Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDL-S, MNRL-S, FFL / MNDL, FFL**

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**") made by the landlord. The first, filed September 16, 2020, for:

- a monetary order for damage to the rental unit in the amount of $399 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

(the "**first application**")

And the second application, filed January 12, 2021 for:

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent and for damage to the unit in the amount of $2,307.25 pursuant to section 67;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.
- (the "**second application**")

Tenant PB attended this hearing on behalf of both tenants. The landlord was represented by its director ("**AR**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

This hearing was reconvened from a hearing on January 8, 2021, where the first application was scheduled to be heard. Following the adjournment of the January 8 hearing, the landlord filed the second application, which was scheduled to be adjudicated at the same time as the second application.

I issued an interim decision following the January 8, 2021 hearing setting out the reasons for adjournment:

> PB called in [late], and immediately advised me that he required an adjournment. He stated that he had just received a call from his mother, who told him that his father was in critical condition at a hospital. PB stated he was driving to the hospital right now and was unable to participate in the hearing.

In the circumstances, I found it appropriate to adjourn the hearing, absent any corroboration to what PB told me. However, I made the following order in the interim decision:

> I order that, **no later than 14 days before the reconvened hearing**, the tenants provide documentary corroboration of PB's father's medical condition to both the landlord and the RTB prior to the reconvened hearing. Failure to do this may cause me to make adverse findings as to PB's credibility at the reconvened hearing.

PB did not provide any such documents in advance of the hearing. He testified the father had recently passed away, which prevented him from so doing. He provided no evidence that this was the case either.

In light of the passage of time between the first hearing and today, I see no reason why the tenants would have been unable to provide the corroborating documents as ordered. The failure of the tenants to provide such documents gives me pauses as to whether PB was being truthful when he sought an adjournment of the January 8 hearing. This causes to question the credibility of the tenant generally. I will address this point in more detail later in this decision.

Preliminary Issue – Settlement of Second Application

Pursuant to section 63 of the Act, an arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. During the hearing the parties discussed the issues between them, engaged in a conversation, turned their minds to compromise and achieved a resolution of their dispute.

The parties agreed to the following final and binding settlement of all issues, except that of the filing fee, currently under dispute in the second application:

1. The tenants will pay the landlord $250 on or before June 21, 2021.
2. The landlord may retain the security deposit and pet damage deposit ($1,800).
3. The arbitrator will make a determination as to the landlord's entitlement to the filing fee.

These particulars comprise the full and final settlement of all aspects of the second application. The parties gave verbal affirmation at the hearing that they understood and agreed to the above terms as legal, final, and binding, which settle all aspects of this dispute between them.

To the third point of the settlement agreement outlined above, I find that the tenants must pay the landlord the full amount of the filing fee ($100). The bulk of the monetary claim sought by the landlord relates to the tenant's non-payment of January 2021 rent. PB admitted that he did not pay it. The tenancy ended on January 8, 2021. As such, the landlord had to either return the security and pet damage deposits to the tenants or file an application for dispute resolution by January 23, 2021. If it did neither, it would have to pay the tenants twice the amount of these deposits, per section 38(6) of the Act.

Accordingly, by not paying January rent, the tenants left the landlord with little recourse other than to make the second application. It would have been unreasonable to expect the landlord to return the deposits in light of the arrears owed. I find that it was the tenants' actions that necessitated the second application being made. As such, the tenants must reimburse the landlord the filing fee ($100).

Preliminary Issue – Service

The parties agree that each has received the other's evidence and application materials relating to the first application.

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $399; and
2) recover the filing fee.

Background and Evidence

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

The parties entered into a written tenancy agreement starting April 1, 2018. Monthly rent was $1,825 and was payable on the first of each month. The tenant paid the landlord a security deposit of $900 and a pet damage deposit of $900. At the start of the tenancy, the tenants signed a Form K – Notice of Tenant's Responsibilities, as required by the *Strata Property Act*. As stated above, the landlord is entitled to retain the deposits. amounts. The tenants vacated the rental unit on January 8, 2021.

The rental unit is a ground level apartment located in a multi-unit building. The rental unit has an enclosed backyard with a garden. The landlord alleges that the tenants caused extensive damage to the garden during the tenancy and seeks compensation in the amount of $399 for their repairs. The landlord alleges that the tenants "removed the landscaping and rebuilt it to their tastes".

