



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MOUNTAIN TOWN PROPERTIES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR OPR MNR MND MNDC MNSD RP RR FF

Introduction

This reconvened hearing dealt with applications from both the landlord and the tenants pursuant to the *Residential Tenancy Act* ("the Act"). On May 16, 2017, the original hearing with respect to these applications was held, both parties attended and a decision was issued. That decision was reviewed and a new hearing was ordered. On the first reconvened hearing date (August 31, 2017), the tenants both attended the hearing however the landlords were unable to attend. The matter was rescheduled for this hearing date, September 6, 2017. At this hearing, both tenants attended. One party attended to represent the landlord ("the landlord"). All parties were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. Both parties confirmed having received the other party's evidentiary materials for the other party's applications and this hearing.

The landlord applied for an Order of Possession for Unpaid Rent pursuant to section 55 however the landlord withdrew this portion of his application as the tenant has now vacated the rental unit. At this hearing, the landlord sought a monetary order for unpaid rent pursuant to section 67; authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants withdrew their application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent pursuant to section 46 and their application that the landlords make repairs pursuant to section 33. The tenants proceeded with their application for a monetary order for compensation under the *Act*, regulation or tenancy agreement pursuant to section 67 and an order to allow the tenant(s) to reduce rent for repairs agreed upon but not provided, pursuant to section 65; as well as recovery of the filing fee for this application pursuant to section 72.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent and damages as well as to retain the tenants' security deposit towards any monetary order?

Are the tenants entitled to a monetary order to reflect a rent reduction for the landlord's failure to make repairs to the rental unit during their tenancy?

Is either party entitled to recover the filing fee for their application from the other party?

Background and Evidence

While I have turned my mind to all the documentary evidence; digital evidence and documentary evidence including e-mail correspondence, as well as the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal and most relevant aspects of each party's claim and my findings on each application are set out below.

This tenancy began on November 24, 2015. The rental amount of \$1150.00 was payable on the 1st of each month. The tenants vacated the rental unit on May 3, 2017 – approximately 7 months prior to the predetermined end date of their most recent tenancy agreement. The landlord continues to hold a \$575.00 security deposit and a pet deposit of \$575.00 paid by the tenants on December 15, 2015.

A copy of the most recent tenancy agreement (signed October 26, 2016) was submitted as evidence for this hearing. The agreement included an addendum with a liquidated damages clause that required the tenants to pay \$750.00 if the tenants breached the tenancy agreement in such a manner that requires the tenancy ends before the end of the fixed term.

The landlords sought a monetary order totalling \$3050.00 from the tenants as well as the recovery of their \$100.00 filing fee.

Item	Amount
Liquidated damages fee	\$750.00
April 2017 rent outstanding	1150.00
May 2017 rent outstanding	1150.00
Less Security & Pet Damage Deposit (\$575.00 + \$575.00 = \$1150.00)	-1150.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought by Landlord	\$2000.00

The tenants sought a monetary order totalling \$5690.00 and recovery of their \$100.00 filing fee.

Item	Amount
Loss of Use of Yard	\$3910.00
Loss of Use of Bath/shower	460.00
11 hours of Tenant M's time @120.00 per hour	1320.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought by Tenants	\$5790.00

The tenants testified that they were justified in vacating the rental unit prior to the end of the fixed term. They testified that they were provided with a 10 Day Notice in May 2017 to vacate the unit. The landlord testified that the tenants did not advise her that they would be complying with the notice to end tenancy or provide any information about when they might move. The landlord testified that it was impossible to re-rent the unit immediately given the lack of notice. The landlord testified that she doubts the move-out was as a result of health and safety concerns given that there were no unaddressed concerns of this nature at the rental unit and given that the tenants continued to reside in the unit for approximately one year and half.

