



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Peter Wall Yaletown
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution. The participatory hearing was held, by teleconference, on February 21, 2019, and April 11, 2019 by conference call. The Tenants applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- A monetary order for the return of the security deposit;
- A monetary order for compensation for loss or other money owed.

The Landlord was represented at the hearing by counsel, and two witnesses/agents (collectively referred to as the "Landlord"). The Tenants were both at the hearings. The Landlord confirmed receipt of the Tenants' documentary evidence, and amendment and took no issue with the service of these documents. The Landlord did not submit any documentary evidence.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Are the Tenants entitled to an order that the Landlord return all or part of the security deposit or pet damage deposit?
2. Are the Tenants entitled to compensation for loss or money owed?

Background and Evidence

General Background Information

Both parties agree that monthly rent was \$2,710.00 and was due on the first of the month. The Landlord held a \$800.00 pet deposit and a \$1,355.00 security deposit. The Tenants stated that they paid September 2018 rent in full, and did not pay October rent, due to the issues discussed below.

The Landlord provided a file number for a dispute resolution proceeding they had last fall. In this dispute, the Landlord received an order of possession and a monetary order on October 30, 2018. The monetary order was issued for October rent, which was unpaid, plus the filing fee, totalling \$2,810.00.

The Tenants argued that the tenancy was frustrated, as of the date of the flood, September 8, 2018, and that this is when the tenancy ended. The Tenants stated that they were out of town at the time the unit flooded, and when they came home the day following, they discovered a severely flood damaged rental unit (photos provided). The Tenants continued living in the rental unit off and on (one Tenant was there part time, and the other was staying with a friend) until September 26, 2018, when they moved their belongings out so that the Landlord could fully remediate and fix the rental unit.

The Landlord stated that there was a fire sprinkler in the unit above the Tenants that burst, and flooded 9 units in total. The Landlord stated that they did the best they could to manage all of the different units, the different contractors, schedules, and varying amounts of damage in all of the units. The Landlord stated that they were often without full information, so they were unable to give the Tenants as much information on the remediation schedule as they wanted. The Landlord stated that the Tenants demanded to be given 48 hours written Notice before entry, and they insisted on being present for all work, and anytime any of their belongings were moved. The Landlord stated that the Tenants made it difficult to complete the renovations, because they insisted on being there for everything, and it took them some extra time to move their belongings out, so that the work requiring vacant possession could be completed (flooring, drywall etc).

The Tenants stated that there were dehumidifiers and fans running constantly, which was disruptive and stressful for them and their cats. The Tenants stated that their unit was directly below the source of the flood, and almost all of their walls were damaged,

the ceilings were wet, the stove, washer, and dryer all had water in them and were unusable. The Tenants stated that the unit was unlivable until it had been remediated (October 2018).

The Tenants have claimed the following items:

- 1) \$4,310.00 – Double the security and pet deposit

The Tenants are seeking double the security and pet deposit they paid because the Landlords failed to return their deposits at all, let alone in a timely manner. The Tenant stated that they provided their forwarding address in writing in early October 2018, and the Landlord stated they got this letter on October 11, 2018, and at this point the Landlord became aware the Tenants formally wanted out of the tenancy.

The Landlord stated that they did not get proper written Notice to end the Tenancy until October 11, 2018, and the Tenants were still on the hook for October 2018 rent. The Landlord stated that the tenancy did not legally end until they got the order of possession on October 30, 2018. The Landlord stated they re-rented the unit right away in November.

- 2) \$500.00 – insurance deductible paid by Tenants for their claim

The Tenants stated that, due to the flood, they had to file a claim for damage and loss with their renters insurance. The Tenants stated that this amount is for the deductible, and they feel the Landlord should be responsible for this, as it is their building. The Tenants stated the insurance company paid for them to stay in a hotel, and for their damaged belongings.

The Landlord stated that they should not be responsible for this, as the flood was a chance occurrence that they had no control over. The Landlord stated that they properly maintain this building and this flood was not a result of their negligence. The Landlord stated that this amount should be paid by the Tenants, as it is between the Tenants and their insurers.

- 3) \$17.90 – BC Hydro charges

The Tenants stated that they paid for the electricity for the month of September, and the Landlord had fans and dehumidifiers running for many days, which used lots of

power. The Tenants took the average daily cost of the prior months versus what they paid during the flood.

The Landlord stated that the calculation is a complete estimate, and is unsupportable. The Landlord stated the Tenants did not provided a bill from the same month last year, so it is impossible to know how much electricity would have been used for all the fans.

