



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, CNR, MNR MNDC, MNSD, FF

Introduction

This hearing dealt with applications from both the landlord and the tenant(s) under the *Residential Tenancy Act* ("the Act"). The landlord applied for: an Order of Possession for Unpaid Rent pursuant to section 55; a monetary order for unpaid rent pursuant to section 67; and authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied pursuant to the Act for: cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") pursuant to section 46; a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; authorization to obtain a return of all or a portion of the security deposit pursuant to section 38 and authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The landlord confirmed receipt of all of the evidentiary materials submitted by the tenants as well as the tenant's Application for Dispute Resolution package.

Issue(s) to be Decided

Should the landlord's 10 Day Notice to End Tenancy be cancelled?

Or is the landlord entitled to an Order of Possession?

Is the landlord entitled to a monetary order for unpaid rent?

Is the tenant entitled to a monetary order for repairs made and/or paid for by the tenant?

Is the landlord or the tenant entitled to recover their filing fee for each of their applications?

Background and Evidence

This tenancy began on July 31, 2016 as a month to month tenancy with a monthly rental amount of \$1300.00 payable on the last day of each month. The tenant continues to reside in the rental unit. The tenant testified that she did not pay a security or pet damage deposit at the outset of this tenancy. The landlord sought an Order of Possession while the tenant sought to cancel the landlord's 10 Day Notice and continue the tenancy. The landlord sought to recover the unpaid rent in the amount of \$3343.00 and the tenant sought to recover costs for emergency repairs done to the rental unit in the amount of \$5833.96. The landlord stated that her calculation of the rental amount was miscalculated and the amount of unpaid rent is in fact \$3330.00. The landlord's application was amended accordingly.

On June 2, 2017, the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent indicating an outstanding rental amount of \$3343.00. The landlord testified that the tenant did not pay the full rent for the months of April 2017, May 2017 and June 2017. The tenant testified that she withheld rent for the months of April and May 2017 and that she only paid a portion (\$570.00) of June 2017 rent in order to recover her expenditures on emergency repairs.

The tenant testified that, when she attended to the rental unit on July 31, 2016 (the first scheduled day of her tenancy), she was appalled by the condition of the rental unit. She was moving into the rental unit with her elderly mother and another family member. Based on the condition of the unit, the tenant testified that her family could not stay in the rental unit that night. The tenant submitted a receipt showing that she paid for 2 nights' hotel accommodations July 31, 2017 and August 1, 2017.

The landlord testified that while the rental unit was dirty and that a couple elements of the rental unit required repair or replacement, the unit was not *unliveable*. She testified that a friend of hers resided in the unit prior to these tenants and that, while she had to leave in a hurry, she had generally kept a clean house. The landlord testified that, when the tenant paid a portion (\$570.00) of rent for June 2017, she provided the tenant with a receipt stating, "*for use and occupancy only*". The landlord testified she provided receipts with "*for use and occupancy only*" on them when the tenant paid rent for July 2017 and August 2017. The tenant did not dispute this testimony.

The tenant submitted photographs of the rental unit before, during and after cleaning and repairs, renovations. The photographs show a significant amount of clothing and other personal items left behind by the previous tenant as well as stained carpets and

dirty walls. The tenant also provided photographs that show the work in progress (bathroom renovations and clean up) and work completed by the tenants and individuals on behalf of the tenants to improve the conditions within the rental unit.

The tenant testified that, on July 31, 2017 (move-in day), she called her brother who is a contractor and asked if he could come look at the rental unit to assess the need for repairs. The tenant's mother and co-tenant testified that the unit smelled like urine and feces from animals and that it was generally disgusting. Therefore, the tenant determined she and her co-tenants would spend the night at a hotel in order to clean the rental unit. She testified that it took two days of cleaning in order to be able to move in.

The tenant's brother ("the contractor") testified on behalf of his sister (the tenant). He testified that she had called him to say that the unit was in awful condition and asked him to come assess the unit. The contractor testified under oath as to the details of the condition of the unit – including its uncleanliness and its required repairs. He testified that the landlord agreed to contribute to payment of the contractor to undertake some repairs to satisfy the tenants. The landlord did not dispute that she agreed to pay the contractor however she says the work undertaken on the instructions of the tenant became excessive in scope beyond repairs and into renovations including replacing kitchen countertops.

