Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT, MNDCT, MNSD**

Introduction

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

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $18,585 pursuant to sections 65 and 67; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 2:51 pm in order to enable the landlord to call into this teleconference hearing scheduled for 1:30 pm. Tenant SG attended the hearing on behalf of all the tenants and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. He called two witnesses, the former property manager ("**MO**") and a contractor who made some repairs to the rental unit ("**GW**"). 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 SG and I were the only ones who had called into this teleconference.

SG testified he served that the landlord with the notice of dispute resolution form and supporting evidence package via registered mail on January 25, 2020. He testified that he sent it to the landlord's PO Box, which was provided to him by the landlord's current property manager as the address these materials should be sent to. SG 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 30, 2020, five days after SG mailed it, in accordance with sections 88, 89, and 90 of the Act.

Preliminary Issue – Re-submission of Evidence

At the hearing, SG referred to three letters from a doctor which did not appear in the evidence provided to the Residential Tenancy Branch (the "**RTB**") by Service BC. The tenant testified he provided Service BC with a memory stick containing all of his documentary evidence, but that he was unsure if Service BC provided all of the documents on the stick to the RTB. He testified that these letters were among the documents he sent to the landlord on January 25, 2020.

As the landlord has been served with the documents, and as they are not before me, I permitted the tenants to upload these letters by June 17, 2020.

The tenants uploaded three doctor's notes to the RTB on June 16, 2020. However, these notes were all dated June 10, 2020. As they are dated after the hearing took place, I conclude that these notes were not the documents that the tenant referred to at the hearing and were not among those sent to the landlord in January 2020. As such, I decline to accept them into evidence, as they amount to the submission of new evidence that the landlord has not had an opportunity to review prior to the hearing. I will not consider these documents when making my decision.

Issues to be Decided

Are the tenants entitled to:

1) an order cancelling the Notice;
2) a monetary order of $18,585; and
3) recover their filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of SG, not all details of his 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 November 10, 2018 and ending April 30, 2019. The rental unit is a basement suite. The upper level is rented out to other tenants (the "**Upper Tenants**"). Monthly rent is $1,375 and is payable on the first of each month. The tenants paid the landlord a security deposit of $680 and a pet damage deposit of $680 (collectively, the "**Deposits**"). The tenancy ended on May 1, 2019, by way of a mutual agreement to end tenancy.

The tenants have applied for an order of $18,585, representing the following:

Double Deposits penalty	$1,375.00
Breach of quiet enjoyment - unreasonable disturbance	$2,500.00
Breach of quiet enjoyment - unable to use common areas	$2,500.00
Failure to provide facilities	$4,440.00
Compensation of health issues	$7,770.00
Total	**$18,585.00**

1. The Deposits

SG testified that the tenants provided their forwarding address, in writing, to the landlord's property manager on June 10, 2019. The landlord returned the Deposits on July 15, 2019.

Per section 38(6) of the Act, the tenants claim for the return of an amount equal to two times the Deposits less the amount of the Deposits already returned.

2. Breach of quiet enjoyment

    a. Unreasonable disturbance

SG testified that within the first week of the tenants moving into the rental unit, the Upper Tenants made excessively loud noise on a constant basis. He testified that they frequently held large parties late into the night, and that, as a result, it was difficult for the tenants to sleep. SG testified that his wife had just given birth and that they could not get the child into a sleep routine due to the constant noise caused by the Upper Tenants.

SG testified that the parties and loud noise continued two to three times a week for months. He testified that it continued throughout the entire term of the tenancy. He testified that he asked the Upper Tenants to stop the disturbances, but that, on February 10, 2019, they threatened to "bash his head in" and "kill him". He called the police shortly thereafter, but this did not halt the disturbances.

SG testified that he notified the landlord's then-property manager ("**MO**") of the Upper Tenant's conduct immediately (that is, in November 2018). MO testified at the hearing and confirmed SG's testimony. She testified that she spoke to the Upper Tenants "a handful" of times regarding their conduct, but that it did not change.

I have no evidence before to suggest that the landlord ever took any steps, beyond having MO speak with them, to require the Upper Tenants to stop their disruptive conduct (such as sending them warning letters or serving them with a notice to end tenancy for cause).

The tenants claim damages in the amount of $2,500, representing roughly the return of 25% of each months' rent, as compensation for tenants' loss of sleep and prolonged stress and anxiety fearing altercations with the Upper Tenants.

    b. Unable to use common areas

SG testified that the Upper Tenants would constantly throw cigarette butts, beer cans, and other debris (including, on one occasion, what he believed to be plastic baggie used to store drugs) from their patio onto the shared backyard. On one occasion, SG testified, they threw a lit cigarette into the brush, which caused a small fire.

