Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF MNR OPR CNR MNDC MNSD and O

Introduction

This hearing was convened in response to applications by both parties pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The tenants requested:

- cancellation of the landlords' 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (10 Day Notice) pursuant to section 46 of the *Act*;
- a Monetary Order pursuant to section 67 of the *Act* for the cost of emergency repairs and for money owed or compensation for damage or loss under the *Act*;
- a return of the tenants' security deposit pursuant to section 38 of the *Act*;
- an Order for the landlords to comply with the *Act* pursuant to section 32 of the *Act*; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72 of the *Act*.

The landlords requested:

- an Order of Possession for non-payment of rent and utilities pursuant to section 55 of the *Act*;
- a Monetary Order for unpaid rent and other expenses pursuant to section 67 of the *Act*; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72 of the *Act*.

Both the landlords and the tenants were represented at the hearing by legal counsel. KR, appeared for the landlords, while GM, appeared for the tenants. Both lawyers confirmed that they would be speaking on behalf of their clients. They were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

KR gave sworn testimony that a 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") was posted on the front door of the rental unit on January 4, 2017. I find that in accordance with sections 88 and 90 of the *Act* the 10 Day Notice was deemed to have been served to the tenants on January 7, 2017.

GM gave sworn testimony that the Tenants' Application for Dispute Resolution and evidentiary package ("Tenant's Application for Dispute") was served on the landlords in person on January 13, 2017. Pursuant to sections 89 and 90 of the *Act* the landlords are found to have been served on January 13, 2017.

On January 16, 2017, the landlords mailed their Application for Dispute Resolution and evidentiary package ("Landlords Application") to the tenants by Registered Mail. A copy of the Canada Post tracing number was provided to the hearing. The tenants are deemed to have been served with the Landlords` Application on January 21, 2017.

At the outset of the hearing, counsel, GM requested an adjournment of the matter pursuant to *Residential Tenancy Branch Rules of Procedure 7.8 and 7.9.* GM sought an adjournment so that she may properly instruct her client and collect all applicable receipts and expert reports. It was argued that not allowing an adjournment would result in her clients being prejudiced.

GM stated that it was her understanding that the tenants had attempted to attend to this tenancy dispute with the help of a legal assistant. The tenants had only recently realized how complicated of a matter they were facing, and therefore retained GM's service the day prior to the hearing. GM continued by noting that the tenants misunderstood their rights and were under the impression that they needed to remain in the rental unit until the time of the hearing.

Residential Tenancy Branch Rules of Procedure 7.8 and 7.9. provide guidance on the instances in which an adjournment should be granted.

Rule 7.8 notes, "At any time after the dispute resolution hearing begins, the arbitrator may adjourn the dispute resolution hearing to another time. A party or a party's agent may request that a hearing be adjourned. The arbitrator will determine whether the circumstances warrant the adjournment of the hearing."

Pursuant to rule 7.9 the criteria for granting an adjournment when allowing or disallowing a party's request for an adjournment are as follows:

• the oral or written submissions of the parties;
• the likelihood of the adjournment resulting in a resolution;
• the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
• whether the adjournment is required to provide a fair opportunity for a party to be heard; and
• the possible prejudice to each party.

While I appreciate the difficult position in which counsel for the tenants finds herself, I am dismissing the request for an adjournment. It was acknowledged by counsel that the tenants had themselves initiated this application over 1 month ago. Furthermore, the tenants had the wherewithal to hire an interpreter to guide them through the various forms required by the Residential Tenancy Branch and to secure a home inspection company to view the rental premises, indicating they appreciated the severity of the matter. Granting an adjournment would unfairly prejudice the landlords who were prepared for the hearing, had gathered all necessary documents in the allotted time frame and secured their own legal counsel. An adjournment would also unfairly delay the consideration of the landlord's attempt to obtain an end to this tenancy on the basis of the 10 Day Notice they issued in early January.

Issue(s) to be Decided

Are the tenants able to cancel the Notice to End Tenancy? If not, are the landlords entitled to an Order of Possession?

Are the tenants entitled to a Monetary Order for the cost of Emergency Repairs and for money owed as compensation for damage or loss under the *Act?*

Should the landlords be directed to comply with section 32 of the *Act*?

Are the landlords entitled to a Monetary Order for unpaid rent?

Are the landlords able to recover the filing fee from the tenants?

Background and Evidence

Evidence and testimony were presented during the course of the hearing by both parties that this tenancy began on December 22, 2016 and ended on January 4, 2017. Rent was set at $2,800.00 per month and a $1,400.00 damage deposit continues to be held by the landlords. Both parties stated that this was originally a fixed term tenancy that was to run from January 1, 2017 to December 31, 2018. The landlords allowed the tenants to take possession of the rental unit on December 22, 2016, for which the tenants paid the landlords $800.00.