The tenants acknowledged that they did not pay rent in April 2017 or in May 2017. Tenant M testified that he told the landlords they could retain the security and pet damage deposit to cover April 2017 rent. The tenants acknowledged that they stayed in the rental unit until May 3, 2017. They testified that they should only be responsible for the 3 days that they overstayed ("over hold"). The tenants point to email correspondence between the parties. After the tenant advises the landlord on April 3, 2017 that they intend to vacate the rental unit, the landlord does not raise issues regarding the timing of the move-out or the rental amounts. The landlord's representative writes that the landlord agrees to accept less than one months' notice and allow the tenants to move-out before the end of the fixed term. However, the landlord's agent does advise the tenants that they are required to pay outstanding rent for April 2017. A second reminder to pay outstanding rent is sent via email to the tenants on April 10, 2017 by the landlord's agent.

The tenants stated that they were forced into signing the fixed term lease and should not be held to it. The tenants rely on the email messages from the landlord's agent submitting that those emails indicate the landlord was willing to release them from their obligation to fulfill the fixed term lease.

The tenants also submit that, given all the circumstances of the tenancy as described below, they should not have been required to continue with the fixed term agreement until the expiry date.

The tenants testified that, from December 2016, the bath/shower in their rental unit was not functional or safe to use. They testified that this bath/shower was the only bath/shower in the only bathroom of their rental unit. They testified that they advised the landlords in writing as well as by telephone that the bath/shower required repair.

The landlord's agent stated that the leak in the bath/shower was reported to them on December 27, 2016. The landlord testified that, given the time of year (winter/holidays), it was difficult to have someone attend and investigate the leak. She testified that a bucket was placed under the leak as a precaution. She testified that, ultimately, a contractor came out to investigate on January 13, 2017 but that the bath/shower was not repaired at that time. The landlord was advised that the bath/shower repair was not a 'quick fix'. The bath/shower was ultimately repaired in mid-February 2017. The landlord could not remember the exact date in February 2017 that the bath/shower was repaired. She testified that, as well as holidays, the repair was delayed because of the limited workforce in the area of the rental property. The landlord testified that she believed the tenants were able to use the bath/shower prior to its repair.

Both tenants testified that they did not use the bath/shower while awaiting their repair as they feared damage to the rental unit and their belongings if the leak got worse. They provided undisputed testimony that the bath itself required repair and that they were very concerned about its strength to hold a full grown person while awaiting repair. The tenants testified that they would use the showers at a local swimming pool during the 2 months that the bath/shower was not useable. They testified that they did so several times a week.

The tenants testified that, over the course of their tenancy, they were also unable to use their yard in the front of their home. The tenants testified that they have pets (dogs) and children and that the yard was treacherous in bad weather. The tenants testified that the dogs and children could not easily use the yard because an eaves trough spout drained directly into the yard creating a "soggy moat" most of the time. This created additional inconvenience and mess as well as a dangerous entrance way to the home.

The landlord's agent testified that she was aware that the eaves trough drained into the yard however she submitted that the tenants were exaggerating the effects of the soggy yard. She testified that, on occasion, the water would result in a puddle approximately 4

feet in diameter and that the yard was never entirely flooded or consumed as described by the tenants. The landlord testified that the yard was useable and did not require repair. She submitted that there was certainly no health or safety issue with respect to the yard and therefore the landlord was not obligated to take action with respect to the yard.

Tenant M testified that his time, in making calls regarding repairs, arranging appointments and contacting the landlord equalled more than 11 hours. Tenant M testified that he earns \$120.00 an hour and therefore should be compensated at that rate by the landlord for his time.

Analysis

Pursuant to section 32 of the Act and Residential Tenancy Policy Guideline No.16, “[the] Legislation allows a landlord or tenant to make a claim in debt or in damages against the other party where there has been a breach of the tenancy agreement or the Act. Damages [are] money awarded to a party who has suffered a loss which the law recognizes.” When a tenancy agreement exists between the landlord and the tenant, both are bound to meet certain obligations. As the tenants used the term “quiet enjoyment” several times in their submission, I provide excerpts from Policy Guideline No. 6 on quiet enjoyment which states,

At common law, the covenant of quiet enjoyment “promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant’s right to freedom from serious interferences with his or her tenancy.

