Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND FF
MNDC FF
ERP RP FF

Preliminary Issues

Each Landlord signed into the teleconference hearing on separate telephones while in the same room which caused a loud squeal and echo through the telephone. I instructed them to have one person move into another room or to disconnect the cell phone from the hearing to stop the excessive noise and echo so we could proceed with the hearing. The Landlords chose to have Landlord (2) disconnect from the hearing and he would assist Landlord (1) who would provide the testimony during the hearing.

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlords and the Tenants.

The Landlords filed April 13, 2012, seeking a monetary order for damage to the unit, site or property and to recover the cost of the filing fee from the Tenants for their application.

The Tenants have filed two applications which were joined and scheduled to be heard during this teleconference hearing. Their first application was filed March 2, 2012, seeking a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, and to recover the cost of the filing fee from the Landlords. The Tenants' second application was filed April 11, 2012 seeking Orders to have the Landlords make emergency repairs for health or safety reasons, for repairs to the rental unit, site or property, and to recover the cost of the filing fee from the Landlords for their application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. During the hearing each party was given the opportunity to provide their evidence orally and respond to each other's testimony. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Have the Tenants breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
2. If so, have the Landlords met the burden of proof to obtain Monetary Compensation as a result of that breach, pursuant to sections 7 and 67 of the *Residential Tenancy Act*?
3. Have the Landlords breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
4. If so, have the Tenants met the burden of proof to obtain Monetary Compensation and Orders for repairs as a result of that breach, pursuant to sections 32, 7 and 67 of the *Residential Tenancy Act*?

Background and Evidence

The parties to this dispute affirmed that the following facts were not in dispute:

- On October 4, 2010 the Tenants paid a deposit of $3,500.00; and
- The first tenancy agreement was signed November 1, 2010 for a fixed term tenancy that was to begin November 1, 2010 and end October 30, 2011 for the monthly rent of $3,500.00; and
- The move in condition inspection report was completed November 22, 2010; and
- The second tenancy agreement was signed August 12, 2011 for a fixed term tenancy beginning November 1, 2011 to October 30, 2012 for the monthly rent of $3,700.00; and
- The third tenancy agreement was signed August 2011 for a fixed term tenancy agreement beginning November 1, 2012 and ending July 30, 2013 for the monthly rent of $3,900.00; and
- The three tenancy agreements are consecutive agreements despite the clerical error, and the intent was to have the two initial tenancy agreements ending on the last day of October and therefore are corrected to read that they end October **31**, 2011 and October **31**, 2012, as the following tenancy begins on the next day, November 1st of each year.

The Tenants affirmed they are seeking $2,639.54 in monetary compensation which is comprised of the following:

1) $1,750.00 return of security deposit overpayment. They stated the Landlord required, and they paid, a security deposit equal to a full month's rent of $3,500.00 which is double what the Act allows; and

2) $274.40 for re-keying the rental house. They had the locks re-keyed December 31, 2010 at the suggestion of the Landlord and are seeking reimbursement for this cost; and

3) $350.00 for the cost to have rubbish and debris removed from the yard that was left behind by the previous tenant and additional debris from when the Landlord cleaned the gutters and completed other maintenance. They referenced their evidence which included an e-mail from the Landlord where he agreed to have the rubbish removed but he never followed through with having it removed so they suffered the cost to have it removed; and

4) $165.34 as overpayment of utilities; and

5) $100.00 to recover the cost of each filing fee (2 x $50.00)

The Landlord disputes the Tenants' claim for monetary compensation as follows:

The Landlord collected a security deposit of $1,750.00 and a pet deposit of $1,750.00 for their twelve year old dog, a total of $3,500.00 which is in compliance with the Act; and

The Tenants changed the locks on their own accord and did not consult the Landlord as to which locks to change or which locksmith to use; therefore they should pay the cost as it was their choice to have the locks changed; and

The Landlord stated he was of the opinion that the yard was fully acceptable at the time the Tenants moved in and they agreed it was at the beginning of their tenancy. The lease provides that the Tenants are responsible for yard work, pruning and raking of leaves as well as the disposal of yard waste. The Landlord confirmed they agreed to remove the initial waste and that they instructed the Tenants to let them know when it was ready to be picked up and they would arrange for someone to remove it. However the Tenants never informed the Landlord when it was ready to be removed; and

The Landlords do not dispute the overpayment of utilities of $165.34 and agree to reimburse the Tenants for this amount.

