Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, MNDL-S, FFL

Introduction

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

- a monetary order pursuant to section 67 for money owed or compensation for damage or loss caused by the tenant's failure to comply with the Act, its regulations or the tenancy agreement pursuant to section 7(1) and 7(2);
- authorization to retain the tenant's security deposit pursuant to section 38(1)(d) for money owed or compensation for damage or loss caused by the tenant's failure to comply with the Act, its regulations or the tenancy pursuant to section 7(1) and 7(2);
- monetary order pursuant to section 72(1) to recover the filing fee for this application from the tenant.

Both the applicant and respondent appeared at the hearing and affirmed they would provide truthful testimony. The tenant confirmed he had been notified of the landlord's claim and her supporting evidence and the landlord confirmed she had received the tenant's responding evidence and the parties were prepared to proceed.

Preliminary Matter

The landlord submitted an amended monetary worksheet with extensive marginalia and a value higher than what is listed in the original application. I sought to confirm the value of her claim and that the tenant had received this updated worksheet; he confirmed he had.

The landlord's original dispute application contains two claims against the tenant's security deposit: $1,122.00 for "lost rent for March 2020" and

$9,500.00 for “there was an ongoing leak during the tenancy from Dec. 2018-Nov. 2010 [*sic*] and silverfish/inset infestation never report to Landlord/Owner. There was extensive damage to suite as a result.”

The landlord stated the $9,500.00 value in the original application was a typing error and the correct value, as noted on the revised monetary worksheet, is $10,500.00. The landlord also added $300.00 for dispute resolution application fees, increasing the claim to $10,800.00. I advised the landlord she can claim only $100.00 for the current application.

The landlord stated she wanted to revise the monetary claim again to withdraw the $250.00 claim for lawn/turf replacement and reduce the $3,318.80 claim for roof repairs by $200.00 to $3,118.60.

Pursuant to section 64(3)(d) of the Act, the landlord’s amended claim is for the $100.00 filing fee, $1,122.00 for March 2020 rent and $10,050.00 ($10,500.00 – ($250.00 + $200.00)) in damages related to a water leak.

Issues to be Decided

- Did the tenant’s failure to comply with the Act, regulation or tenancy agreement cause the landlord a financial loss of $11,172.00?
- Is the landlord entitled to retain the tenant’s $550.00 security deposit?
- Is the landlord entitled to recover the $100.00 filing fee for this application?

Background and Evidence

The landlord submitted 349 pages of evidence and the hearing lasted 90 minutes. Only those elements of the testimony and evidence critical to the analysis of the claim will be referenced below.

In her testimony the landlord claimed the tenant failed to comply with section 32(3) of the Act because he neglected to give her timely notification of water damage occurring in the rental unit. The landlord claims water damage began in December 2018 and the tenant lied to her about when he noticed the water damage, not disclosing it until November 2019 when by this time the damage was severe.

The landlord testified the tenant failed to meet his legal obligation to minimize her losses by not occupying the rental unit full time. Had the tenant occupied the rental unit full

time he could not have failed to notice the water damage developing. The landlord's costs incurred to repair the flooring and drywall of the rental unit, the roof of the rental property and to hire an home inspector are documented in her evidence submission.

The rental unit is a basement suite in a rental property located in the lower mainland. The periodic tenancy began on October 1, 2017 and ended on February 29, 2020. February 2020 rent was paid. The tenant vacated the unit after giving the landlord one month's notice to end the tenancy on January 31, 2020; this is substantiated with an affidavit of service. At the start of the tenancy the monthly rent, due on the first of the month, was $1,120.00; at the end of the tenancy, monthly rent was $1,122.00. The landlord holds the tenant's $550.00 security deposit in trust.

The landlord acknowledged receiving the tenant's forwarding address on March 7, 2020. The tenant did not agree to any funds being deducted from his security deposit.

The tenant testified no move-in condition inspection was completed at the start of the tenancy and the topic was never broached by the landlord. The landlord claimed she did do a condition inspection at move-in, took photographs and completed an inspection report, but the tenant didn't sign it.

The landlord referred to her evidence 'D 9/10/11' as proof of this move-in condition inspection report. The evidence 'D 9/10/11' shows a condition report dated December 14, 2019—two years after the start of the tenancy. The tenant signed the report, adding the remark "Since this move in report was done more than a year after the tenancy started, it cannot be valid or meaningful."

