



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR, OPR, MNR, MDSD & FF

### Introduction

The Application for Dispute Resolution filed by the landlord makes the following claims:

- a. An Order for Possession for non-payment of rent
- b. A monetary order in the sum of \$4774 for unpaid rent and damages
- c. An order to retain the security deposit
- d. An order to recover the cost of the filing fee

The Application for Dispute Resolution filed by the Tenant makes the following claims:

- a. A monetary order in the sum of \$13,500.
- b. An order that the tenant recover the cost of the filing fee

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the Application for Dispute Resolution/Notice of Hearing filed by each party was sufficiently served on the other. With respect to each of the applicant's claims I find as follows:

### Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the landlord is entitled to A Monetary Order and if so how much?
- b. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?

- c. Whether the landlord is entitled to recover the cost of the filing fee?
- d. Whether the tenants are entitled to a monetary order and if so how much?
- e. Whether the tenant is entitled to recover the cost of the filing fee?

### Background and Evidence

The parties entered into a fixed term written tenancy agreement that provided that the tenancy would start on April 1, 2015 and was to end on March 31, 2016. The rent is \$2600 per month payable on the first day of each month. The tenant paid a security deposit of \$1300 at the start of the tenancy.

The tenants gave the landlord notice they were not renewing the fixed term tenancy agreement and they vacated the rental unit on February 29, 2016. The tenant(s) failed to pay the rent for the month of March.

Each party has filed a claim. The applicant in each case has the burden of proof to present sufficient evidence at the hearing to prove each of their claims on a balance of probabilities.

### Credibility:

In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, the B.C. Court of Appeal set out the following test for assessing credibility:

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case 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. (page 357)”

The landlord claimed the sum of \$1260 for the cost of landscaping. She presented a quotation for a landscaping company indicating that sum which had a stamp on it that suggested it had been paid. When specifically questioned the landlord confirmed the sum had been paid to the landscape contractor. The tenant testified she had talked to the contractor the day before the hearing and he confirmed that he had provided a quotation but told her the landlord never asked her to do the work and that he has never been paid.. The landlord responded saying her earlier testimony was wrong, that she

obtained a quotation from another individual who stated he could do the work for \$850 and he eventually completed the work for \$550. The landlord failed to produce documents to corroborate this testimony. The tenant disputes that any landscaping work was done. The falsity of the landlord's testimony is very unfortunate. I determined she was not a credible witness and care must be taken in assessing her evidence.

The tenant gave considerable evidence relating to the poor condition of the rental unit at the start of the tenancy and later. In particular the tenant expressed concern about the presence of mold and asbestos. The tenant testified as follows:

- There was a musty mold smell in the house when they moved in and it stayed with them the entire tenancy.
- There was water damage in parts of the rental unit that was just painted over.
- My family suffered from headaches, fatigue, stuffy noises throughout the tenancy. The ill health went away when we left the house for periods of time.
- There was rotting around the shower baseboards and the shower base.
- There is mold coming out of an open cavity to the house.
- When we moved in there was a rotting baseboard in the master washroom and we have not been able to use the master washroom for an extensive period of time.
- The landlord advised the repaired to paint over it.
- The tenant testified that she commonly complained to the landlord about the mold problems when the landlord inspected the rental unit. However, she acknowledged that she did not give the landlord notice in writing prior to the end of January 2016.

The landlord testified as follows:

- She responded promptly to any complaints made by the tenants.
- A yellow stain was noticed in the master bathroom and her contractor inspected it around the middle of April 2015. He could not find mold at that time but asked that the tenants continue to monitor it. The next report the landlord received from the tenants about mold was on January 29, 2016. The restoration company was on the property on February 2, 2016. The tenant complained of asbestos and the rental unit was tested for asbestos within a couple of days of receiving the complaint.
- There are 3 full bathrooms in the rental unit including two full bathrooms upstairs and one full bathroom on the main floor.
- The tenant never advised the landlord of the tenants intention to seal the rental property
- The tenants never advised the landlord of problems with rodents or bugs.

- On January 20, 2016 the tenant advised the landlord of a problem with a leak in the dining room. A plumber attended on January 22, 2016 and determined it was not a plumbing problem. A roofer was retained shortly thereafter who attended on January 30, 2016.

Landlord's Claims - Analysis - Monetary Order and Cost of Filing fee:

With respect to each of the landlord's claims I find as follows:

- a. I dismissed the landlord's claim of \$1260 for the cost of yard work. The landlord admitted in the hearing that her earlier testimony that she paid a contractor \$1260 was false. She subsequently testified she paid another individual \$550. The tenant disputes that any yard work was done. Given the landlord earlier false testimony, the fact that she failed to present evidence to corroborate the \$550 payment and the tenant's evidence disputing that any work was done I determined the landlord failed to prove this claim and it is dismissed in its entirety.
- b. The landlord claimed the sum of \$2600 for loss of rent for March 2016. This is a difficult claim to assess. On one hand it is reasonable to expect that the new tenant might not be able to take possession until the end of March given the late showings and thus the rent would be owed for that month. However, the tenant testified she knows the new tenant and that he moved into the rental unit in March. The tenant failed to produce evidence from the new tenant as to when he moved in. The landlord failed to produce a copy of the tenancy agreement with the new tenant. The landlord was specifically questioned and she testified that the new tenant took possession on March 29, 2016 and did not pay rent for March 2016. The landlord was warned of the consequences of lying including the rights of the tenant to have the monetary order set aside on review if the tenant could show the landlord produced fraudulent evidence.

