



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

This hearing originally convened on January 21, 2021 and was adjourned to April 19, 2021 in an Interim Decision dated January 21, 2021 (the “First Interim Decision”). Due to time constraints this hearing was adjourned to August 10, 2021 in an Interim Decision dated April 19, 2021 (the “Second Interim Decision”). This final decision should be read in conjunction with the First Interim Decision and the Second Interim Decision. This hearing dealt with the applicant’s application pursuant to the *Residential Tenancy Act* (the *Act*) for:

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

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. At the first hearing the respondent’s interpreter attended. The respondent’s interpreter/spouse attended the second and third hearings and provided affirmed testimony and translation services.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Issues

1. Is the applicant entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?

2. Is the applicant entitled to recover the filing fee for this application from the respondent, pursuant to section 72 of the *Act*?

Background/Evidence

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

Both parties agreed to the following facts. This sub-tenancy began on January 31, 2020 and ended on October 30, 2020. A security deposit of \$625.00 was paid by the applicant to the respondent. The respondent returned the applicant's security deposit before the end of the tenancy. A written subtenancy agreement was signed by both parties and a copy was submitted for this application. The sub-tenancy agreement states that the applicant is the subtenant and the respondent is the sublandlord.

The applicant testified that rent in the amount of \$1,250.00 was due on the last day of each month. The respondent testified that rent was requested on the last day of each month but was due on the 1st day of each month. The respondent testified that rent payments were never an issue.

Both parties agree that the applicant rented one of two rooms in townhouse A. Townhouse A is a fully contained unit. Both parties agree that the applicant had right of access to a separate townhouse in the vicinity, townhouse B, for the purposes of doing laundry. The respondent and his spouse controlled the renting of townhouse A and B. Townhouse A and B each have their own bathrooms and kitchens.

The respondent testified that he lived in the second bedroom in townhouse A when the applicant moved in and shared a kitchen with the applicant. The respondent testified that he moved out of townhouse A and into townhouse B on March 1, 2020 because he rented the second bedroom in townhouse A to another subtenant, subtenant A.M. ("A.M.").

The respondent testified that he resided in townhouse B until July 12, 2020, when he moved back into townhouse A and slept on the couch as both of the two rooms were occupied by the applicant and A.M. respectively. The respondent testified that A.M. moved out of townhouse A on September 1, 2020 and he moved from the couch to that

bedroom on September 1, 2020. The respondent testified that he did not spend every night from July 12, 2020 - September 1, 2020 on the couch as he sometimes slept in townhouse B with his spouse. The respondent testified that at that time he and his spouse were having relationship issues and they each needed their own space.

The applicant disputed the above timeline provided by the respondent. The applicant testified that the respondent did not live in the subject rental property at the start of the tenancy. The applicant testified that the second bedroom was empty for the first month of his tenancy and that A.M. moved into the second bedroom at the end of February 2020. The applicant testified that the respondent moved into A.M.'s bedroom 1.5 -2 months before the end of this tenancy, when A.M. moved out. The applicant testified that he did not see the respondent sleep on the couch between July 12, 2020 and September 1, 2020 but that the landlord did leave lots of his possessions in the living room over the course of the tenancy.

The respondent and the respondent's spouse testified that when this tenancy agreement was signed, it was signed in the presence of all the roommates for townhouse A and townhouse B and it was made clear to all that this was shared accommodation and that all tenants had the right to use all common spaces and to enter either townhouse at will.

The applicant testified that it was never suggested that the tenants of townhouse A and B lived communally and that he was only granted access to townhouse B to do laundry. The applicant testified that the tenancy agreement granted him exclusive possession of his bedroom in townhouse A and that he would share the rest of the townhouse with another tenant, not the landlord. The subtenancy agreement states in part:

1. The Sublandlord agrees to sublease to the Subtenant part of the Premises (the "Subleased Premises") described as follows: single-bedroom, single occupancy (short term overnight guests permitted for 10\$ extra if staying more than 7-nights), inclusive of bills/utilities and linens/towels (heat, electricity, water, internet), for use as a residential Subleased Premises only, This is a shared house in which we strive for the right roommates. The owners of said property have given permission for this sublease to supersede any other verbal agreement.