SG testified that the Upper Tenants would “clean” their patio by using a leaf blower to blow the garbage off of it into the backyard.

The presence of these items in the backyard made it unusable for the tenants. They could not use the garden to plant vegetables as they intended, and they could not enjoy the lawn.

SG testified that he complained to the landlord about this conduct as well, but that the landlord never did anything to fix it. He testified that he asked the Upper Tenants to stop doing this, but that they ignored him.

SG testified that following the threats made to him on February 10, 2019 by the Upper Tenants, the tenants were afraid to go out in the backyard at all.

The tenants claim damages in the amount of $2,500, representing roughly the return of 25% of each months’ rent, as compensation for the loss of use of the backyard.

3. Failure to Provide Facilities

SG argued that the landlord restricted or terminated the tenants’ access to the rental unit’s facilities, in breach of section 27 of the Act.

SG testified that, prior to the start of the tenancy, the landlord promised the tenants that he would have a dishwasher and a set of kitchen cupboards installed in the rental unit. SG testified these were never installed. He testified that, as a result, the tenants’ food and dishes were stored in cardboard boxes, and that the tenants had to spend more time than they intended to washing dishes.

MO confirmed SG’s testimony. She testified that the tenants asked her on more than one occasion for the dishwasher and cupboards to be installed, as per the representations made to them before the start of the tenancy, and that the landlord refused to install them. She testified that the landlord had actually purchased the cupboards, and had stored them at another location, but never got around to installing them in the rental unit.

SG also testified, as stated above, that the actions of the Upper Tenants deprived his family of the use of the backyard, particularly the back garden, which he testified was a major selling point for the tenants when they agreed to move in. SG testified that the tenants intended to grow their own fruits and vegetables in the garden. He testified that due to the Upper Tenants’ actions (described above) and the landlord’s failure to take steps to correct them, they were deprived of use of the garden, and incurred additional costs (the purchase of fruits and vegetables) that they would not otherwise have incurred.

SG testified briefly that, during the winter months, one of the bedrooms in the rental unit was not heated and was not usable. He did not provide any corroboration of this, and did not elaborate on what efforts, if any, the tenants undertook to have the landlord fix this. MO did not provide any testimony on this issue.

The tenants claim compensation in the amount of $4,440, representing repayment of $20 per day of the tenancy (which the tenant testified was 222 days long), for the lack of dishwasher, kitchen cupboards, vegetable garden, and heated bedroom.

4. Mold

SG argued that the landlord breached section 32 of the Act by failing to maintain the rental unit in a state that was suitable for occupation or in compliance with health safety and housing standards required by law.

SG testified that there was significant black mold throughout the rental unit. He testified that kitchen tap leaked, which caused water to wick down the faucet and counter and pool in the cabinet below. He testified that he advised the landlord of this, but that the issue was never fixed. He testified that as a result of the pooling, black mold began to grow in the kitchen and spread throughout the rental unit. He testified that he sprayed the mold with hydrogen peroxide and kept the temperature in the rental unit under 20 degree Celsius in an effort to hinder the spread of the mold.

SG testified that the tenants discover black mold behind the bathroom sink as well. He submitted photos of the black mold throughout the unit.

MO testified that the tenants advised her of the mold, but that the landlord refused to pay for its cleaning. MO also testified that, prior to the tenants moving into the rental unit, the landlord was aware of black mold in the rental unit's bathroom. She testified that the landlord instructed her to have the mold "painted over" when having a new bathtub installed prior to the tenancy.

MO stated that the landlord liked to "cut corners" when maintaining the rental unit. She was unaware of the mold in other areas of the rental unit until the tenants brought it to her attention during the tenancy.

SG testified that the landlord eventually hired a contractor ("**GW**") to address the mold issue. He did not provide a date as to when GW attended the rental unit, but based on the fact that the tenants sent a demand letter to the landlord on March 27, 2020 for the black mold to be remediated, it was at some time after this date (that is, at some point in the final month of the tenancy).

GW attended the hearing and gave evidence which corroborated SG's testimony. He testified that the landlord hired him to fix the leaky faucet which was contributing to the black mold problem in the kitchen. He testified that he also discovered the black mold in

the bathroom. He testified that he had to remove and replace the moldy drywall. Upon removing the drywall, he discovered that there was no insulation or vapour barrier behind it, which likely caused on contributed to the drywall becoming moldy.

SG testified that his wife and his daughter suffered as a result of the landlord failing to remediate the mold, in accordance with the landlord's obligation under section 32(1) of the Act. He testified that his wife's allergies were aggravated by the mold to the point of vomiting and that that his daughter developed sinus irritation. He testified that when they left the rental unit, these symptoms would abate, but would return when they came back to the rental unit. The tenants did not submit any medical evidence (such as medical records or a letter from their physician) which supported SG's testimony as to the symptoms suffered by his wife and daughter, or what the cause of these symptoms might be.

