Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC

Introduction
On December 21, 2011, a Dispute Resolution Officer (DRO) issued a Review Decision in which he suspended a November 4, 2011 decision (the original decision) of another DRO. He did so as he was satisfied by the landlord's application for review that the landlord was unable to attend the original November 4, 2011 hearing because the landlord had not been served with the tenant's original application for dispute resolution. The second DRO ordered that the original decision and order be suspended and directed that the current new hearing be conducted.

This new hearing dealt with the tenant's application pursuant to section 67 of the *Residential Tenancy Act* (the *Act*) for a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement. Both parties attended the January 23, 2012 hearing and were given a full opportunity to be heard, to present evidence, to make submissions and to cross-examine one another.

Preliminary Matters - Tenant's Request for an Adjournment
The landlord testified that on January 14, 2012 his female partner handed a woman at the tenant's address identified on the tenant's application for dispute resolution a copy of his written evidence package. The tenant testified that the landlord did not serve this written evidence to her by January 13, 2012, the date she said such evidence needed to be served to her in order to comply with the *Act.* She said that she did not receive this evidence until January 16, 2012. The tenant testified that she needed more time to respond to the landlord's written evidence and asked for an adjournment of this hearing.

Section 88 of the *Act* outlines the methods by which documents, including written evidence, can be served to a party. In this case, the landlord testified that he had not received the tenant's new mailing address or a telephone number where she could be reached until he received a copy of the tenant's application for dispute resolution following his receipt of notice that funds had been garnisheed from his account through an order of the court. In accordance with section 88, this written evidence was left with a person who assured his female friend that she would make sure that it was received by the tenant, which by the tenant's own admission occurred. Pursuant to section 88 of the Act, I consider the landlord's written evidence served to the tenant on January 14,

2012, the date when it was handed to the adult at the address identified as the tenant's on the tenant's application for dispute resolution.

Rule 4.1 of the RTB's Rules of Procedure establishes that written evidence is to be served by the respondent at least 5 business days before the dispute resolution proceeding. As I find that this occurred, I dismiss the tenant's claim that the landlord's evidence was submitted late and find no substance to her assertion that the landlord's evidence had to be served by January 13, 2012.

Rule 6 of the RTB's Rules of Procedure allows a DRO to adjourn a hearing at any time, even after a proceeding has commenced. In considering the tenant's request for an adjournment presented at this hearing, I have taken into account the criteria established under Rule 6.4 for considering such requests for adjournment:

I asked the landlord whether he was willing to agree to an adjournment to accommodate the tenant's request for more time to respond to his written evidence. The landlord said that he very much wished to reach a final determination on this matter, as the tenant had already taken action in early December 2011 to garnishee funds from him and only a new hearing and decision could enable him to reverse this action.

At the hearing, I advised the parties that I was not willing to grant an adjournment as I accepted that further delay to this process would have a prejudicial effect on the landlord. I also noted that the tenant submitted her original application for dispute resolution in August 2010 and could have produced any evidence she wished to have considered regarding her application for dispute resolution by the time of the original November 4, 2011 decision regarding her application or since receiving the December 21, 2011 Review Decision. In accordance with Rule 6.6 of the RTB Rules of Procedure, I refused the tenant's request for an adjournment and proceeded with this hearing.

Preliminary Matters - Service of Documents

The tenant did not dispute the landlord's testimony that in late June 2011 or early July 2011 the tenant gave him oral notice that she intended to end her tenancy by August 5, 2011. He said that he asked her to put this oral notice into writing as required by the *Act*. The tenant entered into written evidence a copy of her July 4, 2011 written notice to end this tenancy by August 5, 2011. The landlord denied receiving this written notice addressed to him at an address that the DRO found was not his mailing address for the purposes of the service of her application for dispute resolution to the landlord in accordance with section 89(c) of the *Act.* I note that she claimed in this letter that "landlords generally accept notice to end a tenancy until the 7th of the month."

The tenant testified several times during this hearing that she did in fact serve the landlord by sending a copy of her dispute resolution hearing package to the mailing address he provided to her orally on June 9, 2011. Other than her claim that the landlord provided the mailing address to her on that date, the tenant has not provided anything substantive to demonstrate that she mailed her dispute resolution hearing package to the landlord in accordance with the *Act*.

