Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNR, FF
MNDC, FF

Introduction

This hearing convened as a result of cross applications. In the Landlord's Application for Dispute Resolution, filed August 23, 2017, the Landlord requested monetary compensation from the Tenants for damage to the rental unit (specifically the septic system) and to recover the filing fee. In the Tenants Application for Dispute Resolution filed on January 26, 2018, the Tenants also applied for monetary compensation from the Landlords and recovery of the filing fee.

The hearing was conducted by teleconference on March 12, 2018, May 31, 2018 and August 10, 2018. Both parties called into the hearings and were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form, and 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.

Preliminary and Procedural Matters

The Managing Broker for the property management company, A.M., named himself personally as the applicant on the Application for Dispute Resolution. Further, only one

Tenant was named. By Interim Decision dated March 12, 2018, and pursuant to section 64(3)(c) of the *Residential Tenancy Act,* and *Rule 4.2* of the *Residential Tenancy branch Rules of Procedure* I amended the Landlords' Application to correctly name the parties.

The parties provided their email addresses at the outset of the hearing. The parties confirmed their understanding that this Decision would be emailed to both parties and that any applicable Orders would be emailed to the appropriate party.

Issues to be Decided

1. Are the Landlords entitled to monetary compensation from the Tenants?

2. Are the Tenants entitled to monetary compensation from the Landlords?

3. Should either party recover the filing fee?

Background and Evidence

Introduced in evidence was a copy of the residential tenancy agreement indicating this one year fixed term tenancy began on October 1, 2015. Monthly rent was payable in the amount of $2,300.00 and the Tenants paid a $1,150.00 security deposit and a $1,150.00 pet damage deposit.

The Tenancy Agreement also included a "Septic System Maintenance Addendum" which was signed and dated by all parties on September 28, 2015 (the "Addendum"). The Addendum included instructions to the Tenants in terms of what not to put in the septic system as well as instructions to report any problems to the Landlord immediately. Included in the list of what not to put in the system were diapers, baby wipes, grease, oil or solvents, and liquid laundry detergent.

In the hearing before me the Landlords alleged the Tenants flushed oil in the system causing it to fail which in turned caused the Landlords to incur substantial repair costs.

The Landlord's agent, A.M., testified at the hearing. He confirmed that the tenancy began October 1, 2015. He also confirmed that he was the one who met with the Tenants and went over the tenancy agreement and Addendum with them. He also

stated that to his knowledge they had been tenants before in other properties with septic systems and therefore they were aware of how such systems are to be treated.

A.M. stated that the tenancy ended November 2016.

A.M. testified that during the tenancy the Tenants complained about the smell of the septic system. He further stated that the Landlord brought in "every septic technician in the surrounding area" to determine what the problem was; but ultimately the problem was simply the items the Tenants were putting down the drain. He claimed that since the Tenants have vacated they haven't had to pump the system and it is working fine.

A.M. confirmed that the $7,116.51 claimed on the Application for Dispute Resolution represents the amounts the Landlords seek in terms of compensation from the Tenants. The $12,174.97 figure noted on the Monetary Orders Worksheet filed in evidence by the Landlords included work on the system which was done *before* the Tenants moved in.

A.M. confirmed that the Tenants are not responsible for routine maintenance of the system. However, he alleged that into a few months of the tenancy beginning there were chronic problems which he submitted were caused by the Tenants.

A.M. stated that one septic technician, G.E.E., also thought that the Tenants were contributing to the problem.

A.M. also claimed that the Tenants were informed by an emails sent from the Landlords to stop putting grease down the drain; notably, those emails were not provided in evidence by the Landlords.

The Landlord's witness, P.I., testified as follows. He confirmed he is a technician for B.I. which is a septic installation and service company. He confirmed that he was hired by the Landlords to address issues with the septic system.

P.I. testified that initially they believed the problem was a stuck float switch. He stated that the rental property is serviced by a waste treatment system, which is like a miniature treatment facility. He stated that a standard system collects the waste, whereas the subject system treats all the water and is more efficient. He stated that when the float switch malfunctions it backs up and creates a smell.

He further stated that he discovered a substantial amount of grease in the system. From there he got a hold of the office who called the property managers who authorized cleaning out the system to “zero”.

P.I. then explained the “dos and don’ts” of septic to the Tenants and told them how to keep grease out of their system. P.I. stated that he also provided them with a sheet of instructions that they give to people who are new to septic systems.

P.I. said he returned in three months at the request of the owners. P.I. stated that at this time they found more grease. He said it was less, approximately half of what was there the first time, which to his knowledge was after six months, such that it appeared as though the Tenants had not made any changes to reduce the amount of grease in the system.

