Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MDSD & FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing filed each party was sufficiently served on the other. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the landlord is entitled to A Monetary Order and if so how much?
b. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
c. Whether the landlord is entitled to recover the cost of the filing fee?
d. Whether the tenants are entitled to a monetary order and if so how much?
e. Whether the tenants are entitled to recover the cost of the filing fee?

Background and Evidence

On March 11, 2013 the parties entered into a fixed term written tenancy agreement that provided that the tenancy would start on March 18, 2013, continue until March 31, 2014 and become month to month after that. The rent was $4300 per month payable in advance on the first day of each month. The tenant paid a security deposit of $2150 on March 17, 2013.

The tenants experienced problems with the downstairs tenants and complained to the landlord on several occasions. The landlord attempted to evict the downstairs tenants for cause on three occasions. However, the downstairs tenants disputed the Notices and the landlord was not successful.

The tenant produced a large number of e-mails and text messages. In one e-mail to the landlord dated October 14, 2013 the landlord urges the tenant to attend the arbitration hearing set for October 21, 2013 stating “I have gathered all the evidence to show the arbitrator. You need to be there as a witness on Oct 21 at 10 a.m. If you do not come we have no chance to win. The arbitrator needs to hear your side of the story. I have also gathered pictures and statements from Shaw and RCMP to try to help. I have done my best t help your family live in peace and I have given notices to the basement tenants every time…” The tenants did not attend the hearing saying she did not have sufficient notice and she wanted the landlord to bring a translator.

On October 24, 2013 the tenants gave the landlord a note that stated: “If you do not solve a problem that and you cannot kick them (the downstairs tenants) out until 31.Oct.2013 we will move out after 1.Nov.2013.”

On November 25, 2013 the tenants gave the landlord a note that stated: “I have decided to move out since my right to have quiet enjoyment (Residential Tenancy Act: clause 28) has not been protected by you (landlord) despite repeated requests, verbal and written. An based on the RTA: clause 45(3) I decided to end tenancy and am moving out without a full notice for that.

On December 6, 2013 the parties discussed the problems with the downstairs tenant and the landlord changed the written tenancy agreement to set an end of tenancy date for December 31, 2013 and the following note was placed on the bottom of tenancy agreement “the landlord will return the 3 outstanding cheques once it is mutually agreed to end the tenancy agreement at December 31, 2013.”

The tenants testified they gave the landlord a note dated December 31, 2014 that stated “I have decided to move out since my right to have quiet enjoyment (Residential Tenancy Act: clause 28) has not be protected by you (landlord) despite repeated requests, verbal and written.

And based on the RTA: clause 45(3) I decided to end the tenancy and am moving out without a full notice for that. Moving date: 10 Jan 2014. The landlord testified he never received this note.

The tenants moved on January 9, 2014. The landlord testified he was never given the notice dated December 31, 2013. He testified he immediately advertised the rental unit for rent once he became aware the tenants had vacated the rental unit. He also subsequently hired a Property Manager. Eventually the landlord was able to find a tenant to rent the rental for 4 months for $3000 per month commencing March 1, 2014. The new tenant was permitted to move in belongings of February 22, 2013.

The landlord testified the tenants failed to provide him with their forwarding address in writing. The tenants testified the landlord always knew of their business address.

Landlords Claim:

The Law:

The tenants are obliged to pay the rent for the entire period of the fixed term tenancy subject to the parties mutually agreeing to end the tenancy early, the tenant’s right to end the tenancy early under section 45(3) of the Residential Tenancy Act where the

landlord has breached a material term of the tenancy agreement and subject to the obligation of the landlord to mitigate his loss.

Section 45(3) provides as follows:

> **Tenant's notice**
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> **45** (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Section 27 provides as follows:

> **Protection of tenant's right to quiet enjoyment**
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> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
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> (a) reasonable privacy;
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> (b) freedom from unreasonable disturbance;
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> (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.

Policy Guideline 6 - Right to Quiet Enjoyment includes the following

> **“Basis for a finding of breach of quiet enjoyment**
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> Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord’s actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord’s power to control.
>
> The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. **Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly**

by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment (my emphasis). Such interference might include serious examples of: ·

- entering the rental premises frequently, or without notice or permission;
- unreasonable and ongoing noise; ·
- persecution and intimidation; ·
- refusing the tenant access to parts of the rental premises; ·
- preventing the tenant from having guests without cause; ·
- intentionally removing or restricting services, or failing to pay bills so that services are cut off; ·
- forcing or coercing the tenant to sign an agreement which reduces the tenant's rights; or, ·
- allowing the property to fall into disrepair so the tenant cannot safely continue to live
  there.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Substantial interference that would give sufficient cause to warrant the tenant leaving the rented premises would constitute a breach of the covenant of quiet enjoyment, where such a result was either intended or reasonably foreseeable.

