



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT
 MNDCL-S, FFL

Introduction

This hearing convened as a result of cross applications. In the Tenants' Application for Dispute Resolution, filed on March 12, 2018 they sought monetary compensation from the Landlord, including return of rent paid and their security deposit in addition to recovery of the filing fee. In the Landlords' Application for Dispute Resolution, filed on March 23, 2018, they sought monetary compensation for unpaid rent and recovery of the filing fee.

The hearing was conducted by teleconference on May 30, 2018. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Are the Tenants entitled to monetary compensation from the Landlords?
2. Are the Landlords entitled to monetary compensation from the Tenants?
3. What should happen with the Tenants' security deposit?
4. Should either party recover the filing fee?

Background and Evidence

In support of their application the Tenant, V.V., testified as follows. He stated that the tenancy began September 1, 2017. Monthly rent was payable in the amount of \$3,400.00 for a self-contained home where the Tenant, the other Tenant (his spouse) as well as their two children resided.

The Tenants paid a security deposit in the amount of \$1,700.00 at the start of the tenancy.

The Tenants claimed return of two months' rent (January and February 2018) as they claimed the house became unliveable.

V.V. testified that on January 10, 2018 they started to experience a huge amount of drain flies in the rental unit. He stated that it was later determined that the drain flies were coming from the heating system. The Tenants submitted photos in evidence which showed a significant number of drain flies on the window sills, on the counters, and otherwise in the rental unit.

The Tenants informed the Landlords about the issue after which the Landlord sent in a pest control company who said it was not a pest issue, but a plumbing issue.

V.V. testified that as many as three different plumbing companies attended the rental unit attempting to address this issue. V.V. stated that the source of the drain flies was not initially determined, and after a video of the sewer system was done, it was determined that the water came from the sewage system. Apparently, the heating system was flooded with sewage water which in turn attracted drain flies which then infiltrated the home. V.V. stated that in addition to the flies, the rental unit smelled of sewage when the heating system was used.

V.V. stated that the rental unit flooded at Christmas which impacted their ability to enjoy the holiday and entertain. V.V. also stated that they were not able to use the kitchen because of the number of flies. He stated that they could not invite friends over to visit because of the condition of the rental unit, which was very upsetting as they love to entertain. He also stated that they had nowhere else to live and as such had no choice but to stay in the rental unit.

V.V. confirmed that they asked for return of their rent paid for January and February 2018 and the Landlord refused.

The Tenant stated that there was also a leak in the kitchen. He said that the Landlord did not hire any contractors and tried to do the work on his own and didn't finish the job. This left an unsightly unfinished patch of drywall in the kitchen. Photos submitted by the Tenants confirmed this testimony.

The tenancy ended on March 15, 2018.

Introduced in evidence was a copy of the residential tenancy agreement which provided that this was a 1 year fixed term tenancy starting September 1, 2017 and ending August 31, 2018. The Tenant confirmed that it was the Tenants' position that the tenancy was frustrated because of the condition of the rental unit.

The Tenant also stated that the Landlord's agents, J.Y. and K.H., told the Tenants that they could end the tenancy earlier than the fixed term. By email dated February 2, 2018 the Landlord agreed that the Tenants could end their tenancy early; a copy of that email was provided in evidence and which confirmed the Landlord agreed to an early termination.

The Tenants provided a monetary orders work sheet wherein they detailed their claim as follows:

Cost of movers	\$966.00
Rental of moving trailer	\$83.83
Return of security deposit	\$1,700.00
Return of January rent	\$3,400.00
Return of February rent	\$3,400.00
TOTAL CLAIMED	\$9,549.83

In terms of the moving costs, the Tenant testified that it was their intention to live in the property long term. The youngest daughter goes to school across the street and the oldest goes to a school nearby.

A copy of the move out condition inspection report (dated March 16, 2018) was provided in evidence and which confirmed that the Tenants provided a copy of their forwarding address in writing at the time of the inspection.

