Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, MNDL-S, MNRL-S, MNDCL-S, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement 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 applied for cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46.

The landlord and Tenant JM (the tenant) attended the hearing and 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. The tenant said that he was expecting Tenant TG to call into this hearing, but that did not occur during this 34 minute teleconference hearing. The tenant said that he had not thought to ask for her authorization to act on her behalf on this matter as he had expected her to call into this hearing. In accordance with the Residential Tenancy Branch's Rules of Procedure, I conducted the hearing in the absence of Tenant TG.

As the tenant confirmed that the tenants received the landlord's 10 Day Notice posted on their door on December 4, 2018, I find that the tenants were duly served with that Notice on that date in accordance with section 88 of the *Act*.

The tenant testified that he sent copies of the landlord's dispute resolution hearing package to the landlord by registered mail on December 23, 2017, and provided a second copy in the landlord's mailbox. The landlord confirmed that he received a copy of the tenants' dispute resolution hearing package on January 2, 2018. I find that this package was duly served to the landlord in accordance with section 89 of the *Act*.

The landlord entered into written evidence proof that he sent both tenants copies of the landlord's dispute resolution hearing package by registered mail on January 4, 2018. The landlord provided copies of the Canada Post Tracking Numbers and Customer Receipts for these two separate registered mailings. As the tenant confirmed that he received copies of the landlord's dispute resolution hearing package sent by the landlord by registered mail on January 4, 2018, I find that the tenant was duly served with this package in accordance with section 89 of the *Act*. Although the tenant testified that Tenant TG moved out of the rental unit in early January, he also said that no one had informed the landlord that this had occurred. On this basis, the landlord had no way of knowing that Tenant TG may no longer have been residing in the rental unit when the dispute resolution hearing package was deemed served to Tenant TG. In accordance with sections 89 and 90 of the *Act*, I find that Tenant TG was deemed served with the landlord's dispute resolution hearing package on January 9, 2018, five days after its registered mailing to the last known address for Tenant TG provided to the landlord.

The landlord confirmed that the tenant's written evidence was received by the landlord in sufficient time to prepare for this hearing. The tenant testified that photographs included in the written evidence package sent to the Residential Tenancy Branch were not provided to the landlord, as he was unaware that it was the tenant's responsibility to serve these photographs to the landlord. Under these circumstances, the tenant's written evidence was duly served to the landlord in accordance with section 88 of the *Act*. I advised the tenant that I could not consider the tenant's photographic evidence as it had not been served to the landlord. As the tenant confirmed that the landlord's written evidence had been provided to the tenants in two separate packages, I find that these packages were also served to the tenants in accordance with sections 88 and 90 of the *Act*.

At the commencement of the hearing, I clarified the spelling of Tenant TG's first name, which was slightly different on the two applications. In accordance with the powers delegated to me, I corrected the spelling of Tenant TG's first name to that which appears on the first page of this decision.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to a monetary award for damage arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

This one year fixed term tenancy commenced by way of a written Residential Tenancy Agreement (the Agreement) signed by the landlord and both tenants for a tenancy that is to run from November 1, 2017 until October 31, 2018. This tenancy was for one suite in this four unit

rental building, owned by the landlord. According to the terms of the Agreement, entered into written evidence, monthly rent was set at $1,450.00, payable in advance on the first of each month, plus hydro. While the Agreement required the payment of a $725.00 security deposit, there is undisputed sworn testimony and written evidence that only $580.00 of that deposit has been paid to the landlord. The landlord continues to hold that deposit.

The landlord's 10 Day Notice identified $1,595.00 in rent owing as of December 1, 2017. This amount was comprised of $1,450.00 in rent owing for December 2017, plus $145.00, the unpaid portion of the security deposit.

The parties in attendance agreed that no payments have been made by the tenants to the landlord since the landlord issued the 10 Day Notice. The tenant testified that both tenants will have vacated the rental unit and surrendered vacant possession of the rental unit before the end of January. At the hearing, the tenant did not dispute the landlord's 10 Day Notice, confirming that rent has not been paid for either December 2017 or January 2018.

The contentious portion of this hearing narrowed to the landlord's application for a monetary award of $6,445.00. The details of the landlord's claim were outlined as follows in the landlord's Monetary Order Worksheet, entered into written evidence by the landlord:

Item	**Amount**
Unpaid December 2017 Rent	$1,450.00
Unpaid Portion of Security Deposit	145.00
Unpaid January 2018 Rent	1,450.00
Anticipated Loss of Rent for February 2018	1,450.00
Anticipated Loss of Rent for March 2018	1,450.00
Damage to Front Door and Wall(s)	500.00
Total Monetary Order Requested	**$6,445.00**

In addition, the landlord requested the recovery of the landlord's $100.00 filing fee.

In written evidence and sworn testimony, the landlord asserted that the front door of this rental unit had been seriously damaged during this tenancy as had a wall, and that a bedroom door was missing altogether. The landlord provided no receipts, estimates or photographs to substantiate the landlord's application for a monetary award for damage caused by the tenants. The landlord gave undisputed sworn testimony that it would be difficult to rent out this suite to prospective tenants for February 2018, as it would take time to repair the damage caused during this tenancy. The landlord also testified that the landlord's efforts to rent out the remainder of the suites in this four-unit rental building had been unsuccessful, thus far.