The landlord testified that the tenant never did properly serve him with a copy of her dispute resolution hearing package. He said that he contacted the Residential Tenancy Branch (the RTB) on December 2, 2011 and obtained a copy of the original decision and the tenant's original application for dispute resolution, in which she sought $3,729.44 for a monetary award for damage or loss under the *Act*, regulation or tenancy agreement. Although he testified that he had a copy of the tenant's three page addendum to her application for dispute resolution, he said that he was unaware of the tenant's amendment of this application adding $560.00 to the amount she was previously seeking for a total of $4,289.44. I am not satisfied that the landlord was served with the tenant's amendment to the amount she was seeking in her application for dispute resolution. However, I am satisfied that by the time the landlord applied for a review of the original decision, the landlord was aware of the tenant's application for dispute resolution, which included the details of her original application and the items she added to this application through her amendment. As such, I am satisfied that the landlord had an adequate opportunity to meet the case against him raised by the tenant with respect to her application for a monetary award.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for losses arising out of this tenancy?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, miscellaneous letters and receipts, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

This tenancy commenced as a one-year fixed term tenancy on March 1, 2009. By the end of this tenancy, by which time this had converted to a periodic tenancy, the monthly rent was set at $875.00, payable in advance on the first of each month. The tenant was also responsible for paying for her separately metered hydro and gas. The landlord continues to hold the tenant's $425.00 security deposit paid on February 19, 2009.

The tenant provided written evidence that no joint move-in condition inspection was conducted. The landlord said that a joint move-in condition inspection occurred on or about February 15, 2009, two weeks prior to the commencement of this tenancy. The parties agreed that no joint move-in condition inspection report was prepared by the landlord. The parties agreed that no joint move-out condition inspection was conducted nor did the landlord conduct his own move-out condition inspection. The landlord said that some cleaning was required at the end of this tenancy, but for the most part, the rental premises were left in good shape and without damage. He said that he had no intention of claiming for damage against the tenant's security deposit. He testified that he never received the tenant's forwarding address in writing and has been retaining the tenant's security deposit pending receipt of her forwarding address.

The tenant's amended application for a monetary award of $4,289.44 for compensation for losses arising out of her tenancy included the following items:

Item	**Amount**
1) Reduction in Rent from August 2010 to August 2011 for hydro bills ($15.00 x 12 = $180.00)	$180.00
2) Reduction in Rent from August 2010 to August 2011 for Noise/Disturbance/Inconvenience Caused by Construction ($50.00 x 12 = $600.00)	600.00
3) Pro-Rated Reduction in Rent for Landlord's Alleged Failure to Address Late Night Noises Caused by his other Tenants May 28 – May 31, 2011 (4 days @ $28.22 per day = $112.88)	112.88
4) Reduction in Rent for Landlord's Alleged Failure to Address Late Night Noises Caused by his other Tenants – June 2011	875.00
5) Reduction in Rent for Landlord's Alleged Failure to Address Late Night Noises Caused by his other Tenants – July 2011	875.00
6) Pro-Rated Reduction in Rent for Landlord's Alleged Failure to Address Late Night Noises Caused by his other Tenants – August 1 - 4, 2011 (4 days @ $28.22 per day = $112.88)	112.88
7) Moving Expenses (Movers, Canada Post & Transfer of Utility Account)	349.44
8) Return of Security Deposit ($425.00 - $112.88 (Unpaid Rent from 1st 4 days of August 2011) = $312.12 x 2 for Failure to Return within 15 days = $624.24)	624.24

9) Replacement of Bracelet arising from Landlord's Alleged Release of Tenant's Keys to Landlord's Other Tenants	500.00
10) Reimbursement of Tenant's Postage Costs	60.00
Total Monetary Award Requested	**$4,289.44**

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a DRO may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. As the tenant submitted a lengthy list of items for which she was seeking compensation, I will address these in the order of those listed in her original application and as outlined in the table above.

I first note that both sides did not produce any witnesses at this hearing. The landlord attempted to contact a number of witnesses to attest to the written statements attributed to them by the landlord. None of these individuals were available when we attempted to connect with them. Some of these written statements were signed by the authors of these letters, mostly neighbours who live on the same street as the tenancy in question. None of these signed statements were sworn affidavits. Many of the other written statements entered into written evidence were not signed by those who purportedly wrote them. As such, I attach little weight to these unsigned written statements.

The tenant did not enter into written evidence a single statement from anyone other than herself to attest to her account of the events that transpired during her tenancy. She explained that she lived alone in this tenancy.