A tenant does not have to end the tenancy to show that there has been sufficient interference so as to breach the covenant of quiet enjoyment, however it would ordinarily be necessary to show a course of repeated or persistent threatening or intimidating behaviour. A tenant may file a claim for damages if a landlord either engages in such conduct, or fails to take reasonable steps to prevent such conduct by employees or other tenants.

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it (my emphasis). A landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy."

Analysis:

I do not accept the submission of the tenants that the parties mutually agreed to end the tenancy on December 31, 2013. I determined the changes to the tenancy agreement indicated an agreement to end the tenancy early conditional on the parties entering in a Mutual Agreement to End the Tenancy in writing. The tenants were aware and expected that the landlord would be returning with other documents and they understood they would be signing the other document. Further, the tenants themselves would have breached an agreement to end the tenancy on December 31, 2013 as they stayed on in the rental unit until January 9, 2014.

The tenants were having problems with the downstairs tenant and they made several complaints to the landlord. The problems included but were not limited to the following:

- the downstairs tenants car blocked the entrance to the garage and limited the ability of the tenants to go and come
- loud noises late at night including noise from the laundry machine, the dishwasher, showers and loud music
- the downstairs tenants smoked cigarettes and marijuana on many occasions affecting their ability to sleep.
- Slamming of the mail boxes
- Banging on doors and other intimidating conduct
- Interrupting the regular lifestyle of the tenants.

The landlord testified the tenants are making excuses so that they could be relieved of their legal obligation to pay the rent for the fixed term tenancy agreement. The landlord attempted to evict the downstairs tenants leading to three arbitration proceedings which are as follows:

- Decision dated June 20, 2013 in which the one month Notice to End Tenancy dated May 22, 2013 was cancelled.
- Decision dated October 21, 2013 in which a one month Notice to End Tenancy and a 10 day Notice to End Tenancy dated September 6, 2013 were cancelled.

- Decision dated November 27, 2013 in which a one month Notice to End Tenancy and a 10 day Notice to End Tenancy was cancelled.

A tenant may end the tenancy early where the landlord has failed to comply with a material term of the tenancy and the tenant has given the landlord a reasonable opportunity to rectify the situation after getting written notice. The Policy Guidelines provide that a landlord is not normally responsible for the conduct of other tenants unless notified that a problem exists and failed to take reasonable steps to correct the situation. After hearing the conflicting evidence I determined the tenant failed to prove that the landlord did not take reasonable steps to correct the situation. The landlord talked to the downstairs tenant and conveyed told them the upstairs tenant was complaining about their conduct. Further, the landlord attempted to evict the downstairs tenants by serving 3 one month Notice to End Tenancy for Cause and two 10 day Notices. He was not successful as the arbitrators in each of these cases determined the landlord failed to establish sufficient cause. However, in my view it cannot be said that the landlord stood idly by.

The tenant also complained about the landlord conduct as follows:

- Inability to solve problems of caused by the downstairs tenant
- Bringing in the wrong tenants
- Inability to fix or repair any broken or not working things around the house
- Inability to give tenants the sense of security.

I do not accept the submission of the tenants that the complaints about the landlord amount to a breach of a material term of the tenancy agreement. The complaints about repairs are not so significant to amount to a material term. The landlord acted reasonably in dealing with problems caused by the downstairs tenant. The renting of a unit in a rental property to a tenant which later becomes a problem does not give other tenants the right to breach their fixed term tenancy agreement provided the landlord has

not stood idly by and has acted reasonably in dealing with a problem tenant on the property.

I do not accept the submission of the tenants that the landlord has failed to mitigate his loss. The tenants left the rental unit on January 9, 2014 without giving the landlord sufficient notice. The tenants failed to prove they gave the landlord the letter dated December 31, 2013. The landlord was not aware the tenants had vacated until January 9, 2014. He acted reasonably in immediately advertising the rental property and subsequently hiring a Property Manager. Further, the landlord cannot be faulted for renting the rental unit to a friend for $3000 per month commencing on March 1, 2014 pursuant to a 4 month fixed term tenancy agreement as he had been unsuccessful finding new tenants.

I do not accept the submission of the landlord that he has failed to mitigate his loss when he advertised the rental unit at $4850 in August and September. At that stage there was no obligation to mitigate as the tenants were still in the rental unit. The

With regard to each of the landlord's claims I find as follows:

a. As a result I determined the landlord is entitled to $4300 for the loss of rent for the month of January 2014. The tenants breached the fixed term tenancy agreement by leaving prior to the end of the fixed term. The landlord acted reasonably in attempting to mitigate his loss but was not able to find a new renter.
b. The landlord claimed the sum of $4300 for loss of rent for February. While the tenancy agreement with the new tenant provided that the tenancy would start on March 1, 2014, the landlord gave the new tenant access on February 22, 2014 and the hydro was put into the new tenants name on that date. I determined the old tenants are only responsible for 22 days of rent in February as it is not appropriate for the old tenants to bear the financial obligation of the landlord's

generosity to the new tenants. As a result I determined the landlord has established a claim in the sum of $3378 for loss of rent for February.