In support of this allegation, the landlord provided an architectural map submitted to the municipality which shows the layout of the flowers and shrubs in the garden of the rental unit. It depicts a densely populated garden area. The landlord provided photos of other units on the residential property that AR testified he took in April 2020. These photos show densely populated gardens which appear to be well maintained. The landlord also submitted photographs of the tenants' garden, which shows their garden to be markedly different: the dense, manicured bushes are missing; the garden area along the slatted fence bordering the sidewalk is mostly dirt; a small water fountain is present; potted plants have been placed on the dirt bed; a short brick pathway has been installed in the garden; and a mesh fence was installed along the inside of the portion of the wooden slat fence facing the sidewalk.

In one photo of the tenants' garden submitted into evidence, the garden of the adjacent unit is visible. The neighboring garden is in the condition indicated on the architectural map: dense shrubs and plants with no dirt visible between them. This garden and the tenant's garden abut and are separated by a short fence along which a row of slightly taller bushes run on the tenant's side.

PB disputed that this photograph was taken in April 2020. PB stated that, as of April 13, 2020, the condition of his neighbor's garden was the same as his own. He denied that the photo showing both gardens was taken when AR said it was.

The tenants did not provide any documentary evidence as to the condition of the neighbor's yard on April 13, 2020. However, they did submit a photograph PB took of the tenants' garden date-stamped April 13. It shows the tenants' garden in poor condition (worse than is depicted in the landlord's photos), with large patches of dirt and an absence of many of the bushes shown on the architectural drawing. However, in this photo the fountain cannot be seen, the brink pathway is not installed, and significantly more shrubbery (in poor condition) exists in the garden. The mesh on the fence is in place.

On April 27, 2020, the landlord issued the tenants a notice "Caution Notice to Tenant" which stated:

> Per the strata bylaws, landscape alterations are not allowed. The landscaping must be brought back to the original condition. Or landscape contractor has provided an estimate of $1000 to repair the landscaping. The landlord will undertake the repairs at your cost and will inform you when the contractor will arrive. The cost for dumping landscape materials in the garbage room is $75. Please remit payment for the garbage removal within five days.

AR testified that the tenants had deposited bags of plant trimmings in the building's garbage room in April 2020. The landlord submitted photos of these bags into evidence.

In a series of emails from April 27 to 29, 2020 entered into evidence by the landlord, PB admitted that the tenants placed items in the garden but denied that the tenants damaged any plants or shrubs from the garden. Instead, on April 27, 2020 at 1:27 pm, he wrote:

> The (plants/garden) was destroyed due to [property management company] landscaping team negligence to maintain the garden.
>
> Your landscaping team not notifying the operations team at [property management company] about our not maintained dead garden is not our fault.
>
> We were under the clear understanding that [property management company] residence manager should be on top of the upkeeping of the building grounds.
>
> As there has been no residence manager for quite some time now it's our fault [property management company] failed to maintain the grounds.
>
> I do totally agree with you that the garden is destroyed however to clarify it is destroyed due to lack of [property management company] landscaping maintenance and upkeep of its grounds.

On April 27, 2020 at 1:45 pm, AR replied:

> Unfortunately, since you did not notify us, we were not given the opportunity to fix it. Again, our landscapers are there regularly and did not note any issues with your landscaping.
>
> If you would have contacted us, we would have quickly fixed it. Moving the landscaping without approval is not a suitable solution.
>
> Will be moving forward with the repairs at your cost. Please remove the fountain/bricks and any landscaping that you would like to salvage prior to landscapers arriving.

In an email sent on April 27, 2020 at 1:58 pm, PB wrote:

> We have removed the bricks, fountain, and plants. Currently in the process of putting everything back together in a state it was just recently.
> We have picture to reference the damage unmaintained state of the garden.
>
> We will not be paying for gardening/landscaping work when the landscaping team does not maintain the ground over the past two years and let's everything get destroyed and die in the garden. Unclear what cost you are looking to charge us for? What needs to be repaired.

> Now asking us to pay for a garden that died and was not maintained by your landscaping is something we are not obligated to pay for.

AR testified that the property management company employed a landscaping company to maintain the rental unit gardens. He testified that from November 15, 2017 to February 2020, the property management company used the same landscaping company. Then, it switched to using a second landscaping company starting in March 2020. He testified that both landscaping companies attended the residential property once every two weeks, and that there was no disruption in this schedule when the property management company switch landscapers.

PB testified that the garden had deteriorated over time, and as the shrubs died, the tenants removed them and replaced them with their own effects (foundation, potted plants etc.). Once the tenants received the caution notice from the landlord, they removed these items from the garden.

