind, but disagreed with the amount charged. In particular, the tenant AT submits that the debris which the landlord actually had removed included construction materials from work on the residential property.

The tenant AT agreed that the tenant CN left the inspection. The tenant AT denied that the tenant CN was slamming his fist in anger. The tenant AT testified that the tenant CN left of his own accord because of the vitriol the agent was directing at the tenant CN. The tenant AT testified that this occurred as the agent "laid hands on [the tenant CN]". The tenant AT added that the agent also had to be removed.

The tenant AT testified that tenants always cooperated with showings for the rental unit. The tenant AT testified that there was one showing that the tenants did not accommodate, but that notice of that showing was given less than 24 hours in advance.

The tenant NC testified that the tenants did not threaten the agent. The tenant NC testified that he has spoken to the agent on three occasions and thought that everything went well. The tenant NC testified that he does not understand on what this accusation is based. The tenant NC testified that the tenants returned all of the keys to the rental unit. The tenant NC testified that he does not have any keys to the rental unit in his possession.

The tenant NC admits that he was not present when the agent and the tenant CN had their conflict. The tenant NC testified that he heard that the tenant CN was aggravated because of the way the agent was treating the tenants. The tenant NC testified that he is not aware of any police file on the purported interaction.

The tenants deny the landlord's allegations.

The landlord claims for $3,380.25:

Item	**Amount**
Overholding	$2,250.00
Cleaning	507.50
Change Locks	184.80
Utilities	171.25
Rubbish Removal	266.70
Total Monetary Order Sought	**$3,380.25**

Analysis

The tenants admit liability for the cleaning costs ($507.50) and the utilities amount ($171.25). I award the landlord recovery of these amounts.

Subsection 32(2) of the Act requires a tenant to maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

The landlord claims one month of rent as compensation for the tenants' overholding and the inability of the landlord to rerent the unit because of the purported condition the tenants' kept the rental unit. The tenants deny that they caused the rental loss.

Where there are conflicting versions of an event, I am required to make a finding of credibility. A finding of credibility may be assisted by the circumstances surrounding the events in question. The often cited test of credibility is set out in *Faryna v Chorny,* [1952] 2 DLR 354 (BCCA) at 357:

> The real test of the truth of the story of a witness… must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The agent and witness testified that the rental unit was poorly kept; the tenants testified that the rental unit was presentable. The landlord did not provide any photographs of the state of the rental unit during the showings in support of its claim. The landlord did not provide copies of any written warnings to the tenants indicating that the condition of the rental unit did not comply with the Act. The landlord's agents did not mention any claim for the loss prior to or during the condition move out inspection. This allegation is not even mentioned in the landlord's application. The rental unit did not rerent for several months following the end of the tenancy.

On the basis of the testimonies before me and the evidence available, I find that the version of events most in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable is that of the tenants. In particular, the tenants' version of events is more consistent with the circumstantial evidence. Further, evidence that I would expect to exist had the landlord's agents taken issue with the condition of the rental unit during the tenancy has not been provided. The landlord has failed to show, on a balance of probabilities, that the tenants were in breach of the Act. On this basis the landlord's claim for the rental loss is dismissed.

The landlord claims for compensation for the tenants' overholding.

Pursuant to section 57 of the Act, a landlord may make a claim for compensation from an overholding tenant. Subsection 7(1) sets out that 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. 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.

The tenants admit that they retained possession of the rental unit for one day to complete additional cleaning. The tenants submit that the landlord did not put the tenants on notice of the landlord's intent to claim for the overholding period. The tenant submits that if the landlord had, the tenants would have not completed the additional cleaning. The tenants submit that the landlord had no actual loss as it had not secured new tenants.

I find that the tenants' overholding was not the proximate cause of the landlord's loss. The landlord's loss resulted from its failure to secure new tenants. As the landlord has not shown any loss that resulted from the tenants' overholding, I find that the landlord is not entitled to compensation for the extra day the tenants retained possession for the limited purpose of cleaning. The landlord's claim for overholding is dismissed.

Pursuant to subsection 37(2) when a tenant vacates a rental unit, the tenant must give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property. *Residential Tenancy Policy Guideline*, "1. Landlord & Tenant – Responsibility for Residential Premises" (Guideline 1) sets out the tenant's responsibilities for keys:

> The tenant must return all keys at the end of the tenancy, including those he or she had cut at his or her own expense.

The agent testified that it was necessary to change the locks as the tenants did not return keys to the rental unit, but instead returned some other keys. In addition, the agent testified that it was necessary to change the locks because of the tenant CN's "violent" outburst. The tenants deny that they were in possession of any keys to the rental unit and testified that they returned all keys in their possession. The tenants deny

the landlord's characterization of the tenant CN's conduct. The landlord has not provided me with any police reports that corroborate the agent's version of events.

I find that the tenants' version of events was more credible. The tenants in the course of the hearing were willing to admit liability where they believed they were at fault and did not overstate their position. Further, the tenants were forthright in their denial that they retained any keys in their possession that gave access to the rental unit. The agent appeared to be exaggerating the extent of the interaction with the tenant CN and the agent's account did not appear to accord with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable. On this basis, I find that the tenants returned all keys in their possession or control that gave access to the rental unit. I find that the tenants did not breach the Act. I find that the landlord is not entitled to compensation for changing the locks and this portion of its claim is dismissed.

Subsection 37(2) of the Act specifies that when a tenant vacates a rental unit, the tenant must leave the unit reasonably clean and undamaged except for reasonable wear and tear. Guideline 1 sets out the responsibility for garbage removal from a rental unit:

> Unless there is an agreement to the contrary, the tenant is responsible for removal of garbage and pet waste during, and at the end of the tenancy.

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.

The tenants admit that they left debris at the rental unit, but deny that it was enough to warrant the invoice in the amount of $266.70. In particular, the tenants provided evidence that they observed construction materials with the other debris. The tenants testified that there were ongoing construction activities at the residential property. The photograph of the debris shows no more than a chesterfield-sized pile of debris. The invoice notes a "large load" of rubbish. The invoice is not otherwise itemized.

I find that the tenants breached subsection 37(2) of the Act by failing to remove all the garbage from the rental unit; however, I find that the landlord has not substantiated that the full costs of the invoice for debris removal is attributable to the garbage left behind. I do not find it plausible that a rubbish removal company would characterize the chesterfield-sized amount as large. I accept the tenants' evidence that the landlord

added construction debris to the load. For this reason, I find that the landlord has failed to prove the amount of its loss. The landlord's claim for compensation for the debris removal is dismissed.

The landlord claimed for $3,380.25. The landlord has been successful in proving $678.75 or approximately one fifth of its claim. The only claims which the landlord has proven are those to which the tenants admit liability. 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, on the basis of the factors listed above, I am excising my discretion to refuse to award recovery of the filing fee from the tenants.

The landlord's total monetary entitlement is less than the security and pet damage deposit held. *Residential Tenancy Policy Guideline*, "17. Security Deposit and Set off" provides guidance in this situation:

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
    - a landlord's application to retain all or part of the security deposit, or
    - a tenant's application for the return of the deposit

   unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

There is no evidence before me that indicates that the tenants' right to the security deposit has been extinguished. As there is a balance in the amount of $1,571.25, I order that the balance of the tenants' security deposit shall be returned to the tenants forthwith.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $1,571.25 under the following terms:

Item	**Amount**
Security Deposit	$1,125.00
Pet Damage Deposit	1,125.00
Offset Cleaning Costs	-507.50
Offset Utilities	-171.25
Total Monetary Order	**$1,571.25**

The tenants are provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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: March 21, 2016

Residential Tenancy Branch