1) Analysis - Rent Reduction for Landlord's Use of Tenant's Hydro

The landlord entered into evidence photographs of the separate hydro meters for the tenant's rental unit and the coach house rental unit where the other tenants on this property resided. The landlord provided some written statements attesting to his claim that his work on the coach house property was done sporadically and respectfully. He said that he always used the power supply metered to the coach house.

Other than the tenant's claim that the landlord used her power without her approval and without compensating her, the tenant produced little to support her claim that she suffered losses arising out of the landlord's actions with respect to his use of hydro.

Although she said that she had photographs that showed that the landlord had tapped into her power supply, she did not submit these into evidence for this hearing. As the burden of proof rests with the tenant and she has not satisfied that burden, I find on a balance of probabilities that the tenant is not entitled to a monetary award for extra costs she claims to have incurred to her hydro bills arising from the landlord's actions.

2) Analysis – Rent Reduction for Construction Noise Caused by Landlord

The parties provided conflicting accounts of the extent and duration of construction and repairs conducted by the landlord during this tenancy to the rental property.

The tenant entered oral and written evidence that the landlord worked on the rental property frequently and caused considerable noise, disturbance and inconvenience to her for the final 12 months of her tenancy. The tenant stated that the landlord often left his radio playing loudly just outside her rental unit, left tools, equipment and his truck in her driveway parking spaces and generally caused her ongoing disturbance from his unscheduled projects to maintain and repair the rental property.

The landlord testified that he works full-time and could only conduct repairs and maintenance as his schedule permitted. He testified that the duration of the installation of new vinyl siding did not take long, nor did work that he performed on repairing a leak in the original roof on the rental property. He said that he always checked with the tenants in the coach house (the coach house tenants) beforehand as he realized that the female tenant in the coach house was undergoing a difficult pregnancy and he did not wish to disrupt his tenants. He also gave undisputed testimony that there are seven parking spaces for this property, that the tenant had no vehicle, and that he always left parking space for her. Although I would have attached more weight to his written evidence from his other tenants and others who reside on this street had these individuals participated in this hearing or sent sworn affidavits, he did present some written evidence to support his assertion that his activities in working on the rental property did not cause disruptions to his tenants.

At the hearing, the landlord admitted that he played his radio when he was working at the rental property. He also testified that some of the work included the occasional use of power equipment and that he "tinkered" away on the rental house when he found time to devote to repairs, renovations and maintenance. Based on the evidence before me, I find that the construction and maintenance work performed by the landlord did not necessarily follow a set schedule and may have caused an element of disruption and inconvenience to the tenant. However, I do not accept the tenant's claim that this process was extensive, nor do I accept that it continued to affect her quiet enjoyment of her rental unit for a twelve month period. For these reasons, I allow the tenant a

monetary award in the amount of $150.00, representing a rent reduction of $25.00 per month for a six-month period of her tenancy.

3-6) Analysis – Rent Reduction for Late Night Noise - May to August 2011

The tenant has applied for a monetary award for her loss of quiet enjoyment of her rental unit for the landlord's failure to address concerns she raised with him in a voice mail on May 24, 2011 about noises caused by the coach house tenants. She maintained that noises and disturbances caused by the coach house tenants were so excessive and stressful to her that she should be entitled to a monetary award for the full amount of her rent from May 28, 2011 until she vacated the premises on August 4, 2011. She said that the coach house tenants would slam doors, run loads of laundry, and hold noisy parties late into the night. Other than her own oral testimony and her own written statements, the tenant did not produce any evidence from anyone else who witnessed any of these alleged noises and disturbances she maintained the coach house tenants caused.

The landlord gave his own oral and written evidence that he had followed up on the tenant's claims that noises and disturbances were originating in his other rental suite in this property. Once more, the landlord's written evidence would have been much stronger had any of those who wrote letters about the tenant's allegations regarding noise participated in this hearing. However, the landlord did attempt to call some of these individuals, including his coach house tenants as witnesses, but they could not be contacted during the hearing.

The parties entered conflicting testimony regarding information conveyed to them by police who attended when the tenant called them with noise complaints. The tenant said that the police were always "sympathetic" to her concerns. The landlord said that no one other than the tenant heard any of the alleged noisy behaviour that the tenant asked the landlord to address.

