Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1125844 BC LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

his hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- authorization to obtain a return of double their security and pet damage deposits in the amount of $2,200.00 pursuant to section 38;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $13,266.56 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 1:40 pm in order to enable the landlord to call into this teleconference hearing scheduled for 1:30 pm. The tenants attended the hearing and were given a full opportunity to be heard, to present testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the tenants and I were the only ones who had called into this teleconference.

The tenants testified that the landlord was served the notice of dispute resolution form and supporting evidence package via registered mail on January 24, 2019. The landlord provided a Canada Post tracking number confirming this mailing which is reproduced on the cover of this decision. I find that the landlord was deemed served with this package on January 29, 2019, five days after the tenants mailed it, in accordance with sections 89 and 90 of the Act.

The tenants testified that the landlord's agent was personally served with their evidence package on March 8, 2019. I find that the landlord was served with this package on March 8, 2019, in accordance with section 88 of the Act.

Preliminary Issue – Amendment of Claim

The tenants named the landlord incorrectly on their application for dispute resolution. They named it as "[last name of owner of numbered company] [numbered company]". Upon review of the tenancy agreement, it is clear that the owner was not a party to the agreement, and that the numbered company is the tenant's landlord.

Accordingly, pursuant to section 62 of the Act, I order that the name of the landlord be amended so as to remove any reference to the last name of the owner of the number company, and replaced by the numbered company alone.

Issue(s) to be Decided

Are the tenants entitled to:

- the return of double their security and pet damage deposit in the amount of $2,200.00;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $13,266.56; and
- recover the filing fee for this application from the landlord?

Background and Evidence

While I have considered the documentary evidence and the testimony of the tenants, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below.

The parties entered into a written fixed term tenancy agreement starting February 15, 2018 and ending February 15, 2019. Monthly rent is $1,650.00 and is payable on the first of each month. The tenant paid the landlord a security deposit of $825.00 and a pet damage deposit of $275.00. The landlord still retains these deposits.

The tenancy agreement included an addendum which contained the following clause:

"Tenant is accepting property 'As is where is'"

Tenant SE testified that that:

- When the tenants moved in, they knew the rental unit would be "in shambles". She testified that they thought this would be okay, as the landlord agreed to

remove much of the garbage around the unit. She testified that this was not done.

- Shortly after the start of the tenancy she noticed silver fish and spiders throughout the rental unit. She testified that she spoke to an agent of the landlord who told her that the tenancy agreement stipulated that that the rental unit was “as is” and that the landlord would not address this problem.
- She initially believed that the “as is” clause prevented her from being entitled to ask for any repairs to be done. She testified that, at some point in July 2018, she learned that this was not the case. She testified that she then sent a letter to the landlord demanding in writing that the dishwasher be repaired, as it did not work.
- The landlord told her that tenancy agreement did not state that a dishwasher was to be provided, and that, as such, the dishwasher would not be fixed.
- She complained between 3 and 5 times to the landlord about the condition of the lower level of the rental unit. She testified that it was full of moisture, and the floor would seep water when stepped on.
- She understood from the landlord that the moisture was due to water leaking from drain tiles. She testified that the landlord advised her that they were not going to fix the leak, as it would be too expensive.
- The tenants did not use the lower level of the rental unit for the duration of the tenancy due to this problem
- At the end of October, a friend of the tenants came to stay with them, and used the bedroom located in the lower level. She testified that, within two or three days, he developed a chest infection.
- Once her friend developed the infection, she investigated the lower level and discovered mold and mushrooms growing on parts of the floor and walls on the lower level. She testified that she immediately contacted the landlord.
- On November 1, 2018, tenant DM spoke to a representative of the landlord over the phone to advise him of the mold and demand that it be removed. The representative told him that the tenants should move. Tenant DM and the representative then argued about who would pay for such a move.
- On November 1, 2018, the landlord’s owner and the landlord’s representative attended the rental unit to inspect the mold. She testified that they agreed the mold was present and told her that they would not remediate the rental unit as it would be too expensive, and that they would instead tear down the unit. The owner told the tenants that they had to move, and that the landlord would help. No specifics as to what this help would be were discussed or agreed to.
- Shortly thereafter the tenants located a new place to live, which had a monthly rent in the amount of $2,200.00. She testified that they had moved out of the rental unit by November 20, 2018.

- On November 20, 2018, tenant DM met with the owner of the landlord to get the security deposit back. She testified that the landlord's owner wanted tenant DM to sign a mutual agreement to end tenancy form, which he refused to do. She testified that the tenants had not agreed to move, but only did so because the landlord told them to because the mold was not going to be remediated.
- The landlord has still not returned the security deposit.
- On November 29, 2018, she sent the landlord her forwarding address by text message. She submitted into evidence a screenshot of this message.

The tenants submitted a bylaw enforcement officer's report which corroborated the tenants' claims that there was black mold in the lower floor of the rental unit.

