



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL MNRL-S FFT MNDCT MNSD

Introduction

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

- authorization to recover his filing fee for this application from the tenant;
- a monetary order for money owed or compensation for damage or loss under the *Act*; and,
- authorization to retain the tenants' security and pet damage deposits.

This hearing also dealt with the tenants' application pursuant to the *Act* for:

- authorization to recover the filing fee for this application from the landlord;
- authorization to obtain a return of the security and pet damage deposits; and
- a monetary order for money owed or compensation for damage or loss under the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, to call witnesses and to question one another. The parties acknowledged the exchange of evidence and stated there were no concerns with timely service of documents and were prepared to deal with the matters of the applications.

Issues to be Decided

- Is the landlord entitled to compensation for unpaid rent pursuant to Section 67 of the *Act*?
- Is the landlord entitled to retain the tenant's security deposit and pet damage deposit pursuant to Section 38 of the *Act*?

- Is the landlord entitled to recover the \$100.00 filing fee for this application from the tenants, pursuant to Section 72 of the *Act*?
- Are the tenants entitled to the return of their security deposit and pet damage deposit, pursuant to Section 38 of the *Act*?
- Are the tenants entitled to a monetary order for compensation for loss under the *Act*?

Background and Evidence

This dispute stems from an non-functional swimming pool in the backyard of the rental property which is a five-bedroom home of approximately 3,900 square feet. The parties agree the pool was not functional until July 22, 2018. It is in dispute as to whether or not the pool ever functioned properly.

The tenants and landlord agree the tenancy started on September 1, 2017 and the tenants vacated on October 31, 2018. Rent was \$6,000.00 per month for a fixed term of 20 months to April 30, 2019. Utilities are not included in the rent.

In August 2017 the tenants paid twelve months rent in advance (\$72,000.00) for September 1, 2017 to August 31, 2018. The landlord holds in trust a security deposit of \$3,000.00 and a pet damage deposit of \$3,000.00. All parties agree the tenants have not paid rent for the two months they occupied the rental property in September and October 2018 and there is a new tenancy agreement in place for the rental property starting January 1, 2019.

The landlord seeks to recover unpaid rent for September, October, November and December 2018 in the amount of \$24,000.00 and applied to the Residential Tenancy Branch (RTB) on October 30, 2018 to retain the tenants' \$6,000.00 security and pet damage deposits to off-set the unpaid rent.

The tenants filed a counter application on Nov. 13, 2018 and seek to recover their deposits of \$6,000.00, compensation for the cost of \$716.51 in natural gas utility for the month of August 2018, compensation for the cost of \$466.35 in pool maintenance, and a reduction in rent for \$2,500 per month for the loss of use of the backyard for eleven months, September 2017 to July 2018 (\$27,500.00). I note that \$2,500.00 is 42% of the \$6,000.00 monthly rent.

The tenants' counsel submitted that the tenancy ended by mutual agreement on October 31, 2018 because the landlord met with and accepted the keys from the

tenants. The landlord disputed this. Counsel referred to an arbitration decision of the RTB awarding the landlord an order of possession of the rental property, effective 48 hours after service and stated that no rent should be due after this order of possession was issued. The landlord testified he did not ever serve the order of possession to the tenants.

The parties agree that the tenants did not participate in a move-out condition inspection. The landlord expected the inspection to occur when he collected the keys from the tenants on October 31, 2018. The tenants weren't prepared for the inspection. The landlord issued, in writing, a second opportunity for the move-out inspection on November 3, 2018; the tenants did not attend. The landlord entered into evidence the completed move-in and move-out inspection report without the tenants' signatures in the move-out section. The tenants' forwarding address is recorded on the report.

The move-in condition inspection report specifically refers to the swimming pool. In Section X 'Start of the tenancy – Repairs to be completed at start of tenancy' it is written that the pool needs to be drained and cleaned. It transpired that the pool needed more than cleaning and was not functional.