PB testified that he did not advise the landlord of the deteriorating condition of the garden because there was no onsite manager at the building.

AR agreed that the residential property did not have a residence manager onsite, but testified that the property management company posted notices throughout the building with its phone number and email address, so that occupants could contact it if there were any problems. PB did not recall ever seeing such signs. No copies of such signs were entered into evidence.

AR speculated that the damage to the shrubs and plants was made by the tenants' dog, and that, following this damage, the tenants populated the garden with items of their own. He pointed to the fact that there was a mesh fence attached to the fence as evidence that their dog would go into their garden. PB denied installing the mesh fence. He testified that he did not know who installed it, when it was installed, or for what purpose. He argued that the landlord failed to provide any proof that the tenants' dog damaged the garden, and as such, the landlord's theory that the tenants caused the damage to the garden is not tenable.

AR testified that the cost of repairing the garden was $399 (including tax). He submitted an invoice dated May 15, 2020 from a landscaping company for this amount describing the work done as "shrub install" to the rental unit.

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**")

Section 32(3) of the Act states:

> **Landlord and tenant obligations to repair and maintain**
> 32(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.

Rule of Procedure 6.6 states:

> **6.6 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.

As such, the landlord bears the evidentiary burden to prove that it is more likely than not that the tenants caused the damage to the garden, that it suffered a quantifiable loss as a result of this damage, and that it acted reasonably to minimize the damage.

AR and PB presented radically different explanations as to the cause of the damage to the garden. PB said it was the result of continued neglect on the part of the landscapers. AR said the landscapers reported no problem with the garden, and that he did not become aware of the damage until April 2020. He speculated it was caused by the tenants' dog. Whatever the cause, the AR took the position that the damage was the result of a single discreet action which occurred at some point in the two-week period between landscaper's visits as opposed to PB's position that the damage occurred gradually.

PB argued that the landlord has insufficient evidence to prove that the tenants were responsible for causing the damage. He presented an alternate version of the cause of

the damage. However, his testimony does not accord with the photographic evidence entered.

PB testified that, as of April 13, 2020, the neighboring yard was in the same condition as the tenants'.

The landlord submitted a photograph of the tenants' yard that AR testified he took in April 2020. It shows the neighbor's yard to be in an entirely different (much better maintained) condition. The tenant argued that the photograph was not taken in April 2020.

In his April 27, 2020 email, PB wrote that the tenants removed the fountain, bricks, and potted plants they set up in the garden. The landlord's photograph shows these items in the tenant's yard. As such, the photograph must have been taken before April 27, 2020.

Accordingly, I can conclude that the landlord's photograph was not taken at a point in time after April 2020, when the landlord had an opportunity to repair the damage to the neighbor's yard. It must have been taken at some point before.

Additionally, I can conclude that the landlord's photo was taken at some point after April 13, 2020, as the photo of the tenants' garden submitted into evidence by the tenants shows the garden to be in an even less manicured condition (with dying shrubs that are not present in the landlord's photograph). It would follow then that, at some point after April 13, 2020, the tenants removed the dying shrubbery from the garden, deposited it in the building's garbage room, and installed the brick pathway and fountain. This would then support AR's testimony that he took his photo of the tenants' and their neighbor's backyard in April 2020 (likely after April 13, 2020).

Were I to accept PB's evidence, I would have to accept that the tenants removed the dead shrubs and installed the fountain and brick pathway at some point prior to April 13, 2020, following which AR took the picture in question, and then, completely unprompted, removed those features and installed dying shrubs on or before April 13, 2020 so they could be captured in the April 13, 2020 photograph. Such a course of events strains credulity.

As such, I find that the landlord's photo was taken by AR at some point between April 13, 2020 and April 27, 2020. This photo shows the contrast in conditions between the tenants' and their neighbor's yard during this time. Contrary to PB's testimony, the neighbor's yard was not in the same condition as theirs on April 13, 2020. It was in a condition similar to that depicted on the architectural plans. The tenants' yard was significantly modified.

I find it unlikely that the landscaping company could have negligently maintained these two gardens in such a way that would cause their appearance would be so disparate.

Rather, if the landscaping company was negligent in maintaining both yards, I would expect the gardens to be in a similar condition. This is not the case.

From this, I conclude that, if the landscaping company was negligent in maintaining the tenants' garden, they were not negligent in maintaining the neighbor's garden. This supports my prior finding that PB's testimony regarding the condition of the neighbor's garden on April 13, 2020 is not credible.

