Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNL, MNDCT, OLC, FFT

Introduction

The Tenant filed an Application for Dispute Resolution on March 23, 2023 seeking:

- cancellation of a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two-Month Notice");
- compensation for monetary loss/other money owed;
- the Landlord's compliance with the legislation and/or tenancy agreement;
- reimbursement of the Application filing fee.

The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on July 6, 2023. Both the Landlord and the Tenants (hereinafter referred to in the singular as "Tenant") attended the hearing and the Landlord confirmed they received notice of this hearing and the Tenants' evidence.

The Tenant and the Landlord attended the conference call hearing. The Tenant confirmed they moved out from the rental unit on March 30, 2023.

Preliminary Matter – end of tenancy

The Tenant confirmed that they would move out from the rental unit on June 30, 2023, the day after the scheduled hearing. The Landlord confirmed that they learned of this the day prior to the hearing. The Landlord requested an Order of Possession to confirm that the tenancy would end, and the owners of the rental unit would be able to move in. The Tenant consented to this Order of Possession.

By the time of this decision, the tenancy would have ended as confirmed by the Tenant in the hearing. I grant the Landlord an Order of Possession merely as a precaution and by reason of the Tenant's consent.

Given that the tenancy was ending imminently, the validity of the Two-Month Notice, issued by the Landlord on March 7, 2023 is no longer at issue. This Landlord-Tenant relationship is effectively ended; therefore, I dismiss the other piece of the Tenant's Application concerning the Landlord's compliance with the *Act* and/or tenancy agreement.

Preliminary Matter –timeline for this decision

While the *Act* s. 77(1)(d) sets a 30-day time limit for a decision of the delegated decision maker, ss. (2) states that authority is not lost, nor the decision invalidated, if a decision is given past the 30-day period. I reached this decision through review and evaluation of all testimony and evidence.

The parties' right of due process, entailing a thorough consideration of all evidence, and my deliberation on the applicability of the law, outweighs the need for a 30-day time limit. Also, this was a matter of a tenant's right to compensation for what they alleged were breaches to their quiet enjoyment of their rental unit in a tenancy that had effectively ended by the time of the hearing. This did not concern an eviction of an end of tenancy which are matters of more immediate human consequence.

Issues to be Decided

- Is the Tenant entitled to compensation for monetary loss/other money owed pursuant to s. 65 of the *Act*?

- Is the Tenant entitled to reimbursement of the Application filing fee pursuant to s. 72 of the *Act*?

Background and Evidence

The Landlord and Tenant each provided a copy of the tenancy agreement they had in place. The tenancy started on August 1, 2018, for the fixed term ending on July 31, 2020. The tenancy reverted to a month-to-month agreement after that.

The Tenant paid rent of $5,582 and paid a security deposit amount of $2,750 and a pet damage deposit amount of $2,750.

On their Application, the Tenant entered: “Compensation of $30,000.00 for ongoing stress related to the inaction of the repairs to the unit in addition to the stress of finding new housing in this pressing and expensive market.” The Tenant provided a completed ‘Monetary Order Worksheet’. completed with their counsel’s name on it, unsigned and dated March 27, 2023. This document provides the amount of $30,000 and states “See written statements.”

In the hearing, the Tenant described the following chronology:

- in 2021 and 2022 scaffolding was in place for repairs undertaken by the Landlord – the Tenant wanted compensation for this and there was a dismissive response from the Landlord
- they had severe allergies to drywall dust from May 2022 – there was a leak from the ceiling outside the rental unit’s bathroom
- the Tenant initially notified the Landlord about this leak, and “then the process was ridiculous”
- the Tenant had to use “rudimentary measures” to contain the issue
- over 10 people came to examine and assess the issue, with a “ridiculous amount of communication on this” – the Tenant queried why the matter was turning into “a huge production”
- the Landlord hired a contractor by November; however, that contractor required an indemnity clause in a “legal form” – this was due to the open drywall that was proving hazardous to the Tenant’s health.