Based on a balance of probabilities, I find that the tenant has not met the burden of proof required to entitle her to any reduction in rent for noises and disturbances that she claimed were occurring on a regular basis at night from late May 2011 until the end of her tenancy. The tenant did not dispute the landlord's oral and written testimony, nor written statements entered into by the landlord that:

- the male coach house tenant started work at 5:00 a.m. each weekday;
- the female coach house tenant worked and was undergoing a difficult pregnancy; and
- the couple had a 1 ½ year old child.

Under these circumstances, I find the landlord's evidence regarding this portion of the tenant's application more convincing and credible than that of the tenant, given all of the evidence presented. The tenant who bears the burden of proving her application for a monetary award provided no police reports, no witness statements, no witnesses and no evidence other than her own claim about these alleged noises late at night. I dismiss the tenant's application for a monetary award that would eliminate her responsibility for rent payments from May 28 until the end of her tenancy. In so doing, I find that the tenant's application falls far short of meeting the standard required to entitle her to any such reduction in rent over this period.

I also note that for the months of June and July 2011, the tenant has also asked for rent reductions in excess of the rent she actually paid for those months (i.e., $50.00 reductions for noise from construction and $875.00 for the landlord's failure to resolve her concerns about night noises). The tenant's claim for a monetary award for June and July 2011 exceeded the rent she paid for those months and asked that the landlord pay her to live in his rental unit for those months. In addition, I note that although the tenant sought a rent reduction from August 1 until August 4, 2011, by her own written evidence, she did not in fact pay any rent for August 2011.

7) Analysis – Reimbursement for Tenant's Moving Expenses

The tenant applied for reimbursement of her moving expenses because she claimed that the landlord had breached a material term of her tenancy agreement. She claimed that she "had no choice but to end this tenancy" as the landlord's unauthorized use of her power and his failure to take action to end the night time noises that disturbed her breached her tenancy agreement and entitled her to end her tenancy and obtain reimbursement for her moving expenses. I find that the tenant has failed to demonstrate that the landlord breached any material term of her tenancy agreement. I dismiss the tenant's application for reimbursement of her moving expenses.

8) Analysis – Security Deposit

Section 38 of the *Act* requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* equivalent to the value of the security deposit.

Although the tenant included the return of her security deposit in the monetary award she sought through her application, she did not specifically note in her application that she was seeking the return of her security deposit from the landlord. In the addendum to her application for dispute resolution, the tenant maintained that she was entitled to a

return of her $425.00 security deposit less only the pro-rated portion of her August 2011 rent (i.e., $112.88) that she did not pay when she ended this tenancy. She also requested a return of double the difference between these figures due to the landlord's alleged failure to return her security deposit to her within 15 days of the end of her tenancy or her provision of her forwarding address in writing to the landlord.

The landlord testified that he had no objection to returning that portion of the tenant's security deposit to her that she was entitled to receive as he had no claim of damage against her arising from this tenancy. He said that he would have returned her security deposit had he known where to send this deposit.

In this case, I find that the tenant did not provide her forwarding address in writing to the landlord. He gave convincing testimony that he did not even become aware of her application for dispute resolution until the tenant took action to give effect to the monetary Order she received at the original hearing. Under these circumstances, I dismiss the tenant's application for a monetary award under section 38(6) of the *Act* for an amount equivalent to the retained value of the tenant's security deposit.

Even though the tenant's application does not specifically seek to obtain the return of her security deposit, as set out below, the offsetting provisions of section 72 of the *Act* enable me to consider the return of the tenant's security deposit.

> ***72*** *(2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other,…*
>
> *(a) in the case of payment from a landlord to a tenant, from any rent due to the landlord, and*
>
> *(b) in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit* due to the tenant…

I find that the tenant has not demonstrated any basis in practice or law for her assertion that landlords allow tenants until the 7th of each month to end a tenancy that month. In fact, rather than the tenant's claim addressed earlier in this decision to be absolved of responsibility for rent for the first five days of August 2011, section 45(1) of the *Act* required her to end her periodic tenancy by giving the landlord written notice to end her tenancy the day before the day in the month when rent was due. In this case, in order to avoid any responsibility for rent for August 2011, the tenant would have needed to provide her notice to end this tenancy **before** July 1, 2011. Section 52 of the *Act*

requires that a tenant provide this notice in writing. For these reasons, I find that the tenant did not comply with the provisions of section 45(1) of the *Act.*

