Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNR-S, MNDC-S, FF

Introduction

This hearing convened by teleconference on October 13, 2022, to deal with the landlord's application for dispute resolution seeking remedy under the Residential Tenancy Act (Act) for a monetary order for unpaid rent, compensation for a monetary loss or other money owed, authority to keep the tenants' security deposit to use against a monetary award, and recovery of the cost of the filing fee.

The landlord, the tenant, and the tenant's spouse/occupant (collectively, the tenants) attended, the hearing process was explained, and they were given an opportunity to ask questions about the hearing process. All parties were affirmed.

The hearing continued for 65 minutes, at which time it was adjourned as the proceedings had exceeded the one hour allotted. An Interim Decision was issued on October 15, 2022, which is incorporated by reference and should be read in conjunction with this Decision.

At the reconvened hearing, the landlord and the tenants attended, and the hearing continued.

Thereafter the parties were provided the opportunity to present their evidence orally and to refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me. Neither party raised concerns with service of the other's evidence.

I have reviewed all oral, written, and other evidence before me that met the requirements of the Residential Tenancy Branch (RTB) Rules of Procedure (Rules). However, not all details of the parties' respective submissions and or arguments are reproduced in this Decision. Further, only the evidence specifically referenced by the

parties and relevant to the issues and findings in this matter are described in this Decision, per Rule 3.6.

Words utilizing the singular shall also include the plural and vice versa where the context requires.

Issue(s) to be Decided

Is the landlord entitled to the relief sought as noted above and recovery of the cost of the filing fee?

Background and Evidence

The evidence at the hearing was that the tenancy began on March 1, 2020 and ended on December 17, 2021, for a monthly rent of $5,900 and a security deposit of $3,000 being paid by the tenants. The documentary evidence showed various start dates for the tenancy, including January 31, 2020.

The landlord confirmed keeping the security deposit of $3,000, having filed this claim against it.

The landlord's total monetary claim is as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Unpaid rent/loss of rent	$17,700.00
2. Leak repairs	$8,580.00
3. Unpaid Fortis bills	$3,022.24
4. Repairs	$2,693.25
5. Filing fee	$100.00
TOTAL	**$32,095.49**

In the application for $17,700, the landlord wrote the following:

> *Tenant's lease was to Feb 28th 2022; however Tenant abruptly moved out on Dec 17th and refused to pay rent for the remainder of his obligation including December, Jan and Feb - rent payable according to his lease was $5,900 per month until Feb 28th 2022 - totaling: $17700*
>
> [Reproduced as written]

Loss of rent

In support of her application for a loss of, or unpaid rent, the landlord submitted the parties had a fixed-term tenancy agreement, which was from March 1, 2021, through February 28, 2022. The landlord filed a written tenancy agreement, which I note had mark-throughs and handwritten changes, with initials.

The landlord testified that the tenants did not pay the December 2021 rent and the tenants only informed the landlord 1-2 weeks prior that they were leaving. The landlord submitted she told the tenants she expected the monthly rent through the end of the fixed term.

The landlord said that there was no attempt to re-rent the rental unit, because at the time, contractors were working on the rental unit, and when the tenants vacated, they began taking their time to complete the repairs. The landlord said the repairs took through March 2022 to complete and so they could not re-rent until the repairs were completed.

The landlord submitted that most of the rental unit was still livable as the rental unit was a large home and only two areas were affected by the leaks. The landlord said that the contractors also needed clear days to work on the home, and they really took their time to figure out how the leaks started so they would not re-occur.

Tenant's response

In response, the tenants submitted they alerted the landlord on November 29, 2021 via email that they were moving out. The tenant submitted that they were moving out because of the ongoing repairs and maintenance that were not done in a timely manner, and that the leaks caused health concerns. Further, this was the 2nd time they had to live through repairs for the leaks during 2021. What this meant was there were mould and fungus issues in the rental unit. The first repair took 64 days. The tenants referred to their photographs to show insulation being pulled out and that the children's bedroom in the basement was not usable.