The Tenant provided the following documents as evidence to the Residential Tenancy Branch:

- on May 26, 2022 the strata confirmed that a plumber had identified an intermittent leak, being either condensation or a “minor roof leak, or roof drain

leak", with the recommendation that a contractor remove drywall in the area with a tent in place "to prevent drywall dust from escaping as customer is VERY allergic to drywall dust"

By June 30, the strata requested the drywall removal for a plumber to investigate the water leak further. The Tenant on June 30 thanked the others involved, and the strata noted the Tenant's approval "to start to remove the drywall" with the use of a "poly curtain to contain any dust"

On July 14, 2023, the strata confirmed that a contractor visited, and provided a report. They noted the need for further work because of an exhaust fan duct issue. This required further inquiry from the Landlord to the strata on whether the strata approved that further work. By July 18, the strata was still deliberating the issue, and the Landlord queried the strata on the delay and the need for such deliberation, noting the time passing and impact on the Tenant. The following day, the strata approved "investigation/cleaning of the exhaust fan duct".

- emails:
    - October 3, 2022, the Landlord wanted to arrange "tenting and cutting of the drywall" – requesting a suitable date and time from the Tenant
    - October 3, 2022, the Tenant's response noting a "tent with a zippered entrance in the hallway with space for the workers to remove their coveralls inside before stepping out"
    - same date, the Landlord's response noting use of a plastic sheet with consideration to the expense, the Landlord notes their ability to amend the schedule based on a suitable date for the Tenant

- email dated November 3, 2022 from the Landlord informing the Tenant of pending repairs – the strata would send someone for drywall cutting soon and the rental unit owners expressed their regret about the issues, and offered "rent concessions while the repair work is going on"

- November 7 2022 emails from the Landlord informing the Tenant that they "cannot stay at the apartment even with safety precautions due to the fact that the contractors now say they have to cut more drywall out than was previously thought." – the strata/contractor informed the Tenant that they should "attain accommodation for a week", with the Landlord offering "$500.00 a night for up to a week"

The Tenant responded on that same day, refusing the offer, and stating “If they tarp it as it needs to be all should be well. . . not exposing the rest of the apt to builders dust”.

The Landlord responded the following day to list the order of work to be undertaken by the contractor, with the repairs happening “a little less than a week to complete”.

- emails from November 8 wherein the Landlord noted the Tenant’s specific concerns with contractors entering/exiting the tented area (“strong tenting measures”) – the Tenant stated their objection to the number of emails on this issue and stated “We will be seeking monetary compensation for all this.” By November 14, the Tenant was requesting the Landlord provide the rental unit owner’s contact information. The Landlord reminded the Tenant of their open offer for accommodation and coverage.

- emails from November 16 wherein the Landlord requested confirmation from the Tenant that they acknowledge, in writing, that the main job may be finished, with assurance from the Tenant “that after refusing to leave and stay elsewhere and in spite of being financially compensated for it, that [the Tenant] would hold the strata and contractors harmless”. The Tenant responded to say they were not prepared to give a “release of liability/waiver of rights.” The Tenant also specified the date of November 21 for the start of the work, otherwise they would “seek a repair order from Residential Tenancy Branch as well a monetary compensation application for the egregious delay, multiple intrusions on estimates, the 100+ emails back and forth, the lack of both a bathroom and a dryer for months on end, and the stress this has caused.”

  The Landlord, at length, responded to this by quoting the contractor’s previous message, stating: “if you do not consent to [the contractor] coming in and giving them their indemnity, the contractors cannot do anything. . . that has arisen because you do not want to leave.” They also underlined that access during the work would be limited.

- emails starting on November 24 wherein the Landlord requested the Tenant to sign a “letter of release confirming “from the tenant acknowledging that after being advised to stay elsewhere during the drywall removal/repairs and being offered by the rental property management company to cover for additional

accommodation during the repairs, the tenant has declined the offer and to remain within their unit during the repairs" –

The Tenant responded: "We see this as harassment and undue delay. We're retaining legal counsel. Do not communicate with us further on these issues. Stop harassing us. Our counsel will be dealing with you." (The Landlord read all of this email in the hearing.)

