Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR MNSD MNDC O FF
MNDC MNSD OLC RR FF

Introduction

This hearing convened on December 5, 2013, for sixty minutes and reconvened on February 5, 2014 for 171 minutes to deal with cross Applications for Dispute Resolution filed by both the Landlords and the Tenants. During the December 5, 2013 convening the parties attempted to settle these matters. When the parties were not able to reach a settlement agreement I heard testimony on the matters before me. During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

The Landlords filed their initial application on September 18, 2013 seeking monetary compensation of $2,944.46 for: damage to the unit, site or property; unpaid rent or utilities; to keep all or part of the security deposit; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the filing fee from the Tenants for this application. They amended their application on November 18, 2013, to reduce the total amount of their claim to $1,951.92.

The Tenants filed their initial application on August 28, 2013, seeking a monetary order for $5,110.00 for: money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; to have the Landlords ordered to comply with the Act, regulation or tenancy agreement; to allow the Tenants reduced rent for repairs, services, or facilities agreed upon but not provided; and to recover the cost of the filing fee from the Landlords for their application. The Tenants amended their application on November 19, 2013, increasing their monetary claim to $5,283.30 and to add their request for the return of their security deposit.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

Issue(s) to be Decided

1. Are the Tenants entitled to monetary compensation pursuant to sections 67 and 7 of the *Residential Tenancy Act*?
2. Are the Landlords entitled to monetary compensation pursuant to sections 67 and 7 of the *Residential Tenancy Act*?

Background and Evidence

It was undisputed that the parties executed a written tenancy agreement on November 6, 2012, for a month to month tenancy that commenced on December 1, 2012. The Tenants occupied the property as of November 28, 2012, and were required to pay rent of $1,100.00 on the first of each month. On November 6, 2012 the Tenants paid $550.00 as the security deposit. The move-in condition inspection report form was completed and signed on December 4, 2012, at which time the Landlords presented the Tenants with a second tenancy agreement which indicated that the Tenants were required to pay a pet deposit of $275.00. No pet deposit was ever paid by the Tenants. The Tenants vacated the property by early September 2013 and both parties attended the move-out condition inspection on September 6, 2013, and signed the condition inspection report form.

The Tenants testified that they felt they were forced to move after an accumulation of events of having to deal with the Landlords continued attendance at the property and their aggressive tactics. As a result, they are seeking $673.30 in moving costs; $1,980.00 for loss of quiet enjoyment; $1,980.00 for lost services and facilities; and the return of their $550.00 security deposit, as supported by their volumes of documentary evidence and photographs.

The Tenants stated that they responded to an advertisement for rent for a one acre rental property with a mobile home and when they first viewed the property on November 4, 2012, the Landlords assured them of their privacy. They discussed the Tenants having two dogs and being allowed to build a small temporary enclosure but there was no discussion about the Landlords' continued use of the property and no discussions about the rental unit being non-smoking. They left the Landlords with their references and were called a few days later and told they were accepted as tenants. At the request of the Landlords, the male Tenant stopped by the Landlords' home on his way home from work on November 6, 2012, to sign the tenancy agreement and pay the deposit. The first tenancy agreement and addendum outlining the terms and conditions of the two dogs, were already created and waiting for the Tenant's signature when he arrived at the Landlords' home on November 6, 2012.

The Tenants submitted that on December 1, 2012, the second day of their tenancy, they heard someone underneath the home and they later saw the male Landlord leave the property. Later that day the Landlords called to say there was to be no smoking in the

home which they agreed with. When the Landlords attended to conduct the inspection on December 4, 2012, the Tenants brought up their concerns about unannounced attendance at the property. They made sure the Landlords had all of their telephone numbers and requested that the Landlords call in advance and not just show up and knock on their door. The Tenants stated that the Landlords assured them that day that the unannounced visits would not happen again, but that was not the case.

The Tenants argued that the Landlords continued to attend the property, without prior notice, on an average of 3 to 5 times per month. Over time the Landlords became increasingly indignant and assertive saying they had the right to attend when they wanted to because it was their property. The Tenants said they informed the Landlords of their rights and when that failed they contacted the Residential Tenancy Branch on May 30, 2013 and were told to start documenting everything as the situation had become aggravated.