The Tenants also provided in evidence numerous photos of the rental unit as well as copies of communication between the parties regarding the issues in the rental unit. They also provided copies of witness statements

The Landlord applied for Dispute Resolution on March 23, 2018.

In response to the Tenants' claims and in support of the Landlords' claims the Landlord's representative, J.Y., testified as follows.

J.Y. confirmed that the Landlords are opposed to reimbursing the Tenants for any rent paid.

J.Y. stated that the Tenants did not inform the Landlord about the drain fly issue until January 28, 2018 such that the Landlords were not even aware there was an issue until this time.

In terms of February, J.Y. stated the Landlord agrees that there was an impact on and inconvenience to the Tenants in the month of February. However, the Landlords disagree with providing the Tenants with any further compensation.

J.Y. stated that the Tenants also have a duty, pursuant to the *Residential Tenancy Act*, to cooperate with the Landlord for regular maintenance and repairs. She confirmed that the Tenants did cooperate, but they should not be provided with any further confirmation than that which was provided to them by allowing them to terminate their tenancy early.

J.Y. confirmed that the Tenants did not pay rent for March 2018. The Landlord seeks compensation for the 15 days of March in which the Tenants were in occupation. As such, the Landlord seeks to retain the Tenants' security deposit.

J.Y. stated that the Tenants sought compensation for two months on the basis that the rental contract was "frustrated". In response, J.Y. stated that pursuant to *Residential Tenancy Policy Guideline 34—Frustration*, the test for a frustrated contract is a high one, such as an earthquake or fire. She stated that while the drain flies were a persistent annoyance, they are harmless and did not render the rental unit unliveable. She also noted that the Landlord actively tried to resolve the issues as soon as it was brought to their attention. They hired pest control people, plumbers, furnace professionals, etc.

J.Y. further stated that the Landlord agreed that the drain flies and brought the Tenants a disturbance to their right to quiet enjoyment which is why the Landlord offered to terminate the contract early.

Analysis

After consideration of the evidence before me, the testimony of the parties and on a balance of probabilities I find as follows.

The full text of the *Residential Tenancy Act*, Regulation, and Residential Tenancy Policy Guidelines, can be accessed via the website: www.gov.bc.ca/landlordtenant.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Section 32 of the *Act* mandates the Tenant's and Landlord's obligations in respect of repairs to the rental unit and provides as follows:

Landlord and tenant obligations to repair and maintain

- 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.
- (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.
- (3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.
- (4) A tenant is not required to make repairs for reasonable wear and tear.
- (5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

The *Residential Tenancy Act Regulation – Schedule: Repairs* provides further instruction to the Landlord as follows:

8 (1) Landlord's obligations:

- (a) The landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant. The landlord must comply with health, safety and housing standards required by law.
- (b) If the landlord is required to make a repair to comply with the above obligations, the tenant may discuss it with the landlord. If the landlord refuses to make the repair, the tenant may make an application for dispute resolution under the *Residential Tenancy Act* seeking an order of the director for the completion and costs of the repair

The above mandates a Landlord to make repairs when a request for repairs is to ensure reasonable aesthetics, reasonable functioning or lawful compliance with health, safety and housing standards.

The evidence before me confirms that the presence of drain flies in the rental unit and smell of sewer from the heating system was a significant issue during this tenancy. I am satisfied that the Tenants brought their concerns to the Landlords' attention and the Landlord complied with sections 32 of the *Act* and section 8 of the *Regulations* in addressing these issues.

Copies of invoices submitted by the Landlord confirm the Landlord addressed the issues in a timely and reasonable manner. However, the evidence also confirms that the issue was complicated and that numerous professionals attended the rental unit on numerous dates in hopes of determining the source of the flies. There is no question this was time consuming and disruptive for the Tenants.