The Landlord subsequently confirmed with the contractor's representative that the Tenant had previously sent an email stating they would take no legal action against strata/contractor/Landlord "after the repairs are done and any health issues will appear".

Separately with the Tenant, the Landlord confirmed that the offer for accommodation and coverage was "still on the table". The Tenant responded to say communication should be via their counsel, and the Landlord requested confirmation from the Tenant whether they accepted the offer or declined it.

- notes re: a medical consultation of December 15, 2022, noting "what was supposed to be a simple bathroom renovation, has turned into a 6 month long process where now they are paying a lawyer to be involved", noting the strength of the Tenant's current prescription

- notes from a medical consultation of February 15, 2023, noting the Tenant's "stress with living situation"

- an Occupational Health Fitness Assessment signed by the attending physician on March 31, 2023 – this listed a start date for symptoms on March 9, 2023, including "daily anxiety, low mood, bouts of crying, panic attacks", with similar medical problems in the past – the practitioner noted a prescription, and a psychiatry consultation

- notes from a separate appointment, for the other Tenant, dated March 31, 2023 – this notes increased stress from "housing situation . . . they were recently evicted" – when asked about support, the Tenant responded that they "just needs [their] housing situation to be resolved and then the anxiety will be gone"

- a copy of the strata/contractor release, unsigned, noting the contractor's recommendation that the Tenant vacate the rental unit during the repairs (noted

specifically as “tenting (as if it were asbestos remediation), drywall removal and repair”), noting also the Tenant’s “severe pre-existing allergy to drywall dust”, noting also the Tenant’s inability to relocate during the repair because “going elsewhere would present more allergic risk than staying” – with previous drywall work previously completed in the rental unit with the Tenant present, and no reaction – this was sent via one law firm to counsel retained by the Tenant at that time. The emails attached to this document appear to show dialogue surrounding the wording of this release, involving counsel, continued through March 2023.

Tenant’s counsel provided submissions on how damages arise in this matter, via legal concepts involving the BC legislation, and comparable case law from other jurisdictions:

- the Landlord is responsible for maintaining the unit in a good state of repair, as per the *Act* s. 32 – here, the Landlord is trying to obfuscate by referring to the strata – ultimately, the Landlord was failing in their responsibility. The case law cited by counsel on this point[1] referred to damages for pain and suffering, based on the “nature, severity, and duration of both the underlying injury and the pain and suffering itself.” The board in that instance awarded compensation for the stresses that tenant experienced, in the form of “some damages for pain and suffering.”

- courts have paralleled the notion of non-pecuniary damages into the loss of quiet enjoyment, a concept that is more often found in residential-tenancy-type legislation[2]

- medical evidence is not strictly necessary to prove the existence of mental distress[3] -- in the situation with the Tenant here, the Tenant provided medical evidence showing the impact

- mental stress and contractual breaches by a landlord are also considered to be a breach of quiet enjoyment[4]

[1] EAT 84764-19 (Re), 2021 Canlii 144857 (ON LTB)
[2] Fortugno v Valois & Anor, 2021 SKORT 1704 (CanLII), paragraphs 83, 87, 88
[3] Lau v. Royal Bank of Canada, 2017 BCCA 253 (CanLII)
[4] Vorvis v. Insurance Corp. of B.C., 1984 CanLII 489 (BC CA)

- courts have allowed for damages that are hybridized, encompassing facets of inconvenience, distress, loss of amenity and loss of quiet enjoyment[5].

Tenant's counsel also provided an excerpt from the *Residential Tenancy Branch Policy Guidelines, 6: Entitled to Quiet Enjoyment*:

> 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 where 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.

The Tenant, to close their submission, spoke of the impact of the end-of-tenancy notice. In summary, the Tenant stated they asked for consideration in terms of requesting adequate tenting, and the Landlord would not accommodate that measure that worked effectively in the past.

The Landlord, for their evidence, provided a single string of email dialogue, commencing on November 29, 2022, requesting confirmation from the Tenant whether they accepted the offer of accommodation for $500 per night during the time that work would be done. The Tenant again stated "You will hear from our counsel shortly."

