Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNRL-S, FFL
MNDCT, MNSD, FFT

Introduction

This hearing originally convened on February 4, 2020 and was adjourned due to time constraints. An Interim Decision dated February 4, 2020 resulted from the first hearing and should be read in conjunction with this decision. This was a cross application hearing that dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for the return of the security deposit, pursuant to section 38;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant's application for dispute resolution was filed on October 18, 2019

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

- a Monetary Order for damages, pursuant to section 67;
- a Monetary Order for unpaid rent, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

The landlord's application for dispute resolution was filed on October 4, 2019.

The landlord, the landlord's agent, tenant S.K. (the "tenant") and the tenant's counsel attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issue- Landlord's Evidence

Rule 3.7 of the Residential Tenancy Branch Rules of Procedure states:

> **3.7 Evidence must be organized, clear and legible**
> All documents to be relied on as evidence must be clear and legible. To ensure a fair, efficient and effective process, identical documents and photographs, identified in the same manner, must be served on each respondent and uploaded to the Online Application for Dispute Resolution or submitted to the Residential Tenancy Branch directly or through a Service BC Office.
>
> For example, photographs must be described in the same way, in the same order, such as: "Living room photo 1 and Living room photo 2".
>
> To ensure fairness and efficiency, the arbitrator has the discretion to not consider evidence if the arbitrator determines it is not readily identifiable, organized, clear and legible.

The landlord uploaded approximately 200 files, only some of which contained descriptions such as "Living room photo 1". Approximately 50 jpeg files had no description, only a series of numbers. I find that the files bearing no description are not readily identifiable or organized. I therefore decline to consider them.

Preliminary Issue- Landlord's Attendance

Throughout both hearings the landlord would periodically hang up the phone for brief periods of time. The landlord's agent testified that the landlord was working and sometimes had to leave the hearing but that she had authority from the landlord to continue the hearing during his absences.

Issues to be Decided

1. Are the tenants entitled to a Monetary Order for the return of the security deposit, pursuant to section 38 of the *Act*?
2. Are the tenants entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?

3. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
4. Is the landlord entitled to a Monetary Order for damages, pursuant to section 67 of the *Act*?
5. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
6. Is the landlord entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
7. Is the landlord entitled to recover the filing fee for this application from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on June 1, 2019 and ended on September 22, 2019. This was originally a fixed term tenancy set to end on June 1, 2020. Monthly rent in the amount of $1,800.00 was payable on the first day of each month. A security deposit of $800.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application. The landlord has not returned the security deposit to the tenants.

Both parties agreed that a move in condition inspection report was not completed and that the landlord did not ask the tenants to complete a move in condition inspection and report. Both parties agreed that the tenants sent the landlord an email containing photographs of deficiencies at the beginning of the tenancy.

Both parties agree that a move out condition inspection was completed by both parties on September 22, 2019. Both parties signed the move out condition inspection report; however, the move out condition inspection report states that the tenants do not agree with the contents of the move out condition inspection report. Both parties agree that the tenant provided the landlord with her forwarding address on the move out condition inspection report. The move out condition inspection report was entered into evidence.

The landlord's agent testified that landlord is seeking the following damages arising out of this tenancy:

Item	**Amount**
Repair wall and paint	$127.09
Repair cooktop	$537.00
Repair shower	$524.00
Repair Flooring	$5.00
Cleaning	$250.00
Registered mail	$66.19
Strata move out fee	$200.00
Repair bathroom wall	$65.56
Loss of rental income for October 2019	$1,800.00
Loss of rental income from November 2019 to May 2020	$600.00
Total	**$4,174.84**

Repair wall and paint

The landlord's agent testified that the tenants dented and scuffed the walls at the subject rental property requiring the subject rental property to be repainted when the tenants moved out. The landlord's agent testified that the subject rental property was painted in early 2019, shortly before the tenants moved in. The landlord's agent entered into evidence the following labelled documents showing damage to the subject rental property after the tenants moved out:

- a video taken after the tenants moved out showing some wall damage to a bedroom wall;
- a video taken after the tenants moved out showing some wall damage to the walls in the master bedroom;
- a photograph of some black marks on the walls;
- a photograph of a mark near an outlet; and
- a photograph showing water marks down a wall from an air conditioner.

A receipt for patching the walls and painting them in the amount of $127.09 was entered into evidence.

Counsel for the tenants submitted that the walls were already scuffed and dented when the tenants moved in. The tenants entered into evidence numerous photographs of the

subject rental property taken on May 29, 2019 showing dents, scratches and scuffs on the walls. Counsel for the tenants submitted that the tenants did not damage the walls and so should not have to pay for the cost of repairing and painting them.