The Tenants advised they are also seeking orders to have repairs completed as follows:

a) Hot water tank repair – there has been a problem with the hot water since the onset of their tenancy as supported by the numerous e-mails provided in evidence. The Landlords refuse to have a licensed plumber check the tank and instead just increase the temperature setting on the hot water tank which produces scalding hot water initially however there never is enough hot water to bath their eight year daughter in the evening. There is a rental unit in the basement and they believe the hot water tank is either corroded and needs replacement or a larger one needs to be installed to accommodate the two rental units; and
b) The water tap in the master bedroom ensuite has leaked since almost the beginning of their tenancy. They have requested repairs on numerous occasions and were able to live with the drip for the first while. However the leak has now become so severe that they have had to shut the water off to that tap; and
c) Removal of dead tree located in the back yard. They informed the Landlord of their concerns with the dead tree as early as August 11, 2011 and have pruned the dead branches to the best of their ability to attempt to prevent fallen branches. They have recently had an arborist provide an assessment which indicates the tree is dead and is a health and safety risk and must be removed however the Landlord refuses to hire a professional to remove the tree. They are concerned for the safety of their eight year old daughter who plays in the back where the tree is located.
d) Removal of the old fridge located in garage and leave new fridge in rental unit. As supported by their evidence the Landlord provided them with a new fridge near the beginning of their tenancy to replace the one that had broken shelves. The old fridge was placed in the garage awaiting removal by the Landlord. The Landlord continued to put off removing the old fridge from the garage and now since they filed their application for dispute resolution the Landlord has threatened to remove the fridge from the rental unit and replace it with the broken one from the garage.

The Landlord disputes the Tenants' testimony as follows:

They believe there is nothing wrong with the hot water tank and have been told by the downstairs tenant that there is plenty of hot water. They do not know the exact age of

the current tank but think it is approximately four years old. They attended the unit with their handyman in November 2011 and cleaned out the sediment and it was working fine. They are of the opinion that a larger tank cannot be installed; and

They attempted to have their handyman attend the rental unit to fix the ensuite water tap recently however the Tenants refused them access requesting a licensed plumber and to wait for the outcome of today's hearing. The tap only needs a washer so why should they have to hire a plumber instead of having their handyman do the work.

The Landlord stated that they believe the arborist report is fraudulent as it indicates the tree was inspected on May 10, 2012, at date that has not arrived yet, and because the clerk they spoke to at the municipal office did not recognize the name of the arborist. They believe the removal of the tree would be the Tenants' responsibility as they are responsible for yard maintenance as per their tenancy agreement.

The fridge that the Tenants are currently using is a "loaner" fridge and as noted in the lease agreement the Landlord agreed to have the broken shelves replaced in the other fridge. They want the loaner fridge returned.

The Landlord affirmed that they are seeking recovery of $104.10 which they paid to have the washing machine repaired on November 10, 2011. The repairman found a pen stuck in the drain hose and therefore the Tenants should be held responsible for the cost of the repair. They are also seeking guidance and orders on when they can enter the rental unit. They have decided to sell the property and require regular access to the rental unit however the Tenants have refused access. The Landlord stated that as the owner of the property he should be allowed to show the unit to any of his friends on a regular basis if he wishes to sell the house privately or by word of mouth.

The Tenants advised that the Landlords' actions since they filed their initial application for dispute resolution have become acrimonious and retaliatory. There has never been any mention of the house being sold and now they are seeking to have a blanket access to the house without notice in accordance with the Act. After hearing the mistruths in the Landlord's testimony they are concerned about how their relationship will be moving forward. Their evidence supports all of their claims and they acknowledge signing the future fixed term agreement after believing the Landlords' claims that they would follow through with their promises to repair the rental unit. They never discussed paying a pet deposit and in fact their tenancy agreement stipulates no pets are allowed but has a provision for their existing dog that was specifically written into the terms of the tenancy agreement.

The parties were given the opportunity to attempt to settle this matter however when they could not agree on the terms of settlement they chose to proceed with their applications as filed.

Analysis

I have carefully considered the aforementioned and the volumes of evidence provided by each party which included, among other things, copies of the first two tenancy agreements, the first page of the condition inspection report, numerous e-mails between the parties, invoices for work performed, and the arborist report; and on a balance of probabilities I find as follows:

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Section 5 of the Act stipulates that Landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect.

