Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties.

The Landlord filed their Application requesting an order of possession based on unpaid rent, a monetary order for unpaid rent, for money owed or compensation under the Act or tenancy agreement, for an order to keep the security deposit in partial satisfaction of the claim, and to recover the filing fee for the Application.

The Tenant filed for a monetary order for the cost of emergency repairs in the rental unit, for money owed or compensation under the Act or tenancy agreement and for the return of the security deposit under section 38 of the Act, and to recover the filing fee for the Application.

Both parties appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Issues

At the outset of the first hearing the parties agreed that the Tenant was vacating the rental unit, therefore, the order of possession was no longer required.

The hearings for this matter were conducted over three separate dates, by telephone conference calls. The first hearing was adjourned by consent of the all, in order for the Landlord to obtain the services of an English translator and for the Tenant to file their Application and serve it on the Landlord.

The second hearing was adjourned for the parties to exchange further evidence and for the Tenant to reserve the Landlord with their Application. The Tenant had an incorrect address for the Landlord and the mail did not arrive, although the Landlord acknowledged they knew the Tenant was making a claim for losses. At the conclusion of the second hearing the Tenant was very emotional and upset that the matter was being adjourned to a third hearing.

The Tenant did not appear at the third hearing although the Landlord and their translator did. The Landlord acknowledged receipt of the Application and evidence from the Tenant. As I had heard most of the evidence in this matter in the previous hearings the Landlord agreed with my authority to proceed to make a decision based on the testimony from the previous hearings and the written evidence submitted by the parties. The third hearing concluded immediately after that discussion.

Pursuant to section 74(2) of the Act, and with the consent of the Landlord, I make this decision based on a combination of the oral testimony and the written evidence submitted by the parties.

I note that that during the course of the second hearing the translator had to be cautioned to not provide their own evidence, but rather, they were there to translate for the Landlord.

I also note this was the second dispute resolution matter between the parties. The Tenant had filed an Application previous to this, although the hearing did not proceed as the Tenant had given the Landlord a notice to vacate the rental unit. For ease of reference the file number for the previous matter is set out on the cover page of this decision.

Issue(s) to be Decided

Is the Landlord entitled to the monetary relief sought?

Is the Tenant entitled to the monetary relief sought and the return of the security deposit?

Background and Evidence

This tenancy began on April 15, 2013, with the parties entering into a written, one year fixed term tenancy agreement (the "Tenancy Agreement"). The Landlord had included a clause in the Tenancy Agreement that the Tenant could move out with two months notice. I note this clause is not valid, as it does not comply with the requirements to end a tenancy under the provisions of the Act.

There is an additional clause written on page 3 of the Tenancy Agreement which sets out that the Landlord acknowledged that if there is train noise or a ceiling leak in the rental unit the Tenants can cancel the contract. The validity of this clause is examined below.

The monthly rent was agreed to be $2,800.00 per month, payable on the first day of the month. The Tenant paid a security deposit of $1,400.00 on April 12, 2013.

The Landlord is claiming that the Tenant did not pay rent for September or October of 2013. The Landlord is claiming $5,600.00 for two months of rent.

The Tenant agrees that they did not pay rent to the Landlord for September or October of 2013.

The Landlord is also claiming for cleaning the rental unit and removing garbage and debris left behind by the Tenant. The Landlord claims $400.00 for this. The Landlord has submitted an invoice indicating $100.00 of this amount was for the removal of garbage left behind by the Tenant and that $300.00 was for cleaning the rental unit. The Landlord has submitted photographs of the rental unit after the Tenant vacated. These indicate foodstuffs left behind in the refrigerator, and various items left behind in the rental unit, such as garbage bags, a box of what appears to be small household items, and items on the patio. The Landlord has also supplied photos of the stove top, oven and bathroom sink and cabinet, which appear to require cleaning.

The Landlord further claims the Tenant has a parking pass and requests $40.00 for this.

The Landlord has also claimed a $50.00 filing fee for the previous Application. The filing fee for the previous Application was awarded to the Tenant as it was the Tenant's Application, and therefore, the Landlord has no right to make a claim for this amount, as it is payable to the Tenant by the Landlord. This portion of the Landlord's claim is dismissed without leave to reapply.

As explained above, the Tenant vacated the rental unit on October 31, 2013. The Landlord submitted a document dated October 31, 2013, signed by the Landlord, that there was no damage done to the rental unit and that two keys for the rental unit, one mail box key and two fobs had been returned to the Landlord.

In reply to the Landlord's claims for rent, the Tenant testified that when they viewed the rental unit they noticed a stain around the light fixture in the bathroom, which appeared to have been caused by water leaking through the light fixture. The Tenant testified that they discussed this with the Landlord and the Landlord informed them that there were no leaks.

The Tenant testified that the Landlord also assured them that they would not hear the noise from nearby train, as the Tenant was concerned it would disturb their 6 month old baby. The Tenant was concerned about these items, so they had the Landlord or the Agent for the Landlord add the clause to the tenancy agreement that if there were leaks in the ceiling or the train noise disturbed them they could cancel the Tenancy Agreement.