The tenants denied the rental unit was livable, pointing out that they had 2 adults, 4 children and two businesses in the home that they could not use fully. The tenant

submitted the work commenced 64 days after a report and had 7 teams of contractors coming through the house. One contractor said the leaks had been ongoing for years.

The tenants submitted that they notified the landlord of the first leak immediately on February 9, 2021, and work did not commence until April 13, 2021. The emergency repairs took approximately 1 month and when they were told of the timeline for the 2nd repairs for the same areas, they made the decision to vacate. This was because parts of the rental unit were not usable and because of the amount of time the first repairs took, earlier in the same year.

The tenants submitted they had 4 issues: the repairs and maintenance, health and safety issues, continued breaches of their right to quiet enjoyment (lack of proper notice) and the landlord not acting in good faith, as the landlord was preparing the home for sale.

In rebuttal, the landlord submitted that the internal work was done much more quickly and the external work was already done. The landlord said that the 2nd leak was not reported in a timely manner and the contractor said that the leak had been at least 12 months prior.

In rebuttal, the tenant submitted that they reported the leak when it was noticed, which was when the hand of tenant JB went through the wall. Up to that point, they had no idea about the water.

The tenant submitted their photographs to prove that the interior work was not minor, as the drywall was opened up and this resulted in a health and safety issue.

Repairs for leaks

In her application, the landlord wrote the following:

> *1. $8,580 in repairs for leaks that the Tenant neglected to report in a timely manner causing severe damage to the walls and a significantly more expensive and intense repair job. 2. Unpaid Fortis Gas bills from Feb 1 2020 to Dec 17th 2022 amounting to $3022.24 in unpaid bills that were tenants responsibility under the lease. 3. Repairs to home due to tenant damage upon move-out: 2693.25. Tenant was offered a walk through but didn't provide a date.*
>
> [Reproduced as written]

In support of this claim, the landlord submitted a 3-paragraph, 1-page, letter-style document claimed to be from a contractor, was listed an “Enterprise”, not a contractor. The letter contained a brief description of some work on the rental unit. The evidence shows that this leak was the first leak of 2021.

The landlord said that the tenants were negligent in not reporting the leaks in a timely manner, as the leak had been there for months and months. The landlord said that the tenants notified the landlord’s agent in February or March 2021 and they did file an insurance claim. The leak was in the far corner of the basement and a 2nd leak was in the front bedroom, with the source of the leaks seeming to be water pooling on the deck.

The landlord agreed that some repairs were made after the tenancy ended.

In support of the claim of $2,693.25 for move-out repairs, the landlord submitted another short, letter style document from the same company, dated February 1, 2022.

The landlord said that there was a move-in inspection with her father. No move-in or move-out condition inspection report (Report) was filed in evidence.

As to the Fortis bills, the landlord submitted she noticed the unpaid Fortis bills after the tenants moved out, although they were responsible for paying the utilities. The clause in the written tenancy agreement states the following:

> *The Tenant is responsible for the payment of all utilities in relation to the Property.*
>
> [Reproduced as written]

The landlord submitted that the Fortis bill was for the entire house, although there was a tenant in the basement. The landlord said she would be agreeable to a small deduction for the other tenant’s use, perhaps 10%.

The landlord submitted copies of the Fortis bills, showing a different address than the rental unit address.

Tenant's response

In response, the tenant submitted that the Fortis bills show a different civic address than the rental unit. The address listed on the Fortis bills is the civic address for the basement suite. The tenant submitted that the lower tenant was pretty much at home 24 hours a day, as they worked from home. The tenant asked why this issue was not raised for over a year and a half and they never received the bills. The tenant said they assumed that the Fortis bills were part of the monthly rent, as the lower tenant said they did not pay any Fortis charges. The tenant said that some of the bills submitted cover periods of time when they did not live in the rental unit and also included any extra bills for the repairs being made in 2021.