The Tenants stated that on June 10, 2013, the Landlords served them a letter dated June 9, 2013, which changed the property to a “shared property” with the Landlords and outlined a common area that runs down the side of the property where the woodshed is and “is approximately 10 metres wide” [sic]. This letter also changed the Tenants’ access to storage The Tenants argued that they never agreed to rent a “shared property” and this change was forced upon them by the Landlords and was effective immediately upon receipt of the letter at 7:15 p.m. on June 10, 2013.

The Tenants pointed to the copy of the advertisement they provided in their evidence which indicates that the rental property was advertised as a one acre property and not a “shared property”. They also pointed to the move-in condition inspection report form which lists the garage and shed as storage and stated that this supports their argument that they had access to both buildings as part of their tenancy. The Tenants pointed out that the lawn mower and lawn maintenance equipment was stored in the shed and argued that they were required to maintain the lawn so that proves they had initially been given access to that shed and the equipment stored in it. The Tenants indicated that they calculated the value of the loss to their tenancy after they determined that the rent in the area for only the home, without the one acre property, would be approximately $800 to $900 per month.

The Tenants testified that their relationship with the Landlords became increasingly more difficult and they felt the Landlords would retaliate against them if they served the dispute resolution papers before they ended their tenancy. On August 28, 2013, they sent the Landlords a registered letter with their notice to end their tenancy effective September 7, 2013 and they served their hearing packages to the Landlords on August 31, 2013.

The Landlords disputed all of the items claimed by the Tenants and argued that the Tenants knew from the beginning that they would be accessing their personal items which were stored on the property. They said they had talked about the car, hunting trailer, cement mixer and wood rounds that were there when they viewed the property

and spoke about how the Landlords would need to access those items when required. They did add additional piles of wood and other storage items during the tenancy which included a camper and a canoe. They said the male Tenant indicated they were concerned about the dogs and asked that they let them know when they needed to go on the property by calling or knocking, which they always did.

The Landlords argued that they did not force the Tenants to move. They indicated they would have been happy to resolve the situation but unfortunately communication from the Tenants stopped after they issued the June 9th, 2013 letter outlining their use of the property and the common area. The Landlords argued that their letter did not change anything and it did not take anything away from the Tenants. The letter simply put their previous discussions with the Tenants in writing. They said the Tenants had originally told them they were fine with the Landlords occasionally coming to the property and then they began to tell them that they had no right to be on the property.

Upon review of the tenancy agreement and addendum the Landlords confirmed they constructed both documents and presented them to the male Tenant to sign on November 6, 2012. The Landlords stated that they had verbal discussions and agreements with the Tenants about absolutely no smoking inside the home and about their access to their stored property. They said they never thought to put those agreements in writing.

The Tenants said there were no verbal agreements about the shared use of the property; rather, they discussed and were assured by the Landlords that they would have privacy, peace and quiet. They confirm that the Landlords requested that they not smoke in the rental home, which they agreed not to do, but that was not discussed until after they had already moved in.

The Landlords presented the merits of their application which consisted of: $287.50 for a damaged tree; $458.50 for cleaning; $105.92 for evidence and service of documents; and $1,100.00 for September 2012 rent.

The Landlords testified that they did not know exactly what had happened to the tree but they found it lying on the ground when they attended the property sometime in July 2013, as supported by the photos they provided in their evidence. This tree has not been replaced and they did not submit evidence of the cost of the original tree. They estimated the value to be $200.00 and included about 2.5 hours of labour in their claim. They argued that this tree had sentimental value to them and that it was planted to mark a special occasion.

The Landlords stated that they are seeking to recover their cleaning costs which they incurred after the Tenants vacated the property, and pointed to the move out condition inspection report form to prove the unit required cleaning. They hired someone to do the work and said they paid $375.00 for labour ($210.00 + $165.00) plus $30.00 for a washing pole. They argued that they had to purchase a special wall scrubber pole to clean the cigarette smoke off of all the walls. They did not submit receipts, invoices, or

proof of payment to support these amounts. They are also seeking to recover $53.50 for carpet cleaning as per the invoice they provided in evidence. The Landlords requested to recover costs incurred to compile and serve their evidence as well as the cost to file their application.