Tenants' application

Based on the aforementioned and notwithstanding the Landlord's argument that the Tenants agreed to rent the property "as is", I find as follows:

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

Section 19 (2) of the Act provides that if a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

Section 20(c) of the Act stipulates that a landlord **must not** require a pet damage deposit at any time other than when the landlord and tenant enter into the tenancy agreement or if the tenant acquires a pet during the term of a tenancy agreement, when the landlord agrees that the tenant may keep the pet on the residential property.

The evidence proves the Tenants' paid $3,500.00 as a deposit and that each tenancy agreement includes: Section 11 "no pets except for one 13 year old dog"; Section 15 "...NO animals, birds, or pets of any kind shall be kept or sheltered on the premises except for one 13 year old dog"; and Section 24 "Security Deposit. The Tenant agrees the security deposit cannot be applied towards rent". The tenancy agreements do not have a provision for a pet deposit nor does it indicate a pet deposit was paid; therefore I find the Landlord collected a security deposit equal to one month's rent in breach of section 19(1) of the Act. Accordingly I award the Tenants recovery of the overpayment in the amount of **$1,750.00.**

Upon careful review of the evidence I find there to be insufficient evidence to prove the Landlords instructed the Tenants to have the locks re-keyed or that they had agreed to pay for the work. Therefore I dismiss the claim of $274.40 for re-keying locks at the rental unit.

Section 32 (1) of the Act provides that a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law and having regard to the age, character and location of the rental unit makes it suitable for occupation by a tenant.

Section 32 (5) of the Act stipulates that a landlord's obligations under subsection 32(1) apply whether or not a tenant knew of a breach by the landlord of that subsection **at the time of entering into the tenancy agreement** [my emphasis added]**.**

I find that the condition of the property at the start of the tenancy did not meet the requirements of sections 32 of the Act, as listed above, and that the Landlords accepted responsibility to have the rubbish and debris removed that was left behind by the previous tenants and was the result of the Landlords' maintenance of cleaning out the gutters and yard, as noted in the e-mail dated January 17, 2011. I accept that given the pattern of behaviour that has been established, and noted above, that the Tenants were left to deal with the removal of the rubbish at a cost. Accordingly I find the Tenants have met the burden of proof, as listed above, and I award them **$350.00**.

The Landlords agreed that there was an overpayment of utilities. Therefore I award the Tenants **$165.34.**

I accept the evidence that the Landlords have failed to resolve the issues pertaining to the hot water tank and ensuite taps and that they have attempted to resolve the hot water tank by having their “handyman” attend and set the water temperature at such a high setting that it is risking severe injury to a small child.

Notwithstanding the Landlords testimony that the hot water tank is only four years old, the evidence supports the house was built in 1960 and the plumbing was redone in approximately 2000, (twelve years ago) and in the absence of proof to the contrary, indicates the hot water tank may be older and may need repair or replacement. Therefore I HEREBY ORDER the Landlord to hire a licensed plumber to repair the ensuite tap and inspect and either repair or replace the hot water tank to ensure it can accommodate normal use for the number of occupants in both rental suites, no later than May 31, 2012.

The Residential Tenancy Policy Guideline # 1 provides that major projects for yard and property maintenance, such as tree cutting, pruning and insect control are major projects and **are the responsibility of the landlord** [my emphasis added].

Upon careful review of the arborist report issued April 1, 2012, and notwithstanding the Landlord’s testimony that the arborist’s report is fraudulent because it indicates the tree was inspected May 10, 2012; I find on a balance of probabilities that there was a clerical error made when the report was typed listing the inspection date as Ma**y** instead of Ma**r** 10, 2012, which would be reasonable as the report was written April 1, 2012. That being said the report is signed by a certified arborist listing his license numbers. Accordingly I find the report to be valid and accept that the dead tree poses a serious health and safety risk. Therefore I HEREBY ORDER the Landlord to have the entire tree and all branches and debris removed no later than May 26, 2012 by a licensed professional tree remover.

I do not accept the Landlord’s testimony that the fridge the Tenants are currently using is a loaner even though the tenancy agreement indicates the Landlord would repair the previous fridge. Rather the move in condition report completed November 22, 2010 indicates the Landlord will replace the broken fridge, and the additional e-mails supports the Landlords were to remove the old fridge from the garage. I find the Landlords actions of attempting to remove the replacement fridge to be retaliatory and harassing.

Accordingly I HEREBY ORDER the Landlord to have the old fridge which is currently stored in the rental unit garage to be removed from the property no later than May 19, 2012.

The Tenants have been successful with their application; therefore I award recovery of their $**100.00** filing fees.

