# Dispute Resolution Services



Residential Tenancy Branch
Office of Housing and Construction Standards

matter regarding ACR Investments
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes Landlord: MND, MNR, MNSD, MNDC, FF
Tenant: MNDC, MNSD, RR, SS, O, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking monetary orders. The hearing was conducted via teleconference and was attended by the landlord's agent and both tenants.

While the tenants had applied, as part of their Application, to obtain an order to serve documents in a manner not normally allowed by the *Residential Tenancy Act (Act)*, they confirmed at the start of the hearing they did not need such an order. As a result, I amend the tenants' Application for Dispute Resolution to exclude the matter of substituted service.

The landlord filed this Application for Dispute Resolution on June 7, 2016, in part, in response to the tenants' Application which was filed on November 27, 2015. She requested a monetary order in the amount of $7,430.81 plus the filing fee for her Application. The amount claimed by the landlord is for unpaid utilities; balance of rent owing; fraudulent service calls; and damage to and cleaning of the residential property.

Previously, the landlord had filed an Application for Dispute Resolution (file number is noted on the coversheet of this decision). A decision was written in response to that claim on December 30, 2015. In that Application she named the same tenants, as named in this Application. In addition, a monetary order was granted in consideration for compensation for lost rent; utilities due; closet repair; damaged property; and unnecessary service calls with a subsequent application of the security deposit held by the landlord.

A hearing was conducted on October 8, 2015 and December 18, 2015. The decision dated December 30, 2015 dismissed the bulk of the landlord's claim. The decision granted the landlord monies for unpaid utilities and part of the filing fee. A monetary order was issued to the tenants for return of the security deposit less $388.30 award as noted above.

The landlord's current Application for Dispute Resolution before me is an additional Application for a monetary order for the majority of the same claim plus utilities charges not included in the landlord's first Application.

As a result, issues arise in both the tenants' Application and the landlord's Application as to whether or not I can consider the claims as submitted.

The issue in the landlord's Application is whether the landlord, having already sought and obtained a decision on her claims for the compensation noted above is now precluded from making a second application for the same issues and for additional monies for utilities that were not sought in her original file.

The issue in the tenants' Application is whether the tenants are entitled to claim compensation for utility costs during the tenancy or if this issue was considered as part of the decision issued on December 30, 2015.

The following passages from the text: *Res Judicata*, Spencer-Bower and Turner, 2nd ed. (London: Butterworths, 1969) were expressly adopted and applied to circumstances analogous to those before me on this Application in the decision of the Supreme Court of British Columbia In London Life Insurance Company v. Zavitz et al, [1990] S.C.B.C., Vancouver Registry No. C881705:

At page 359 of *Res Judicata* the required elements to support a plea of "former recovery" are set out as follows:

1. That the former recovery relied upon was obtained by such a judgment as in law can be the subject of the plea;
2. That the former judgment was in fact pronounced in the terms alleged;
3. That the tribunal pronouncing the former judgment had competent jurisdiction in that behalf;
4. That the former judgment was final;
5. That the Plaintiff, or prosecutor, is proceeding on the very same cause of action, or for the same offence, as was adjudicated upon by the former judgment;
6. That the parties to the proceedings, or their privies, are the same as the parties to the former judgment, or their privies.

The learned author commented further at p. 380:

> ... where there is substantially only one cause of action, and it is a case, not of "splitting separable demands", but of splitting one demand into two quantitative parts, the plea [of *res judicata*] is sustained. In homely phrase, a party is entitled to swallow two separate cherries in successive gulps, but not to take two bites at the same cherry. He cannot limit his claim to a part of one homogeneous whole, and treat the inseparable residue as available for future use, like the good spots in the curate's egg.

> ... Thus, where the omitted matter is a portion of the entire sum, or an item or parcel of the entire property, recoverable on a single cause of action, the judgment is a bar to any subsequent action in respect of such omitted matter.

In the Application before me I find the parties are identical to the parties in the former proceeding resulting in the December 30, 2015 decision. I also find that the decision and order were rendered with respect to unpaid rent and utilities; damage to and cleaning of the residential property; fraudulent service calls and the dispensation of the security deposit held by the landlord. I find that the former judgment was final.

The claim before me, as was the prior claim, is one for unpaid rent and utilities for the duration of the tenancy; compensation for cleaning; damage; and false service calls; and the security deposit held. I find that the landlord, by bringing this second application is splitting one homogenous claim for compensation into two quantitative parts when the full amount was recoverable on a single cause of action.