Repair cooktop

The landlord's agent testified that the cooktop was brand new when the tenants moved in with no scratch marks on it. The landlord's agent testified that the cooktop was heavily scratched when the tenants moved out. Photographs and a video of the cooktop taken at the end of the tenancy were entered into evidence. The photographs show that the cooktop is scratched. The landlord entered into evidence a text message stating that the cooktop would cost $537.00 to be replaced. The landlord's agent testified that the text message was from a repair company, but the text itself does not state who the message is from.

Counsel for the tenant submitted that the tenant used the cooktop in a normal fashion with pots and pans and that the scuff marks are the result of regular wear and tear.

Repair shower

The landlord's agent testified that the tenants dented the shower wall in the master bedroom. The landlord's agent testified that she received a number of quotes to fix the dent and is seeking $524.00 for this repair. Quotes were entered into evidence. No photographs of the shower taken prior to the tenants moving in were entered into evidence. The landlord's agent did not enter any labeled photographs of damage to the shower.

Counsel for the tenants submitted that the shower was already dented when the tenants moved in.

Repair flooring

The landlord's agent testified that the tenants damaged the strip joining the flooring in the living room and the kitchen which requires repair. The landlord's agent entered into evidence an advertisement for laminate flooring in the following amounts:

- $2.98 per square foot;

- $1.87 per square foot; and
- $1.98 per square foot.

The landlord's agent testified that the landlord is seeking $5.00 for a new flooring strip. Counsel for the tenants submitted that the crack was there when the tenants moved in. The tenants entered into evidence the following text exchange between the tenants and the landlord (a photograph of the cracked joining strip was included in the text):

- Tenant: And now this has cracked as a result of the wood lifting at the island by the dishwasher.
- Landlord: Hey [tenant]. Thanks for the update. He has already agreed to re-do the flooring. That crack was there prior to you living there so don't worry about that.

Counsel for the tenants submitted that the above text proves that the crack pre-existed the tenancy and was not caused by the tenants.

Cleaning

The landlord's agent testified that the subject rental property required cleaning after the tenants moved out. The landlord's agent testified that the baseboards, patio, floor and blinds were dirty. The landlord's agent entered into evidence a video of a bedroom showing dust on a window sill and dust on the baseboards of the mater bedroom. The landlord's agent testified that the fridge was not properly wiped down on the outside and entered into evidence a video showing some marks on the exterior of the fridge. The landlord's agent testified that the tenants left chewed gum in the bathroom. The landlord testified that she received a quote for cleaning in the amount of $250.00. The quote was entered into evidence.

Counsel for the tenant testified that the subject rental property was not clean when the tenants moved in which is evidenced by a text message from the landlord dated June 4, 2020 which states:

> …if you guys need a cleaner to run through the place again just order it I want to make sure you guys are set up properly. I had a lot go on during the time of us working you into the place

Counsel for the tenants submitted that the tenants cleaned the subject rental property when they moved out and a cleaner was not necessary. The landlord's agent testified that the landlord was being generous but that the place was already cleaned when the

tenants moved in.

Registered Mail

The landlord's agent testified that the landlord is seeking reimbursement for the cost of sending the tenant registered mail for this proceeding. The landlord entered registered mail receipts totaling $66.19.

Strata move out fee

The landlord's agent testified that the tenants did not pay the $200.00 strata move out fee at the end of the tenancy and the landlord was charged the $200.00 fee. The landlord's agent entered into evidence proof of the $200.00 charge. The landlord's agent testified that the tenant signed a Form K Notice of Tenants Responsibilities ("Form K"). The tenant testified that she could not recall if she signed a Form K. The landlord's agent did not enter into evidence a Form K. The landlord's agent did not enter the Strata Rules into evidence.

Repair bathroom wall

The landlord's agent testified that the tenants damaged the bathroom wall. The landlord's agent testified that it looked like the tenants drilled a hole in the tile. No labeled photographic evidence of the above damage was accepted into evidence. The landlord's agent entered into evidenced an advertisement for wall tiles in the amount of $52.59 per case and an advertisement or grout in the amount of $12.97. The landlord is seeking $65.56 to repair the bathroom wall.

The tenant testified that she did not damage the wall in the bathroom.

Loss of rental income

Both parties agree that on September 12, 2019 the tenants texted the landlord a notice to end tenancy effective September 22, 2019. The landlord responded to the text on September 12, 2019. The September 12, 2019 text messages were entered into evidence.

The landlord's agent testified that the tenants broke their fixed term lease and she was not able to find a new renter until November 1, 2019; however, she had to drop the rental rate to $1,700.00 to secure the new tenant as soon as possible. The landlord is seeking lost rental income in the amount of $1,800.00 for October 2019 and the difference between what she would have received from the tenants' tenancy agreement and what she will receive from the new tenants from November 2019 to May 2020 in the amount of $600.00.