The Landlords testified that they were claiming the unpaid rent for September 2013 of $1,100.00 and argued that the Tenants did not give them thirty days notice to end the tenancy. They stated that they were able to re-rent the unit as of October 1, 2013.

The Tenants disputed all of the items claimed by the Landlords. They stated that they did not know what happened to the tree and they did not know that it had special meaning to the Landlords. They simply returned home after being away for a few days and saw the tree lying on the ground. They really didn't pay much attention to it as there were always branches and twigs strewn across the lawn as their area could be windy at times. Then they saw the Landlords pick up the tree and watched as the Landlords cut off a portion off the bottom of the tree before taking a picture of it. The Tenants argued that they noticed that the tree stump was rotten and figured the tree was diseased and simply fell down. They noted that there had always been a rock beside the tree stump and they suspected it was placed there to hold up the tree.

The Tenants pointed to the move out condition inspection report form and argued that the form indicates that walls and trim were in good condition which contradicts what is written on the last page about smoke damage throughout the entire house. Then they pointed to the move-in condition report were it states there was a burn in the bathroom and argued that this indicated that there had been smoking in the unit prior to their tenancy. They stated that they cleaned the house, washed all the walls, floors, and the carpets themselves. They did not provide proof of the carpet cleaning and confirmed it had not been professionally cleaned. They pointed to their pictures which were taken September 5 and 6th, 2013, and argued that they show how clean the unit was left.

The Tenants do not believe they are required to pay September 2013 rent and argued that the *Residential Tenancy Act* provides a tenant the opportunity to end their tenancy with ten days notice if the landlord breaches a material term of the tenancy agreement. When asked which section of the *Act* they were referring to the Tenants read a section out of the Guide for Landlords and Tenants into evidence, which was later determined to be referencing sections 45(2) or 45(3) of the Act.

In closing, the Landlords argued that although they did not provide receipts for the cleaning they did provide the cleaner's name and number so he could be called as a witness if needed. They also provided photos in their exhibits as to the condition of the rental unit at the end of the tenancy and noted how the Tenants' photos are taken from a distance and do not show the actual condition of items such as the stove top. They were simply left on the hook with no rent being paid for September.

Analysis

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

After careful consideration of the aforementioned, the volumes of documentary evidence provided by each party, and on a balance of probabilities I find as follows:

The fact that the Landlords left personal items and one load of log rounds on the acreage from the start of this tenancy is not in dispute. Neither is the fact that the parties had agreed that the Tenants would leave the property when the Landlords planned to cut up the one load of log rounds so their quiet enjoyment would not be disrupted. What is in dispute is whether the Landlords had unrestricted access to their property and stored items during the tenancy and if the tenancy included a predetermined common area.

The *Residential Tenancy Act* defines **"common area"** as any part of residential property the use of which is shared by tenants or by a landlord and one or more tenants.

When renting a single family dwelling the onus is on the landlord to clearly establish which part of the residential property, if any, is excluded from the tenancy agreement and which areas are designated as common areas.

Under the Act, landlords are required to prepare a written tenancy agreement and provide a copy to the tenant. The premises rented to a tenant are to be reflected in the tenancy agreement. The written tenancy agreement, as with any contract, reflects the terms both parties agreed upon when the tenancy or contract formed. As such, the written tenancy agreement must reflect the premises rented to the tenant.

The landlord prepared a tenancy agreement using the form published by the Residential Tenancy Branch and the parties executed this document. The form produced by the Residential Tenancy Branch provides space for the landlord to indicate the premises rented to the tenant and also provides a space to indicate if any addendums have been created that form part of the tenancy agreement. In this case the Landlords prepared a one page addendum listing four additional terms.

Section 91 of the Act provides that the common law applies to landlords and tenants unless modified or varied under the Act. Under the Parol Evidence Rule of contract law, where the language of a written contract is clear and unambiguous, then no extrinsic parol evidence (written or oral) may be admitted to alter, vary or interpret in any way the words that are written in the agreement. When there is no ambiguity in a written contract it must be given its literal meaning. Words must be given their plain, ordinary meaning unless to do so would result in an absurdity.

The Parol Evidence Rule prevents a party to a written contract from presenting extrinsic evidence that contradicts or adds to the written terms of the contract that appear to be whole. The rationale for this rule is that since the contracting parties have reduced their agreement to a final written agreement, extrinsic evidence should not be considered when interpreting the written terms, as the parties had decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the writing.

