



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BALFOUR PROPERTIES LIMITED
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC RPP FF

Introduction

This hearing was convened as a result of the tenant's application for dispute resolution seeking remedy under the *Residential Tenancy Act* (the "Act"). The tenant applied for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, for an order for the return of the tenant's personal property, and to recover the cost of the filing fee.

The tenant, an agent for the landlord (the "agent"), and a maintenance person for the landlord (the "maintenance person") appeared at the teleconference hearing and gave affirmed testimony. During the hearing the parties presented their evidence. A summary of the testimony and documentary evidence is provided below and includes only that which is relevant to the hearing.

On August 18, 2016 the hearing commenced and after 67 minutes, the hearing was adjourned to allow additional time to consider all of the evidence from the parties. On October 18, 2016, the hearing reconvened and after an additional 81 minutes of testimony, the hearing concluded. An Interim Decision was issued dated August 19, 2016 which should be read in conjunction with this Decision.

Neither party raised concerns regarding the service of documentary evidence.

Preliminary and Procedural Matters

During the hearing, the tenant agreed to amend her Application to remove the personal name of the landlord agent, A.B., and amend the named landlord company to the full name of the landlord company. This amendment was made in accordance with section 64(3)(c) of the *Act*.

During the hearing, the parties confirmed that the personal items of the tenant had been disposed of and as a result, I am unable to order their return as requested by the tenant. Given the above, I will only be considering whether the tenant is entitled to monetary compensation under the *Act*, and if so, in what amount.

Issue to be Decided

- Is the tenant entitled to monetary compensation under the *Act*, and if so, in what amount?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A one year, 17 day fixed term tenancy began on May 15, 2005 and reverted to a month to month tenancy after that time period. Monthly rent of \$1,450.00 was due on the first day of each month and has increased over the course of the tenancy to the currently monthly amount of \$1,715.00 per month.

The tenant's monetary claim of \$15,215.00 is comprised as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Compensation for artwork (dolphin)	\$7,500.00
2. Compensation for elliptical machine	\$2,500.00
3. Loss of peaceful enjoyment of rental unit (calculated at 3 month's rent at \$1,695.00 per month X 3 months)	\$5,085.00
4. Recovery of cost of filing fee	\$100.00
5. Photocopying costs	\$10.00
6. Gas to drive to RTB to file application	\$20.00
TOTAL	\$15,215.00

Tenant's Evidence

Item 1 – The tenant testified that she was widowed in August of 2014 and that her husband was a wood carver. The tenant stated that her husband was working on a wood dolphin carving (the “dolphin”) which the tenant described as “six to eight feet long possibly” and that it was located on her back patio in December 2013. The tenant stated

that one day it was removed by who she believes was the maintenance person for the landlord.

The tenant referred to two colour photos submitted in evidence as examples of her husband's carving work. One photo was of a cat on a keyboard, and the other was of a horse. The tenant referred to a letter submitted in evidence that claims the photo of what the tenant alleges to be the dolphin carving her husband was working on before his death look like it was freshly cut but did not have a name on the letter. There was also a letter from a person employed at a guitar shop who claims the wood looked freshly cut. The tenant also referred to a police report file number; however, no police report was submitted in evidence.

The tenant claims that she wasn't given a chance to protect the dolphin or communicate with the landlord as her items were disposed of. The tenant blames the maintenance person for cutting the dolphin's wooden head off to make it look like garbage before it was disposed of.

Regarding the value of \$7,500.00 the tenant claims that the dolphin is "invaluable". The tenant did not provide photos of the entire dolphin. The only photos was a partial view of a piece of wood on the rear patio of the rental unit, and some closer photos where the wood is in a pile of scrap wood and appears to have had a portion of it cut off based on the appearance of the rest of the piece of wood.

Item 2 - The tenant claims that she also had her elliptical machine taken from her back patio at the same time frame of the removal of the dolphin. The tenant submitted in evidence a quote for an elliptical machine in the amount of \$2,513.85. The tenant submitted photos which showed a rusted elliptical machine on the back patio of her rental unit. The tenant confirmed that the elliptical machine was left outside and was exposed to the elements. The tenant did not have a receipt or any other supporting documentation other than the quote for an elliptical machine which did not match the make or model of the tenant's elliptical machine.