In an email to the tenant on December 5, 2019, the landlord explains the situation with the move-in condition inspection (landlord's evidence 'E14'; errors in original):

> Also, although when you moved in I took extensive photos, at the beginning of your tenancy, but we didn't have the opportunity to do a legally required move-in checklist. If I recall correctly you were dashing off for a ferry to Nanaimo and it was not a convenient time for you. Subsequent to that, on other occasions I wanted to meet you were never around or on the island are busy. As a result, as legally required, I'm going to suggest at least 2 specific times/dates which you could attend do "the move in" Condition Inspection Report together. Under (section 23 subsection 2B) of the BC residential act, both the tenants and less landlords must do this inspection. It must be done at a later time, if the inspection was never done originally. Of course, you have the option not to participate but the landlord has still has the legal right to do the inspection, regardless. By Law, if you do not participate in either the Move in OR move out inspections, you automatically forfeit your damage deposit.

The landlord sent the tenant the December 5, 2019 email after the tenant filed to dispute a notice to end tenancy issued to him by the landlord. In the email the landlord appears to use inspections to encourage the tenant to vacate the rental unit:

> Of course, you have the option of withdrawing your dispute application and just leaving ....
> In the meantime, if you continue to occupy my home, I am notifying you that I plan to do MONTHLY physical inspections of the suite. As permitted by law, under the BC ACT for the ENITRE remainder of your tenancy.

The landlord did not arrange a move-out condition inspection required by section 35 of the Act until directed to do so by an arbitrator in a March 5, 2020 hearing. The tenant provided the file number for this previous dispute.

The March 7, 2020 move-out condition inspection report is landlord's evidence 'A 10/11/12'. The landlord did not use the same report she completed on December 14, 2019.

In her December 5, 2019 email referred to above, the landlord recounts the numerous times she has visited the rental property over 27 months. The landlord testified that aside from the December 14 and March 7 inspections, she did not complete any inspections of the rental unit over this 27 month period.

In December 2018 the upper tenants reported a problem with silverfish; the landlord did not carry out an inspection nor did she pay for pest control. In her evidence 'T1/2/3/4' the landlord provided a timeline of the tenancy and noted:

> December 2018
> -Upstairs tenants reported a silverfish problem via text that was worsening and had been going on for a while.
> -In subsequent communication upstairs tenants reported that the silver fish infestation improve greatly after 2 fumigation's paid for by the upstairs tenants.
> -Landlord was told silverfish problem improved and was resolved in early to mid 2019 during spring and summer.

The landlord notified the tenant she would be entering his unit in late September 2019 to access the furnace room in response to the upper unit tenants' report of problems with the thermostat and furnace. She testified that when she was in the rental unit she did not do a "formal inspection" but saw there were some pools of water on the floor and felt that something wasn't right, testifying it was "suspicious" that the tenant had tools on

the floor. In her timeline ‘T 1/2/3/4’, the landlord noted for September 2019 (errors in original):

> Landlord took notice of unusual set up of Suite in Sept. as well as excessive tools, Bikes bike parts equipment and bake accessory’s hat helmets etc. As well as overall condition and cleanliness of basement suite.

The landlord did not conduct an inspection to follow up on her concerns.

The damage from water leaking into the rental property was identified by upper unit tenants in November 2019. In her timeline ‘T 1/2/3/4’, the landlord notes:

> NOV . 2 – New upstairs tenants reported bathroom/bedroom doors were expanding on unit 2 upper floors & doors not closing. ***It became very apparent with the silverfish and the doors that there was a major issue going on in the house with regards to a possible plumbing leak.
> ....
> NOV. 7 Landlord hired a private licensed certified home Inspector to do a top to bottom inspection...

The landlord submitted photographs of a phone or computer screen showing excerpts from a home inspection report; it is not possible to tell if the whole report has been submitted. The landlord has highlighted the section with a photograph of discoloured flooring in the rental unit, under which the inspector has written:

> There was a very heavy down pour last December where flooding was noted in numerous houses in the [redacted] area. Wood floors typically will go black with longer periods of contact with water. For this window to leak it may also require directional rain which may not occur every time it rains.