Tenants' Damages

The tenants claim $15,466.56 in damages, as follows:

Tenant DM's vacation pay	$1,173.00
Hiring Movers	$700.00
Truck rental	$277.00
Food for people assisting in moving	$270.95
Moving Supplies (boxes, bubbles wrap)	$120.61
Damages for breaking lease (3 month's rent)	$4,950.00
Difference in rent between rental unit and new accommodation ($550.00 x 6 months)	$3,300.00
Loss of use of 1/2 the rental unit (50% reduction of three months' rent)	$2,475.00
Return of double the deposits	$2,200.00
Total	**$15,466.56**

The tenants seek reimbursement of moving costs, including the hiring of movers, food for people who assisted the tenants in packing and moving, the cost of renting a moving truck, and packing supplies. The tenants provided receipts to support the figures in the table above associated with the claimed moving expenses.

The tenants claim compensation for the time tenant DM had to take off work to prepare for the move. Tenant SE testified that, due to a medical condition, she was not able to assist in packing for the move, and that tenant DM had to take vacation days from work to do this. She provided a pay statement of tenant DM which shows that, had he not used those vacation days, he would have been entitled to $1,173.00 in vacation pay.

The tenants claim $4,950.00 in damages stemming from the landlord breaking the lease. They testified that they had three months left on the lease, and, since the landlord broke the lease, it should pay the tenants the equivalent of three month's rent.

The tenants claim $3,300.00 in damages, representing the difference in monthly rent of $550.00 between the rental unit ($1,650.00), and the tenant's new accommodation ($2,200.00). Tenant SE testified that, as a result of the landlord's breaking the lease, the only accommodation they could find was more expensive. She did not provide a specific basis as to why she sought repayment of this amount for six months, as opposed to some other number.

The tenants claim $2,475.00 in damages for the landlord's breach of the Act for failure to repair or maintain the lower floor of the rental unit. The tenants allege that they were deprived of the use of the lower floor due to the condition it was in for the duration of the tenancy. They seek a retroactive reduction in monthly rent of 50% ($825.00) for three months. Tenant SE testified that the tenants only seek the reduction for three months, as it was only three months before the end of the tenancy that the tenants became aware of their right under the Act to demand that repairs be made.

The tenants claim $2,200.00 pursuant to section 38 of the Act, representing an amount equal to double their security and pet damage deposit, as the landlord has failed to return these deposits to the tenants or make a claim against them as required by the Act.

Analysis

I found tenant SE's uncontroverted testimony to be credible. Her testimony was measured, considered, and corroborated by documentary evidence. In light of this, and in light of the fact the landlord did not attend the hearing, although duly served, I accept tenant SL's version of events as true.

Section 5 of the Act states:

> **This Act cannot be avoided**
>
> **5** (1)Landlords and tenants may not avoid or contract out of this Act or the regulations.
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> (2)Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 32 of the Act states:

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.

As such, I find that the "as is, where is" clause contained in the addendum to the tenancy agreement to be of no effect, and that the landlord is obligated to provide and maintain the rental unit in a state of repair that is suitable for occupation.

I find that the lower floor had black mold on the walls, and mushrooms growing on the floor. I find that this caused the rental unit not to be suitable for occupation by the tenant (the landlord, by directing the tenants to move out of the rental unit, confirms this). I find that by failing to remediate the lower floor, the landlord breached section 32 of the Act.

I find that the landlord told the tenants it was not going to remediate the lower floor, and directed them to vacate the rental property. I find that by doing this, the landlord ended the tenancy. I do not find that the parties mutually agreed to end the tenancy (as can be seen by tenant DM's refusal to sign the mutual agreement to end tenancy form presented to him by the landlord).

The manner in which the landlord ended the tenancy does not conform to the methods of ending a tenancy set out in section 44(1) of the Act. Section 44(1) states:

How a tenancy ends

44 (1)A tenancy ends only if one or more of the following applies:

(a)the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 *[tenant's notice]*;

(i.1) section 45.1 *[tenant's notice: family violence or long-term care]*;

(ii) section 46 *[landlord's notice: non-payment of rent]*;

(iii) section 47 *[landlord's notice: cause]*;

(iv) section 48 *[landlord's notice: end of employment]*;

(v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii) section 50 *[tenant may end tenancy early]*;

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
(c) the landlord and tenant agree in writing to end the tenancy;
(d) the tenant vacates or abandons the rental unit;
(e) the tenancy agreement is frustrated;
(f) the director orders that the tenancy is ended;
(g) the tenancy agreement is a sublease agreement.

As such, I find the landlord breached the Act by ending the tenancy in the manner it did.

Tenants' Damages

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The landlord breached two sections of the Act (sections 32 and 44, as discussed above). The tenants allege they suffered damages flowing from each of these breaches.