And

A landlord can be held responsible for the actions of other tenants if it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

As the tenants have made an application and a claim that their landlord’s failure to act resulted in their loss of quiet enjoyment, it is their burden to show that loss through evidence submitted to the arbitrator. When considering whether there has been a breach of a tenant’s right to quiet enjoyment, I must consider whether the landlord has created or allowed a **substantial interference** to these tenants’ enjoyment of their premises. Temporary inconvenience does not constitute a breach of quiet enjoyment -

an interference that would give the tenant sufficient cause to end the tenancy would constitute a breach of quiet enjoyment.

In this case, I find that the soggy moat yard is, as described by the landlord, an inconvenience. I find based on all of the testimony and evidence before me, that the tenants were able to use the yard and that the yard's condition did not result in health or safety concerns. I find that the landlord's steps, in the circumstances, sending a party to inspect in response to the tenants' complaint and determining that action was not necessary in this circumstance, met the landlord's obligations under the Act.

The standard with which to consider compensation for loss of quiet enjoyment is that the tenants were subject to **substantial interference** to their enjoyment of the premises. Based on the all of the evidence before me, I find that the tenants have not provided sufficient evidence to meet the burden of proof, on a balance of probabilities that they were **unreasonably disturbed** because of the soggy moat yard. I do not accept the entirety of the tenant's evidence regarding the level of disturbance or that any inconvenience they suffered was out of the ordinary.

I dismiss the tenants' claim for compensation based on a loss of quiet enjoyment with respect to the rental unit yard.

With respect to the tenant's application for a rent reduction as a result of a failure to repair the bath/shower in the rental unit, section 32 of the *Act* provides the landlord and tenant obligations to repair and maintain the rental unit. The landlord's obligations are as follows;

- 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.

I find that the tenants have provided largely undisputed evidence sufficient to prove that the landlord did not meet housing standards by delaying the repair of the bath/shower. Furthermore, the tenants have shown that they made multiple requests to the landlord to make repairs to the bathroom bath/shower. Despite the fact that there was only one bathroom in the rental unit for the tenant family, the repair issues remained unresolved for approximately two months. The evidence, including the landlord's testimony

provided shows that the landlords were aware of the repair issues as well as the tenant's dissatisfaction with the restriction of bath/shower facilities.

If a landlord fails to meet the obligations under the Act and a tenant is subsequently deprived use of a part of their premises, the tenant may be entitled to damages in the form of rent abatement or a monetary award. Any loss of use of a part of the property, services or facilities as originally provided within the residential tenancy agreement may, under section 27 and 32 of the *Act*, may result in a rent reduction that is equivalent to the reduction in the value of the tenancy agreement resulting from any loss of use or restriction to use.

I find that the landlord has failed to provide suitable bathing facilities in accordance with the residential tenancy agreement and the principles of the Act. I accept the testimony of the tenants and consider it reasonable that they were concerned about continuing to use their rental unit bath/shower when it was leaking. I find that the 2 month period without full, confident use of the bath/shower by the tenants requires compensation by the landlord. For the time period from December 27, 2017 to February 27, 2017, the tenants are entitled to their 20% rent reduction totalling (\$230.00 per month for 2 months = \$460.00) for that period of time. I find that the tenants are entitled to a further nominal amount for ongoing issues described by the tenant and undisputed by the landlord with respect to the bath/shower. I accept the testimony of the tenants that the bath/shower continues to have minor issues and leaking causing an ongoing inconvenience. Therefore, I find that the tenants are entitled to a further 2 months' rent reduction by 10% or \$230.00. I find the tenants are entitled to compensation totalling \$690.00 with respect to the bath/shower.

I dismiss the tenant's application to recover \$120.00 per hour for 11 hours of his time in attempting to obtain quotes for repairs to the bath/shower as the tenant is being compensated for the loss of the use of the bath/shower and as the landlord did not require the tenant to take action in this manner. The nature of their monetary compensation for loss of use includes consideration of any inconvenience to the tenants in attempting to address the issue. Therefore, I find that the tenant is not entitled to recover \$1320.00 for his time.