4) , 5) & 6) \$42.26 – Registered mail fees

The Tenants stated that they want to recover the mailing costs they incurred to send the Landlord their contract termination letter, their notice of hearing, and their evidence.

The landlord stated that these are expenses the Landlord had to incur as well, and it is normal costs of doing business, that each party is responsible for.

7) \$100.00 – Filing fee

The Tenants are looking to recover the fee they paid to file this application for dispute resolution.

8) \$3,569.10 – Cat Surgery

The Tenants stated that one of their cats ingested a piece of black rubber after the flood occurred, which required several vet visits and surgery. The Tenants stated that there were 3 invoices for this incident, and the Tenants stated that the black rubber that their cat ingested was from nothing they own, and therefore must be from the Landlord, contractors, or the restoration process. The Tenants stated that their cats lived in the rental unit from the time of the flood on September 8, 2018, until they moved out.

The Landlord stated that the Tenants should have had pet insurance, and this issue has nothing to do with them. The Landlord stated that there is no evidence to show the cat suffered this issue as a result of anything they did.

9) \$1,987.33 – Rent rebate from September 8, 2018 until September 30, 2018

The Tenants stated that they should be entitled to recover the rent they paid for this period because they lost the use of the rental unit as of when it flooded. The Tenants stated that there was extensive water damage in nearly every room and the appliances were damaged and not useable. The Tenants want a per diem refund totalling \$1,987.33. The Tenants pointed out that the Landlord never offered them to move into a different unit in the building, despite there being available units. The Tenants stated that they had to stay with friends and would only occasionally sleep in the rental unit from September 8 - 26, 2018.

The Landlord stated that they offered the Tenants a place to store their belongings, but acknowledged that they did not provide a place for the Tenants to reside. The Landlord stated that although the unit was extensively flooded, the Tenants were only asked to be out for a couple of days at the end of September while the dirty part of the remediation was occurring.

10) \$1,500.00 – Stress and compensation

The Tenants stated that they should receive \$750.00 each for all the stress and inconvenience they endured. The Tenants stated that they suffered both professionally and personally as the events took a toll on them, and affected their ability to function.

The Landlord stated that they did their best to minimize the impact on the Tenants, and to maintain communication, but they expressed that some impact is unavoidable due to the extent and nature of the flood (impacted several units, and involved many contractors). The Landlord stated they were unable to satisfy the Tenants demands for exact dates, times, and schedules, but the Landlord stated that since this flood was not a result of their negligence, the Tenants should not be awarded this amount.

11) \$1,921.77 – Tenant #1 Lost wages

12) \$3,415.38 – Tenant #2 Lost wages

Both of the Tenants stated that they lost some work as a result of the flood. Tenant #1 stated that he had to cancel his flight to Beijing on September 26, 2018, due to an “expedited” move-out request by the Landlord. The Tenant stated he was unable to

find all of his work uniform, and suffered a mental breakdown, which forced him to miss work (30 hour flight x \$75.00/hour).

Tenant #2 stated that he missed two days of work (approximately \$107.00/hour) due to the hassle of moving his items to let the floor restoration happen and also to provide access to the contractors. The Tenants were both present while their items were moved on September 25, 2018.

The Landlord stated that there was no requirement for the Tenants to be there when the contractors were there, nor did they have to move their own belongings or be there while others moved them. The Landlords stated that they offered to move the Tenants items for them, but the Tenants declined. The Tenants opted to move with their own resources and initiated a claim with their insurance company.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Tenants to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Landlord. Once that has been established, the Tenants must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Tenants did everything possible to minimize the damage or losses that were incurred.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

First, I will consider whether or not the tenancy agreement was frustrated by the flood that occurred in the rental unit. I turn to the following portion of the *Act*:

- 44 (1) A tenancy ends only if one or more of the following applies: [...]
- (e) the tenancy agreement is frustrated;

Next, I turn to the following portion of the *Act*:

92 The ***Frustrated Contract Act*** and the doctrine of frustration of contract apply to tenancy agreements.

Frustration is an English contract law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract.

If an event occurs which causes an inordinate delay in the performance of the contract, frustration may be held. However, it must be a serious delay which affects the intended purpose of the contract. Although the Tenants were clearly disrupted and inconvenienced, I find the interruption caused by the flood in the rental unit was relatively short lived within the context of a long term tenancy agreement. The flood occurred on September 8, 2018, and the Tenants had access and use of the rental unit (pet cat remained staying there) up until they were asked to vacate on September 25/26, 2018, so that repairs could be completed over the upcoming week. I note the repairs were completed by early October 2018, and I find the duration of the disruptions short, and they are insufficient to find the tenancy agreement was frustrated.