The landlords are seeking an Order of Possession for unpaid rent. They are also seeking a Monetary Order of $6,050.00 for unpaid rents for the months of January and February 2017, as well as for a repair fee paid to the tenants and a return of the filing fee.

Item	**Amount**
Unpaid Rent January 2017	$2,800.00
Unpaid Rent February 2017	2,800.00
Repair Fee paid	350.00
Filing Fee	100.00
Total =	$6,050.00

The landlords alleged that $350.00 was given to the tenants to make repairs to a kitchen counter that was damaged. Counsel for the tenants acknowledged that this money was received, but she informed that her clients had told her, these funds were put to other uses, namely the cleaning of air ducts and the household. No receipts were provided to the hearing.

The tenants are seeking a Monetary Order of $6,456.00 as compensation for damage and loss they suffered. Specifically the tenants are seeking;

Item	**Amount**
Return of the Damage Deposit	$1,400.00
Return of December 2016 Rent	800.00
Recovery of the cost of the Inspection Report	630.00
Professional Cleaning	126.00
Translation Fee	500.00
Miscellaneous Costs	3000.00
Total =	$6,456.00

Analysis – Landlord's Obligation to Repair

Counsel for the tenants informed that her clients are seeking to end the tenancy, to obtain a return of their security deposit as well to obtain a Monetary Order based on expenses they incurred as a result of the premises being uninhabitable. Specifically, counsel cited section 32 of the *Act* and the role that a landlord has in maintaining a property.

Section 32 of the *Act* articulates the responsibilities a landlord has with respect to maintaining a property;

32*(1) A landlord must provide and maintain residential property in a state of decoration and repair that*

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Further direction is found in the *Residential Tenancy Policy Guideline #1* which expands on responsibilities of the landlord and tenant regarding maintenance, cleaning and repairs of residential property and manufactured home parks, and obligations with respect to services and facilities.

It states:

> *The landlord is responsible for ensuring that rental units and property… meet "health, safety and housing standards" established by law, and are reasonably suitable for occupation given the nature and location of the property...An arbitrator may also determine whether or not the condition of the premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant.*

The home inspection report provided to the hearing by the tenants explains that it is, "Common for this age of house: to have minimal or no moisture barrier on the foundation. When interior basement walls are finished and using a vapor barrier that will cause condensation to the concealed finished wall assemblies (sic). These high moisture environments are ideal for mold (sic) growth within the wall assembly and eventually transferring to the base of finished walls." The inspector notes, "There is no easy or quick solution of mitigating this environmental exposure to what I believed to be toxic mold (sic)." It continues by stating, "basement alterations done without permits: potential electrical hazards without electrical permit oversight." The report concludes that the home owners should hire a licensed electrician to inspect and make repairs on all floors.

While I accept the conclusions reached in the report submitted to the hearing that this house had characteristics that can promote growth of mould, it does not say that samples of mould were found and tested for toxicity. I also note the tenants vacated the property after only 14 days of occupancy. They did not provide the landlords adequate time to make repairs to bring the rental unit to acceptable standards. In addition, they did not provide notice to the landlords that they were ending the tenancy. They simply stopped paying rent, after signing a fixed term tenancy agreement. While the report states "forced air will distribute the toxins and mold (sic) spores throughout the house" the home was not deemed uninhabitable, nor were any medical reports produced at the hearing documenting any health issues related to the mould.

I am therefore denying the tenants' request to end the tenancy based on the landlords` failure to repair the rental unit.

<u>Analysis – Order of Possession</u>

The tenants failed to pay the January and February 2017 rent within five days of receiving the 10 Day Notice to End Tenancy on January 4, 2017. During the course of the hearing, counsel for the tenants acknowledged that her clients have not paid rent for January and February 2017. She explained that they

had withheld the rent as they had become sick as a result of the mould present in the unit and wished to vacate the property.

While the tenants may have taken issue with the state of the property, they were responsible for paying rent when it was due. Section 26 states:

> **26** (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenants had not received permission to deduct all or a portion of the rent.

As this was a fixed term tenancy, the tenants may have found relief in section 45(3) of the *Act*. This provision explains:

> **45**(3) If a landlord has failed to comply with a material term of the tenancy 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.

In this case, the tenants moved into the rental unit on December 22, 2016 and moved out January 4, 2017. Despite no longer living in the rental unit, the tenants continue to have all of their possessions in the rental unit. While the tenants made their feelings known concerning the state of the building, 10 days is not a reasonable period of time for the landlord to correct the situation.