The tenants allege they suffered the following damage in the amount of $2,475.00 as the result of the landlord's failure to repair the rental unit. They argue they lost the use of half the rental unit, and accordingly should be compensated for half the rent, for three months.

I find the tenants reasonably attempted to minimize their loss by repeated asking the landlord to make repairs to the lower floor.

I find that the tenants have suffered the loss of use of the lower floor as the result of the landlord's breach. I do not, however, agree that the amount of loss they suffered is equivalent to half a month's rent. While they gave no direct evidence on this point, I infer from the tenants' testimony that they were able to manage without access to the lower floor for almost nine months. As such, I infer that the amenities necessary for keeping a home (e.g. kitchen, sole bathroom, or sole bedrooms) were not located on the lower floor.

I do not find it reasonable to assess the damage to the tenants on solely a square footage basis. Instead, I find it reasonable to assess their loss based on the utility of the space. As such, I find that a more reasonable quantification of the tenants' loss is 25% of their house. They undoubtedly lost the benefit of the extra space the lower floor afforded them, but I heard no evidence regarding the loss of the tenants' ability to maintain a functioning home.

I accept the tenants' claim that they are entitled to three months' retroactive reimbursement as compensation for this loss. Accordingly, I order that the landlord pay the tenants $1,237.50.

I find that the tenants suffered some of losses alleged (but not all) as the result of the landlord's breach of section 44 of the Act (improperly ending the tenancy).

The tenants have failed to persuade me that this breach caused them to incur any loss associated with moving costs that they would not have otherwise incurred were they to have moved if the tenancy was ended in accordance with one of the methods set out in section 44 of the Act. Accordingly, I decline to award any amount the tenant has claimed for hiring movers, renting a truck, purchasing food for the movers, purchasing moving supplies, or for tenant DM's vacation pay.

Additionally, I find that the amount of $4,950.00 representing rent for the final three months of the tenancy is not a loss that was actually incurred by the tenants. The tenants did not pay any portion of this amount to the landlord. They are not therefore entitled to its recovery. There is no basis in the Act for me to make an award of damages such as this.

I find that the tenants did suffer loss as the result of the landlord improperly ending the tenancy in connection with the increased rent of the new accommodations. I find that the monthly rent of the new accommodation is $550.00 higher than monthly rent of rental unit. I find that, in light of the time frame the tenants had to move and the lower

amount of monthly rent the landlord was likely seeking for the rental unit on account of its condition, the tenants reasonably minimized their losses.

However, I do not agree that the tenants are entitled to an amount equal to the difference of six months of rent. Rather, had the landlord ended the tenancy in accordance with section 49(6) of the Act (end tenancy to demolish the rental unit), the landlord would have had to provide the tenant four months' notice (section 49(2)(b), plus the equivalent of one month's rent (section 51(1)). As such, the tenants would have been able to pay the reduced amount of rent for four more months. I therefore find that the loss suffered by the tenant is as follows:

Difference between old and current rent	$550.00	
	x4	
	$2,200.00	$2,200.00
One month's rent		$1,650.00
	Total	**$3,850.00**

Accordingly, I order that the landlord pay the tenants $3,850.00.

Return of Tenant's Deposits

I find that the landlord retains the entirety of the security deposit and the pet damage deposit in the combined amount of $1,100.00.

Section 38(1) of the Act states:

> **Return of security deposit and pet damage deposit**
> 38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
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> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the tenancy ended on November 20, 2018, and that the tenant provided their forwarding address in writing to the landlords on November 29, 2018.

I find that the landlords have not returned the security or pet damage deposits to the tenants within 15 days of receiving their forwarding address.

I find that the landlords have not made an application for dispute resolution claiming against the security or pet damage deposits within 15 days of receiving the forwarding address from the tenants.

Accordingly, I find that they have failed to comply with their obligations under section 38(1) of the Act.

Section 38(6) of the Act sets out what is to occur in the event that a landlord fails to return or claim against the security or pet damage deposits within the specified timeframe:

> (6) If a landlord does not comply with subsection (1), the landlord
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> (a) may not make a claim against the security deposit or any pet damage deposit, and
>
> (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

The language of section 38(6)(b) is mandatory. As the landlords have failed to comply with section 38(1), I must order that they pay the tenant double the amount of the security and pet damage deposits ($2,200.00).

As the tenants have been successful in their application, they are entitled to have their filing fee of $100.00 repaid by the landlords.

In total, I order that the landlord pay the tenants $7,387.50, representing the following:

Loss of use of the lower floor	$1,237.50
Difference in rent + one month's rent	$3,850.00
Return of double the deposits	$2,200.00
Filing Fee	$100.00
Total	**$7,387.50**

Conclusion

Pursuant to sections 67 and 72 of the Act, I order the landlord pay the tenants $7,387.50.

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 1, 2019

Residential Tenancy Branch