



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: Tenants: FFT, CNR, RP, MNDCT, LRE
Landlords: OPU-DR, OPUM-DR, FFL

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlords requested:

- an Order of Possession for unpaid rent pursuant to section 55; and
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The tenants requested:

- cancellation of the landlords’ 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an order to the landlords to make repairs or emergency repairs to the rental unit pursuant to section 33;
- an order to suspend or set conditions on the landlords’ right to enter the rental unit pursuant to section 70;
- a monetary order for compensation for money owed or losses under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The spelling of the names of both parties were confirmed during the hearing. As neither party were opposed, the tenant AC's name was corrected on the landlords' application to reflect the proper spelling of her name.

The tenant JG testified that the tenants are in the process of moving out, and confirmed that they would vacate the home by 4:00 p.m. on April 30, 2021. Accordingly, the landlords will be provided an Order of Possession for that date, and the non-monetary portions of both applications was cancelled as the tenancy has come to an end.

Preliminary Issue – Tenants' Late Evidence

The tenants uploaded additional evidence to the online portal on April 27, 2020. The landlords dispute having received these new materials, which the tenant testified was sent to the landlords.

Rule 3.14 of the RTB's Rules of Procedure establishes that a respondent must receive evidence from the applicant not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, the last day for the tenants to file and serve evidence as part of their application was April 12, 2021.

The RTB did not receive these materials until April 27, 2021. Furthermore, I am not satisfied that the landlords were served with this evidence within the timelines prescribed by Rule 3.14. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. A party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, the landlord's agent testified that they were not served with these additional evidentiary materials, and therefore did not have an opportunity to review the late evidence submitted by the tenants. I find that the tenants failed to submit and serve their additional evidence within the required timelines. On this basis I find that there is undue prejudice by admitting the tenants' late evidence. Accordingly, the tenants' late evidence was excluded for the purposes of this hearing.

With the exception of the late evidence submitted by the tenants, both parties confirmed receipt of each other's applications for dispute resolution hearing packages ("Applications") and evidentiary materials, and confirmed that they were ready to proceed with the hearing. In accordance with sections 88 and 89 of the *Act*, I find both the landlords and tenants duly served with each other's Applications and evidence packages as confirmed. The hearing proceeded.

Issues(s) to be Decided

Are the parties entitled to the monetary orders that they have applied for?

Are the parties entitled to recover their filing fees for their applications?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of both applications and my findings around it are set out below

This tenancy originally began on October 1, 2017. The tenants had originally rented the upper two portions of the home. Both parties confirmed that the tenants started renting the entire home approximately 1.5 years ago for \$3,000.00 per month, payable on the first of every month. The landlords had collected a security deposit in the amount of \$3,000.00. The tenant testified in the hearing that as the landlords had collected an amount that exceeded the amount allowable under the *Act* for a security deposit, they exercised their right to apply the \$1,500.00 overpayment of the deposit towards the December 2020 monthly rent, and paid the remaining balance of \$1,500.00 for that month.

The landlord's agent testified that the tenants failed to pay any monthly rent after the issuance of the 10 Day Notice to End Tenancy dated January 20, 2021, and that the tenants owe the monthly rent for the months of January 2021 through to April 2021, in addition to \$1,500.00 that was not paid for December 2020. The landlords are seeking a monetary order for these amounts.

The tenants do not dispute that they had withheld the monthly rent for the months of January 2021 through to April 2021. The tenants submit that they were forced to move out as the landlords have failed to maintain and home to meet health and safety standards. The tenant testified that the landlord did not disclose to them that there were issues with the foundation, and submitted a photo of a hole in the floor. The tenant testified that the landlord had no interest in maintaining the home even though it was rotting. The tenants submit that the landlords did not replace the carpets as promised, and that the washer and dryer and never worked, and that the dishwasher has not been working for 9 months. The tenants submit that the basement was not livable, and the home contained mould. The tenant testified that the landlords had even proposed a reduction in rent for the numerous issues in the home. The tenants are seeking a monetary order in the amount of \$25,000.00 for loss of quiet enjoyment of the home. The tenants dispute that a proper move-in inspection was completed at the beginning of the tenancy.

The landlords' agent responded that the tenants were aware of the condition of the home, but had decided to rent the home anyway. The landlord testified that the carpet was cleaned prior to the beginning of the tenancy, and that when they had sent the repairman to attend to matters, the tenants had denied the landlord and their repairmen access. The tenants dispute this claim stating that the landlords had never given them proper notice as required by the *Act*.

The landlords' agent testified that the hole depicted in the photo was located in the boiler room, and did not affect the tenants' ability to enjoy the home. The landlord's agent confirmed that the dryer did require repairs, but testified that the other appliances were working, and that there was no mould.