The tenants testified to the significance of the pool in the tenancy agreement. The tenants are adamant that they would not have rented the property had they known the pool was not functional. They stated the neighbourhood was not their choice, another neighbourhood was their preferred neighbourhood for various reasons. They submitted into evidence a chronology of ongoing communications with the landlord about the importance of having the pool functional, starting March 2018.

The landlord agreed with the tenants that the pool was important, even referring to the pool as a material term of the tenancy agreement in his testimony. He submitted into evidence the tenants' first communication with him on August 4, 2017 in which one of the tenants notes the rental property is just around the corner from their new house which is under construction. The landlord asserts that the primary reason for the tenancy agreement was not the pool but its proximity to the tenants' new home; the tenants vehemently dispute this.

The landlord testified a rent rebate is warranted but a \$2,500.00 rebate for eleven months is unreasonable. The landlord submitted into evidence two arbitration decisions in which tenants received a rent rebate of much less than 42% of the monthly rent for a loss or restriction of a facility, etc. He also submitted that the tenants could replace the pool facility by attending at a community centre.

The tenants believe the value of the rebate is reasonable because not only was the pool not functioning, the ongoing repairs rendered the backyard inaccessible to the tenants and their family members due to the hazardous conditions created by the repair work. Photographs of the pool and the backyard were entered into evidence by both parties. There is no safety fence around a hole made by the repairs or the empty pool. The tenants testified they had to prevent any family or pets from entering the backyard; to protect themselves, they placed orange cones near the hazardous areas. The tenants also testified that they experienced a mosquito infestation due to water accumulating in the hole and the pool.

The parties both submitted evidence and testified the pool was not functional until July 22, 2018. The tenants testified that after the pool was supposedly repaired, it continued to malfunction; the consequence was pool water leaking into the ground and an exorbitant increase in the use of natural gas to continually heat the water that was being pumped into the pool to replenish what had leaked away. The tenants testified they were morally obligated to shut off the pool to prevent further negative consequences.

As proof of the additional cost of natural gas, the tenants submitted a natural gas bill for the period of August 27 to September 26, 2018 for \$716.51; the bill shows that the natural gas used for the period is dramatically higher than all previous months. One of the tenants testified he has been an pool owner for 30 years and knows that the pool was not functioning properly and explained why. The tenants also submitted a pool maintenance invoice dated September 1, 2018 for \$466.35. The invoice shows \$160.00 for pool service labour in August and the rest of the charges relate to pool chemicals. Handwritten on the invoice is the note “water loss 1 ½ to 2” per day in cold weather.” The tenants testified the pool wasn’t balanced properly, so he needed to have this additional servicing completed after the pool was supposedly repaired.

The landlord disputes the tenants’ claim that the pool malfunctioned after July 22, 2018. He testified the pool level remained constant after the tenants vacated. He submitted a photo of the pool with a normal water level on November 22, 2018 and testified there was no evidence of leakage—had there been leakage of 1 ½ to 2” per day, the water level would have been lower in the photo. The tenants countered that the pool level remained high due to rain. The landlord submitted evidence that the rain fall for November 2018 was only 207 mm or just over 8”. The landlord stated that if additional natural gas was required to heat the pool it was due to the outside temperature and not due to heating the replenishing water. The landlord entered into evidence the

temperatures for Vancouver for the period of the natural gas bill showing an average high of 19 degrees and a low of 10 degrees.

The landlord submitted into evidence a \$1,950.00 pool service invoice dated December 22, 2016 which describes problems with the pool, which were successfully addressed—the invoice states “All ok now.” The landlord also submitted a statement dated September 6, 2018 from the pool servicing company which completed the repairs to the pool to get it functional on July 22, 2018. It gives a detailed chronology of the situation from August 24, 2017 to July 22, 2018. An estimate for repairs was issued on March 19th and the landlord authorized the company to carry out repairs on April 02, 2018. In May 2018 more problems were found with the pool; the final repair being completed on July 22, 2018. The final invoice, dated August 21, 2018, was for \$8,341.34. Included in this invoice was the cost of rebalancing the pool.