The tenant's witness SS testified that she was called to the rental unit that first day when the tenants were present to move in and begin their tenancy. Witness SS testified that Tenant LF was very upset, crying and arrangements were made to have the tenants reside in a hotel nearby. Witness SS testified that she often does paid housecleaning work, that she was asked to clean this rental unit and that she was paid \$300.00 by the landlord and \$675.00 by the tenant to clean the rental unit.

The tenant's witness RV provided similar testimony to Witness SS with respect to the condition of the rental unit when the tenants were scheduled to move in. He stated that Tenant LF cried on the first day they were scheduled to move in when she saw the condition of the rental unit. He testified that the rental unit smelled very badly (like feces and urine). He testified that no room in the rental unit was clean. He testified that, eventually, he helped with clean-up, dealing mainly with the exterior of the house. He testified that there were substantial amounts of animal feces outside of the house – in the yard and on the stairs to the residence.

Both Witnesses RV and SS and the two tenants who attended this hearing referred to black mold throughout the rental unit – under the carpets, in the bathroom and in the kitchen as well as other areas of the home (including the basement). Witness MF (brother/contractor) was responsible for most of the repair work done to the rental unit. The witness provided a \$5500.00 invoice to the tenant (his sister) and the witness testified that he was assured by the landlord he would be paid. I accept the evidence of Witness MF as well as Witness RV and the two tenants present at this hearing that the landlord agreed to pay for repairs to the rental unit. I refer to a June 2, 2017 note written by the landlord. The note, provided the same date as the notice to end tenancy to the tenant, states, “... *do not buy anything else for my house. If something necessary is needed, I will buy it. I will not pay for anything else you buy. ...*”

The tenant submitted invoices for this hearing including but not limited to the cost of a hot water tank and other appliances, contractor work done by her brother (kitchen floors and cabinets as well as carpeting replacement, etc.), hardware store purchases and invoices for interior and exterior cleaning. The tenant submitted very complicated calculations with respect to the amount owed to her by the landlord. The tenant testified that she sought compensation for \$402.50 for 2 nights' hotel stay when the tenants were scheduled to move in to the rental unit but could not do so. The tenant sought compensation for the renovations done by her brother. An initial invoice submitted by her brother was approximately \$8300.00 however a second invoice submitted for \$5500.00. The tenant testified that they reduced the amount of the bill when the landlord balked at the total. The tenant and her brother/contractor testified that they were aware the landlord was having financial issues and as a result, they agreed to reduce the amount of the bill for his work.

The landlord testified, undisputed by the tenant, that she has paid the tenant a significant amount of money to compensate her for her expenditures for the rental unit. The tenant agreed that the landlord had paid her approximately \$8000.00 but stated that some of that money was put towards another outstanding debt owed by the landlord to the tenant unrelated to the tenancy. The tenant also submitted that the amount of money she had spent on renovations was both necessary and urgent (making them emergency repairs) and that furthermore, the landlord had not fully compensated her for the costs to repair and renovate the rental unit. The tenant stated “*why would a renter spend their own money to renovate someone else's home?*” She testified that she merely helped the landlord out by paying upfront as she knew the landlord was having financial problems.

The tenant testified that the landlord told her that when she sold her winery in the area, she would pay all outstanding debts to the tenant. Two of the witnesses supplied similar testimony. The landlord did not dispute this testimony.

Analysis

I accept the testimony of both the landlord that the tenant did not pay the April 2017 and May 2017 as well as the entirety of June 2017 rent within five days of receiving the 10 Day Notice to End Tenancy. The landlord provided undisputed testimony that, when the tenant paid a portion of rent for June 2017, and rent in full for July and August 2017, she provided the tenant with receipts stating, "*for use and occupancy only*" thereby ensuring the tenant was aware that her acceptance of the rent was not intended to reinstate the tenancy.

The tenant testified that she understood the landlord sought to end her tenancy for failure to pay rent and made application pursuant to section 46(4) of the *Act* within five days of receiving the 10 Day Notice to cancel the notice to end tenancy. The tenant relies on section 33(7) of the *Act* claiming she was required to make emergency repairs and therefore, as indicated below, a tenant may deduct the amount owed by the landlord for emergency repairs from rent if a landlord does not reimburse a tenant for the cost of emergency repairs.