The respondent and the respondent's spouse testified to the following information. While the tenants of townhouse A and townhouse B usually used the kitchen and bathroom in their respective townhouses, they were permitted to use the kitchen and

bathroom in either unit. The kitchen in townhouse A was fully furnished with kitchen equipment but the kitchen in townhouse B was not. The roommates in townhouse B frequently borrowed kitchen equipment from townhouse A, though they usually cooked in the kitchen in which they have bedrooms.

The applicant testified that townhouse A came pre-furnished and that at times occupants/tenants of townhouse B borrowed kitchen supplies. The applicant testified that he did not use the kitchen in townhouse B unless he was invited.

Applicant's Claim for Damages

The applicant testified that he retained possession of his previous accommodation for the month of February 2020 and slowly moved his possessions to the subject rental property over the course of the first week of February 2020. The applicant testified that he was away on a work trip for the last two weeks of February 2020 and when he returned, A.M. had moved in. The applicant testified that when he returned to the subject rental property from his work trip he noticed that his bed sheets were warm, as if recently taken out of the dryer. The applicant testified that he asked A.M. about it and she told him that the respondent had stayed in the applicant's bedroom and slept in his bed while he was away.

The applicant testified that he is seeking one month's rent in the amount of \$1,250.00 from the respondent for not getting what he paid for, exclusive use and occupation of the bedroom. The applicant testified that he is also seeking an additional one month's rent from the respondent for illegally staying in his room. The respondent's written submissions state:

\$1250 for damages relating to unauthorized access, and utilization of my room equal to that months rent

\$1250 rent paid during the month where room was occupied

The respondent testified that townhouse A came fully furnished, but at the start of this tenancy, the applicant's bedroom did not have furnishings. The respondent testified that the applicant gave his authorization to set up the bedroom furniture while he was away. The respondent testified that he set up the applicant's bedroom and slept in the applicant's bed after it was set up and before the applicant returned because the applicant told him he did not need the room during that time.

The applicant testified that the respondent was permitted to set up the bedroom furniture, but not to sleep in his bed.

The applicant testified that in March 2020 he asked the respondent and the respondent's spouse to limit their entrance into townhouse A unless absolutely necessary due to COVID 19. The applicant testified that the respondent's spouse did not abide by this request.

The applicant entered into evidence the following text message exchanges between himself and the respondent's spouse which show late or no notice of entry:

February 5, 2020

- Respondent's spouse: Were gone and door is locked. Left heat and a few lamps on for your comfort :) will not come this late again thanks for your patience with the setup
- Applicant: No worries. Do you want me to close the light. The little sustainable me.

February 10, 2020

- Applicant: Hey is someone coming to fix something today? The range?
- Respondent's spouse: Possibly The guy was gonna put tape on flange+ take his tools from front closet....
- Applicant: Oh ok. Yeah he taped but was looking for hand saw. He left 20 minutes ago. I didn't know where it was so he left.

February 11, 2020

- Respondent's spouse: Hi from India! Please don't forget to only lock the top lock- the deadbolt only- so that [the respondent] can get in to change the lock with Telus tomorrow:)
- Applicant: I'll be home all day. Well until 5
- Respondent's spouse: Sweet thanks guys! Telus comes between 8-9am and [the respondent] will be there likely passed out on the sofa

April 23, 2020

- Respondent's spouse: Hey [applicant]! I'll come grab those two pieces of furniture today :) [the respondent's] home to help finally.
- Applicant: What time?
- Respondent's spouse: You tell me what time works for you well make it work.

- Applicant: Does 6 work for you?
- Respondent spouse: Sweet works great.

April 27, 2020

- Respondent's spouse: tonight delivering the sofa that likely will live in Your room :) also moving out A.M.'s armoire at 6pm
- Applicant: Hey I was hoping to take a look at it first. I'm not sure if I want a couch just yet.
- Respondent's spouse: Well it'll be in your livingroom to take a look then ;) We're emptying Mario's apartment It's a leather two seat. It'll be in the livingroom you can move it upstairs if you like it

July 17, 2020

- Respondent's spouse: Hi [applicant] I am about 20 minutes away from the house I completely forgot that I had to come pick up the boat canvases that are in the upstairs closet in the hallway I won't make much noise I'm so sorry to bother you guys this late I'm rushing home from the marina right now I should be there in about 20 minutes and I may not have keys I'm not sure if [the respondent] has them I texted [A.M.] as well just in case you guys are busy thank you
- Applicant: Hey sorry just am out. Hope you got in.