The photo of the elliptical machine shows a wet electronic display which the tenant confirmed did not work and was not used by the tenant. The tenant claims she used with machine without the electronic display working and that her neighbours also used her elliptical machine and that it was a form of exercise for the tenant.

Item 3 – For this portion of her monetary claim, the tenant is seeking reimbursement in the amount of three full months of rent at \$1,695.00 per month for a total of \$5,085.00. The tenant alleges that the landlord trespassed on her patio by removing her personal

items and disposing of them without her permission, and that the tenant denies breaching section 9 of the tenancy agreement which states:

“9. The tenant agrees to not store or leave any article outside of the Premises.”

[reproduced as written]

The tenant stated that the landlord did not remove the personal items of other tenants as shown in several colour printouts submitted in evidence such as a trampoline and children's play equipment belonging to a neighbour. The tenant alleged that the landlord has targeted her as a result by removing her personal items.

The tenant testified that the rental unit includes the rear patio and that she has use of the rear patio as part of her tenancy. She claims that the landlord does not include use of the rear patio as part of her rent and considers it to be common area that the tenant is not entitled to use as part of her tenancy. The photos submitted in evidence clearly show rear stairs of the rental unit coming down to a rear patio area and that there is a second lower door to the basement of the rental unit from the rear patio. The tenant testified that the tenancy agreement does not indicate that the tenant is unable to use the rear patio of the rental unit.

The tenant referred to many photos submitted in evidence including one photo of a canoe which the tenant indicates a neighbour had in the backyard for years and that the landlord did not remove that canoe. The tenant also submitted a letter from her neighbour which indicates that she has use of her rear patio for plants and had photos to support that her rear patio had many plants on it.

The tenant referred to a letter dated October 13, 2006 which the landlord denied having received by fax or by mail. The tenant testified that she came up with the value of \$5,085.00 for this portion of her claim as that period of three months was valuable grieving time for her and submitted three medical notes in evidence.

The tenant confirmed that she did not have tenant's insurance and still does not have tenant's insurance as of the date of the hearing. The tenant claims she minimized her loss by storing the two items outside because she has not had items stolen from her rear patio before.

Item 4 – The filing fee will be determined later in this Decision.

Items 5 and 6 – The tenant was advised during the hearing that both of these items were dismissed as there is no remedy under the *Act* for photocopying costs or gas costs

in relation to filing a claim for dispute resolution. As a result, these items would not be considered further.

Landlord's Evidence

Item 1 – The agent denies that the dolphin was a carving at all and that it was a piece of wood that had been sitting outside for well over one year and did not resemble a dolphin or a carving for that matter. The agent also denies that the wood was ever cut by the agent or the maintenance person for the landlord and that the piece of wood was left in a pile outside for over 36 hours before it was eventually disposed of and the tenant did not state anything about it being of value to the agent.

Item 2 – The agent claims that the elliptical machine was junk and considered abandoned as it was rusted and kept outside and was discarded as a result. The maintenance person testified that as a regular part of their maintenance they maintain the exterior of the building and remove items considered to be abandoned. The agent confirmed that the tenant was not consulted before items 1 and 2 were removed and discarded but that the tenant could have removed them from the junk pile where they remained for 36 hours before they were eventually disposed of. The agent claims that the rear patio is common property and not for the exclusive use of the tenants and not part of the tenancy agreement.

Item 3 – The agent stated that he does not understand how the tenant can justify the amount she claiming for and that she is not entitled to her claim as a result.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;

3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the tenant to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the landlord. Once that has been established, the tenant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the tenant did what was reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Item 1 – After carefully considering the evidence before me, I find the tenant has failed to meet the four part test for damages or loss for this portion of her claim. I find that it is not reasonable that if the dolphin was valued at \$7,500.00 that the tenant would not have at least one clear photo of the entire dolphin. In addition, I find that the dolphin photos do not resemble the examples submitted of what the tenant described as examples of her husband's artwork.