I note the Tenants had several emails back and forth with the Landlord, and there was much dissatisfaction from the Tenants over the repairs, the communication about the repairs, and the time it took. I note the Tenants sent a letter clearly indicating their intentions to vacate, end the tenancy, and have their deposit returned to them. The Landlord received this letter on October 11, 2018, via registered mail, and acknowledged receiving the Tenant's forwarding address in writing as part of this letter. I find the correspondence leading up until this letter lacked sufficient clarity, and was not given in proper form. As a result, I find this letter, received by the Landlord on October 11, 2018, was the Tenants' written notice that they would be ending the tenancy.

I note the Tenants appeared to have vacated the rental unit on September 26, 2018, with the potential to return after the remediation was completed in early October. I find the Tenants' intentions to terminate the tenancy were not made sufficiently clear prior to October 11, 2018, at which point they formally declared the tenancy was frustrated. However, proper Notice (at least one month) was not given. As stated above, I find the tenancy agreement was not frustrated, and although the Tenants had removed their belongings so that the remediation could occur, I find the tenancy did not formally end until the Landlord obtained an order of possession on October 30, 2018, as part of the previous dispute resolution.

I will address each of the Tenants' monetary items in the same order as above:

1) \$4,310.00 – Double the security and pet deposit

The Tenants are seeking double the security and pet deposit they paid because the Landlords failed to return their deposits at all, let alone in a timely manner. However, I find it important to note that, as per section 38(3) of the Act, the Landlord has the authority to withhold the deposits to offset a monetary order from this office. I note the Landlord obtained a monetary order on October 30, 2018. As such, they were legally entitled to withhold these deposits which were less than the amount the Tenants were ordered to pay. I dismiss the Tenants' claim for double their security and pet deposit, as the deposits were legally withheld to offset some of what the Tenants owed for October 2018 rent.

2) \$500.00 – insurance deductible paid by Tenants for their claim

I find it important to note that this flood does not appear to be caused by any negligence and happened spontaneously. It is an unfortunate occurrence that would have been difficult to prevent. The Tenants chose to carry insurance, and are responsible for paying these premiums and deductibles, should they want coverage. I find the Landlord is not responsible for paying the Tenants' insurance deductible, and I dismiss this portion of the Tenants' application.

3) \$17.90 – BC Hydro charges

The Tenants stated that they paid for the electricity for the month of September, and the Landlord had fans and dehumidifiers running for many days, which used lots of power. I note the Tenants estimated the amount of electricity used by the remediation efforts. However, I find the Tenants have failed to sufficiently establish the value of their loss, and I find the Tenants estimate of electricity use is not sufficient to establish what power the Landlord used during remediation. I dismiss this portion of the Tenants claim.

4), 5) & 6) \$42.26 – Registered mail fees

The Tenants stated that they want to recover the mailing costs they incurred to send the Landlord their contract termination letter, their notice of hearing, and their evidence.

I decline to award these items, as each party is expected to bear the costs of supporting their own position. I note the Landlord would have had similar costs in their previous application against the Tenants.

7) \$100.00 – Filing fee

The Tenants are looking to recover the fee they paid to file this application for dispute resolution. This will be addressed at the end of this decision.

8) \$3,569.10 – Cat Surgery

The Tenants stated that one of their cats ingested a piece of black rubber after the flood occurred, which required several vet visits and surgery. The Tenants stated that there were 3 invoices for this incident, and the Tenants stated that the black rubber that their cat ingested was from something they own, and therefore must be from the Landlord, contractors, or the restoration process. However, I find the evidence does not sufficiently establish that the cat's illness was a result of the Landlord's actions or inactions. I find the Tenants have not met the burden of proof to establish this portion of their claim. As such, I dismiss their request for compensation on this matter.

9) \$1,987.33 – Rent rebate from September 8, 2018 until September 30, 2018

The Tenants stated that they should be entitled to recover the rent they paid for this period because they lost the use of the rental unit as of when it flooded. The Landlord stated that they offered the Tenants a place to store their belongings, but acknowledged that they did not provide a place for the Tenants to reside. I note the Tenants stated the flood ruined flooring, walls, and appliances in the living room, kitchen, and bedroom, and it was difficult if not impossible to use the rental unit after it flooded on September 8, 2018.