With respect to the landlord's claim for a liquidated damages fee, Residential Tenancy Policy Guideline No. 4 provides guidance with respect to claims by the landlord for liquidated damages,

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of

the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

The Policy Guideline provides a variety of considerations in determining if a liquidated damages clause is a penalty. Among the considerations is, as stated in the guideline, “[if] an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.” This tenant provided a vacate notice prior to his move out and prior to the end of his agreed-to fixed term tenancy. Given that the tenant made the choice, aware of the lease provisions (included in each of his lease agreements signed over the prior 5 years) to end the tenancy prior to the fixed end date.

The residential tenancy agreement is clear that this tenancy was intended to continue from October 26, 2017 to November 2, 2017. Residential Tenancy Policy Guideline No. 30 provides direction on the definition and terms of a fixed term tenancy as used in section 44 of the Act:

A fixed term tenancy is a tenancy where the landlord and tenant have agreed that the tenancy agreement will begin on a specified date and continue until a predetermined expiry date...

The tenants telephoned and emailed the landlord on April 10, 2017 to advise that they intended to vacate the residence by May 1, 2017 however they did not in fact vacate the residence until 3 days after the agreed upon date. The tenants argue that they were served with a 10 Day Notice to End the Tenancy for Unpaid Rent and vacated in accordance with the Notice. However, again, they chose to vacate after the end of April 2017 thereby limiting the landlord’s ability to re-rent the unit. Service of a Notice to End Tenancy does not negate the tenant’s obligation to advise the landlord that they are vacating the premises, just as it does not negate a tenant’s obligation to pay the rent.

A fixed term tenancy creates security for both parties to the agreement. Based on all of the evidence submitted at this hearing, the tenants breached the conditions of the residential tenancy agreement and should therefore be required to pay the lease break fee. I accept the undisputed testimony of the landlord that the tenant ended the tenancy prior to its end date without an agreement with the landlord to do so as required by the legislation. However, I find that the amount of the lease break fee is excessive in that it provides for an amount totalling $\frac{3}{4}$ of one months’ rent as a result of a broken lease. I take into consideration the amounts awarded to the landlord below.

With respect to the landlord's claim to recover the April and May 2017 rent, section 26(1) of the Act establishes that "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." I note that the tenants resided in the rental unit during the month of April 2017 without paying rent and therefore they are required to do so. I find that the landlord is entitled to recover April 2017 rent in the amount of \$1150.00.

The tenants resided in the rental unit until May 3, 2017. Given that the tenants provided notice on April 10, 2017 and that tenancies generally begin at the beginning of the month, the landlord was left in a difficult position to re-rent for the month of May 2017. However, I find that the landlord did not provide sufficient evidence to prove that the landlord made efforts (through advertisements, showings or other means) to attempt to re-rent the unit for a portion of May 2017. As a result of the lack of evidence from the landlord to prove that the landlord sufficiently mitigated any loss for May 2017 rent, I find that the landlord is entitled to a nominal monetary amount to reflect some loss that could be anticipated by the tenants in the circumstances. Therefore, I find the landlord is entitled to \$575.00 to compensate some rental loss as a result of the tenants' decision to vacate.

Given that the landlord will recover unpaid rent as well as a portion of rental loss and given that the landlord has provided a limited description of efforts to re-rent the unit after being advised by the tenants that they intended to vacate the residence, I find that the landlord is entitled to recover \$575.00 as a result of the broken lease by the tenants and the landlord's time and efforts to re-rent.

As both the landlords and the tenants have been partly successful in their application, I find that the parties will bear their own filing fee costs. With respect to the monetary applications of both parties before me, I find that ... is entitled to a monetary order as follows,

Item	Amount
Landlord's Liquidated damages fee (reduced)	\$575.00
Landlord's April 2017 rent outstanding	1150.00
Landlord's May 2017 rental loss	575.00
Less Tenant's Security & Pet Damage Deposit (\$575.00 + \$575.00 = \$1150.00)	-1150.00
Tenant's Loss of Use of Bath/shower	-690.00
Total Monetary Order to the Landlords	\$460.00

Conclusion

I allow the landlord to retain the tenants' security (\$575.00) and pet damage deposits (\$575.00) towards their monetary amount.

I issue a monetary order in favour of the landlord's in the amount of \$460.00.

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: September 12, 2017

Residential Tenancy Branch