The tenant provided sworn testimony supported by written evidence regarding the condition of the rental unit, many features of which the tenant claimed were deficient. The tenant

maintained that the landlord had not fulfilled adequately the obligation in the Agreement whereby the landlord was responsible for providing heat to the rental unit. The tenant provided undisputed evidence that the landlord approached the tenants during the first week of their tenancy to let them know that the landlord had been unsuccessful in renting out any of the other suites in this four-unit building. For that reason, the landlord had told them that the landlord was unwilling to turn on the boiler that heated the entire building. Rather than provide the tenants with the heating source that they were expecting to receive, the tenant testified that the landlord handed them an electric space heater at the end of the first week of November and a second one a week later. The tenant did not dispute the landlord's assertion that the landlord committed to pay the tenants' hydro bills during the time period when the landlord was planning to leave the boiler heating system turned off and until the landlord had more tenants for this building. The tenant testified that the landlord's heaters were small and inadequate to properly heat the entire rental unit. The tenant also maintained that turning both heaters on simultaneously caused the circuit breakers in the rental unit to fail, turning off the hydro for the rental unit.

The landlord testified that the tenants had entered into an oral agreement with the landlord to provide heating to the rental unit in the way proposed by the landlord. The landlord said that the first notification from the tenants that this was not acceptable to them was in January 2018. The tenant disagreed with the landlord's claim that the tenants had agreed to this arrangement. The tenant maintained that the landlord simply gave the tenants the heaters and offered no other alternative. The tenant said that one of the main attractive features to renting this suite was that there was a boiler heating system that would keep the rental unit well heated.

The landlord testified that for much of the tenancy, the tenants had no hydro in their rental unit. The tenant testified that the tenants had hydro for all of November and "some" of December. Since then, their hydro has been disconnected.

Analysis

The landlord's 10 Day Notice incorrectly included the unpaid portion of the tenants' security deposit as unpaid rent owing as of December 1, 2017. Despite this error in the amount identified as owing at that time, there is undisputed evidence that no portion of the correct $1,450.00 amount that was owing at the time of the landlord's issuance of the 10 Day Notice has been paid by the tenants to the landlord. Although of no consequence to the landlord's application for an Order of Possession based on the 10 Day Notice, I also note that the tenant fully admitted that no payment has been made towards either the December 2017 rent or the January 2018 rent owing for this tenancy.

I attach little weight to the tenant's claim that the landlord was unavailable to receive a payment of the rent identified as owing in December 2017. Even when the landlord was available, the tenants have not made any payments to the landlord for either December 2017 or January 2018.

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." The tenant confirmed that no order had been issued by an arbitrator appointed under the *Act* allowing the tenants to withhold any portion of the $1,450.00, that became owing as of December 2, 2017.

Under these circumstances, I find that the tenants had no valid reason to obtain a cancellation of the landlord's 10 Day Notice. I also find that the form and content of the landlord's 10 Day Notice complied with the requirements of sections 52 and 55(1) of the *Act*. I hereby dismiss the tenants' application to cancel the 10 Day Notice and allow the landlord's application to obtain an Order of Possession based on the 10 Day Notice. As the landlord did not dispute the tenant's stated plan to vacate the rental unit by 1:00 p.m. on January 31, 2018, I issue an Order of Possession to take effect at that time and date, by which time the tenants are to have surrendered vacant possession of the rental unit to the landlord.

Turning to the monetary portions of the landlord's application, I first note the wording of section 67 of the *Act*, which 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. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. Section 7(2) of the *Act* also places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

In this case, I find that there is undisputed evidence from both parties that no rent has been paid for December 2017 and January 2018. I also find that the landlord has presented sufficient evidence to support the landlord's assertion that it will take time to repair the damage arising out of this tenancy, and that it may be difficult to re-rent the premises that were subject to this fixed term tenancy that was to have continued until October 31, 2018. Given that other suites in this building have not been rented, the landlord may very well require time to reduce the tenants' exposure to the landlord's loss of rent for February 2018. For these reasons, I find that the landlord is entitled to a monetary award for unpaid rent owing for December 2017 and January 2018, and for the loss of rent for February 2018.

Although the landlord has also applied for the loss of rent for March 2018, I find that this portion of the landlord's application is premature. There is no way of knowing at this time whether the landlord will suffer a loss of rent for that month. I dismiss the landlord's application for the loss of rent for March 2018, with leave to reapply.

If the landlord had provided all of the services and facilities required by the Agreement, the landlord would be entitled to a monetary award of $1,450.00 for each of the three months. However, in this case, there is a dispute as to the extent to which the landlord provided the services and facilities that the tenants were expecting to receive when they signed their Agreement. In this regard, the landlord testified that the tenants made an oral agreement with the landlord to allow the landlord to provide heat to the rental unit by way of electric heaters in exchange for the landlord's assumption of the tenants' hydro costs. By contrast, the tenant testified that the tenants were presented with this option without any real input, and that they did not agree with this arrangement, which proved unsuitable, eventually leading to the end of their tenancy.