Since the Tenants paid for September 2018 rent, and given the nature and extent of the damage, I find the Tenants should be compensated for this item, in full, as their use of the rental unit was substantially impacted for this period of time. I note the Tenants' insurance coverage paid for a hotel for them to stay in. I also note the Tenants were not actually required to vacate the rental unit until September 26, 2018. However, I find they should not have to pay rent for a unit which they could not substantially use, as of September 8, 2018. As such, I award the Tenants \$1,987.33.

10) \$1,500.00 – Stress and compensation

The Tenants stated that they should receive \$750.00 each for all the stress and inconvenience they endured. The Tenants stated that they suffered both professionally and personally as the events took a toll on them, and affected their ability to function.

Although the Tenants have not explicitly sought "Aggravated Damages" I interpret their application on this point as their intention to seek non-pecuniary losses.

I note an arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator may award aggravated damages. These damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Losses of property, money and services are considered "pecuniary" losses. Intangible losses for physical inconvenience and discomfort, pain and suffering, grief, humiliation, loss of self-confidence, loss of amenities, mental distress, etc. are considered "non-pecuniary" losses.) Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's wilful or reckless indifferent behaviour. They are measured by the wronged person's suffering.

The damage must be caused by the deliberate or negligent act or omission of the wrongdoer.

In this case, I find there is insufficient evidence to establish that the Landlord acted in a deliberate, negligent and/or high-handed manner. I note there were several rental units affected, several contractors involved, and the flood remediation posed scheduling issues and frustration. However, I find there is no evidence any of the stress and inconvenience was caused by bad faith conduct. I note the Landlord attempted to offer some help moving and also offered storage services to the

Tenants but these offers were mostly turned down by the Tenants for varying reasons. I dismiss this portion of the Tenants' claim.

11) \$1,921.77 – Tenant #1 Lost wages

12) \$3,415.38 – Tenant #2 Lost wages

Tenant #1 stated that he had to cancel his flight to Beijing on September 26, 2018, due to an "expedited" move-out request by the Landlord. The Tenant stated he was unable to find all of his work uniform, and suffered a mental breakdown, which forced him to miss work (30 hour flight x \$75.00/hour).

I have considered the Tenants request on this matter. However, I note the Landlord provided the Tenants 2 days' notice that they had to move their belongings out so that flood remediation work could be completed. This notice was given within the context of the Tenants knowing a major flood had occurred and remediation was pending. I also note the Landlord offered to help move things out of the rental unit to make sure work could start on time, which the Tenants declined. I find the Tenants have failed to establish why the Landlord would be responsible for the Tenant not being able to locate all of his uniform, or for being unable to report to work. There is insufficient evidence that both Tenants were required to be there for the move and why the Tenants were unable to sufficiently organize and plan such that Tenant #1 could have attended work. I decline to award item #11, as laid out above. I find the Tenants did not sufficiently mitigate and plan in a manner which would prevent both of them from missing work.

With respect to the claim for lost wages for Tenant #2, I note he stated that he missed two days of work (approximately \$107.00/hour) due to the hassle of moving his items to let the floor restoration happen (1 Day) and also to provide access to the contractors (1 Day). I find it important to note that the Tenant was not required to be present to let the contractors in to complete the work. I find being in attendance for these matters was voluntary, and is not compensable. Further, as stated above, I find the Tenants choice to decline the Landlord's assistance with moving some items exacerbated their last minute moving rush, and contributed to the moving day they both took in order to clear their items out. It is not clear why some of this moving could not have been done outside of work hours, or why the Tenants were unable to have others assist them with the move and mitigate their lost wages. I note Tenant #2 is claiming for lost wages of \$107.00 per hour but it is not sufficiently clear why he had to be present for the move, nor is it sufficiently clear whether or not he took

steps to find a cheaper alternative than losing \$107.00 per hour doing it himself. Ultimately, the Tenants lack of mitigation on these items is detrimental to this portion of their claim. As such, I dismiss their claims for lost wages.

Further, section 72 of the *Act* gives me authority to order the repayment of a fee for an application for dispute resolution. Since the Tenant was partially successful in this hearing, I also order the Landlord to repay the \$100.00 fee the Tenants paid to make the application for dispute resolution.

In summary, I grant the monetary order based on the following:

Claim	Amount
September Rent Rebate:	\$1,987.33
Filing Fee	\$100.00
TOTAL:	\$2,087.33

Conclusion

The Tenants are granted a monetary order pursuant to Section 67 in the amount of **\$2,087.33**. This order must be served on the Landlords. If the Landlords fail to comply with this order the Tenants may file the order in the Provincial Court (Small Claims) and be enforced as an order 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: April 12, 2019

Residential Tenancy Branch