Counsel for the tenant submitted that the landlord is not entitled to recover loss of rental income because the landlord breached a material term of the tenancy agreement by failing to repair the subject rental property within a reasonable period of time from written demand. In addition, or in the alternative, the tenancy was ended due to frustration.

The tenants submitted text messages between the landlord and the tenant between May 29, 2019 and September 12, 2019. Below is a brief summary of the relevant text exchanges:

- June 15, 2019- The tenant notified the landlord that the bedroom air conditioner was leaking. The landlord responded that it leaked in the past and that he left a message with the developer to fix it and is waiting to hear back from him.
- June 18, 2019- the landlord provided the tenants with the developer's phone number and instructed the tenants to contact him.
- June 21, 2019- The tenant texted the landlord photographs of the landlord's mail delivered to the subject rental property. The mail included a property tax notice and a letter from the British Columbia Ministry of Finance. The tenant informed the landlord that he had mail to be picked up.
- June 25, 2019- The tenant informed the landlord that the developer had not responded to them and that they can hear water dripping from the living room air conditioner.
- June 29, 2019- The tenants texted the landlord asking if the developer got back to the landlord. The landlord did not respond.
- July 11, 2019- The tenant texted the landlord again asking if anyone got back to the landlord.
- July 15, 2019- The landlord responded to the July 11, 2019 text, he stated that he just got back from a trip and just tried to get a hold of the developer but was not successful.
- July 15, 2019- The tenant informed the landlord that they have tried not to use

the air conditioner but the weather has been very hot. When the air conditioner is not on, water can be heard dripping between the walls. Photographs of water damage to the wall and baseboards were included in the text.

- July 15, 2019- The landlord responded that he would call the developer in the morning.
- July 18, 2019- The landlord informed the tenant that he spoke with the developer and asked the tenant to let him know “how it goes”.
- July 18, 2019- The tenant informed the landlord that a guy came by and said he would send the developer tomorrow.
- July 19, 2019- The tenant informed the landlord that the developer did not attend the subject rental property.
- July 23, 2019- The landlord stated: “Any luck with those guys before I go down to their jobsite and drag them over to your unit lol? Either way keep AC on because they are paying for everything Even new hardwood”.
- July 23, 209- The landlord stated “I don’t think ill get warranty as its been over a year. But they already came and fixed the problem (as collects water in a resoviour [sic] that is WAY too small)”.
- July 29, 2019- The tenant informed the landlord that the developer came and fixed both air conditioning units. The landlord responded that the developers have to do all new laminate that got damaged because of the water leak.
- August 2, 2019- The tenant informed the landlord that the air conditioner in the bedroom is leaking again and that the developer has been notified.
- August 2, 2019- The tenant informed the landlord that “the floor is lifting in the middle of the room, underneath the area rug we put down has water stains from water coming up from the floor which trails to under neath [sic] the dishwasher area.” Pictures of same were included in the text message. The tenant asked the landlord to call her.
- August 7, 2019- The tenant texted the landlord a picture of a cracked flooring strip used to connect different types of flooring. The accompanying text states: “And now this has cracked as a result of the wood lifting at the island by the dishwasher. The landlord responded: “Hey [tenant]. Thanks for the update. He has already agreed to re-do the flooring. That crack was there prior to you living there so don’t worry about that.”
- August 7, 2019- The landlord told the tenant to “take the cost of your carpet out of your next rent im currently sending pics to my lawyer and developer now”.
- August 7, 2019- The landlord states “If its not comfortable for u guys living there let me know and we can discuss….i feel so bad for this. If it becomes bad enough to wanna leave let me know.” The tenant responds that she would like to have the problem fixed and to stay.

- August 12, 2019- The tenant requests an update.
- August 14, 2019- Landlord informs the tenant that he has been back and forth with the developer who will call the tenant to follow up.
- August 15, 2019- The tenant informs the landlord that the developer asked them to stop using the air conditioning to prevent further damage. The tenant asks the landlord to attend at the subject rental property.
- August 20, 2019- The landlord's agent informed the tenant that she would let the tenant know if she needed to attend at the subject rental property.
- August 26, 2019- The tenant asks the landlord if he has heard back from strata or the developer.
- August 28, 2019- The landlord informed the tenant that he "sent everything to strata and waiting now".
- September 3, 2019- The tenant asks the landlord for a mutual release from the tenancy agreement due to the ongoing water leak issues.
- September 9, 2019- The tenant informed the landlord that she is responding to a text message from the landlord's agent which stated in part: "if you think your health is at risk, by all means you can hire someone to come assess the apartment for mold and to assess health risks and we can discuss that as needed."
- September 12, 2019- The tenant informed the landlord that she withdrew a previous offer to mutually agree to end the tenancy based on information she received from the Residential Tenancy Branch. The tenant informed the landlord that she hired a company to test for mold and inspect the water damage. "The water mapping test came back with clear indication of water damage which has spread from the inside of the wall between the master bedroom and living room to underneath the living room laminate floor as a result of the on and off long term leaking of the [air conditioning unit]…. Due to the seriousness of the water damage and further options provided by the Residential Tenancy Branch, we will be out of the unit on September 22, 2019.