Counsel for the tenants acknowledged that the tenants failed to pay the entire amount of rent identified as owing in the 10 Day Notice of January 4, 2017, I find the 10 Day Notice to be valid and the tenancy to have ended on the corrected effective date of the notice, January 14, 2017. As that has not occurred, I find that **the landlord is entitled to a 2 day Order of Possession**. The landlords will be given a formal Order of Possession which must be served on the tenant. If the tenants do not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

Analysis – Landlords' Application for a Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 7(1) of the *Act* establishes that a tenant or landlord who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the other party for damage or loss that results from that failure to comply.

In this case, the onus is on both parties to prove their entitlement to their claim for a monetary award.

The landlords provided testimony and written evidence was submitted with the hearing package demonstrating that rent has not been paid in its entirety for January and February 2017, totalling $5,600.00. The tenants acknowledged not paying rent for this period. They vacated the premises January 4, 2017 and did not provide notice to the landlords. Despite no longer living in the rental unit, the tenants continue to have all of their possessions in the rental unit.

The landlords are also seeking to recoup $350.00 for a repair fee for which they provided the tenants money. This repair was never performed. The counsel for the tenants acknowledged that her clients received these funds, but explained that the tenants did not perform the repairs for which the money was intended and instead put the money towards hiring professional cleaners. The landlords intended for this money to be spent on a repair that was required for the kitchen counter.

The tenants have not disputed any of the losses in rent that the landlords have incurred, and acknowledge not paying rent for January and February 2017. Despite abandoning the rental unit, the tenants continue to be in possession of the home. I am therefore awarding the landlords the entire amount requested in their Monetary Order.

As the landlords were successful in their application, they can, pursuant to section 72 of the *Act*, recover the cost of the $100.00 filing fee from the tenants.

Using the offsetting provisions of section 72 of the *Act*, I allow the landlords to retain the tenants` $1,400.00 security deposit plus applicable interest in partial satisfaction of the monetary award. No interest is payable over this period.

Pursuant to section 67 of the *Act* and based on the landlords' evidence, I find that the landlords are entitled to a Monetary Order of $4,650.00 for unpaid rent and a return of the repair fee.

Monetary Order – Tenants

The tenants are seeking a Monetary Order of $5,000.00 from the landlords for damage and loss suffered as a result of mould present in the rental unit. The basis of the tenants' claim rests on the fact that they have abandoned the rental unit due to large amounts of black mould present in the rental unit. GM explained that her clients' daughter became very ill. The tenants concluded this was a result of this mould and as a result moved out of the rental unit after ten days. As such, the tenants are seeking a return of their damage deposit, and the rent paid for the duration of time they occupied the rental unit. Furthermore, they are looking to recover costs associated with moving, translating documents related to their claim and the expenses of a professional cleaner and home inspector who prepared a report for them.

It is very difficult to make any award when receipts for alleged expenses were not produced for the hearing. It is challenging to understand how the tenants were able to produce a home inspection report compiled by TG, yet were unable to produce a receipt for this report. Furthermore, no receipts, bills, credit card or bank statements were presented at the hearing concerning the "miscellaneous" costs associated with their application. Counsel for the tenants stated that she had no receipts from her clients and that her clients had instructed her that they were unable to identify which moving company they used to vacate the premises. The tenants' inability to provide their lawyer with basic information for which they are seeking reimbursement, makes it problematic to justify their application for a Monetary Order.

Based on these shortcomings, I am not satisfied that the Monetary Order sought by the tenants is justified. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the tenants failed to prove their entitlement to their claim for a monetary award.

As the tenants were unsuccessful in their application, they are not entitled to the return of their filing fee.

Conclusion

I am granting the landlords an Order of Possession to be effective two days after notice is served to the tenants. If the tenants do not vacate the rental unit within the two days required, the landlords may enforce this Order in the Supreme Court of British Columbia.

I am making a Monetary Order of ~~$3,800.00~~ $4,650.00 in favour of the landlords as follows:

Item	**Amount**
Unpaid Rent January 2017	$2,800.00
Unpaid Rent February 2017	2,800.00
Repair Fee paid	350.00
Filing Fee	100.00
Less Security Deposit	(-$1,400.00)
~~Less Monetary Order for Tenants~~	~~(-$850.00)~~
Total Monetary Award	**~~$3,800.00~~ 4,650.00**

The landlords are provided with formal Orders in the above terms. Should the tenants fail to comply with these Orders, these Orders may be filed and enforced as Orders of the Provincial Court of British Columbia.

The tenants` application for a Monetary Order for the cost of emergency repairs, and for money owed as compensation for damage or loss under the *Act* is dismissed.

The tenants` application for a return of the security deposit is dismissed.

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: February 27, 2017

Residential Tenancy Branch