I find that the December 30, 2015 decision that granted the landlord a monetary award in the amount of $388.30 and the order that granted the tenants $611.70 for return of the balance of the security deposit does constitute a bar to a subsequent claim for the same issues that were omitted from the landlord's original claim and considered for that decision. As a result, I order the landlord's Application for Dispute Resolution is dismissed, in its entirety, without leave to reapply.

In regard to the tenants' Application that awarded the tenants' return of their deposit and considered the landlord's claim for utilities and the tenants' rebuttal that they should not be required to pay utilities for the period that the landlord was completing renovations is the same as their argument put forward in this Application, I find the Decision of December 30, 2015 constitutes a bar to a claim for the same issue that was considered in that decision.

The tenants' opportunity to address this claim was considered and ruled on in the December 30, 2015 decision. As a result, I order the portion of the tenants' Application for Dispute Resolution requesting compensation for hydro is dismissed without leave to reapply.

I find, however, that the tenants' claim for compensation for hydro due to a heating issue is not barred as this issue was not considered in the December 30, 2015 decision.

Based on the above, the remainder of the tenant's claim for compensation includes: doubling of the security deposit ($1,000.00); ongoing appliance (including: the stove/oven; washing machine; dryer; and fridge) problems in the amount of $650.00; "landlord vacates premises" (3 months at $2,000.00 per month) in the amount of $6,000.00; restriction of use of secondary rental unit (10.5 months at $550 per month) in the amount of $3,025.00; landlord's refusal to buy a fridge in the amount of $1,000.00; landlord's refusal to provide heat (hydro costs) in the amount of $1,950.00; and costs

associated with their application including the cost of photocopies and travel to the Burnaby Residential Tenancy Branch office in the amount of $250.00.

Issue(s) to be Decided

The issues to be decided are whether the tenants are entitled to a monetary order for doubling the security deposit; compensation for damages or losses suffered as a result of their tenancy and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 27, 28, 32, 38, 65, 67, and 72 of the *Act.*

Background and Evidence

Both parties submitted into evidence a copy of a tenancy agreement signed by the parties on July 9, 2014 for a 1 year and 1 day fixed term tenancy beginning on July 15, 2014 for a monthly rent of $2,500.00 due on the 1st of each month with a security deposit of $1,000.00 paid.

I note the decision dated April 17, 2015 determined the tenancy ended on March 20, 2015 in accordance with a 10 Day Notice to End Tenancy for Unpaid Rent issued by the landlord on March 2, 2015. The tenants vacated the rental unit July 1, 2015.

The tenancy agreement stipulates that the following items and services are included in rent: stove and oven; dishwasher; refrigerator; carpets; window coverings; laundry; parking for 2 vehicles. The agreement also contained an addendum with 4 additional terms including clause 3 that states: "Tenants aware that renovations to house may not be complete by August 1st – although we will make every attempt possible to have them done promptly" [reproduced as written].

The tenants also submitted into evidence a copy of a real estate posting regarding the subject property that states there is a garage converted to a revenue suite on the property.

The tenants testified that prior to entering into the tenancy agreement the landlord offered to rent the main house to the tenants for $2,000.00 or in the alternative pay $2,500.00 per month and they could also rent the converted garage studio. The tenants submit the landlord also agreed the tenants would be able to rent the garage studio to a third party.

The landlord's position was that no such discussion took place and that at no time did the tenants indicate an intention to rent any portion of the residential property to a third party, until the tenants asked for permission in January 2015.

The tenants stated that when they contacted the landlord to seek approval to rent out the garage studio that the landlord advised them that they could not rent out the studio as it would be contrary to the allowable use as permitted by local authourities. The

tenants submitted that they had a friend who was willing to pay $550.00 per month to rent the studio at the time they requested the approval. They seek compensation for 10.5 months of lost revenue for a total of $3,025.00

Email correspondence between the two parties submitted by the landlord and some by the tenants shows the discussion that occurred after the tenants' request. Through that correspondence the landlord explained that the studio could be used by the tenants or their guests but it could not, by local authourities, be rented to a third party.

The tenants further submitted that they had contacted local authourities and were told that the garage studio was never issued an occupancy permit and such the possibility or either renting it out to a third party or the use of the studio by themselves as party of their own tenancy was not allowed.

The only documentary evidence from local authourities, was submitted by the landlord and confirms certain variances had been obtained by the landlord as of February 18, 2015. The document does not clarify whether the studio has been granted an occupancy permit or is restricted in its use to primary occupants of the property.

I also note the only clauses in the tenancy agreement or its addendum regarding the tenants' ability to assign or sublet the rental unit in whole or in part were listed under Clause 9. This clause does not provide any specificity regarding the garage studio but rather speaks only to the act of assigning or subletting the tenancy of the rental unit.