The Tenant testified that in April and May of 2013, water leaked down through the ceiling light fixture in the bathroom. The Tenant testified that this happened again in June and July of 2013. The Tenant was very upset with the situation, as they worried they might get shocked from the light fixture having water in it. The Tenant testified they found out the roof had been apparently repaired in March although the leaking continued. It appears the rental unit was a penthouse suite in a strata building.

The Tenant submitted evidence that the Agent for the Landlord came to see the leak in April, shortly after the tenancy had started. People apparently came and painted the ceiling and wall at that time.

The Tenant submitted that the leak occurred again in May, June and July. After the first few occasions of leaking the property manager apparently told the Tenant they would not be doing any more repairs. Eventually the Tenant just continued to mop up the leaks and were not able to use the bathroom due to electrical concerns when there was leaking. The Tenant testified this was an ongoing hardship as this washroom had the bathtub for bathing their child.

The Tenant also testified that the noise from the trains woke them and their baby up.

The Tenant testified they were upset because the Landlord and the Agent would not even consider a discount in rent for their inconvenience.

The Tenant testified around the end of August the Landlord changed property managers for the rental unit. The Tenant testified they spoke many times to the Landlord and both the Landlord's agents, but the Landlord did not seem to understand the problems they were having with the rental unit.

The Tenant then testified that in early September their baby became ill. At the same time the Tenant noticed there was a smell of natural gas in the rental unit. The Tenant testified that in early September 2013, they called the gas company and they attended the rental unit. The gas company discovered that there was a natural gas leak in the stove pipe in the rental unit and shut off the gas. The Tenant informed the Landlord of this. Fortis provided a notice, which was provided in evidence by the Tenant, which stated that a licensed gas fitter was required to do repairs, as there was a gas leak from a, "…flare 90 degree angle…", behind the stove.

The Tenant testified that shortly after this the Landlord came to the rental unit with a person to fix the gas leak. The Tenant testified that the Landlord and this person wrapped tape around the gas pipe and turned the gas back on.

In evidence, the Landlord has provided a hand written note from a person, dated September 9, 2013, indicating they did a gas bubble check and found no leaks. According to the handwritten note, this person is a licensed gas fitter.

The Tenant testified that they could smell the gas again the next day. When the Tenant called Fortis again a repair person attended and warned the Tenant that they, "… were living in a bomb", according to the testimony of the Tenant. The gas was shut off again and apparently the strata council where the rental unit is located was notified as well. The Tenant immediately moved their family out of the rental unit.

The Tenant paid for a report from the gas company to investigate the leak. A copy of the report was submitted in evidence by the Tenant. The report sets out that on September 20, 2013, the company technician found the gas line had been shut off and disconnected by the gas company. The technician reports testing and finding a leak on the 90 degree elbow joint and that a 3/8" copper line had been leaking and these would need to be replaced.

According to the Tenant the Landlord had run a gas line to the barbeque outside, off of the gas line to the stove. The technician goes on to note that that the gas fitting is defective, and the copper line was discoloured from where the gas was leaking.

The Tenant testified that the Landlord had also received a notice from the strata council where the rental unit is located, informing the Landlord that they required a licensed gas fitter or company to perform the repairs and that evidence of this was to be submitted to the strata by the Landlord. A copy of this letter was submitted in evidence by the Tenant.

The Tenant testified that whenever they informed the Landlord of the gas leak, the leaking water from the ceiling or the train noise, the Landlord or the Agent replied that they did not care.

The Tenant initially claimed $7,100.00 for losses including two months of rent, the cost of the repair report of $250.00 (the cost of having the gas leak report prepared) and the return of the security deposit, although the Tenant appears to have lowered the request to $1,500.00 for the return of the security deposit and the $50.00 filing fee for the Application.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities.

Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on each respective Applicant to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the respective Respondent. Once that has been established, the Applicant must then provide evidence that can verify the

value of the loss or damage. Finally it must be proven that the Applicant did everything possible to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find as follows.

Landlord's Claims

I find the Tenant was required to pay the Landlord rent for September and October. Under section 26 of the Act, the Tenant could not withhold rent even if the Landlord was in breach of the Act or the Tenancy Agreement. The Tenant could only withhold rent if they had an order from the branch allowing them to do so, or if they had paid for emergency repairs. I find the Tenant did not have an order allowing them to withhold rent.

I also find that paying for the gas inspection was not an emergency repair. It is clear on the invoice from the gas company that the Tenant did not want to pay for a repair and they were just paying for a report. Therefore, I find the Tenant did not pay for emergency repairs and had no right under the Act to withhold rent for two months.

Under section 37 of the Act the Tenant was required to leave the rental unit reasonably clean and without damage, and I find they failed to do this by not cleaning the stove top, oven or refrigerator, and by failing to remove garbage and other items. I find this based on the photographic evidence of the Landlord.

However, I do not accept the evidence from the Landlord on the costs of cleaning or removing these items. The invoice from the person who performed this work does not explain the hourly rate, or what cleaning was done or how long it took to do the cleaning. For this reason I allow the Landlord a nominal amount of **$100.00** for cleaning and removal of garbage.