In cross examination, the Tenant, T.K., referred P.I. to his invoice dated October 11, 2015. He confirmed that was the initial call to the rental unit.

T.K. then drew P.I.’s attention to his second invoice, dated August 19, 2016. P.I. confirmed that he completed the invoice. T.K. asked P.I. why there was no mention of grease on this invoice to which P.I. stated that a technician writes all their notes on an “invoice ticket”, which is then given to the office who in turn renders a bill.

P.I. confirmed that the office retains the technicians notes; those notes were not provided in evidence.

P.I. also stated that during the August 2016 call he spoke to both Tenants about the problems with the septic. He gave them the “dos and don’ts” of proper procedure.

P.I. stated that he then followed up three months later with the Landlord as a courtesy and did not charge them.

T.K. then suggested that P.I. recommended a product which is not appropriate for the system, to which P.I. stated that the product was “absolutely” appropriate.

T.K. suggested that P.I. first told them that there was nothing they could have done to correct the problem. P.I. did not deny this suggestion, however he stated that at first he did not know what the “little balls” were. He then discovered that the grease was tumbling in the aeration system, and forming balls which were wrapped in toilet paper.

The Tenant, T.K., responded to the Landlords claims as follows.

T.K. disputed P.I.'s evidence as to the nature of the septic system and whether a particular product was appropriate for use. She referenced email communication from S.S., whom she claimed was hired by the Landlord to come and fix the problem at the end of the tenancy in November of 2016. In that communication, S.S. wrote that the system was not an aerobic system, and that the product recommended by P.I. was not appropriate for such a system.

T.K. also noted that in email communication with the Landlord's representative dated August 18, 2016, A.M. writes that he spoke with P.I. The Tenant notes that there was no mention of grease being poured down the drain or any suggestion this was the problem. T.K. submitted that had this been the major issue, as claimed at the hearing, presumably there would have been some mention of this conversation in the email. The contents of that email read as follows:

> "Yes, I spoke to P. he told me he showed you guys how to turn the aeration pump back on and to leave it off for a week until the tank fills?
>
> Thank you for getting the septic stuff. Hopefully that solves the problem. Did he say we should be adding it all the time?..."

T.K. confirmed her awareness that it is common knowledge that grease cannot be put in a septic system. She testified that she does not put grease in the system, keeps a jar under the sink and when it fills up she throws it out. She also confirmed that she has lived in other homes with septic systems as well as this home and was therefore aware of how to properly use it.

T.K. submitted that the problem with the septic system was that the system was a prototype system that was banned/condemned in 2004 and rather than replace it the Landlords simply replaced components and tried to repair it.

In support of this, the Tenants provided a letter from the local health authority dated April 12, 2017 in which the writer notes he spoke with the Landlords' representative, A.M. and explained that he was familiar with the property and the sewer system as the health authority had taken legal action against the previous property owner 12 years prior. The result was that a *B.C. Health Act Order* was served and which forced the previous owner to repair the failing system. The writer also noted that "the treatment plant used on the property was an early proto-type that "was not a successful design".

The writer further notes that A.M. informed him they had spent approximately $8,000.00 on repairs and “did not know what else he could do”.

Notably, this letter and the allegations contained therein were not put to P.I. when he testified. T.K. stated that P.I. was only one of seven people who attended and investigated.

T.K. stated that she was informed by a technician from S.W. that the field was too small, the pipes were too small, and the whole thing needed to be replaced.

T.K. also noted that all the bills provided by the Landlord have details of the work done, yet none of them indicate that the Tenants were responsible for the problem or that they could have done anything differently. She noted that in those invoices, the technicians note the following non exhaustive list of problems:

- missing effluent filter;
- poor functioning due to pump being removed; and
- “open to elements”

T.K. confirmed that it is the Tenants’ position that the problem was the septic system design itself, not anything they did. She submitted that the evidence confirms there was a problem with the design of the system, and it should have been replaced, not repaired. She confirmed that this was the third property they had rented from the Landlord, H.P., and that they all had septic systems and this is the first and only one that had any problems.

A review of Residential Tenancy Branch Records confirms that the Tenants made a previous application on January 4, 2017 which was heard before my fellow Arbitrator Ceraldi on June 26, 2017. A copy of the file number is included on the unpublished cover page of this my Decision.