Landlord's application

Section 5 of the Act and #1 of the Residential Tenancy Policy Guidelines confirm that Residential Tenancy Agreements must not include terms that contradict the Legislation. For example, the tenant cannot be required as a condition of tenancy to paint the premises or to maintain and repair appliances provided by the landlord. Such a term of the tenancy agreement would not be enforceable.

Section 32(4) of the Act provides that a tenant is **not** required to make repairs for reasonable wear and tear [my emphasis added].

The evidence supports the washing machine is provided by the Landlord and required repair at a cost of $104.10, after normal usage by these and previous tenants. Therefore, in accordance with sections 5 and 32 of the Act I find the repair costs to be the responsibility of the Landlords and their claim is hereby dismissed.

The Landlords have sought to have the future fixed term tenancy agreement of November 1, 2012 to July 30, 2013 to be considered null and void due to their desire to sell the property. Upon careful consideration of the aforementioned I find the Landlord's request to cancel the fixed term tenancy agreement to be unsubstantiated and there is no provision in the Act to cancel a fixed term tenancy because a property is listed for sale or is sold. Rather, if a rental property is sold the new owner may request the property be vacant for their own use, pursuant to section 49 of the Act, on a date that is **not before** the end of the fixed term lease. Accordingly, I find the fixed term lease which expires July 30, 2013 to be in full force and effect.

The Landlords request access to the unit for "anticipated" showings for three blanket access times of one hour on weekdays and once on each weekend because they have decided to sell their property. In the absence of any proof of the Landlords' intent to sell this property, and given the evidence before me that the Landlords changed their attitude because the Tenants sought remedy through dispute resolution, I find this request to be retaliatory and harassing in nature, not to mention it does not meet the requirements of section 29 of the Act, as listed at the end of this decision. Accordingly I

hereby dismiss the Landlord's request for blanket access times for anticipated showings.

If the Landlords truly intend to list their property for sale on MLS then they need to arrange to have a licensed realtor contact the Tenants to make arrangements to view the home once, prior to listing, and then to seek access for legitimate showings in accordance with the Act.

The Landlords have not been successful with their application; therefore I decline to award recovery of their filing fee.

I caution the Landlord that under section 95(2) of the Act any person who coerces, threatens, intimidates or harasses a tenant from making an application under the Act, or for seeking or obtaining a remedy under the Act, may be found to have committed an offence and is subject to a fine or administrative penalty.

I have included with my decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the parties to familiarize themselves with their rights and responsibilities as set forth under the *Residential Tenancy Act*.

Conclusion

The Tenants are HEREBY awarded Monetary Compensation in the amount of **$2,365.34** ($1,750.00 + $350.00 + $165.34 +$100.00). The Tenants may deduct this one time award from their next two months rent payments in equal amounts of $1,182.67. Accordingly I HEREBY ORDER the Tenants to pay **$2,517.33** as full rent for **June 1, 2012** ($3,700.00 - $1,182.67) and **$2,517.33** as full rent for **July 1, 2012** ($3,700.00 - $1,182.67). Rent returns to $3,700.00 as per the tenancy agreement effective August 1, 2012.

Pursuant to section 62 of the Act, I HEREBY ORDER the Landlord to hire a licensed plumber to repair the ensuite tap and inspect and either repair or replace the hot water tank to ensure it can accommodate normal use for the number of occupants in both rental suites no later than **May 31, 2012.**

Pursuant to section 62 of the Act, I HEREBY ORDER the Landlord to have the dead tree cut down by a licensed professional tree faller and all resulting tree debris removed from the rental property no later than **May 26, 2012.**

Pursuant to section 62 of the Act, I HEREBY ORDER the Landlord to have the old fridge which is currently stored in the rental unit garage to be removed from the property no later than **May 19, 2012**.

The evidence supports the parties have established an acceptable form of communications via electronic e-mails. Therefore I HEREBY ORDER pursuant to section 62 of the Act, that for the purpose of completing the above repair orders that the Landlord provide notice to attend the unit, in accordance with section 29 of the Act, via e-mail.

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: May 08, 2012.

Residential Tenancy Branch

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;

(b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

Landlord's right to enter rental unit restricted

29 (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

(a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

(i) the purpose for entering, which must be reasonable;

(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;

(d) the landlord has an order of the director authorizing the entry;

(e) the tenant has abandoned the rental unit;

(f) an emergency exists and the entry is necessary to protect life or property.

(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).