October 2, 2020

- Respondent's spouse: Hey guys someone's coming over to see [A.M.'s] room. Sorry tomorrow at 4pm.

October 2, 2020

- Respondent's spouse: Hey [applicant] are you home this evening? I've got a good prospect for the room he wants to come see. I'll ask him to come if that's ok with you.
- Applicant: Sure. What time?
- Respondent's spouse: Now if possible.
- Applicant: Yeah that's fine.

The respondent and the respondent's spouse testified to the following facts. After the applicant asked them to limit their attendance at townhouse A, they tried to accommodate him and enter only when necessary. They sought permission to enter townhouse A from the applicant or A.M. via text when possible and the applicant never restricted their access or asked for written notice of entry.

The respondent's spouse testified that he only entered townhouse A for repairs/maintenance or when one of the subtenants requested he do so and to provide additional cleaning services for high touch areas to prevent the spread of COVID 19.

The respondent testified that he discovered mould problems in the subject rental property a couple of months into this tenancy. The respondent testified that he may have notified the landlord of this mold as early as June 2020 but definitely by August 2020. The respondent entered into evidence text messages to the respondent's spouse about water leaks and mold dated, June 8, 2020, August 8, 2020 and September 3-5, 2020. Three undated text messages were also entered into evidence. The respondent testified that the landlord did surface area cleaning but did not deal with the cause of the water leaks and mold.

The applicant testified that he is seeking \$10,000.00 because the respondent and his spouse frequently entered townhouse A without providing proper notice and failed to repair mould and water damage. I asked the applicant to explain how the \$10,000.00 claim was calculated. The applicant testified that the bulk of the \$10,000.00 claim is for failure to provide proper notice. The applicant did not provide testimony on what amount of the claim was for failure to provide proper notice of entry and what portion was for the landlord's failure to remediate the mold and water issues. The applicant testified that he believes he arrived at his claim for \$10,000.00 by seeking $\frac{1}{2}$ of each months' rent for the duration of this tenancy agreement. The applicant did not explain why the above issues are worth $\frac{1}{2}$ of all rent paid for the duration of this tenancy.

The respondent testified that the first time the water and mould issues were provided to him in writing was in August of 2020 by tenant A.M. The respondent testified that he immediately passed these concerns to the owner of the subject rental property.

The applicant testified that the battery in the keyless entry fob died and the respondent did not replace it when requested by the applicant. The applicant testified that he purchased new batteries for the fob and installed them. The applicant testified that he is seeking \$10.00 for his time and the cost of new batteries. No receipts were entered into evidence.

The landlord testified that replacing the battery was complicated and that it did not get done at the end of the tenancy.

Analysis

Jurisdiction

Section 4(c) of the *Act* states that this *Act* does not apply to living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation.

The testimony of the parties differs as to when the respondent lived at the subject rental property with the applicant.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

Residential Tenancy Branch Policy Guideline #19 states:

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains

responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.

The subtenancy agreement states at section 2:

The Sublandlord agrees to sublease to the Subtenant part of the Premises (the "Subleased Premises") described as follows: single-bedroom, single occupancy (short term overnight guests permitted for 10\$ extra if staying more then 7-nights), inclusive of bills/utilities and linens/towels (heat, electricity, water, internet), for use as a residential Subleases Premises only. This is a shared house in which we strive for the right roommates. The owners of said property have given permission for this sublease to supersede any other verbal agreement.

I find that the respondent's evidence regarding the times the respondent lived at the subject rental property does not accord with the sub-tenancy agreement entered into evidence. The sub-tenancy agreement states that the applicant is a sub-tenant and the respondent is a sub-landlord. Had the respondent lived at the subject rental property at the start of this tenancy, a room-mate agreement should have been signed, not a sub-tenancy agreement. A sub-tenancy agreement entitles the applicant and other tenants to exclusive possession of the subject rental property from the respondent.