In the January 4, 2017 Application the Tenants sought the following:

1.	Damages from previous tenancy	$1000.00
2.	Return of double the deposit $4600-2100.00=	$2500.00
3.	Compensation for septic smell	$9200.00
4.	Two month penalty – landlords use	$4600.00
5.	B.C. Hydro	$1200.00
6.	Filing Fee	$100.00

	Total	**$18,600.00**

By Decision dated June 26, 2017, the Tenants were awarded $1,350.0 representing double their security deposit less what they had already received. They were also awarded recovery of the filing fee for a total award of $1,450.00. The balance of their claim was dismissed.

T.K. testified that the Landlord has not paid the $1,450.00 which was awarded pursuant to the June 26, 2017 Decision, and it is their position that he only brought forward the current claim because he does not want to pay them; she characterized his claim as retaliatory.

T.K. further stated that they had to take the Landlord to the B.C. Provincial Court (Small Claims Division) and still he wouldn't pay. She stated that at the Small Claims hearing they were awarded interest and the filing fee in small claims court and the Landlord was to pay $1,588.00 and he finally paid in February of 2018.

T.K. noted that the Landlord filed for dispute resolution on August 31, 2017, after the Tenants obtained a favourable judgment of $1,450.00 and as such he "made good on his threat" to pursue an application if she wouldn't walk away from the amounts awarded.

T.K. also noted that in his evidence the Landlord's agent submitted a bill for the hot tub which wasn't related to the septic and was merely an attempt by the Landlords to "pad their bill".

The Tenants submitted that the Landlords' claims should be dismissed in their entirety.

In terms of the Tenants' claims in their application filed January 26, 2018, the Tenants claimed the following:

Small claims Court "Landlord Retaliation"	$1,000.00
Hydro bills due to mismanagement (fireplace)	$1,000.00
2 months compensation for uninhabitable rooms	$4,600.00
TOTAL CLAIMED	$6,600.00

T.K. stated that she claimed $1,000.00 as she believed it was a standard amount to claim when someone “stands in the way of you achieving justice” and that she had read it somewhere in the *Residential Tenancy Act.*

The Landlords disputed the balance of the Tenants’ claims on the basis that these issues had already been decided at a previous hearing.

T.K. stated that during the January 2017 they claimed $1,200.00 in increased hydro costs related to the septic smell (because they had to leave the windows open). She clarified that the claim before me of $1,000.00 relates to the non-functioning fireplace at the beginning of the tenancy which she says necessitated increased hydro. T.K. stated that she did not claim this amount during the January 2017 application as she was only “doing so for the septic” and she wanted to break it down.

T.K. stated that she asked A.M. to inspect the fireplace before they lit it. The inspector came to the property and inspected and said it wasn’t up to Code and they couldn’t light it. T.K. claimed that because they were not allowed to light the fireplace, their hydro bill was $1,000.00. She stated that the fireplace heats water which heats the floor and which is supposed to reduce their hydro consumption. T.K. stated that she asked the Landlord to give them a rent reduction and he refused; she confirmed that they did not apply for a rent reduction during the tenancy.

T.K. further clarified that the January 2017 application included a claim of $9,200.00 for “compensation for septic smell” which represented four month’s rent for “having to live in home with a faulty septic system and smell”. T.K. conceded that in the current claim she included two months compensation for the smell of the septic as she wanted to see if asking for a lesser amount might be more successful.

In response to the Tenants’ claims, A.M. testified that the Tenant made submissions about the increased hydro at the previous hearing and therefore should be prohibited from pursuing that claim again.

A.M. further submitted that when the tenancy first began they were not aware that the fireplace heated the flooring and only became aware of this when it was inspected. He also stated that the first and second inspection confirmed that the fireplace was fine.

A.M. stated that the Tenant alleged that their hydro bill was higher because of the fireplace not functioning, yet it did work and in any case they have not proven the

amounts claimed as they did not provide copies of their hydro bills to substantiate their claim for $1,200.00.

T.K. noted that they asked the Landlord for compensation in January 26, 2016 and February 18, 2016 in email communication wherein they raised issue of the fireplace and their increased hydro. The Tenant claimed that their hydro costs were $1,000.00 per month.

In reply A.M. pointed out that the evidence from the local health authority is addressed to a complainant with the initial "J." which he claimed was another person who lived in the property. A.M. stated that these Tenants may know how to use septic systems, but someone else might not have and that in any case, he didn't know who else lived there, but "someone" put grease in the system.

A.M. denied the Tenants' allegation that his claim was retaliatory. He stated that he did not initially apply for Dispute Resolution because the Tenants do not have any verifiable income and he did not believe he would have any chance of obtaining the funds from the Tenants.