The tenant testified that even though the landlord told her in a July 23, 2019 text to continue to use the air conditioner, she stopped using them on August 15, 2019 to prevent further damage.

Counsel for the tenant submitted that the landlord did not provide an address for service on the Residential Tenancy Agreement. The Residential Tenancy Agreement was entered into evidence and the landlord's address for service is left blank. Counsel for the tenant submitted that since the landlord was receiving mail at the subject rental property about the subject rental property, the tenant sent a letter to the landlord via regular mail, addressed to the subject rental property. The letter is dated August 8, 2019 and states:

> We write this letter pursuant to the Residential Tenancy Act demanding you, our landlord, to complete the following repairs in our unit:
>
> 1. Leaking Air System Unit on living room wall;
> 2. Leaking Air System Unit on bedroom wall;
>
> We have submitted photographs to you by way of text message to show the damage and proof of need for repair.
>
> We give you until August 29, 2019 to complete all reasonable repairs that need to be made in our unit.
>
> If you do not meet the date of repairs, we will be seeking further options from the Residential Tenancy Branch.
>
> We will also be considering a mutual tenancy release if you are unable to complete all repairs, or if not agreeable, we will pursue an action against to proceed to arbitration with the Residential Tenancy Branch.

The tenant testified that she left a letter dated September 11, 2019 in the landlord's mailbox. That letter was entered into evidence and states:

> Pursuant to the Residential Tenancy Agreement and my letter dated August 8, 2019, I had served a letter regarding repairs and maintenance and provided you with a deadline of August 29, 2019 to schedule and complete the necessary repair to the leaking air unit in the living room and the leaking air unit on the bedroom wall.
>
> We had previously strictly communicated regarding the need for repairs through text messages June 2019 until September 2019.

> As stated in the Standards of Maintenance on the BC Government website and as per the *Residential Tenancy Act* that a "landlord is required to maintain their rental properties in a state that is suitable for occupancy- they must meet housing, safety and building standards required by law."
>
> As a result of your failure to repair and maintain the air units since I had initially advised you of the issues in June 2019 and my concern of water leaking between the walls. It had become evidence that the air unit on living room was in fact leaking between the walls resulting in swelling along the baseboards along the wall it is built on with eventual swelling throughout areas of laminate flooring as further advised to you. It further became a risk to health standards due to the water leak being left for such a time period.
>
> On September 11, 2019, I hired [a mold testing company] to inspect the condo and conduct water mapping along with air quality testing for my own mental well-being as no actions had previous being taken regarding the issue and I did not believe that my concern for mold or the potential of mold between the walls was being taken seriously. We received immediate results of the water mapping indicating and confirming the leak in the wall and it also confirmed the water had spread throughout under the laminate flooring.
>
> Considering all of the above, we will be moving out by September 22, 2019.

The landlord's agent testified that the landlord did not receive the August 8, 2019 or September 11, 2019th letters until after the tenants moved out so the landlord did not have an opportunity to respond and repair the unit. The landlord's agent testified that since the parties communicated through text and email, the tenant should have texted or emailed the letters to the landlord. The landlord's agent testified that the letters should have been sent through Canada Post, not left in the mailbox.

The tenant testified that the inspection for the mold report occurred on September 11, 2019. The mold report was entered into evidence and states in part:

> Review of the laboratory date reveals that the samples collected indicate an elevated mold score. The data also indicates the mold levels and/or hyphal fragment levels inside are over ten times higher than similar groups present in the outdoor/baseline sample….There was also water staining on the baseboard in the living room as well as some discoloration between the laminate flooring. Moisture mapping was done and the baseboard readings were 22-24% moisture content which is enough moisture to support mold growth. The laminate flooring was swollen in some areas and the moisture meter indicated that it was 48%-100% moisture content under the flooring. The source of any water intrusion should be identified and in this case we believe the AC Unit is the cause of and should be corrected…

The landlord's agent testified that she did not authorize the tenants to get a mold inspection report completed and that the tenant had the test done without discussing it with her first. Both parties agree that the tenant sent the landlord a copy of the mold report.