I do; however, find that the rear patio is included as part of the monthly rent and is intended for the use of the tenant and that the landlord did not have permission to remove the piece of wood from the tenant's rear patio, regardless of value of the piece of wood. I note that my finding is consistent with other rental units that clearly have children's play equipment and a trampoline on their rear patio and yard. At the very least, I find the landlord should have written to the tenant to warn the tenant of the potential removal of the piece of wood before they removed it from the tenant's rear patio if the landlord considered it to be "junk". Had the landlord advised the tenant in advance in writing, the tenant could have taken steps to protect the piece of wood or move it indoors if it had sentimental value. I do not find that leaving the item in a pile outside for 36 hours as claimed by the agent relieves the landlord from their responsibility to communicate with the tenant regarding removal of personal items of tenants. While I find the tenant has failed to meet parts three and four of the test for damages or loss, as the I find there to be insufficient evidence of the value claimed and taking into account that the tenant failed to obtain tenant's insurance to protect herself from financial loss of her personal items, I do find that the landlord breached section 28 of the *Act* which states:

Protection of tenant's right to quiet enjoyment

28 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.

[reproduced as written]

Therefore, I grant the tenant a nominal amount of **\$100.00** to reflect that the landlord breached the *Act* by removing the piece of wood from the tenant's rear patio without prior permission from the tenant and without having first given the tenant notice in writing of the pending removal of a tenant's personal item considered to be "junk" by the landlord so that the tenant would have a reasonable time period to respond.

Item 2 – I find the elliptical machine (the "machine") was left outside contrary to the intended use which is clearly an indoor machine as it had an electrical panel and as visibly rusty in many areas and in poor condition. As a result, I find that while the tenant has failed to meet part three and four of the test for damage or loss, and consistent with my finding for item 1 above, I grant the tenant a nominal amount of **\$100.00** to reflect that the landlord breached the *Act* by removing the machine from the tenant's rear patio without prior permission from the tenant and without having first given the tenant notice in writing of the pending removal of an item considered to be "junk" by the landlord so that the tenant would have a reasonable time period to respond.

I caution the landlord not to remove any further personal items from the tenant's rear patio without communicating in writing in the future. The landlord is also ordered to provide the tenant at least one month's notice to respond in writing to any written communication from the landlord regarding the removal of personal items from the rear patio of the tenant for the remainder of the tenancy. Failure to do so could result in a future claim for monetary compensation from the tenant under the *Act*.

Item 3 – I find this portion of the tenant's claim to be unreasonable and that the tenant has failed to meet part three and part four of the four part test for damage or loss as a result. I afford the medical notes little weight as two of the three letters are dated outside of the claimed time period, and the third letter is a summary of the tenant's self-reported concerns regarding items 1 and 2. Given this, **I dismiss** this portion of the tenant's claim due to insufficient evidence, **without leave to reapply**.

Regarding item 4, as the tenant was only successful with a small portion of her monetary claim, **I grant** the tenant the recovery of **\$50.00** of the cost of the filing fee. As described above, items 5 and 6 are dismissed without leave to reapply.

Monetary Order – I find that the tenant has established a total monetary claim in the amount of **\$250.00**, comprised of a \$100.00 nominal amount for item 1, a \$100.00 nominal amount for item 2, and for the return of \$50.00 of the cost of the filing fee. **I authorize** the tenant to deduct **\$250.00** from a future month's rent on a one-time basis in full satisfaction of the tenant's monetary claim of \$250.00 pursuant section 67 of the *Act*.

Conclusion

The tenant's claim is partially successful.

The tenant has established a total monetary claim of \$250.00 as described above. The tenant has been authorized to deduct \$250.00 from a future month's rent on a one-time basis in full satisfaction of the tenant's monetary claim of \$250.00 pursuant section 67 of the *Act*.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: October 31, 2016

Residential Tenancy Branch