The landlord testified and indicated in her documentary evidence the tenant is lying about not seeing evidence of water damage prior to November 2019. Her analysis of the tenant’s text messages and her conclusions about his credibility are recorded in her evidence section L. She testified that she knows the tenant is lying because while the tenant claimed he first saw discoloured flooring when he moved furniture out of the way to accommodate the inspection, he must have already known the floor was damaged because he knew what part of the floor to uncover for the inspector. The landlord accuses the tenant of lying about the existence of a couch that he says obscured evidence of water damage. Although she did not conduct inspections and did not reside at the rental property, the landlord was confident she knew how the tenant arranged his belongings and what he was doing in the rental unit. Using evidence of the tenant’s interest in cycling, the landlord concludes in evidence marked G1 that the presence of bikes, bike accessories and tools indicate the tenant doesn’t reside in the rental unit.

The tenant testified he resided in the unit and spent time elsewhere. The tenant testified he did not hide any water damage; when he discovered evidence of water damage in November 2019 he reported it to the landlord. The tenant testified he did see a few silverfish in the rental unit and believes this is normal for a basement unit. He provided documentary evidence from the upper tenants to substantiate that the landlord took no action in 2018 to respond to the upper tenants' complaints about silverfish and that the upper tenants themselves paid for pest control. As noted in his text message to the landlord, the tenant testified he noticed water on a window sill some months prior to November 2019 and believed it was because he had left the window open when it rained. The tenant testified he does not understand the landlord's claim against him and how he could be responsible for the damages she is claiming.

The tenant testified that despite serving the landlord with a monetary order granted to him in a previous dispute hearing, the landlord has not paid him.

Analysis

Numerous sections of the Residential Tenancy Act are cited below; the Act can be found here. Numerous policy guidelines are also cited; the guidelines can be found here.

- Claim for $1,122.00 in rent for March 2020

In the decision from the March 5, 2020 hearing, the arbitrator writes "During the hearing the parties also confirmed the Tenant paid all outstanding rent prior to vacating the rental unit."

Section 45(1) of the Act states that for a periodic tenancy, the tenant must provide one month's notice to end the tenancy, which the tenant did. In the hearing the landlord did not dispute the tenant's account of how the tenancy ended. The landlord failed to advance any legal argument that the tenant owes her rent for March 2020.

This claim is dismissed without leave to reapply.

- Claim to retain the tenant's $550.00 security deposit

As noted above, there is no basis for the landlord to withhold the tenant's security deposit for unpaid rent.

Section 23 of the Act requires a landlord to conduct a move-in condition inspection of the rental unit at the time the tenant takes possession or at another mutually agreed upon time. As is evident from her own documentary evidence, the landlord did not comply with section 23 of the Act. With all due respect to the landlord, it is absurd for her to claim that an inspection in December 2019 meets the Act's requirement for a condition inspection at the start of a tenancy.

Section 24(2) of the Act states that a landlord who does not comply with section 23 extinguishes the right to claim against the tenant's security deposit for damages.

Section 38(5) of the Act states that at the end of a tenancy, the right of a landlord to retain all or part of a security deposit does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit has been extinguished under section 24(2), as it has been in this case. Section 38(6) states that if the landlord retains the security deposit after extinguishing his or her right to retain it, the consequence is that the landlord must return double the value of the deposit to the tenant.

The Residential Tenancy Branch's policy guideline #17 Security Deposit and Set off provides guidance on interpreting how the Act deals with security deposits. It states at part B 7 (emphasis added):

> **The right of a landlord to** obtain the tenant's consent to retain or **file a claim against a security deposit for damage to the rental unit is extinguished if**:
>
> - **the landlord does not offer the tenant at least two opportunities for inspection as required (the landlord must use Notice of Final Opportunity to Schedule a Condition Inspection (form RTB-22) to propose a second opportunity)**; and/or
> - having made an inspection does not complete the condition inspection report, in the form required by the Regulation, or provide the tenant with a copy of it.

At Part B sections 10 and 11 the guideline states (emphasis added):

> The landlord has 15 days, from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to return the security deposit plus interest to the tenant, reach written agreement with the tenant to keep some or all of the security deposit, or make an application for dispute resolution claiming against the deposit.
>
> **If the landlord does not return** or file for dispute resolution to retain **the deposit within fifteen days, and does not have the tenant's agreement to keep the deposit, the landlord must pay the tenant double the amount of the deposit.** Where the landlord has to pay double the security deposit to the tenant, interest is calculated only on the original security deposit amount before any deductions and is not doubled.