Analysis

Section 26 of the Act, in part, states as follows:

Rules about payment and non-payment of rent

- 26** (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Section 19 of the Act states the following about security deposits:

19 (1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.

(2) If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

In this case, I find that the landlords had collected a security deposit in the amount of \$3,000.00 at the beginning of this tenancy, which is contravention of section 19(1) of the Act. I find that the tenants had the right to deduct the \$1,500.00 overpayment from their rent, which the tenants exercised in the payment of their December 2020 rent. Accordingly, I find that the December 2020 rent was paid in full.

I find it undisputed that the tenants withheld the entire monthly rent of \$3,000.00 for the months of January 2021 through to April 2021, and were not in possession of an Order from an Arbitrator allowing them to do so. In accordance with section 26 of the Act, I find that the tenants owe \$12,000.00 in outstanding rent for this tenancy. Accordingly, I allow the landlords a monetary order for this amount.

The tenants had applied for a monetary award of \$25,000.00 for the loss of their quiet enjoyment during this tenancy.

Under the Act, a party claiming a loss bears the burden of proof. In this matter the tenants must satisfy each component of the following test for loss established by **Section 7** of the Act, which states;

Liability for not complying with this Act or a tenancy agreement

7 (1) *If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) *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.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the landlord)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the tenants bear the burden of establishing their claim on the balance of probabilities. The tenants must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the tenants must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenants must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Section 28 states the following about the tenants' right to quiet enjoyment.

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.

Section 32 of the *Act* reads in part as follows:

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...

(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...

The tenants testified that the landlord would enter the home without proper notice. Furthermore, the tenants testified that the landlords failed to maintain and repair the home as required.

Although I sympathize with the tenants, I find that they did not establish how the amount of their claim was obtained, either referenced and supported by similar claims of this nature, or by providing pay stubs, receipts, statements, or written or oral testimony to support the losses the tenants are seeking in this application. Although the tenants did establish that there were issues not addressed in this tenancy, such as the broken dishwasher, the onus still falls on the applicant to support their claim. Despite the numerous issues during this tenancy, and despite the fact that this tenancy began in 2017, with the entire home rented about 1.5 years ago, I find that no applications for dispute resolution have been filed by the tenants for repairs, associated rent reductions, or for similar orders.

Although I do note that the landlords have a duty to maintain the property in a state of repair as required by section 32 of the *Act*, for the purposes of a monetary claim, the onus is on the tenants to establish how the amount claimed was obtained, and provide evidence to support the loss claimed. In this case, I find that the tenants' application falls short, and does not meet the criteria as set out above.

RTB Policy Guideline 16 states that where no significant loss has been proven, but there has been an infraction of a legal right, an arbitrator may award nominal damages. Based on this principle and the evidence before me, I find that the tenants' enjoyment of the property was impacted by the landlords' failure to perform repairs as required, and are therefore entitled to some compensation. Despite the landlords' testimony that the tenants were rented the home in the present condition, and that the tenants were afforded the right to inspect the home before renting it, this does not relieve the landlords of their obligation to perform repairs as required. I note that although the landlords had disputed the majority of the tenants' testimony and claims, it was undisputed by the landlords that the dishwasher was not working. The landlords' explanation for the delay in repairs was the tenants had denied the repairperson access. The tenants responded that they were never given proper notice before the

landlords had attempted entry. I do not find the landlords' explanation to be convincing or persuasive. The landlords did not provide sufficient evidence to support that they had provided notice to the tenants in accordance with the *Act* to perform the requested repairs. I find that the landlords were aware of outstanding repairs such as the dishwasher, but did not properly address these repairs as required by the *Act*.

In accordance with RTB Policy Guideline 16, I award the tenants nominal damages of \$1,000.00 for the loss of enjoyment of the home due to the landlords' failure to address repairs and issues in a timely manner.

As both parties' applications had some merit and due to the offsetting award of the filing fee, no order will be made in regards to the recovery of the filing fees.

After the \$1,500.00 overpayment of the security deposit was applied towards the December 2020 rent, the landlords still have in their possession the tenants' security deposit in the amount of \$1,500.00. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlords to retain the deposit in partial satisfaction of the landlords' monetary award.

Conclusion

As the tenants had agreed to move out on April 30, 2021, the landlords will be provided with an Order of Possession for April 30, 2021. Should the tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a Monetary Order in the amount of \$9,500.00 in the landlords' favour as set out in the table below:

Item	Amount
Unpaid Rent for January 2021 to April 2021	\$12,000.00
Less Nominal Damages awarded to Tenants	-1,000.00
Less Security Deposit Held by Landlords	-1,500.00
Total Monetary Order to Landlords	\$9,500.00

The landlords are provided with this Order in the above terms and the tenants must be served with a copy of this Order as soon as possible. Should the tenants 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.

The remaining monetary claims are dismissed without leave to reapply.

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 27, 2021

Residential Tenancy Branch