The landlord's agent testified that the certification stamp on the mold report is expired and so the report's contents are void and should not be considered. Counsel for the landlord submitted that the author of the report forgot to update his template and used the old certification stamp on the report. When the error was brought to his attention, he sent the tenant a copy of the report with the correct updated certification stamp on it. The email dated October 15, 2019 providing the updated copy of the mold report was entered into evidence.

The landlord's agent testified that the mold report company does not have business license for the city of the subject rental property. The tenant entered into evidence the business license for the mold report company for the city of the subject rental property.

The tenant testified that the mold in the subject rental property aggravated her allergies. The tenant testified that she showed the mold report to her family doctor. The tenant entered into evidence a letter from her family doctor dated September 17, 2019 which states:

> The above patient appears to have allergy to mold. She is living in an apartment that has a water leak. She has had air quality testing and her apartment has been identified to have high levels of mold which produce mycotoxins, and associated with water damage. It is my opinion that this is an unhealthy environment, as she has had exacerbation of allergy symptoms

The landlord's agent testified that the tenant's allergies could have been aggravated by multiple sources and its not appropriate for the tenant to say that it was just mold which aggravated her symptoms and not dust. The landlord's agent testified that the subject rental property was very dusty and that the tenant's failure to clean the subject renal property aggravated the tenant's symptoms.

The tenant testified that her dog's allergies were also exacerbated by the mold problems. The tenant testified that prior to moving into the subject rental property her dog was diagnosed with a mold allergy. The tenant entered into evidence a letter from her dog's veterinarian dermatologist dated September 17, 2019 which states in part:

> Due to the leaky environment and documented high environmental mold counts, our advise to [the tenant] was for [the tenant's dog] to be moved to a new environment away from molds, as this has been affecting his allergy management.

The landlord's agent testified that the tenant's dog was sick before the tenants moved into the subject rental property and it is not appropriate to say that the water leak caused the dog to get sick.

The tenant testified that in September of 2019 she began noticing a bug infestation in the subject rental property, she didn't know what the bugs were so she posted a photograph of them on a social media platform and asked if anyone knew what they were. A doctor of entomology from a local university responded and informed her that the insect was a springtail. The tenant entered into evidence a letter from the doctor of entomology which states in part:

> On September 12, 2019, I was contacted by [the tenant] with request to identify some invertebrates that were "coming out from under the flooring" in their rental unit. I was provided a clean photograph of two specimens and was able to conclusively determined that the invertebrates in question were Collembola, commonly known as "springtails"….
>
> If Collembola are found indoors, it is usually an indication of moisture intrusion that has led to the formation of mold and/or mildew spores, as there are no other suitable sources of food for these animals in a typical human dwelling (they will not consume human food scraps, pet food, dry wood, other insects, etc.) and they are not drawn indoors by heat or light, as in the case with some insects…

> Water-damaged flooring/walls, if not properly dried or treated, are suitable substrates on which mold and mildew will grow. The springtail infestation in [the tenant's] unit indicated the presence of moisture, and of mold and/or mildew spores in the unit.
>
> Unless the food source is eliminated by way of properly repairing or treating the water-damaged materials, it is likely that the infestation will persist or reoccur. In addition, and more significantly, I would be concerned about the possible presence of black or other health hazardous molds in the unit resulting from the water damage.

The tenant entered into evidence photographs and videos of the insects in the subject rental property. The landlord's agent testified that she could not tell where the videos were taken or if they were at the subject rental property.

The landlord's agent testified that she thought it was weird that the doctor of entomology would get involved in this case. The landlord's agent testified that she contacted the university and they were not able to give her any information as to why the doctor was involved.

Counsel for the tenant submitted that the landlord did not make the required repairs following written demand on August 8, 2019 and so the tenant ended the tenancy due to breach of a material term, that being the landlord's duty to repair the subject rental property. Counsel for the tenant submitted that the landlord had a duty to repair and maintain the subject rental property and that if the landlord could not get the developer to promptly fix the deficiencies, it was the landlord's duty to have the property fixed by someone else, which he failed to do.

Section 10(1)(a) of the Tenancy Agreement states:

> The landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant. The landlord must comply with health, safety and housing standards required by law.

Counsel for the tenant submitted that in addition or in the alternative, the tenancy agreement ended due to frustration because it was no longer fit for habitation.

The landlord's agent testified that the landlord was in constant communication with the developer and was doing everything in his power to address the water leak and that it was fixed after the tenants moved out.

The landlord's agent testified that when the air conditioners were repaired, the repair people informed her that the air conditioner filters had never been cleaned. The landlord's agent testified that she entered into evidence a video of the repair people making the above comments, and that the video was labelled video #7. No such document was entered into evidence.