The tenants claim $7,700 in compensation for the damage they suffered as a result of the landlord's breach of section 32(1) of the Act, representing repayment of $35 per day of the tenancy.

5. Amount of Tenants' Monetary Claim

I note that while the tenants provided statutory authority for the basis of each claim (that is, the sections of the Act), they did not provide any authority (be it statute or prior decision of the RTB or of a BC court) supporting the *amounts* claimed for each head of damage. Rather, SG testified that they were amounts he arrived at on his own.

I note that the tenants claim compensation in the amount of approximately $2,337.50 per month (assuming 30-day months), which is almost twice what they paid in monthly rent during the tenancy.

Analysis

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:
>
> - 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 "**Four-Part Test**")

Rule of Procedure 6.6 states:

> **The standard of proof and onus of proof**
>
> 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. In most circumstances this is the person making the application.

So, the tenants must prove it is more likely than not that the landlord breached the Act as alleged, that the tenants suffered a quantifiable loss as a result, and that the tenants acted reasonably to minimize their damages.

I will address each alleged breach of the Act in turn.

1. Return of the Deposits

I must first note that, contrary to the submissions of SG, the combined amount of the Deposits is $1360 ($680 + $680), and not $1,375.

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
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord must do one of the following:
>
> (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.

Based on the testimony of SG, I find that the tenancy ended on May 1, 2019 and that the tenants provided their forwarding address in writing to the landlord's property manager on June 10, 2019. I accept SG's testimony that the landlord returned $1,375 on July 15, 2019

As such, I find that the landlord did not return the Deposits to the tenants within 15 days of receiving their forwarding address.

Additionally, I find that the landlord has not made an application for dispute resolution claiming against the Deposits within 15 days of receiving the forwarding address from the tenants, or at all.

Accordingly, I find that he has 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 the Deposits within the specified timeframe:

> (6) If a landlord does not comply with subsection (1), the landlord
> (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 landlord has failed to comply with section 38(1), I must order that he pay the tenants $1,345 representing double the amount of the Deposits ($2,720) less the amount returned on July 15, 2019 ($1,375).

2. Breach of quiet enjoyment

Section 28 of the Act states:

> **Protection of tenant's right to quiet enjoyment**
> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
> […]
> (b) freedom from unreasonable disturbance;
> […]
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Policy Guideline 6 states:

> 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.
>
> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.
>
> A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

I accept the undisputed testimony of SG. Based on this testimony (and that of MO), I find that the Upper Tenants acted in such a manner to deprive the tenants of their right of quiet enjoyment by both causing unreasonable disturbances (frequent, loud parties), and by interfering with the tenants' ability to use the backyard (by discarding garbage on to the yard and by threatening SG, making the tenants afraid to be in eyeshot of the Upper Tenants).

Based on MO's testimony, I find that the landlord was aware of the Upper Tenants' actions as early as November 2018 and took no steps to remedy the situation.

Policy Guideline 6 addresses tenant compensation for loss of quiet enjoyment:

> A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA […] In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.
>
> A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.

The step taken by the landlord to provide quiet enjoyment to the tenants (directing MO to speak with the Upper Tenants) is not sufficient to cause the landlord to be in compliance with the Act. Such an action is a good first time, but, as it was ineffective, it was unreasonable for the landlord to not to take further action (such as issuing a formal warning letter, and, failing that, serving the Upper Tenants with a Notice to End Tenancy for Cause). As such, I find that the landlord breached section 28 of the Act.

The disturbances caused by the Upper Tenants' conduct was both severe and frequent. They deprived the tenants of significant enjoyment of the rental unit, by denying them the use of the backyard and by frequently denying them the tranquility in their own home they were entitled to.

As such, I find that the value of the tenancy was significantly reduced. I do not, however, find that a 50% reduction in monthly rent (25% for unreasonable disturbance and 25% for loss of use of backyard) is appropriate, as argued by the tenants. The tenants still had use of the rental unit for shelter. They had beds to sleep in, a kitchen to cook in, a bathroom to use, and a place to store their possession. The unreasonable disturbances, while frequent, were not constant. During the winter months, they would not have been able to make use of the backyard, as it was covered in snow.

I find that by repeatedly notifying the landlord of the disturbances, the tenants acted reasonably to minimize their loss.

I find that the tenants are entitled to damage in the amount of 35% of the monthly rent foreach month of the tenancy (November 2018 to April 2019, inclusive). In total, I order that the landlord pay the tenants $2,887.50 (1,375 X 35% = $481.25; $481.25 x 6 months = $2,887.50) for breaching section 28 of the Act.