I find that a practical and informed person would readily recognize as reasonable that the sublandlord as described in the subtenancy agreement would not reside with the subtenant(s). Where the testimony of the applicant and the respondent differ regarding dates of occupancy, I prefer the testimony of the applicant. I accept the tenant's testimony that the respondent did not live at the subject rental property when he moved in. I accept the applicant's testimony that the respondent did not live in the living room of the subject rental property in the summer of 2020 and did not move into the subject rental property until tenant A.M. moved out, around September 1, 2020.

The subtenancy agreement entered into evidence only mentions the address of townhouse A and makes no mention of townhouse B. I do not accept the landlord's submissions that townhouse A and B were shared accomodation and that each person living in either townhouse had unfettered access to both townhouses. I find that while the people living in each townhouse may have been friendly, the townhouses remained separate and distinct units and only those who had a bedroom in the townhouse had unfettered access to the common spaces in the town house. I find that the respondent only had access to the laundry room in townhouse B, and did not share a kitchen or

bathroom with anyone residing in townhouse B. I find that borrowing kitchen items from another townhouse is not the same thing as sharing the kitchen itself and does not exclude this tenancy from the operation of the *Act*.

Pursuant to section 4(c) of the *Act*, I find that the *Act* applies to this tenancy agreement from January 31, 2020 to September 1, 2020. I find that the landlord tenant relationship changed to a room mate relationship on or around September 1, 2020 and the *Act* does not apply from September 1, 2020 to October 30, 2020.

Monetary Claims

Section 67 of the *Act* states:

Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this *Act*, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

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

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

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

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

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

Both parties agree that the respondent stayed in the applicant's bedroom for two weeks in February 2020, while the applicant was away on a work trip. I find that the subtenancy agreement granted the applicant exclusive occupation of his bedroom at the subject rental property and that the respondent breached the subtenancy agreement by sleeping in the applicant's bed in the applicant's room. I find that the respondent was permitted to set up furniture in the applicant's room but was not entitled to sleep in his bed in his room.

The applicant is claiming one month's rent in the amount of \$1,250.00 from the respondent for not getting what he paid for, exclusive use and occupation of the bedroom. The applicant testified that he is also seeking an additional one month's rent from the respondent for illegally staying in his room.

I find that the tenant's two claims are essentially two claims for the same infringement of the tenant's right to exclusive possession of the bedroom in townhouse A. I find that the respondent is not entitled to claim damages for the same infringement two times; however, I find that the respondent breached the tenancy agreement by failing to provide exclusive possession of the subject rental room. As the applicant had exclusive possession of the subject rental property for two of the weeks in February 2020, I find that the applicant is not entitled to an entire month's rent. I find that the tenant suffered a loss resulting from the respondent's breach of the tenancy agreement which is equivalent to two weeks rent, as that is the period of time the applicant did not have exclusive possession of the subject rental bedroom. I find that no mitigation issues are present. I award the applicant a monetary award for \$625.00.

The applicant testified that he is seeking \$10,000.00 because the respondent and his spouse frequently entered townhouse A without providing proper notice and failed to repair mould and water damage. The applicant testified that the \$10,000.00 claim was based on $\frac{1}{2}$ of the rent from January 2020 to October 2020 which is 10 months. $10 \text{ (months)} \times \$625.00 \text{ (}\frac{1}{2} \text{ months' rent)} = \$6,250.00$, not the \$10,000.00 claimed. I find that the applicant has not proved the amount of or value of the damage or loss allegedly suffered as the calculations provided by the applicant do not make sense or account for the total amount claimed. I dismiss the applicant's claim for \$10,000.00 because the applicant did not prove all four points of the test set out in Residential Tenancy Branch Policy Guideline #16.

The applicant did not enter into evidence any receipts for the fob batteries. I find that the applicant has failed to prove the value of the loss and the application's claim for that loss is therefore dismissed.

As the applicant was successful in part of this application for dispute resolution, I find that the applicant is entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the applicant in the amount of \$725.00.

The applicant provided with this Order in the above terms and the respondent must be served with this Order as soon as possible. Should the respondent fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: August 10, 2021

Residential Tenancy Branch