The tenants submit that while they were aware the rental unit was undergoing some renovations and that those renovations might not be completed by the start of the tenancy they didn't think they would take as long as they ultimately did. They stated that worked continued until November 11, 2014. The tenants seek compensation in the amount of $2,000.00 per month for 3 months for loss in the value of the tenancy.

The landlord submitted that all of the work was completed by August 16, 2014. The landlord referred to an email dated September 2, 2014 from the tenants stating that the floors looked great and that they had purchased area rugs to protect them. The landlord submitted that any other work done on the property was a result of requests from the tenants such as a leak in the roof; windows not operating properly; pest control issues; appliance problems.

From the landlord's own evidence, I note that an email dated August 29, 2014 from the male tenant contains the statements the landlord has attributed to a September 2, 2014 email.

The tenants submitted that from the start of the tenancy they had trouble with the stove/oven; the fridge; the clothes washer and dryer. Again both parties have submitted email correspondence that provides details of complaints and responses to the issues of the appliances.

Initially, the tenants identified there was a problem with the new stove and oven the landlord had installed – the stove was replaced three times all under warranty. The correspondence records that these issues were resolved over a 2 ½ week period in August 2014.

From the correspondence the tenants informed the landlord about a problem with the dryer on October 9, 2014. The landlord responded the same day saying she would look into and later confirmed a replacement would be available within a week – no further correspondence regarding the dryer was submitted.

In an email dated November 12, 2014 from the tenants to the landlord they report the washing machine "blew up" and leaked water and asking for a replacement as soon as possible. The landlord responded in an email dated November 18, 2014 that she had purchased a new washing machine but that delivery would likely be that same day. There is no other correspondence identifying any problems with the washing machine.

The landlord sent an email to the tenants on April 1, 2015 asserting that she had been informed the tenants were removing appliances from the rental unit. The tenants send an email to the landlord on April 5, 2015 stating that the fridge stopped working yesterday and has leaked water on the kitchen floor. And on April 23, 2015 the tenants provided the landlord with an email stating that yes they had purchased a house and "that is why your neighbours are busily reporting that our truck is driving around with your new appliances (so very nice of them)" [reproduced as written]. The landlord testified that the tenants had failed to turn the fridge back on after they had unplugged it.

The landlord submitted that all appliances were new at the start of the tenancy. She does not believe that there were any problems the appliances regardless she did replace/repair appliances within a timely fashion.

The tenants seek $650.00 as compensation for these ongoing appliance problems. In addition, the tenants submitted the landlord did not replace the fridge and they lost food as a result. The tenants provided a receipt for the purchase of a fridge in the amount of $500.00. Their claim is for $1,000.00 for purchase; shipping; and spoilage.

The tenants submitted the heat did not work in the rental unit and they seek compensation in the amount of $1,950.00 for the use of space heaters for the duration of the entire tenancy.

The email correspondence submitted shows an email from the tenants to the landlord on March 2, 2015 stating, in part: "The heating system is entirely Non-functioning and does not provide any heat" [reproduced as written]. Subsequent emails show the landlord arranged for a heating technician to attend the property on March 20, 2015; that it was turned back on March 20, 2015; the tenants reported on March 22, 2015 that the boiler had again stopped.

The landlord pointed out that the report of the furnace not working was received by her immediately after she served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent on March 2, 2015. In support of her position the landlord has submitted a receipt dated March 20, 2015 from the heating technician charging her for a site visit for servicing the furnace; leaving the furnace running and labour in the amount of $119.70. There is no indication on the invoice that any additional work was required or that there were any problems at all with the furnace.

The tenants could not remember when they had provided their forwarding address to the landlord. While the tenancy ended on March 20, 2015, as per the decision of April 17, 2015, the tenants did not vacate the rental unit until July 1, 2015.

The landlord submitted into evidence a copy of an email dated June 15, 2015 showing the tenants provided the landlord with their forwarding address on that date. The landlord's original Application for Dispute Resolution seeking to retain the security deposit that resulted in the decision of December 30, 2015 was filed on May 5, 2015.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position. In the case before me this burden rests with the tenants.

Section 27 of the *Act* states a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation or providing the service or facility is a material term of the tenancy agreement. The section goes on to state that the landlord may restrict or terminate a service or facility that is not essential or a material term if the landlord gives 30 days' written notice of the termination or restriction, and reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

The tenants submitted that discussions around the possibility for the tenants to rent out the garage studio were conducted prior to signing the tenancy agreement; the landlord

disputes that any such discussion took place. The burden rests with the tenants to provide sufficient evidence to establish their claim.