I dismiss the claim for parking passes, as I find the Landlord failed to provide sufficient evidence these were supplied to the Tenant. I note the Tenant did return the keys and the "fobs" to the Landlord.

I note that under section 45 of the Act, the Tenant could not end a fixed term tenancy, unless they gave the Landlord written notice of a breach of a material term of the tenancy agreement and allow the Landlord reasonable time to correct the breach. In this instance the tenancy agreement had a clause that stated the Tenant could cancel the tenancy agreement if the ceiling leaked or if the train noise disturbed them. I find this was written notice to the Landlord and the Landlord was notified that these repairs were required and failed to make the repairs in a reasonable time.

Furthermore, I find the Landlord was provided written notice that there was a gas leak in the rental unit.

It cannot be over emphasized what a dangerous situation is created by a gas leak in a rental unit and a water leak over an electrical light fixture. Either one of these can cause significant harm to life and property. The Landlord should have had qualified and professional personnel address these two dangerous situations immediately after being notified by the Tenant of these.

Failing to repair the gas line properly and in accordance with the directive given by the gas company, and failing to repair the water leak over the light in the bathroom were certainly breaches of a material term in the tenancy agreement, and under the Act. For the above reasons I find the Tenant did not breach the tenancy agreement or the Act by ending this fixed term tenancy early.

Nevertheless, having made the above findings, I must Order, pursuant to section 26 and 67 of the Act, that the Tenant pay the Landlord the sum of **$4,400.00**, comprised of two months' rent, the $100.00 for cleaning and the $100.00 fee for filing this Application, less the security deposit of $1,400.00 held by the Landlord, and ***subject to any set off below in the Tenant's claim.***

Tenant's Claims

I find the Tenant has proven the Landlord breached the Tenancy Agreement and section 32 of the Act by failing to provide and maintain a rental unit that was suitable for occupation and complied with health and safety standards.

I find that the Tenant has shown that there was a concern about leaking water in the ceiling of the rental unit at the outset of the tenancy and despite several meetings with the Landlord and the Landlord's Agent, the repairs were not addressed. While painting and cleaning may have been initially performed for the Tenant, the Landlord was under an obligation under section 32 of the Act to make sure the roof was not leaking into the

rental unit and that the electrical system was safe as well. There is no evidence from the Landlord that these problems were ever repaired.

I find the Tenant suffered loss of use of the bathroom and loss of quiet enjoyment of the rental unit due to the constant fear of leaking water into the light fixture, and this went on for the seven months of the tenancy. I do recognize the Tenant had some limited use of the bathroom, and taking this into account, I allow the Tenant **$2,800.00** comprised of 400.00 per month for the seven months of the tenancy in compensation for these losses.

I also find the Tenant had a complete loss of quiet enjoyment due to the loss of safety in the rental unit for the month of September due to the gas leak in the rental unit and the conduct of the Landlord in this matter, which I find breached section 32 of the Act.

It cannot be over stated how dangerous this situation was for the Tenant, the family, and any other occupants in the vicinity of this gas leak.

I find the Landlord was negligent in making a connection to the gas stove for the exterior barbeque, by failing to use the required fittings and proper piping, or by engaging the services of a qualified professional to repair these.

I find the Landlord failed to prove the person they had do a bubble test on the gas line was a professional, certified gas fitter, or that they worked for a professional company, or that the Landlord had proven that the repairs made were sufficient to be safe for the Tenant and family and to the required code. This leads me to find the Landlord breached section 32 of the Act.

Therefore, I allow the Tenant **$2,800.00** for the loss of quiet enjoyment of the rental unit and for the loss of use of the rental unit in general during the time of the gas leak.

Lastly, I also find the Tenant should be compensated for the cost of the gas report in the amount of **$236.25**. This report supported the fact the Tenant had informed the Landlord of the serious nature of the problem that caused the gas leak. Had the Landlord paid heed to this report, and properly addressed the issues of the gas leak, the safety issue would have been addressed and the tenancy might have continued.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenant the sum of **$5,886.25**, comprised of $5,600.00 for loss of use and quiet enjoyment, $236.25 for the gas report and the $50.00 fee for filing this Application, ***subject to any set off below from the Landlord's claim*****.**

Set off

As explained above, I find the Tenant owes the Landlord the sum of $4,400.00 and the Landlord owes the Tenant the sum of $5,886.25.

Pursuant to section 72 of the Act, I set these off and order the Landlord to pay the Tenant the difference of **$1,486.25.**

The Tenant is granted an order in the above amount which must be served on the Landlord. This order may be enforced in the Provincial Court of British Columbia.

Conclusion

Both parties have been found to be in breach of the tenancy agreement and the Act and each owes the other party monetary compensation for the other's losses.

After making the above findings and calculating a set off of monetary awards, I order the Landlord to pay the Tenant the sum of **$1,486.25**.

The Tenant is granted a monetary order in this amount and this order is enforceable in the Provincial Court of British Columbia.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: March 11, 2014

Residential Tenancy Branch