I also accept the Tenants' testimony that this negatively affected their enjoyment of the rental unit and impacted their willingness to entertain guests, as the presence of flies and smell of sewer was no doubt embarrassing. I further find, based on the email communication submitted by the Tenants, that the Tenants made the Landlords aware of their concerns as well as the significant negative impact on their lives.

The Tenants allege their tenancy was frustrated by the presence of drain flies and sewer smell in the rental unit.

The Landlords agreed the Tenants could end their tenancy prior to the expiration of the fixed term. In doing so, I find the Landlords agreed the Tenants could be relieved of their obligations under the tenancy agreement. The Landlords submit that by allowing the Tenants to vacate early, they have sufficiently compensated the Tenants for the issues existing in the rental unit. I disagree.

While the Landlords responded to the Tenants' requests for repairs appropriately, and allowed them to terminate their tenancy early, I find that the value of the tenancy was significantly affected by the presence of drain flies and smell of sewage in the rental unit, and that this in turn affected their right to quiet enjoyment. This right is protected by section 28 of the *Act* and which reads as follows:

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.

Residential Tenancy Policy Guideline 6—Right to Quiet Enjoyment provides in part as follows:

“ ...

In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.

... ”

I find that the value of the tenancy was significantly reduced as a result of the presence of drain flies and sewer smell, which while possibly not harmful, limited the usefulness of the rental unit over a significant period of time. I accept the Tenants' evidence that they had limited options due to the unavailability of alternate accommodation; I expect

had they been able to find another place to live they would have moved out much sooner. I also accept their evidence that they were not able to entertain guests due to the embarrassing condition of the rental unit. I also find that the patch in the ceiling of the kitchen was unsightly and also impacted the Tenants' willingness to entertain guests.

While the rental unit was significantly impacted, it was not valueless. The Tenants continued to reside in the rental unit and store their items. I therefore find they are entitled to a 50% reduction in the rent paid for January and February 2018 for a total of **\$3,400.00.**

The Tenants claim moving expenses. As tenants are not guaranteed perpetual occupation, moving expenses are an inevitable cost of being a renter. I therefore dismiss this portion of their claim.

In an email dated February 28, 2018 the Tenants suggest that they not be responsible for paying rent for January and February of 2018. In a response dated March 1, 2018, the Landlords remind the Tenants that they are not permitted to withhold rent, but that they would discuss "compensation for the hassle brought to [their] family".

In a further email dated March 2, 2018, the Landlord's agent, J.Y., set out the Landlord's perspective on the issue, as well as providing a timeline of events. In that document J.Y. wrote that the Tenants could terminate their contract early, but they would "have to pay rent until [they] vacate the property".

I find that the Landlords agreed the Tenants would only be liable for rent until they vacated the rental unit. I find that the Tenants vacated the rental unit on March 15, 2018. As the drain fly and sewer smell issue persisted in March, I find the Landlords are entitled to 50% of the rent for that time period for a total of **\$850.00.**

The Tenants are also entitled to return of their security deposit in the amount of **\$1,700.00.**

As the Tenants have been largely successful in their claim, I award them recovery of the **\$100.00** filing fee pursuant to section 72 of the *Act*.

Conclusion

The Tenants claim for monetary compensation is granted in part. They are entitled to the sum of **\$5,200.00** calculated as follows:

Return of 50% of rent paid for January 2018	\$1,700.00
Return of 50% of rent paid for February 2018	\$1,700.00
Return of security deposit	\$1,700.00
Filing fee	\$100.00
TOTAL AWARDED	\$5,200.00

The Landlords are entitled to the sum of **\$850.00**. The amounts awarded to the parties are to be offset against the other such that the Tenants are entitled to the sum of **\$4,350.00**.

Pursuant to sections 28, 38, 67 and 72, I grant the Tenants a Monetary Order in the amount of **\$4,350.00**. The Tenants must serve this Order on the Landlords as soon as possible and, if necessary, may file and enforce the Order in the B.C. Provincial Court (Small Claims Division).

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: June 29, 2018

Residential Tenancy Branch