The landlord's agent testified that tenant lied in a September 3, 2019 email to the landlord in which she stated that she cleaned the air conditioner filters. The September 3, 2019 email was entered into evidence. The landlord's agent entered into evidence pictures of dirty air conditioner filters. The landlord's agent testified that the tenants were not doing their due diligence by not regularly cleaning the filters. Counsel for the landlord submitted that the landlord has submitted any evidence to prove that dirty filters caused the leak. The tenant testified that the landlord never told her it was her responsibility to clean the filters.

The landlord's agent testified that the tenant agreed to pay October 2019's rent in an email dated September 9, 2019. The tenant entered the bottom half of the September 9, 2019 email into evidence. The bottom half of the email provides the landlord with two settlement options. In option 2 the tenant offers to pay rent for October 2019 if the landlord agrees to sign a mutual agreement to end tenancy. Both parties agree that the landlord did not agree to sign a mutual agreement to end tenancy.

Counsel for the tenant submitted hat the September 9, 2019 email was made during settlement discussions and the landlord elected not to agree to the settlement offers. Therefore, the tenant is under no obligation to fulfill her portion of those offers.

The landlord's agent testified that the landlord started looking for new tenants immediately after receiving the tenants notice to end tenancy. Text messages between the landlord/landlord's agent and prospective tenants were entered into evidence as were emails and social media messages from prospective renters. The landlord's agent also entered into evidence several online advertisements for the subject rental property.

Counsel for the tenant submitted that the landlord had a duty to repair and inspect the subject renal property and the cost for obtaining the mold report should fall on the landlord. A receipt for the mold report in the amount of $492.45 was entered into evidence.

Counsel for the tenant submitted that the tenant's medical evidence proves that the subject renal property was unhealthy for the tenant and her dog and that the tenants suffered a loss of quiet enjoyment due to the impact on their health. Counsel submitted that the tenant is seeking $3,600.00 which equate to 50% reduction in rent paid during the tenancy.

The landlord's agent testified that the mold report is irrelevant due to the incorrect certification and that there is no evidence that there is mold in the walls of the subject rental property. The landlord's agent entered into evidence a series of videos inside the walls at the subject rental property. The landlord's agent testified that these videos show that there is no mold or moisture in the walls.

Analysis

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.

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To be successful in a monetary claim, the tenant must establish all four of the following points:

1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Failure to prove one of the above points means the claim fails.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

Section 37 of the *Act* states that when tenants vacate a rental unit, the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenants. When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy.

I find that the move in photographs of the subject rental property speak to the condition of the images contained in the photographs at the beginning of the tenancy. I find that the absence of photographs does not prove that the items not pictured were in good condition. The absence of evidence is not proof of the condition of the item not pictured.

Repair wall and paint

Contrary to section 23 of the *Act,* the landlord failed to complete a move in condition inspection report with the tenants*.* The photographs entered into evidence by the tenant show that the walls were dented and scuffed when the tenants moved in. I find that the landlord has not proved the move in condition of the walls and has therefore not proved that the marks on the walls at the end of the tenancy were caused by the tenants. I therefore dismiss the landlord's claim for painting and repair.

Repair cooktop

I find that the landlord has not proved the amount of or value of the damage or loss suffered with relation to the stovetop. I find the nameless text message entered into evidence to have little to no weight. I find that the text message is not sufficient proof of the value or loss suffered by the landlord. I therefore dismiss the landlord's claim for the repair of the cooktop.

Repair Shower

Contrary to section 23 of the *Act,* the landlord failed to complete a move in condition inspection report with the tenants. I find that the landlord has failed to prove the move in condition of the shower. I find that the landlord has not proved, on a balance of probabilities, that the damage to the shower was caused by the tenants. I therefore dismiss the landlord's claim for repairing the shower.

Repair Flooring

Based on the testimony of the tenant and the text from the landlord dated August 7, 2019, I find that the crack in the flooring pre-existed the tenancy. I therefore dismiss the landlord's claim to repair the flooring.

Cleaning

The landlord's agent entered into evidence quotes for the cost of a cleaner; however no actual receipts were provided. The landlord's agent did not testify that a cleaner was hired and provided no details regarding who if anyone cleaned the unit and the amount of time the cleaning took. I find that the landlord has not proved, on a balance of probabilities that a loss was suffered or the value of that loss. I therefore dismiss the landlord's claim for cleaning.

Registered Mail

The dispute resolution process allows an applicant to claim for compensation or loss as the result of a breach of the Act. With the exception of compensation for filing the application, the Act does not allow an applicant to claim compensation for costs

associated with participating in the dispute resolution process. I dismiss the landlord's claim for registered mail costs incurred while participating in this proceedings.