Section 33 regarding emergency repairs is reproduced here,

33 (1) In this section, "**emergency repairs**" means repairs that are

- (a) urgent,
- (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and
- (c) made for the purpose of repairing
 - (i) major leaks in pipes or the roof,
 - (ii) damaged or blocked water or sewer pipes or plumbing fixtures,
 - (iii) the primary heating system,
 - (iv) damaged or defective locks that give access to a rental unit,
 - (v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

- (a) emergency repairs are needed;
- (b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;
- (c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

- (a) claims reimbursement for those amounts from the landlord, and
- (b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:

- (a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;
- (b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);
- (c) the amounts represent more than a reasonable cost for the repairs;
- (d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

- (7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

The landlord did not dispute that the tenant undertook extensive repairs and some renovations as well as clean-up in the rental unit. The first threshold that the tenant must meet is to prove that the repairs were emergency repairs, as defined at section 33, is that the repairs were urgent. I find that the clean-up and repairs done by the tenant after the outset of the tenancy cannot be described as “urgent” nor were the repairs necessary for the health or safety of anyone or for the preservation or use of residential property. Finally, I find that the repairs were not done in relation to repairs of water or sewer or other plumbing pipes, the roof, the primary heating system, electrical systems, locks on access doors to the unit – types of repairs that would qualify pursuant to section 33 as above.

In making the determination that the repairs to the property were not emergency repairs, I have considered all of the testimony by the landlord, the tenants and the tenant’s witnesses as well as the photographic evidence. I find that all of the testimony and photographic as well as documentary evidence proves that the rental unit was both unclean and untidy when the tenants arrived to move in. While the condition of the rental unit was unsightly and required extensive cleaning, this condition does not meet the Act’s definition of emergency repairs. I also note that the tenant provided insufficient evidence to prove that she gave the landlord notice and opportunity, pursuant to section 33(3) of the Act to perform the emergency repairs. As I have found that the repairs are not emergency repairs, the tenant is not entitled to withhold rent. I provide section 26 of the Act below to clarify the requirement to pay rent. As the tenant withheld rent, I find that the landlord is entitled to an Order of Possession pursuant to section 55 of the Act.

Rules about payment and non-payment of rent

- 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.
- (2) A landlord must provide a tenant with a receipt for rent paid in cash.
- (3) Whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not
- (a) seize any personal property of the tenant, or

- (b) prevent or interfere with the tenant's access to the tenant's personal property.

(4) Subsection (3) (a) does not apply if

- (a) the landlord has a court order authorizing the action, or
- (b) the tenant has abandoned the rental unit and the landlord complies with the regulations.

The landlord sought a monetary order for unpaid rent. Given that the tenant candidly acknowledged that she did not pay rent for the months of April 2017, May 2017 and a portion (\$730.00) of June 2017, the landlord is entitled to a monetary amount totalling \$2330.00 in unpaid rent. However, the tenant is also entitled to a monetary amount for the cost of repairs.

The tenant's application for \$5833.96 relates to extensive repairs to the rental unit. Both tenants in attendance at this hearing as well as the tenant's three witnesses provided evidence that the rental unit was unclean, untidy and in a state of some disrepair at the outset of the tenancy. As of June 2, 2017, the landlord asked the tenant to cease with work on the rental unit saying, "... *do not buy anything else for my house. If something necessary is needed, I will buy it. I will not pay for anything else you buy. ...*" I accept the testimony of the landlord, supported by this evidence that, as of the date of this note, she decided that she did not wish the tenant to continue to renovate her rental unit.

The amounts sought by the tenant and the determination of the amounts remaining owing by the landlord are elusive. It is clear and undisputed that the tenant paid \$402.50 for 2 nights' hotel stay when the tenants were scheduled to move in to the rental unit but could not do so. I find that, based on the largely undisputed description of the unit at move in by the witnesses and parties to this hearing the tenant is entitled to recover the cost of the hotel stay. I find that the landlord should have provided the rental unit in a more suitable and clean condition. I also accept the testimony of the witnesses that it would have been beyond uncomfortable to sleep in the rental unit before a more thorough cleaning took place.

The undisputed evidence at this hearing showed that the tenant paid approximately \$675.00 for cleaning to the rental unit. The evidence was overwhelming that additional cleaning was required. The total cost of cleaning was \$975.00 with \$675.00 paid by the tenant. Therefore, I find the tenant is entitled to compensation for cleaning in the amount of \$600.00 to further recover the cost of cleaning while still sharing some of the

cost with the landlord. I find that the landlord is required to pay the bulk of the cost for cleaning while the tenant should contribute based on all of the circumstances of the start of this tenancy.