c. The landlord rented the rental unit for $3000 per month commencing March 1, 2014 and as a result has suffered a loss of $1300. I determined the landlord is entitled to recover $1300 for March 2014.

d. I determined the landlord is entitled to $1177.22 being the tenants' share of the hydro paid by the landlord for the period October 31, 2013 to January 11, 2014. The tenants agreed to pay 2/3 of the hydro. I do not accept the submission of the tenants that they are not responsible for this bill because of the excesses of the downstairs tenant. Further, the tenants failed to present sufficient proof to establish how the hydro bill might be divided between the two units other than the way which as agreed in the tenancy agreement.

e. I dismissed the landlord's claim of $357 for the tenants' share of the hydro for the period from January 12, 2014 for February 22, 2014 as the tenants did not receive a benefit for this and are not responsible. The British Columbia Supreme Court came to a similar determination in the case Talbot v. Thompson 2005 BCSC 1253

f. The Application for Dispute Resolution filed by the Landlord claimed $5000 in damages to the rental unit. I permitted the landlord to withdraw this claim on a without prejudice basis. The landlord has liberty to re-apply.

Analysis - Monetary Order and Cost of Filing fee

In summary I determined the landlord has established a claim against the tenants in sum of $10,155.22. I determined the landlord has given sufficient notice of their intention to claim for all of last month as provided in the Application for Dispute Resolution. I granted the landlord a monetary order in the sum of $10,155.22 plus the sum of $100 in respect of the filing fee for a total of $10,255.22.

Security Deposit

I determined the security deposit totals the sum of $2150. I ordered the landlord may retain this sum thus reducing the amount outstanding to the sum of $8105.22.

Tenants' Claims:

With respect to each of the tenants' claims I find as follows:

a. I dismissed the tenants claimed the sum of $18,633 for reimbursement of the rent for the period August 21, 2013 to December 31, 2013. The tenants lived in the rental unit for the period they have claimed. I accept the evidence of the tenants that they experienced significant difficulty in dealing with the downstairs tenants. However, I am satisfied that the landlord acted reasonably in attempting to deal with this problem. He served a one month Notice to End Tenancy on the downstairs tenants on May 22, 2013, a second one month Notice to End Tenancy in early September and a second one Notice to End Tenancy in late October. In all cases the arbitrator ruled against the landlord. While the tenants may have a claim against the downstairs tenant is civil courts because of the conduct of the downstairs tenant. However, this does not automatically give them a claim against the landlord for breach of the covenant of quiet enjoyment. I determined the landlord did not stand idly by while the tenant experienced their difficulties. The tenants failed to prove they have a claim against the landlord for breach of the covenant of quiet enjoyment.

   The tenants failed to present evidence to establish the landlord was negligent in renting the rental unit to the downstairs tenant. The landlord attempted to find a new tenant to move in the fall of 2013 but was not successful. The landlord was not legally obliged to make such an effort and the failure to find a new tenant does not give the tenants a claim against the landlord. I note the standard form terms included in the tenancy agreement provide that the tenant may assign the tenancy agreement upon written consent of the landlord and that the landlord must not unreasonably withhold his consent.

   However, the tenants provided evidence that the landlord failed to respond to their concerns about the trouble the remote control inside the garage key and the landlord's failure to resolve the problem of washroom on the first floor that filled

with a stinky smell. The tenant produced evidence that she requested the landlord do something about a smelly bathroom but he failed to deal with the problem and the tenant's enjoyment of the rental unit was reduce after August 2014. Further, the landlord failed to provide the tenant with a second garage door key. I determined the tenants are entitled to compensation in the sum of $200 for each of these claims for a total of $400.

b. I dismissed the tenants' claim of $1041 for the overpayment of the hydro. The tenants agreed to pay the hydro in accordance with their tenancy agreement. They have failed to present sufficient proof to establish they made an overpayment.

c. I dismissed the tenants claim for the security deposit the landlord was entitled to apply the security deposit against the proven claims of the landlord. The tenants are not entitled to a doubling of the security deposit as they never gave the landlord their forwarding address in writing.

d. I dismissed the tenants claim of $1680 for the cost of moving. The tenants breached the fixed term tenancy agreement by moving before the end of the fixed term and the landlord is not responsible for the cost of moving.

In summary I determined the tenants have established a claim against the landlord in the sum of $400 plus $50 for the cost of the filing fee (reduced to reflect the limited success of the tenants) for a total of $450.

Conclusion:

I determined the landlord has established a claim against the tenants in sum of $10,155.22 plus the sum of $100 in respect of the filing fee for a total of $10,255.22.

I determined the security deposit plus interest totals the sum of $2150. I ordered the landlord may retain this sum thus reducing the amount outstanding under

this monetary order to the sum of $8105.22. I determined the tenants have established a claim against the landlord in the sum of $450. **I ordered that this amount should be set off against the claim of the landlord. As a result I ordered that the tenants pay to the landlord the sum of $7655.22.**

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial 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: June 11 , 2014

Residential Tenancy Branch