In a separate message provided by the Landlord, the strata were confirming with another person on whether the Tenant's statement confirming they would stay, with the use of "air purifiers, a nebulizer, Eli-pens, the works" constitutes a "letter of release."

By November 29, the strata were still confirming with the Landlord whether the Tenant had provided a letter of release, reiterating that "there are precautions the contractor and strata needs to take to protect themselves as well." The strata agent noted: "there are many parties involved in this repair ([contractor A], [contractor B], strata corporation, rental PM [*i.e.*, property manager], tenant, and owner)."

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[5] Brown v. Residential Tenancy Act, 2008 BCSC 1538 (CanLII)

In the hearing, the Landlord provided the following points in their testimony:

- the Tenant did not contact the Landlord initially regarding the bathroom leak; rather, the Tenant contacted the strata
- there were four different companies that came to assess the job involved and provide estimates, with each individual company "scared to communicate with the Tenant" because "the Tenant would talk lawsuits" and contractors or their representatives would thus want waivers signed
- the Landlord offered $500 per day for a hotel stay but the Tenant said a hotel would present more problems than the rental unit
- the Tenant "obstructed the Landlord's ability to effect repairs" and "played a major role in creating stress for themselves"
- on November 24 the Landlord was asking for a letter of release; however, the Tenant chose to stay in the rental unit and responded that they weren't signing anything and saw the communication as harassment.

Analysis

Under s. 7 of the *Act*, a landlord or tenant who does not comply with the legislation or their tenancy agreement must compensate the other for damage or loss. Additionally, the party who claims compensation must do whatever is reasonable to minimize the damage or loss. Pursuant to s. 67 of the *Act*, I shall determine the amount of compensation that is due, and order that the responsible party pay compensation to the other party if I determine that the claim is valid.

To be successful in a claim for compensation for damage or loss the Applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Tenant's counsel framed their submissions, and their summarizing of the situation, as comprised of the Tenant's loss of amenity in the rental unit, and their loss of quiet enjoyment.

I note a substantial gap in the timeline during which repairs were not initiated: this runs from mid-July to October. There was apparently no communication on this issue during this timeframe, at least in terms of the records submitted by the Tenant for this hearing. There was no direct testimony from either the Landlord or the Tenant on this timeframe, which I find significantly extended the period of time from approximately 3 months, as of mid-July, through to 6 months, as of later October and into November. The burden of proof on this matter is on the Tenant, and I find they did not account for this period of time, whether they made requests to the Landlord, if those requests were ignored, or if other matters were interfering with progress during this timeframe. Presumably the passing of time increased the Tenant's anxiety and frustration surrounding the matter, yet there is a large gap, and with the Tenant expecting full accountability in terms of damages for this entire timeframe, there is nothing on the record that shows the Landlord was either directly causing interference, or not taking reasonable steps to resolve the situation – consistently, and for an extended period of time.

The Tenant alluded to their previous relationship with the Landlord, even going back to the start of the tenancy when they felt communication from the Landlord was intimidating or otherwise improper. I find there was nothing in the record – comprised of lengthy email strings – that showed the Landlord as either dismissive or discourteous. The Tenant is hard-pressed to show communication from the Landlord as harassment, though that was the common term they employed to respond to the Landlord, whom I find was at pains to ensure the Tenant was able to transition through this repair adequately and comfortably. Not once did the Landlord minimize the Tenant's pre-existing allergic condition or call that into question, or even demand proof thereof. I dismiss outright any notion that any loss of the Tenant's quiet enjoyment during this time was because of harassment.

The Tenant's go-to response to the Landlord by November was that they had retained counsel, and that communication should end. There was no communication from said counsel to the Landlord to clarify this for the Landlord, and I find the Landlord was pressed to keep the communication channel open, even if the Tenant found it discourteous or just too much by that time.