I find the tenants have not submitted any evidence such as an advertisement for the rental unit or a tenancy agreement or addendum to a tenancy agreement with terms that address the agreement of both parties for the tenants to rent out the garage studio to a third party. As a result and upon review of the emails submitted by each party, in their totality, I find the tenants have failed to establish any discussions took place regarding the potential to rent the garage studio until January 2015.

As a result, I find the landlord had not obligation, under the tenancy agreement, to allow the tenants to rent the garage studio as a separate rental unit. Therefore, I dismiss the portion of the tenants' claim for compensation in the amount of $3,025.00 for loss of revenue from rent of the garage studio.

Section 28 of the *Act* stipulates a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

> (a) Reasonable privacy;
> (b) Freedom from unreasonable disturbance;
> (c) Exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];
> (d) Use of common areas for reasonable and lawful purposes, free from significant interference.

From the evidence and testimony of both parties I find both parties agreed prior to signing the tenancy agreement and addendum that the landlord may not have completed all renovations prior to the start of the tenancy. As such, I find the tenants would not be entitled to any compensation for failure to complete renovations, unless they could provide sufficient evidence to establish that the renovations took longer than a reasonable person might expect.

Upon review of the male tenant's email dated August 29, 2014 and the landlord's email to the tenants dated September 2, 2014 where she indicates that "My contribution to renos are done for the year". The email goes on to provide the tenants with a paint colour code to deal with "any splatter if this bothers you", I find the landlord has established is that all renovation work had been completed prior to the end of August 2014.

I also find that the further email correspondence indicates that the landlords presence on the property was a result of the tenants' identification of a problem that required the landlord's attention and not a part of the renovations that were acknowledged in the tenancy agreement addendum.

I also find the tenants have provided no documentary or corroborating evidence to support their position that renovations were not completed until November 11, 2014. As a result, I dismiss the tenants' claim for $6,000.00 for loss of quiet enjoyment due to the landlord's renovations.

Section 32 of the *Act* requires a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In the case where the tenancy agreement requires the landlord to provide appliances as a term of the agreement, the landlord must also ensure that those appliances are in good working order.

While I accept that the tenants reported problems with the stove; oven; refrigerator; clothes washer; and dryer to the landlord I also find it incredible that the tenants should have such difficulty with 4 major appliances that were brand new at the outset of the tenancy, only months before.

Regardless, any landlord has an obligation to respond to a tenant's complaints regarding appliances that are not working within a reasonable time frame. In the case before me, I find that in regard to the problems with the stove; oven; clothes washer and dryer the landlord did respond in reasonable time and rectified the problems with all of these appliances. As such, I find the tenants have failed to establish the landlord breached any obligations under the *Act*, regulation or tenancy agreement.

In regard to the fridge, however, I note the landlord's submissions are largely silent on the matter. However, I note that the problems with the fridge were first reported to the landlord on April 5, 2015. From the decision of April 17, 2015 the landlord's obligations under the tenancy agreement ended on March 20, 2015 after the tenants' breach of the tenancy agreement by failing to pay rent in full.

As a result, I find the landlord was under no obligation on April 5, 2015 to provide the tenants with any appliances as these obligations ended on March 20, 2015.

Based on the above, I find the tenants have failed to establish the landlord has breached the *Act*, regulation, or tenancy agreement in regard to the provision of any appliances during the tenancy. I also find the landlord was not obligated, after March 20, 2015 to provide the tenants with an operating refrigerator. Therefore, I dismiss the portion of the tenants' claim for compensation in the amount of $650.00 for the ongoing appliance problems and for $1,000.00 for a replacement fridge and spoiled food.

In regard to the compensation sought by the tenants for no heat during the tenancy, I find there is no evidence that the issue of problems with heating until March 2015. I find that is unlikely that the tenants would have not mentioned any heating problems until after the majority of winter had passed, if there truly was a problem. The tenants did not

shy away from reporting problems to the landlord for other issues and yet no mention of heating problems.

In addition, the landlord has provided evidence that shows that even after the tenants reported a problem nothing was required to be done to the furnace except for a general servicing. As a result, I find the tenants have failed to establish that a problem ever existed with the heating system in the rental unit. Therefore, I dismiss the portion of the tenants' claim for $1,950.00 for failure to provide heat.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

As the landlord submitted her Application for Dispute Resolution seeking to retain the security deposit prior to the date the tenants vacated the rental unit and the date they provided the landlord with their forwarding address, I find the landlord has complied with the requirements set forth in Section 38(1) and the tenants are not entitled to double the amount of the deposit.

Conclusion

Based on the above, I dismiss the tenants' Application for Dispute Resolution without leave to reapply. Also as noted above, the landlord's Application for Dispute Resolution was also dismissed without leave to reapply.

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 22, 2016

Residential Tenancy Branch