The landlord testified that he continues to hold the tenant's security deposit of $425.00 plus interest from February 19, 2009 until the date of this decision. Over that period, no interest is payable on the landlord's retention of the security deposit. The tenant entered written evidence that she did not pay any portion of her August 2011 rent which she calculated as $112.88, for the period from August 1, 2011 until August 4, 2011. The landlord entered undisputed evidence that he asked the tenant to provide him a written notice to end her tenancy and requested that she end the tenancy on August 1, 2011, so as to improve his chances of finding a new tenant for August 2011. As noted above, the tenant's written notice to end tenancy sent on July 4, 2011 would not have released the tenant from responsibility for rental payments for August 2011.

I find that the tenant is entitled to obtain the retained portion of her security deposit. I find that the tenant admitted that she paid no rent for August 2011, and was expecting that a portion of her security deposit would be applied to that unpaid rent. By giving late notice of her end to this tenancy not formally received by the landlord and by timing the end of her tenancy to a non-standard date, I find it unlikely that the landlord would have been able to clean the premises after her departure and prepare it for a new tenant until at least August 15, 2011. Based on the oral and written evidence presented by the parties and pursuant to sections 38 and 72(2)(b) of the *Act*, I find that the landlord is entitled to recovery of one-half of the August 2011 rent owing as of August 1, 2011. This results in a deduction of $437.50 from the tenant's monetary award from the amount of the tenant's security deposit and the amount of the monetary award issued in the tenant's favour. Only the landlord's failure to provide additional evidence regarding his attempts to re-lease this rental unit prevented him from consideration of an additional allowance for unpaid rent for August 2011 pursuant to section 72(2) of the *Act*.

9) Analysis – Tenant's Claim for Landlord's Alleged Release of Keys to Other Tenants

I dismiss in its entirety the tenant's claim that the landlord provided the key to her rental unit to the coach house tenants which she alleged enabled them to enter her rental unit and take a valuable bracelet. Her account regarding this sequence of events is not supported by any other evidence and relies solely on her claim that this occurred. I note that the landlord presented oral and written evidence that it was the tenant and not the coach house tenants who took illegal actions in vandalizing the coach house tenants' new patio furniture on their deck shortly after a dispute with them.

If illegal actions occurred as described by the tenant and the landlord, the parties' recourse would be to the police and, if necessary, through civil action through the court system. There is no role for the RTB in determining who stole what from whom or who vandalized whose possessions. At any rate, I dismiss the tenant's claim as she has failed to substantiate any portion of this portion of her application.

10) Analysis – Postage Expenses

I dismiss the tenant's application to recover postage expenses she incurred in preparation for this hearing. These expenses are not recoverable under the *Act*.

Conclusion

Pursuant to sections 67 and 82(3) of the Act, I vary the original decision and Order to a monetary award in the tenant's favour of $137.50 in the following terms which allows the tenant to recover rent paid during her tenancy and her security deposit, less the amount of unpaid rent owing for August 2011:

Item	**Amount**
Reduction in Rent for Loss of Quiet Enjoyment Resulting from Landlord's Construction Work on Rental Property	$150.00
Security Deposit	425.00
Less Unpaid Rent August 2011 (50% x $875.00 = $437.50)	-437.50
Total Monetary Order	**$137.50**

I dismiss all other portions of the tenant's application for dispute resolution without leave to reapply.

This varied decision and Order takes the place of the original decision and Order of November 4, 2011.

The tenant is provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible to be used **only** in the event that the tenant has not already obtained an amount in excess of this monetary Order to implement the original decision and Order. In that event, should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I order the tenant to refund to the landlord forthwith any amount she has recovered from the landlord by way of execution, garnishment or any other means that exceeds the amount of this monetary award of $137.50. If the tenant does not refund the amount

she has recovered from the landlord in excess of this monetary award forthwith, I find that the landlord is at liberty to file this decision with the Small Claims Court of British Columbia in the proceeding commenced by the tenant and to apply to the Small Claims Court for the recovery of any amount retained by the tenant in excess of this award of $137.50.

As discussed at the hearing and as agreed to by the tenant, I order that the tenant's current mailing address for the purposes of the *Act* is established as follows as set out in her application for dispute resolution:

123 Main Street
Somewhere BC V2V 3T7

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: January 26, 2012

Residential Tenancy Branch