I find the Landlords' testimony about an alleged verbal agreement about their use of the property, to be extrinsic parol evidence. Therefore, I must determine whether there is a basis to consider the parol evidence.

In order to consider the Landlords' parol evidence I must be satisfied that the wording of the tenancy agreement is unclear or ambiguous or that there is some other basis in law that would warrant consideration of the parol evidence.

The Tenants submitted a copy of the original advertisement which reads "*3 BEDROOMS ON AN ACRE recently renovated only 5 minutes to town (CR)! $1100 Avil Nov. 15...*"[sic]. Both the Landlords and the Tenants submitted copies of the original tenancy agreement(s) which list the complete address of the property and include the same addendum listing four additional terms which all relate to the presence and care of two dogs. The Tenants deny entering into a verbal agreement with the Landlords that would allow the Landlords unrestricted access to the rental property.

Based on the above, I find I have not been provided a basis to consider the Landlords' parol evidence and the premises rented to the Tenants remains as reflected by the standard term written in the tenancy agreement as the entire residential property identified by the civic address. I further find that despite the fact that the Landlords left personal items stored on the property, there was no common area prescribed in the written tenancy agreement.

Section 1(2) of the Regulations stipulates that any change or addition to a tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. If a change is not agreed to in writing, is not initialed by both the landlord and the tenant or is unconscionable, it is not enforceable.

In this case I find the Landlords' letter dated June 9, 2013, to be a unilateral change to a standard term of the tenancy agreement that reduced the rental property from being a

one acre property to a portion of that property with a common area and area for landlords' storage. Accordingly, I find this change to be a breach of section 1(2) of the Regulations which is non-enforceable.

Section 28 of the Act provides that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; **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]*; and use of common areas for reasonable and lawful purposes, free from significant interference [my emphasis added].

The evidence supports that the Landlords entered the residential property, without proper notice, at times during the entire period of this tenancy (December 1, 2012 to September 5, 2013). As a result, the Tenants were living on edge wondering if the Landlords would suddenly appear on the property. I find it undeniable that the Tenants suffered a loss of quiet enjoyment and therefore suffered a subsequent loss in the value of the tenancy. Accordingly, the tenants are entitled to compensation for that loss.

Policy Guideline 6 states: "in determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed".

I accept the Tenants submission that without the quiet enjoyment of the full acreage their tenancy was reduced to the quiet enjoyment of the confined area of the home. Therefore, the value of their tenancy would have been reduced to an amount closer to $800.00 and $900.00 per month. Accordingly, I award the Tenants compensation for loss of quiet enjoyment in the amount of **$2,250.00**, which is equal to $250.00 per month ($1,100.00 - $850.00) for the nine months the Tenants paid rent (December 2012 – August 2013).

Section 27 stipulates that a landlord must not terminate or restrict a service or facility if that service of facility is essential to the tenant's use of the rental unit as living accommodation or providing the service or facility is a *material term* of the tenancy agreement.

The *Act* defines a service or facility as any of the following that are provided or are agreed to be provided by the landlord to the tenant of a rental unit: appliances and furnishings;utilities and related services; cleaning and maintenance services; parking spaces and related facilities; cablevision facilities; laundry facilities; storage facilities; elevator; common recreational facilities; intercom systems; garbage facilities and related services; heating facilities or services; and housekeeping services.

If the landlord terminates or restricts a service or facility, other than one that is essential or a material term of a tenancy the landlord must provide 30 days notice and reduce the rent in an amount that is equivalent to the reduction in the value of the tenancy.

Case law provides that a material term is a term written into the tenancy agreement that both parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

In *Worth and Murray v. Tennenbaum*, an unreported decision of the B.C. Supreme Court, August 18, 1980, Vancouver Registry A801884, His Honour Judge Spencer found at page 5 of his decision:

> *As a matter of law the various terms of the tenancy agreement may or may not be material to it in the sense that they justify repudiation in case of a breach.* ***It is wrong to say that simply because the covenant was there it must have been material*** [emphasis added]

Although the Tenants had applied for a rent reduction based on Section 27, I find that the letter written June 9, 2013 by the Landlords does not constitute a breach of section 27 of the Act, rather it was found to be unenforceable and the Landlord's actions to be a breach of quiet enjoyment for the entire tenancy. Accordingly, I dismiss the Tenants' claim for reduced rent of $1,980.00, without leave to reapply.