The tenants testified that the landlord decided that the repair of the pool was too costly and by delaying the decision to pay to repair the pool, the landlord missed the opportunity to have the pool repaired in a timely manner.

I note that the September 06, 2018 statement from the pool service company states that a leak detection service identified leaks needing repair in October 2017, but since it was the rainy season, it would be difficult to pinpoint the leaks and repairs needed to wait until weather improved. On March 19, 2018 the pool service notified the landlord of the estimate of \$1,000.00 to \$5,000.00 to repair the pool and the landlord advised the pool service on April 2, 2018 to do the required work. The landlord testified the two-week delay was due to the vagueness of the estimate; he tried to find other estimates and get more details.

The tenants testified that in various ways the landlord was not ensuring the rental property was properly maintained. The landlord submitted evidence, e.g., receipts for services and equipment, showing the numerous tasks he completed to ensure the rental property was maintained.

Both parties submitted current advertisements for what they believe are comparable rental properties to bolster their respective positions as to the quantitative value of the pool to the rental property. The tenants submitted examples of five-bedroom rental properties currently available, none with a pool. One rents for \$5,000.00/week, the others are \$5,200.00/month and \$5,550.00/month. The landlord submitted comparable properties with values from \$6,000.00 to \$10,000.00 per month; the property with a pool is \$7,000.00/month and the pool is indoors.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Landlord's application

- Unpaid rent September and October 2018

It is undisputed the tenants did not pay rent for September and October 2018 during which time they were occupying the rental property. Even if the landlord is acting contrary to the law, the withholding of rent is unlawful unless ordered by the RTB.

Section 26(1) of the *Act* states:

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 find the tenants owe the landlord \$12,000 for unpaid rent in September and October 2018.

- Unpaid rent November and December 2018

I do not find evidence of a mutual agreement to end the fixed term tenancy early on October 31, 2018.

The landlord's successful application for an order of possession does not prevent the landlord for applying for compensation for loss of rental revenue due to early termination of a fixed term tenancy agreement as a result of the tenants' action of withholding the payment of rent.

I find that the tenants did not provide proper notice to the landlord to end the tenancy early and remain responsible for lost revenue after the tenancy ended and they vacated the rental property.

Per section 7(2) of the *Act*, the landlord is required minimize his loss when a tenant fails to comply with the *Act*. Policy Guideline 5 “Duty to Minimize Loss” deals with claims for loss of rental income and specifies that the landlord must make reasonable efforts to re-rent the property.

The landlord submitted evidence that he advertised the rental property with a move-in date of November 15, 2018. I find that in advertising the rental property with a possession date less than two-weeks after the Nov. 3, 2018 move-out inspection, and the fact that the landlord has secured new tenants for January 1, 2019, the landlord has demonstrated that he acted reasonably to minimize his loss.

I find the tenants owe the landlord \$12,000 for unpaid rent for November and December 2018.

The landlord is successful in his application for \$24,000.00 in unpaid rent.

Tenants’ application

- Return of \$6,000.00 security and pet damage deposits

Section 38 of the *Act* states that to lawfully retain a tenant’s deposit(s), a landlord must apply for dispute resolution within 15 days of the date the landlord received the tenant’s forwarding address in writing or the end of the tenancy, whichever is later. The tenants vacated on October 31, 2018 and their forwarding address is recorded on the Nov. 3, 2018 move-out inspection report. By filing his application on October 30, 2018, the landlord has met the timeline to apply to retain the tenants’ security deposit.

Section 35(2) of the *Act* requires the landlord to provide two opportunities for a final move-out inspection. The tenants did not participate in either move-out inspection on October 31, 2018 and November 3, 2018. As a result, the tenants have extinguished their right to a return of their deposits (reference: section 36(1)).