3. Failure to Provide Facilities

The tenants claim compensation for the landlord's failure to provide them with a dishwasher, kitchen cupboards, and use of the backyard. As I have already ordered that the landlord compensate the tenants for their loss of use of the backyard in the preceding section, pursuant to section 28 of the Act, I decline to order that the landlord compensate the tenants for depriving them of its use pursuant to section 27 of the Act.

The balance of this portion of the decision will address the dishwasher and the kitchen cupboards.

Section 27(2) of the Act states:

> **Terminating or restricting services or facilities**
> **27**(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord
> (a) gives 30 days' written notice, in the approved form, of the termination or restriction, and
> (b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Section 1 of the Act defines "service or facility":

> **"service or facility"** includes any of the following that are provided or agreed to be provided by the landlord to the tenant of a rental unit:
>
> (a) appliances and furnishings;
>
> […]
>
> (g) storage facilities;

I find that a dishwasher meets the definition of “service or facility” as it is an “appliance”. Similarly, I find that kitchen cupboards meet this definition as they are “storage facilities”. Based on the testimony of SG and of MO, I find that the landlord represented to the tenants that a dishwasher and kitchen cupboards would be installed in the rental unit, and that the landlord never did install these items.

However, I do not find that this constitutes a termination or restriction of the promised facilities. These facilities were never provided; as such, their provision cannot be terminated.

Rather, I find that the landlord’s representation that these facilities would be provided constitutes an oral term of the tenancy agreement. As such, I find that, by failing to provide these facilities, the landlord breached the tenancy agreement.

The tenants claim compensation in the amount of $20 per day of the tenancy. I must first note that, contrary to the tenants’ claim, the tenancy was not 222 days. Based on the tenancy agreement entered into evidence and on SG’s testimony, I find that the tenancy started on November 10, 2018 and ended on May 1, 2019. This is a duration of 172 days. I am uncertain as to how the tenants arrived at the duration of the tenancy that they did.

The tenants provided no basis as to how they arrived at the figure of $20 per day. I note that this figure represents slightly less than 50% of the monthly rent. I cannot see how the lack of a dishwasher and kitchen cupboards caused the tenants to suffer a loss of such an amount. I accept that the lack of these facilities did cause the tenants damage, by way of obtaining less facilities than they bargained for in the tenancy agreement. However, I find that a more reasonable valuation of damage suffered for the lack of these facilities is an amount equal to 10% of the monthly rent. As such, I order the landlord to pay the tenants $825.00 ($1,375 X 10% = $137.50; $137.50 x 6 months = $825.00) as compensation for breaching a term of the tenancy agreement.

4. Mold

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.

I accept the evidence of SG, as corroborated by MO and GW, that the rental unit had significant mold in the kitchen and bathroom. I find that the presence of such mold caused the rental unit to be in a state of repair that was not to be suitable for occupation. I find that the landlord was aware of the mold in the bathroom prior to the tenancy starting and did not remediate it.

By failing to remediate the mold damage until the final month of the tenancy, despite knowing of its existence prior to the start of the tenancy and after being notified by the tenants of its on multiple occasions, the landlord has breached section 32(1) the Act.

The tenants argued that they are entitled to an amount equal to $35 for each day of the tenancy. As stated above, they offered no basis for how they calculated this amount. SG testified that the presence of mold negatively affected the health of his wife and daughter. However, the tenants submitted no evidence (such a medical records, correspondence from their physicians, or expert reports regarding the effect mold had on the tenant's wife and daughter) which corroborated this assertion.

Without such evidence, I cannot find that, on a balance of probabilities, the tenants have proved that they suffered negative health conditions as a result of the presence of the mold in the rental unit. Accordingly, I find that the tenants have not met the second step of the Four-Part Test.

However, as I have found that the landlord has breached the Act by failing to remediate the mold damage, I find that nominal damages are appropriate. Policy Guideline 16 states:

> "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

I find that nominal damages in the amount of $100 per month of the tenancy ($600 total) are appropriate in these circumstances.

5. Filing Fee

Pursuant to section 72 of the Act, as the tenants have been substantially successful in their application, they are entitled to recover their filing fee from the landlord.

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the landlord pay the tenants $5,757.50, representing the following:

Double deposit	$2,720.00
Breach of right to quiet enjoyment	$2,887.50
Breach of tenancy agreement – dishwasher and cupboards	$825.00
Nominal damages – mold	$600.00
Filing Fee	$100.00
Credit for late-returned Deposit	-$1,375.00
Total	**$5,757.50**

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: July 8, 2020

Residential Tenancy Branch