When there is a dispute between parties as to the terms of an oral agreement or, in fact, whether both parties entered into such an agreement, the best evidence is often the written terms that parties entered into when they signed the Agreement commencing the tenancy. In this case, there is written evidence that both parties agreed to when this tenancy began on November 1, 2017. The Agreement signed by the parties is the most reliable evidence. It states that the tenants would be responsible for providing hydro to the rental unit and that heat was to be provided by the landlord. Given that there was a heating boiler in the rental unit and no electric heaters were in place when the tenants agreed to enter into this fixed term tenancy, I find that the tenants were reasonable in their anticipation that the landlord would turn the source of heating on for the building that would provide heat to their rental unit. While I can understand why the landlord was interested in reducing the overall costs for heating when other rental units in this building remained unrented, the alternate arrangements implemented by the landlord occurred immediately after this tenancy began. The landlord's lack of success in renting out other suites in this building does not have a bearing on the landlord's duty to provide a source of heating that the tenants expected to receive when they entered into this fixed term tenancy, a few days before. Although I have given the landlord's claim that the landlord did provide a source of heating by way of the electric heaters that satisfied the commitment to provide heating to the rental unit, I do not find that these arrangements were what the tenants anticipated receiving when they entered into this Agreement, or for that matter, that they necessarily agreed with this alternate arrangement identified by the landlord.

Under these circumstances, I have taken into consideration the provisions of paragraph 65(1)(f) of the *Act*, which allows me to reduce past rent paid or owing by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement." In this situation, I find that the landlord's failure to provide an adequate and reliable source of heat of the type anticipated when this tenancy began has led to a reduction in the services and facilities provided to the tenants and has reduced the value of this tenancy. While it is difficult to place an accurate figure on the extent to which this tenancy was devalued as a result of the landlord's

actions with respect to the heating provided to this rental unit, I find that a monthly reduction of 10% of the value of the tenancy is appropriate under the circumstances. This leads to a monthly reduction in the landlord's monetary award for unpaid rent and loss of rent of $145.00 for each of the three months of entitlement provided to the landlord.

In coming to this determination, I note that the lack of heat has caused problems, eventually prompting Tenant TG to vacate the rental unit. However, I find that the tenant has not provided sufficient evidence to demonstrate that the decision to disconnect hydro service to this rental unit had such a direct bearing on the heating issue to entitle the tenants to any further reduction in the value of their tenancy agreement. I also note that many of the other deficiencies identified by the tenant in the tenants' written evidence submission would have been apparent to the tenants with any degree of due diligence at the time they rented this unit from the landlord. I do not accept that the tenants were unaware of many of the deficiencies with this rental unit until they moved into the premises.

I find that the landlord's claim for a monetary award for damage arising out of this tenancy is premature to the extent that the landlord does not yet have a clear sense of what will be entailed in repairing the damage to the rental unit. Given the apparent condition of this building, it would also be important to assess the extent to which the current conditions vary from those identified in the joint move-in condition inspection report that the landlord was responsible for creating at the commencement of this tenancy. For this reason, I dismiss the landlord's application for a monetary award for damage arising out of this tenancy, with leave to reapply.

As this tenancy is ending shortly, I dismiss the landlord's application to recover the unpaid portion of the security deposit without leave to reapply. In accordance with sections 72 and 38 of the *Act*, I order the landlord to retain the $580.00 portion of the security deposit that was paid by the tenants to the landlord in partial satisfaction of the monetary award issued in this decision. No interest is payable over this period.
As the landlord was successful in this application, I allow the landlord to recover the $100.00 filing fee for the landlord's application.

Conclusion

I dismiss the tenants' application and allow the landlord an Order of Possession based on the landlord's 10 Day Notice of December 4, 2017. The landlord is provided with a formal copy of an Order of Possession effective by 1:00 p.m. on January 31, 2018. 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 in the landlord's favour under the following terms, which allows the landlord to recover unpaid rent, loss of rent and the filing fee, and to retain the tenants' security deposit:

Item	Amount
Unpaid December 2017 Rent ($1,450.00 - $145.00 = $1,305.00)	$1,305.00
Unpaid January 2018 Rent ($1,450.00 - $145.00 = $1,305.00)	1,305.00
Loss of Rent February 2018 ($1,450.00 - $145.00 = $1,305.00)	1,305.00
Less Security Deposit Paid by Tenants	-580.00
Landlord's Filing Fee	100.00
Total Monetary Order	**$3,435.00**

The landlord's application for a monetary award for damage arising out of this tenancy is dismissed with leave to reapply. The landlord's application for a monetary award for the loss of rent for March 2018 is dismissed with leave to reapply.

The landlord is provided with these Orders in the above terms and the tenant(s) must be served with this Order as soon as possible. Should the tenant(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: January 29, 2018

Residential Tenancy Branch