Analysis

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.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;

- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

Section 37(2) of the *Act* requires a tenant to leave a rental unit undamaged, except for reasonable wear and tear, at the end of the tenancy and reads as follows:

> 37 (1) Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.
>
> (2) When a tenant vacates a rental unit, the tenant must
>
> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and
>
> (b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

The hearing before me occurred over three days and occupied nearly four hours of hearing time. As in the hearing before Arbitrator Ceraldi, the parties both provided extensive submissions and documentation which included conflicting opinions regarding the septic system.

After consideration of the testimony and evidence before me, and on a balance of probabilities I find the Landlords have failed to meet the burden of proving the amounts paid to service and repair the septic system were a result of the Tenants' actions or inactions.

Notably, in the hearing before Arbitrator Ceraldi, there is no mention of the Landlords' allegation that the Tenants caused the problems with the septic system by introducing

grease to the system. Presumably, had the Landlords believed the Tenants were responsible they would have raised this as a defence to the Tenants' claims.

Further, although the Landlords' witness, P.I., testified that he found grease in the septic system, documentary evidence submitted by the Landlords confirms P.I.'s first call was in October of 2015, at the beginning of the subject tenancy. He provided affirmed testimony that during this first call there was a substantial amount of grease in the system, and that on his second call the grease was approximately half of what he had previously found. However, as aptly pointed out by the Tenants, the presence of grease was not noted on his invoice.

P.I. referenced "Technicians Notes" and photos, suggesting these documents would support his opinion that the problem with the septic system was the introduction of grease by these Tenants, yet these were not provided in evidence.

A.M. claimed to have sent emails to the Tenants reminding them not to put grease in the system, yet again, these emails were not in evidence.

I was, however, provided a copy of an email from the A.M. to the Tenants dated August 18, 2016 wherein he reports he spoke with P.I. That email, which was reproduced earlier in my Decision, references the aeration pump and the "septic stuff" which was to be added to the system. There is no reference to the presence of grease, or instructions to the Tenants not to put grease in the system.

Further, and as noted previously in this my Decision, the Landlord claimed the sum of $12,174.97 on their Monetary Orders Worksheet, which included amounts paid prior to the tenancy beginning; only $7,116.51 claimed on the application for dispute resolution related to amounts the Landlord claims to have paid during this tenancy. In any case, the amounts suggest that the system had problems both before and during the subject tenancy.

I am also persuaded by the letter from the health authority which was introduced by the Tenants. This letter indicates the system has had longstanding issues, which predated the current ownership and more importantly, the subject tenancy.

I accept the Tenants evidence that the first time they were informed the Landlords believed they caused the problems with the septic system was when they received the Landlords' Application.

In all the circumstances, I am not persuaded the problems with the septic system was as a result of the Tenants actions or inaction and I therefore find the Landlords have failed to prove their claim.

I similarly find the Tenants' claim fails.

The Tenants provided no legal basis for their claim for $1,000.00 as compensation for the Landlords "stand[ing] in the way of achieving justice" and this portion of their claim is dismissed.

The balance of the Tenants claims relate to matters which have already been litigated, or should have been included in the Tenants' January 2017 Application.

In the January 2017 application the Tenants sought compensation related to the septic smell. As that was previously dealt with by Aribtrator Ceraldi, the Tenants are barred by the legal principle of *Res Judicata* raising that issue again.

Res judicata ("the matter is judged") is an equitable principle which precludes relitigation of a matter. There are a number of preconditions that must be met before this principle will operate:

1. the same question has been decided in earlier proceedings;

2. the earlier judicial decision was final; and

3. the parties to that decision (or their privies) are the same in both the proceedings.

I find that the above criteria apply in the case before me as it relates to the Tenants claims regarding the septic smell and I therefore dismiss their claim in this regard.

The Tenants also claim compensation relating to their alleged increased electrical utility. T.K. stated that in the hearing before Arbitrator Ceraldi, they sought compensation for increased hydro as they alleged they had to leave the windows open because of the septic smell. In the hearing before me they alleged that they also had increased hydro due to a malfunctioning fireplace.

Rule 2.9 of the *Residential Tenancy Branch Rules of Procedure* provides that a party may not divide their claim. This, like the principal of *res judicata,* prevents parties from

attempting to relitigate matters which have already been decided, or should have been included in previous claims. To allow divided claims would create a situation whereby litigants could endlessly pursue claims with no hope of any sense of finality.

Conclusion

The Landlords' claim for compensation from the Tenants is dismissed.

The Tenants' claim for compensation from the Landlords is dismissed.

Having been both unsuccessful, neither party is entitled to recover the filing fee.

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 7, 2018

Residential Tenancy Branch