At Part C 1 the guideline states (emphasis added):

> **The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:**
>
> - **a landlord's application to retain all or part of the security deposit**; or
> - a tenant's application for the return of the deposit.
>
> Unless the tenant's right to the return of the deposit has been extinguished under the Act, **the arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return**.

As the landlord retained the tenant's security deposit after extinguishing any right to retain it for the tenant's liability for damages, the landlord must pay the tenant double the value of the security deposit pursuant to section 38(6). There is no interest payable on the deposit.

I award the tenant $1,100.00 pursuant to section 38(6) of the Act.

- Claim for $10,050.00 for damage or loss related to water damage

The landlord testified she is entitled to compensation from the tenant because he failed to comply with section 32(3) of the Act. The whole section is below with subsection three (3) emphasized:

> **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.
>
> (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.
>
> (**3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.**
>
> (4) A tenant is not required to make repairs for reasonable wear and tear.
>
> (5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

Residential Tenancy Branch guideline 1. Landlord & Tenant Responsibility for Residential Premises provides guidance on interpreting section 32 (emphasis added):

> **Reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion**. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or **due to deliberate damage or neglect by the tenant**. An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant.

The entry of water into the rental unit was a natural force and was not caused by the tenant. Although the landlord argues the tenant failed to occupy the rental unit full time and thinks this is either a form of neglect or non-compliance, I do not find the landlord's testimony or evidence to prove on a balance of probabilities the tenant failed to use the premises in a reasonable fashion. Despite her assertions otherwise, the landlord's evidence does not demonstrate the tenant acted unreasonably and deceived her about water damage; I believe the tenant alerted the landlord to the water damage when he discovered it.

The landlord also referred repeatedly to the *tenant's* obligation to minimize the landlord's liability for financial losses. It is the party claiming compensation who is required to minimize their losses. Section 7(2) of the Act states:

> A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

In providing criteria to for arbitrators to consider when contemplating a claim for compensation, policy guideline #16 Compensation for Damage or Loss also addresses the duty of the party claiming the compensation to minimize their loss:

> C. COMPENSATION 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:
>
> - 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**

As I have stated above, the landlord has not proved the tenant did not use the rental unit in a reasonable fashion or failed to comply with the Act, regulation or tenancy agreement.

There is evidence the landlord did not act reasonably to minimize her exposure to damage or loss because she failed to meet her obligation to inspect and maintain the premises.

As already explained above, the Act requires the landlord to conduct move-in and move-out condition inspections. The landlord's obligation to conduct annual inspections and inspect in response to a tenant's complaint is found in common law. In 2016 the BC Supreme Court decided in Boyes v. Wong (BCSC 1085) the standard of care owed by a landlord or property manager is to:

1. Conduct an initial thorough inspection of premises to ensure that the premises is safe and clean and to note any deficiencies;
2. Perform a detailed inspection of the property with every tenant prior to their moving in and moving out;
3. On an annual basis, the landlord should inspect the property and note any issues including preventative and deferred maintenance as well as life and health safety issues;
4. On receiving a complaint from a tenant, the landlord has an obligation to investigate the complaint;

If heavy rainfall in December 2018 was indeed the start of water damage, the landlord could have reasonably avoided the severity of the damage to the rental unit by:

1. conducting an inspection of the rental unit after heavy rains in December 2018;
2. conducting an inspection of the rental unit in December 2018 when the upper tenants complained of an infestation of silverfish;
3. conducting an inspection in September 2019 when she noticed water in the rental unit while accessing the furnace room.

Had the landlord acted reasonably and carried out inspections annually and in response to the complaint about silverfish, the landlord may have been able to minimize her losses. Her losses due to the natural force of rain water permeating the exterior of her rental property are not the fault of the tenant. This claim is dismissed without leave to reapply.

- Claim for $100.00 filing fee

The landlord is unsuccessful and is not entitled to recover her fee for filing this application.

Conclusion

The landlord's claim is dismissed in its entirety without leave to reapply.

Pursuant to section 38(6) of the Act. I award the tenant double the value of his security deposit and issue him a monetary order for $1,100.00.

The monetary order should be served by the tenant to the landlord as soon as possible. Should the landlord fail to pay, the tenant may seek enforcement in the small claims division of the BC Supreme 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: May 26, 2020

Residential Tenancy Branch