Strata move out fee

While the strata rules were not entered into evidence, based on the emails entered into evidence by the landlord's agent and the charge incurred by the landlord, I find that, on a balance of probabilities, the strata rules require a $200.00 move out fee. However, I find that the landlord has not proved that the tenants signed a "Form K Notice of Tenants Responsibilities", which would have required the tenant to abide by all strata rules. I dismiss the landlord's claim for the move out fee because the landlord failed to prove that the Form K Notice of Tenants Responsibilities was signed by the tenant(s).

Repair bathroom wall

Contrary to section 23 of the *Act,* the landlord failed to complete a move in condition inspection report with the tenants. I find that the landlord has failed to prove the move in condition of the bathroom wall. I find that the landlord has not proved, on a balance of probabilities, that the damage to the bathroom wall was caused by the tenants. I therefore dismiss the landlord's claim for repairing the bathroom wall.

Loss of rental income

Section 88(c) and (f) of the *Act* state that all documents, other than those referred to in section 89 *[special rules for certain documents]*, that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

> (c)by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
>
> (f)by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

I find that the landlord does not carry on the business of a landlord at the subject rental property. I find that it was clear to all parties that the landlord did not reside or work at the subject rental property. I therefore find that the August 8, 2019 and September 11, 2019 letters were not served in accordance with section 88(c) or section 88(f) of the *Act.*

Section 13(2)(e) of the *Act* states:

> A tenancy agreement must comply with any requirements prescribed in the regulations and must set out the address for service and telephone number of the landlord or the landlord's agent.

Section 71(1)(c) of the *Act* states that the director may order that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act.

I find that the landlord breached section 13(2)(e) of the *Act* by failing to provide the tenants with his address for service in the tenancy agreement. Based on the testimony of the parties, I find that the landlord received mail at the subject rental property. Based on the above, I find that the tenant was permitted to serve the landlord via mail or placing the letters in the mailbox at the subject rental property.

Pursuant to section 71(1)(c) of the *Act,* I find that the landlord was sufficiently served for the purposes of this *Act* with the August 8, 2019 letter and the September 11, 2019 letter. I find that the landlord was deemed served with the August 8, 2019 letter on August 13, 2019, five days after its mailing. I find that the landlord was deemed served with the September 11, 2019 letter on September 14, 2019, three days after it was left in the mailbox.

Section 45(3) of the *Act* states that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Residential Tenancy Policy Guideline 8 states that to end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I find that section 10(1)(a) of the Tenancy Agreement, which states:

> The landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant. The landlord must comply with health, safety and housing standards required by law.

is a material term of the tenancy agreement.

I find that the landlord breached section 10(1)(a) of the tenancy agreement by failing to repair the leaking air conditioners and subsequent water damage within a reasonable time after he became aware of the damage. I find that the landlord was aware of the problems with the air conditioner prior to the tenants moving in. I find that the tenant kept the landlord well informed of the ongoing problems and the landlord failed to repair them in a timely manner.

I find that the landlord's obligation to repair and maintain the subject rental property is not connected or tied to the speed of responsiveness of the developer. I find that the landlord's duty to repair and maintain in independent from the developer. I find that while the landlord may have diligently pursued the developer to make the required repairs, the landlord had a duty to ensure the repairs were made shortly after the tenants advised him of the issues. When the developers were not responsive, it was the landlord's duty to find another party to make the repairs. I find that the landlord, in waiting for the developer to complete the work, breached section 10(1)(a) of the agreement.

I find that the August 8, 2019 letter from the tenant to the landlord meets all of the requirements set out in Residential Tenancy Policy Guideline #8. I find that the landlord

did not make the required repairs identified in the August 8, 2019 letter and the tenants were therefore entitled to end their fixed term tenancy early. I therefore find that the landlord is not entitled to recover lost rental income from the tenants.

As I have determined that this tenancy ended due the landlord's breach of a material term of the tenancy agreement, I decline to consider if the tenancy would have ended pursuant to the doctrine of frustration.

I find that the September 9, 2019 email regarding payment of October 2019's rent was an offer to settle which the landlord did not accept. Since the landlord declined to accept the offer to settle, the tenant had no obligation to fulfill her obligations under that agreement.

Tenant's Claim for Loss of Quiet Enjoyment

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

> (a)reasonable privacy;
>
> (b)freedom from unreasonable disturbance;
>
> (c)exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
>
> (d)use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Policy Guideline 6 states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

Based on the mold inspection report I find that the subject rental property had 10 times the normal amount of certain molds. I find that the outdated certification seal on the mold report has not effect of the validity of the report. Based on the tenant's testimony and the e-mail from the author of the mold report, I find that the incorrect certification seal used on the report was for all intense and purposes a typo that has no bearing on the validity of the report.

The tenant entered into evidence a copy of the mold company's business licence. I find that the mold company had a valid business license at the time the mold testing occurred.