I find this communication exists as proof of the spectre that was in place of the Tenant being of a litigious mindset during this process. I find this was, more likely than not and on a balance of probabilities, the source of all difficulties in this repair process. As noted by the strata agent in November, there were a lot of parties involved: at least two contracting firms (as far as I can interpret from the numerous emails), strata corporation including the strata council, and separate a strata manager, the Landlord, the Tenant, and the owners who were not involved. I find it more likely than not that those contractors, aware of the Tenant's condition (and quoting extensively as being "deathly

allergic") was naturally concerned and took extra precautions, with their concern elevated further when the spectre of lawsuits and legal intervention was language that was utilized frequently by the Tenant, as shown in their response to the Landlord's queries. The strata also had concerns, and that significantly delayed the process whereby they had to circle back and make all decisions with this in mind.

In summary on this point, I accept the Landlord's description wherein they provided that the Tenant, in choosing to communicate in this fashion, was the agent of the delay throughout the whole process.

With reference again to the gap from mid-July to October, I question why the Tenant did not raise the issue with the Residential Tenancy Branch in order to have repairs completed. The Tenant responded to say they left that to their lawyer who was starting that process; however, this ceased when the Landlord served the end-of-tenancy notice. That in itself was a process some 5 months in the works, from November when communication with the Tenant was very strained, through to March when the Landlord served the Two-Month Notice. I question why the Tenant did not undertake this remedy as early as November, and instead communicated to the Landlord that their lawyer would be in touch. In effect, this was no mitigation in the situation by the Tenant, and that is a key component in any question of compensation to the Tenant, regardless of the effective cause of damages. I find, effectively, the Tenant declined to undertake this method of dispute resolution at that time, in the same manner they declined the Landlord's offer of accommodation elsewhere.

Fundamentally, I find there was no breach of the *Act* by the Landlord here. I accept the Landlord's statement in the hearing that they strived every step of the way to have repairs completed. The email record of July 19 shows the Landlord querying the strata on the need for council's deliberation at that stage when everything was ready to go. I find this record shows the Landlord acting in the Tenant's best interest. The Landlord did not violate their obligation to have repairs in the rental unit completed as per s. 32 of the *Act*. The Landlord was not the source of delay in this matter.

Regarding the loss of amenity within the rental unit, the Tenant did not make a submission on this to show their use of any part of the rental unit was limited or blocked by a delay in the work, nor from the source of the leak. There was no reference to the size or number of bathrooms or extra space of the rental unit; therefore, I find there was no hardship to the Tenant. Though their counsel described common components in an award for damages by referring to the loss of amenity, there was no actual evidence thereof, and the Tenant certainly had not communicated that to the Landlord in the past.

By making any award for this consideration, I would only be guessing at the impact to the Tenant's day-to-day living within the rental unit, and how that carries over into the concept of their loss of quiet enjoyment.

Also, I find the Tenant has not adequately assessed the value of the damage or loss, as in consideration 3 listed above. Their counsel referred to $30,000 as being an amount that was less than one-half of a year's rent in full; however, this is not a statement of what the amount actually represents. On this expression of the amount in terms of the timeline involved, I again note that there was a significant chunk of time not accounted for in the Tenant's record; this was a critical time period in which repairs should have been completed but were not, and the onus is on the Tenant to show that was because of the Landlord's negligence or inaction.

In summary, I find the amount of $30,000 was not quantified in the Tenant's submissions. For the other reasons listed above, I find the Tenant did not mitigate in these circumstances by seeking resolution as afforded by tenancy laws in the province. Additionally, I find fundamentally there was no violation of any principle of the *Act*, either s. 32 directly, or the Tenant's quiet enjoyment. I find there is insufficient evidence of a cogent medical impact to the Tenant during the entire time of repairs because the Tenant did not prove definitively an impact to their quiet enjoyment in the rental unit during this time.

For the reasons above, I dismiss the Tenant's Application for compensation in its entirety, without leave to reapply.

The Tenant was not successful in this Application; therefore, I grant no reimbursement of the Application filing fee.

Conclusion

I dismiss this Application by the Tenant in its entirety, without leave to reapply.

I make this decision on the authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: July 31, 2023

Residential Tenancy Branch