In regards to moving costs of $673.30, I find there to be insufficient evidence to prove that the Landlords "forced" the Tenants to move in such a hurry or in such a manner that required the Tenants to incur the costs of a moving company. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of Act. Costs incurred due to a personal choice to hire a moving company to conduct the move, is not a breach of the Act. Accordingly, I dismiss the claim for moving costs, without leave to reapply.

The Tenants has been partially successful with their application; therefore I award partial recovery of the $100.00 filing fee in the amount of **$50.00.**

Upon review of the Landlords claim for $287.50 to replace a tree, I find there to be insufficient evidence to prove that this tree fell down due to the neglect of the Tenants or due to a breach of the Act. Furthermore, there is no evidence of the actual value of this tree. Accordingly, I find there to be insufficient evidence to meet the burden of proof, as listed above, and the claim is hereby dismissed, without leave to reapply.
Section 45 of the Act provides that a tenant may end a month to month or a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this case the Tenants served the Landlords their notice to end tenancy by registered mail on August 28, 2013, did not pay rent for September 2013, and vacated the property by September 5, 2013, in breach of Section 45 of the Act. The Landlords were not able to re-rent the unit until October 1, 2013, and therefore suffered a loss of rental income for September 2013. Accordingly, the Landlords are entitled to compensation for that

loss. As I determined above that the value of the tenancy had decreased to $850.00 per month, I hereby award the Landlords September 2013 rent in the amount of **$850.00**.

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

Upon careful review of the evidence before me, I find the Tenants have breached section 37(2) of the Act, leaving the rental unit requiring some cleaning at the end of the tenancy. That being said, I find there to be insufficient evidence to prove that the Tenants smoked inside the rental unit. In the absence of receipts for cleaning labour or supplies, or proof of payment, there is insufficient evidence to prove the actual cleaning costs claimed by the Landlords.

Residential Tenancy Policy Guideline #16 states that an Arbitrator may award "nominal damages" which are a minimal award. These damages may be awarded where there has been no significant loss, but they are an affirmation that there has been an infraction of a legal right.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], 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.

Based on the above, I find that the Landlords are entitled to nominal damages for all cleaning costs and I award them **$100.00,** which includes the $53.50 paid for carpet cleaning.

In regards to costs to compile evidence and registered mail fees, for bringing this application forward, I find that the Landlords have chosen to incur these costs that cannot be assumed by the Tenants. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of Act. Section 89 of the Act provides for various methods of service therefore I find costs incurred due to a service method choice or choice of the type of evidence used are not a breach of the Act, rather they are a cost of doing business. I find that the Landlords may not claim such costs, as they are costs which are not denominated, or named, by the *Residential Tenancy Act.* Accordingly, the claim for $55.92 for costs is dismissed, without leave to reapply.

The Landlords have been partially successful with their application; therefore I award partial recovery of the $50.00 filing fee in the amount of **$25.00.**

Monetary Order – I find that these claims meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit plus interest and against each other's claim as follows:
Tenants' Award

Loss of Quiet Enjoyment	$2,250.00
Filing Fee	25.00
AMOUNT DUE TO TENANTS	**$2,275.00**

Landlords' Award:

Unpaid September Rent	$ 850.00
Cleaning costs	100.00
Filing Fee	25.00
SUBTOTAL	$ 975.00
LESS: Security Deposit $550.00 + Interest 0.00	-550.00
AMOUNT DUE TO LANDLORDS	**$ 425.00**

OFFSET AMOUNT

Tenants' Award	$2,275.00
LESS: Amount due to Landlords	-425.00
OFFSET AMOUNT DUE TO TENANTS	**$1,850.00**

Conclusion

The Tenants have been awarded a Monetary Order in the amount of **$1,850.00**. This Order is legally binding and must be served upon the Landlords. In the event that the Landlords do not comply with this Order it may be filed with the Province of British Columbia Small Claims 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: February 20, 2014

Residential Tenancy Branch