I dismiss this portion of the tenants’ application without leave to reapply.

I find the landlord may retain the tenants' \$6,000.00 deposits in partial satisfaction of the \$24,000.00 in unpaid rent.

- Compensation of \$27,500.00 for loss of use of pool and backyard

In his testimony and evidence, the landlord acknowledged that a reduction in rent is owed to the tenants due to the loss of the pool facility. Section 27 of the *Act* states:

(1) A landlord must not terminate or restrict a service or facility if

- (a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
- (b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

- (a) gives 30 days' written notice, in the approved form, of the termination or restriction, and
- (b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.**

Relying on the tenants' testimony, the move-in inspection report and the tenants' extensive chronology of communication with the landlord about the use of the pool, I find the tenants' loss of the use of the pool and the backyard to be a breach of a term of the tenancy agreement.

Where a tenant has established that there has been a breach in the term of the tenancy, the tenant may apply for compensation. Section 67 of the *Act* states:

Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this *Act*, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

I have already stated that I find the landlord breached a term of the tenancy agreement by not providing a functional pool and restricting the use of the backyard. The tenants

have applied for a 42% rent reduction (\$2,500.00) for eleven months (\$27,500.00) to compensate them for this breach. I find the tenants minimized their loss by taking reasonable steps to notify the landlord of the problem with the pool.

Excluding the most expensive property with a weekly rental, the tenants' evidence shows that what they believe is a comparable rental without a pool rents for between \$5,200.00 and \$5,550.00 per month. The landlord also submitted comparable rental properties and has submitted two previous and unrelated arbitration decisions with 0.6% reduction in rent awarded for loss of use of a communal swimming pool and 23% reduction in rent for the loss of use of a fridge and freezer. I note that I am not bound to follow the decisions of other arbitrators.

Based on the tenants' evidence and testimony, I find the lack of a functional pool should reduce the rent by one fifth, or 20%, from \$6,000.00 to \$4,800.00 per month for September 2017 – July 2018 ($11 \times \$1,200.00 = \$13,200.00$).

I find that the inability to use the backyard during the period the pool was under repair warrants another rent reduction of 15%, or \$900.00 per month, for the period March 2018 to end of July 2018 ($5 \times \$900.00 = \$4,500.00$).

I find the tenants should receive a total rent reduction of \$17,700.00. This leaves a remaining balance of \$300.00 owed to the landlord ($(24,000 - 6,000) - 17,700 = 300$).

- Compensation for \$716.51 cost of additional natural gas due to malfunctioning pool

The tenancy agreement requires the tenants to pay for utilities. The tenants' evidence to substantiate the increase in natural gas usage for the month of September 2018 is due solely to the faulty operation of the pool is the tenants' testimony as a pool-owner for 30 years and one natural gas bill. The testimony and evidence does not compel me to conclude that the landlord's breach of a term in the tenancy has caused the tenants a loss in the amount of \$716.51.

I dismiss this portion of the tenants' application without leave to reapply.

- Compensation for \$466.35 cost of pool servicing after July 22, 2018 repair

The tenants' evidence to substantiate that the September 1, 2018 cost of \$466.35 to rebalance the pool was caused by the landlord's breach of a term in the tenancy is

based on one tenant's experience as a pool owner and the invoice itself. The landlord submitted a pool service invoice dated August 21, 2018 for \$8,341.34 and included in this invoice was the cost of rebalancing the pool. The September 06, 2018 chronology from the pool service company indicates the pool was being repaired and serviced.

I dismiss this portion of the tenants' application without leave to reapply.

Conclusion

I do not award either party the cost of filing their applications.

I award the landlord \$300.00 for the remaining balance of compensation owed by the tenants for the landlord's loss of rental revenue and have issued a monetary order to this effect. Should the landlord fail to comply with this order, it 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: December 18, 2018

Residential Tenancy Branch