The tenant also sought compensation for the renovations done by her brother. Based on all of the testimony of the witnesses that attended this hearing, I accept that the landlord agreed to pay for cleaning, repairs and basic renovations. The landlord also conceded that she agreed to a certain amount of repairs as well as renovations, including the conversion in the bathroom to include a shower stall.

The tenant acknowledged that the landlord had paid her approximately \$8000.00 towards repairs, cleaning and purchases made by the tenant for the home including but not limited to appliances. The letter from the landlord to the tenant stating that, as of June 2, 2017, she will no longer pay for work to the rental unit proves that the landlord agreed to pay for a certain amount of repair and clean-up of the rental unit. I rely on the second invoice in the amount of \$5500.00. All of the testimony and documentary evidence at this hearing show an agreement for payment with respect to this second invoice. It is difficult to calculate an exact amount owed by the landlord to the tenant given the changing amounts of invoices as well as some lack of clarity on the amounts paid by each party in relation to this tenancy. I am unable to consider amounts paid towards another outstanding debt or consider that outstanding debt, unrelated to this tenancy, in considering what the landlord is required to pay the tenant.

When a tenancy agreement exists between the landlord and the tenant, both are bound to meet certain obligations. If a landlord fails to meet his obligations and a tenant is subsequently deprived use of a part of their premises, the tenant may be entitled to damages in the form of a monetary award or rent abatement. In considering the tenant's monetary request for compensation for the repairs and renovations to the residential premises, I find that the landlord did not make *sufficient* efforts to ensure a clean, tidy, safe and sanitary residence prior to the tenants' move-in date.

I accept the testimony of the tenant and her witnesses regarding the cleanliness (or lack thereof) of the rental unit. The tenant has shown through her documentary and photographic evidence as well as the compelling testimony of her witnesses that the rental unit required some repair and that the landlord agreed to pay for some repair and some renovations. Under section 32(1) of the *Act*, a landlord is required to provide a residential property in a state of repair that complies with health, safety and housing standards under the law and having regard to the character of the rental unit, make it

suitable for occupation by the tenant(s). The tenant is entitled to compensation for the repairs that were necessary, paid for by the tenant and agreed upon by the landlord.

If a tenant is deprived of the use of all or part of the premises, the tenant may be entitled to damages. The types of damages an arbitrator may award include out of pocket expenditures if proved at the hearing in accordance with section 67 of the *Act*. The tenant has provided documentary evidence of out of pocket expenditures with respect to cleaning and purchases to facilitate repairs. However, in this case, an assessment of the nature of the agreement between the parties must be considered. In circumstances where it is not possible to place an actual value on the loss, an arbitrator might assess general damages in an appropriate amount to the aggrieved party. In other circumstances, "nominal damages" might be awarded where there has been no significant loss proven, but it is a necessary tool to affirm that there has been an infraction of a legal right. Rarely, aggravated damages are awarded for significant infractions by the landlord to the tenant.

In this case, aggravated damages or nominal damages are not appropriate. However, the tenant has proven that she incurred financial loss, loss of her property and expense as a result of the condition of this rental unit at the outset of the tenancy. While the landlord attempted to ameliorate the impact on the tenant and accommodate the tenant, she is obligated to compensate the tenant for her expense and her general loss-warranting compensation. Therefore, I find that the tenant is entitled to a general damage award in the amount of \$3800.00.

The tenant also indicated on her application that she sought to the return of all or a portion of her security deposit. However, she testified that she did not pay the landlord a security deposit at the outset of this tenancy or since that date.

During the course of the hearing, the landlord testified and agreed with Witness RV that she would pay him directly for his services in clean-up of the rental unit. I cannot enforce such an agreement as it does not relate directly to the tenancy however I accept the statement of the tenant that she will compensate Witness RV appropriately.

Finally, as both parties were partly successful in their applications, I find that both parties are responsible for payment of their own filing fee.

Conclusion

I dismiss the tenant's application to cancel the 10 Day Notice to End Tenancy.

I grant the landlord an Order of Possession effective August 31, 2017. Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a monetary order to the tenant as follows,

Item	Amount
Repairs and Renovations (General Damages)	\$3800.00
Hotel Stay at outset of tenancy – 2 nights	402.50
Cleaning of Rental Unit	600.00
Unpaid Rent: April, May and part June 2017	-2330.00
Total Monetary Order	\$2472.50

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: August 04, 2017

Residential Tenancy Branch