I find that the videos of the interior of the walls entered into evidence by the landlord do not prove that the subject rental property does not have mold or water issues. I am not an expert in this field and visual inspection may not identify mold issues. I find the mold report to have significantly more weight as it can identify molds not seen with the naked eye.

I find that the landlord's agent has not provided any evidence to support her testimony that dirty air filters contributed or caused the leak in the air conditioners.

Residential Tenancy Policy Guideline # 1 does not provide guidance on whose responsibility it is to clean air conditioner filters, but it does provide guidance on who is responsible for cleaning furnace filters. Residential Tenancy Policy Guideline #1 states:

> The landlord is responsible for inspecting and servicing the furnace in accordance with the manufacturer's specifications, or annually where there are no manufacturer's specifications, and is responsible for replacing furnace filters, cleaning heating ducts and ceiling vents as necessary.

While air conditioners and furnaces are different, they are both used to regulate temperature. Based on the above section of Residential Tenancy Policy Guideline # 1, I find that it was the landlord's responsibility to clean and change the air condition filter as necessary.

I find that the tenants followed the instructions of the landlord regarding use of the air conditioner as the landlord told the tenants to continue to use the air conditioner in his July 23, 2019 text. I find that the tenants mitigated the damage to the unit by stopping the use of the air conditioners on August 15, 2019, contrary to the advise of the landlord.

I find that the presence of mold is supported by the letter from the doctor of entomology. I accept the doctor's statement that the presence of springtails is a reliable indicator that there is mold in the subject rental property. I accept the tenant's evidence that the subject rental had springtails. I find that the landlord's agent's testimony that she could not tell where in the subject rental property the videos of the insects were taken to have little weight. The flooring in the videos matches the flooring in all the photographs of the flooring entered into evidence. I find the landlord's agent has not provided any evidence which would raise a reasonable suspicion that he videos were taken at a location other than the subject rental property.

Based on the letter from the tenant's family doctor and the letter from the tenant's veterinarian, I find that the subject rental property was unhealthy to live in. I note that the tenant did not contest that her dog was diagnosed with the mold allergy prior to moving in, but that the dog's symptoms worsened while living at the subject rental property.

I find the landlord's agent's testimony regarding the causes of the tenant's allergy symptoms to be unhelpful as she did not testify that she was a medical doctor or other professional qualified to comment on the tenant's health.

Given my above findings I find that the tenant suffered a significant loss of quiet enjoyment stemming from the landlord's failure to repair the subject rental property as evidenced by the unhealthy living environment, mold and insect problem. I find that while the tenant suffered an unreasonable disturbance, the value of the tenancy was not decreased by 50%. I find that the tenant is entitled to a 25% reduction in rent paid for the duration of this tenancy as the water leaking issues existed prior to the tenants moving in and were not resolved until the tenants moved out. 25% of rent paid during the course of this tenancy equates to $1,800.00.

I find that since the landlord was aware of continued water leaking issues, the possibility of mold growth should have been expected and the landlord therefore must bear the cost of mold testing in the amount of $492.45.

Filing fees

As the tenants were successful in their application for dispute resolution, I find that they are entitled to recover the $100.00 filing fee from the landlord, pursuant to section 72 of the *Act*. As the landlord was not successful in his application for dispute resolution, I find

that the landlord is not entitled to recover the filing fee.

Security deposit

Section 24(2) of the *Act* states that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not offer the tenant two opportunities to complete the condition inspection. Pursuant to section 17 of the *Residential Tenancy Act Regulations* (the "Regulations"), the second opportunity must be in writing.

A move in condition inspection report was not completed by the landlord contrary to section 24(2) of the *Act*, so the landlord's right to claim against the security deposit for damage to the residential property was extinguished. However, in this case, the landlord filed a claim for both physical damage to the subject rental property and loss of rental income. The extinguishment provision in section 24(2) of the *Act* does not apply to claims other than claims for damage, so the landlord's right to claim against the tenant's security deposit for loss of rental income was not extinguished. The landlord was entitled to retain the tenants' security deposit pending the outcome of this decision because the landlord filed to retain the tenant's deposit within 15 days of the end of this tenancy and the tenant's provision of a forwarding address in writing, as is required by section 38 of the *Act.*

I find that since the landlord was not successful in his monetary claim against the tenants, the landlord must return the tenants' security deposit in the amount of $800.00 to the tenants.

Conclusion

I issue a Monetary Order to the tenants under the following terms:

Item	**Amount**
Loss of quiet enjoyment	$1,800.00
Mold report	$492.45
Security deposit	$800.00
Filing Fee	$100.00
TOTAL	**$3,192.45**

The tenants are provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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 29, 2020

Residential Tenancy Branch