I also note that the damage to the plant life in the tenants' garden is not total. The shrubs in the tenants' yard running along the interior fence that separates the tenants' backyard from the neighbours backyard is undamaged. I find it difficult to believe that the landscaping company properly maintained this part of the garden but was negligent in maintaining the portion of the garden that was damaged. Rather, if the landscaping company was negligent is performing their duties in the tenants' yard only, I would have expected the entity of the garden to be inadequately maintained, not just a portion of it.

Based on this, I do not find PB's testimony that the damage to the tenants' garden was the result of inadequate maintenance from the landscaping company to be likely. It does not accord with the photographic evidence.

Furthermore, were this the case, I would have expected the tenants to attempt to contact the landlord to address the issue. The tenancy agreement lists the landlord's address for service, phone number, and fax number. I am not persuaded that the tenants were unable to contact the landlord due to the lack of a residence manager. The presence of a residence manager is not a requirement under the Act, and, in my experience, the overwhelming majority of tenants have little difficulty communicating with their landlords when a representative of the landlord does not live on site.

Additionally, I accept AR's testimony that the property management company posted notices throughout the building with the property management company's contact information. PB did not contradict this, saying only that he did not remember this. I find the substance of this response, and the manner he provided it, to have been evasive. I do not find his response to be credible.

These conclusions, coupled with PB's failure to provide corroborating evidence relating to his claim that his father had been hospitalized, as ordered in the interim decision of January 8, 2021, causes me to doubt the entirety of PB's testimony. I do not find PB to be a credible witness. As such, I assign little weight to his testimony.

However, this does not mean that the landlord is automatically successful. A stated above, the landlord bears the evidentiary burden to prove the truth of its allegations. The landlord claims that the damage was the result of a single, discreet act that occurred between landscaping company visits. AR testified that the landscaping company did not report any issue with the condition of the tenants' garden to the

landlord prior to April 2020. I accept this testimony as true. From this I conclude that the tenants' garden was damaged within a two-week span between landscaping visits.

I have no evidence as to the cause of the damage to the tenants' garden. AR speculated it was caused by the tenants' dog but provided little evidence to support this. However, it is not necessary for me to determine the precise cause of the damage to the garden. I need only conclude that it was "caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant."

Based on their repeated instance that the damage was caused by negligence of the part of the landscaping company, on my finding that this could not have been the case due to the damage being localized to a portion of the tenants' garden only, and on the fact that the damage was caused in a two-week period, I draw an adverse inference against the tenants. If the damage was caused by someone other than the tenants or a person they permitted onto the residential property, within the period between landscaping visits, I would have expected the tenants to either immediately inform the landlord of this or take the position that someone came onto their property and caused the damage in a single destructive act. They did not do this. Instead they claimed ongoing negligence on the part of the landscaping company. I have already found that this could not have been the case.

As such, I find that the likely reason the tenants attempted to lay the blame for the damage to their garden at the feet of the landscaping company was to cover for their own negligent or destructive actions. If the tenants' garden was damaged by intruders, they would have said so.

Accordingly, I find that the damage to the tenants' garden was caused by the tenants' or someone else they permitted on the property. As such, they are responsible for repairing it. They did not do this. By not doing so, they breached section 32 of the Act. This satisfies the first part of the Four-Part Test.

AR testified it cost $399 to repair the garden by replacing the plants and shrubs. He submitted an invoice for this amount. The tenants did not dispute the cost of the repairs to the garden. As such, I find that the landlord suffered damages of $399 as a result of the tenants' breach of the Act. The second and third parts of the Four-Part Test have been satisfied.

I find the landlord acted reasonably to minimize the cost of the repairs. $399 is a reasonable amount to have incurred. I cannot see what the landlord might have done differently to reduce this cost. As such, I find that the fourth part of the Four-Part Test has been satisfied.

Pursuant to section 72(1) of the Act, as the landlord has been successful in the application, it may recover the filing fee for this application from the tenants.

Conclusion

With regards to the first application, pursuant to sections 67 and 72 of the Act, I order that the tenants pay the landlord $499, representing the following:

1) $399 in compensation for the repairs to the garden; and
2) $100 for the recovery of the filing fee.

With regards to the second application, I order:

1) by consent of the parties:
    a. the tenants pay the landlord $250; and
    b. the landlord may retain the entirety of the security and pet damage deposits; and
2) pursuant to section 72 of the Act, the tenants pay the landlord $100.

I have attached a single monetary order for both application to this decision. This order may be enforced in the Provincial Court (Small Claims) of British Columbia.

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: June 18, 2021

Residential Tenancy Branch