In the face of insufficient evidence I determined that the new tenant moved in on March 29, 2016 and that the new tenant did not pay rent for March. As a result I determined the tenants owed the sum of \$2600 for March. Where tenants agree to a fixed term tenancy they are obliged to pay the rent for the entire fixed term subject to the landlord's breach of a material term and being given an opportunity to rectify the breach after receiving written notice to do so and the landlord's obligation to mitigate. The tenants had already vacated the rental unit by the time they gave the landlord written notice of a breach of a material term. The landlord acted reasonably in attempting to mitigate their loss.

- c. The landlord claimed the sum of \$556 for the cost of repainting damaged walls. The landlord produced an invoice in the sum of \$650 from a contractor as well as

a quotation. The tenants had repainted a wall with chalk board paint which would allow their children to write on it. The landlord testified it had to be re-painted because subsequent tenants may not have children. I do not accept the submission of the tenants that the fact the landlord did not object earlier is a defense. However, I accept the testimony of the tenant that the wall in question was not in good shape and only had a primary coat. I determined the landlord is entitled to \$300 of this claim.

- d. I dismissed the claim in the sum of \$157.50 for the cost of cleaning as the landlord failed to produce sufficient evidence to establish the tenants failed to leave the rental unit in a condition that did not meet the standard of the Residential Tenancy Branch.
- e. I dismissed the landlord's claim of \$100 for compensation for damaged floors as the landlord failed to prove this was caused by the negligent actions of the tenants.

In summary I determined the landlord has established a claim against the tenants in the sum of \$2900 plus \$100 for the cost of the filing fee for a total of \$3000.

Security Deposit:

I determined the security deposit plus interest totals the sum of \$1300. I ordered the landlord may retain this sum thus reducing the amount outstanding under this monetary order to the sum of \$1700.

Tenants' Claim:

The evidence presented by the Tenants is limited. The tenants did not file their Application for Dispute Resolution until July 5, 2016. The tenants produced a 5 page letter to the landlord dated March 3, 2016 setting out their complaints and digital evidence photos and videos. The tenant did not present any evidence relating to the medical condition of her family during the course of the tenancy, the opinion of a doctor or other professional connecting mold to their ailments, expert evidence corroborating her allegation of asbestos exposure and the extent of mold and e-mail messages or other text messages advising the landlord of problems on an ongoing basis. With respect to each of the tenants' claims I find as follows:

- a. I dismissed the tenants' claim for the return of the security deposit as it has been dealt with in reducing the landlords' claim.
- b. The tenants claimed the sum of \$850 for the cost of building garden boxes and soil. I accept the testimony of the tenant that the landlord refused to allow her to remove the garden boxes at the end of the tenancy. The boxes are not fixtures and the landlord did not have the right to refuse to permit her to remove them.

However, the tenant testified those boxes are now being used by the new tenant. At the hearing the landlord testified she could have the boxes. In the circumstances I determined it is appropriate to compensate the tenant rather than ordering the return of the boxes. While the tenants failed to provide documentary evidence to prove the quantum of her loss, the photographs indicate it is well constructed. I determined the tenants are entitled to \$500 for this claim.

- c. I dismissed the Tenants claim of \$500 for breach of the covenant of quiet enjoyment. The tenants were slow to advise the landlord as to whether they wished to renew the lease. When they subsequently advised the landlord they did not wish to renew the lease the landlord made reasonable efforts to find another tenant. I do not accept the efforts amounted to a breach of the covenant of quiet enjoyment. Rather the opposite is true. The landlord arranged to have 10 prospective tenants visit during an arranged viewing. The tenants advised the landlord ½ hour ahead they were sick and they were not prepared to allow the landlord and the prospective tenants in. There were only two viewings. In my view the landlord acted reasonably and the tenants claim is dismissed.
- d. The tenants claimed \$150 for the cost of sealing of 2/3 of the house. However, the tenants never obtained the landlord permission and failed to keep the receipts. The tenants failed to prove this claim.
- e. Similarly, the tenants claimed \$150 for the cost of rat, ant and bug infestation. This claim is dismissed as the tenants failed to prove quantum.
- f. The tenants claimed the sum of \$5000 for Asbestos exposure. The tenant testified some workers refused to work because original walls contained asbestos. The tenant did no present evidence from these witnesses. The landlord produced a report for an Asbestos Analytical Service Company that states asbestos fibres were not detected in the samples that they were given. I determined the tenants failed to prove this claim and accordingly it is dismissed.
- g. The tenants claimed \$500 for the loss of use of the master bathroom. I determined the tenants are entitled to \$100 for this claim. The tenants claim has been reduced as the tenants failed to advise the landlord in a timely way there continued to be a problems with mold in the master bathroom. It is not unreasonable for a landlord to assume the fix of the master bathroom was properly completed unless the tenants advised the landlord otherwise.
- h. The tenants claimed \$5000 for compensation for mold exposure. However, the tenant failed to present medical evidence to corroborate these allegations. Further, there is insufficient evidence that she advised the landlord in a meaningful way prior to the end of January 2016. I accept the tenants' testimony that her enjoyment of the dining room has been reduced from the end of January

to the end of February because the landlord failed to properly fix the ceiling in a timely manner. I determined the tenants are entitled to \$300 for this claim.

In summary I determined the Tenants have established a monetary claim against the landlord in the sum of \$900 plus \$100 for the cost of the filing fee for a total of \$1000.

Conclusion:

In summary I determined the landlord has established a claim against the Tenants in the sum of \$3000. I ordered that the landlord may retain the security deposit of \$1300 leaving a balance owing of \$1700. I determined the tenants have established a claim against the landlord in the sum of \$1000. After setting off this claim I ordered that the Tenants pay to the Landlord the sum of \$700.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

Dated: July 26, 2016

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Residential Tenancy Branch