As to the repair claim, the tenant submitted that they brought the matter of the leaks to the attention to the landlord's father on February 11, 2021, who had been representing the landlord during the tenancy. A series of contractors came through for inspections, and by March 28, 2021, no repairs had been started. In addition, demolition work began on April 18. According to the tenant, the contractor pointed out numerous structural issues and said the issues could have been ongoing for years. The tenant submitted that they could not see behind the drywall to see what was going on.

As to the move-out repair claim, the tenant submitted that there was no move-in inspection or Report or move-out inspection or Report, although they tried to arrange a move-out inspection with the landlord. At the same time as their move-out, there were ongoing repairs. The tenant submitted that 13 days after they moved out and after *"extensive interior and exterior work had been done by the landlord without us being present in the house, the landlord reached out saying she was now prepared to do the move-out inspection and arrange to return our security deposit*".

The tenant's evidence included copies of emails between the parties, dispute timelines for repairs being made, the real estate listing for the home, and written submissions, which included a cross-application.

Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

While I have reviewed the extensive evidence submitted prior to the hearing and the oral evidence following lengthy hearings, I refer to only the relevant evidence regarding the facts and issues in determining this Decision.

Test for damages or loss

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 each of 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 the landlord 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 tenant. Once that has been established, the landlord must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the landlord did whatever was reasonable 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.

Unpaid rent; loss of rent

Under section 26 of the Act, a tenant is required to pay rent in accordance with the terms of the tenancy agreement, whether or not the landlord complies with the Act, the Regulations or the tenancy agreement and is not permitted to withhold rent without the legal right to do so. A legal right may include the landlord's consent for deduction; authorization from an Arbitrator or expenditures incurred to make an "emergency repair", as defined by the Act.

Section 45(2) of the Act states that a tenant may end a fixed term tenancy by giving the landlord written notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, is not earlier than the date specified in the tenancy agreement as the end of the tenancy, 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 other words, the tenant must give written notice to the landlord ending a fixed term tenancy at least one clear calendar month before the next rent payment is due and that is not earlier than the end of the fixed term.

In this case, the end of fixed-term of the tenancy agreement was February 28, 2022 and the tenants vacated on or about December 17, 2021, without paying the monthly rent for December 2021, which they owed.

I therefore find the landlord established a monetary claim of **$5,900** for the unpaid rent for December 2021.

There is no dispute that the tenants breached the terms of their written tenancy agreement by ending the tenancy before February 28, 2022. I find the tenants are liable to the landlord for monthly rent under the terms of the tenancy agreement, subject to the landlord's obligation to minimize their loss.

In this case, the landlord confirmed she did not seek other tenants or advertise the rental unit for January and February 2022. The tenants' evidence shows the landlord listed the residential property for sale on March 16, 2022.

For these reasons, I find the landlord submitted insufficient evidence that she did whatever was reasonable to minimize the loss for January and February 2022, as I find advertising immediately for other tenants would be a reasonable way for the landlord to minimize her loss.

I therefore **dismiss** the landlord's claim for loss of rent for January and February 2022, in the amount of $11,800, **without leave to reapply**.

Repairs for leaks

While the landlord said the first leak in 2021 started months earlier, I find the landlord submitted insufficient evidence to support this statement. The landlord said at the hearing a contractor informed her of the leak starting 12 months prior. The tenant said a contractor informed him the leak had been there for years.

Neither contractor was present at the hearing to provide firsthand evidence of either statement and as the landlord has the burden of proof, I find the landlord submitted insufficient evidence of this statement.

I give no weight to the landlord's hearsay testimony of a statement made from a contractor who was not part of the hearing. Apart from that, the only other evidence to support claims for leak repairs was a short, letter style document containing the list of work done. There were no details of the damage or scope of work, a breakdown of the costs, or even if all the work was attributable to the leaks. Upon my review of the 3-paragraph April 25, 2021, letter, I find part of the work appeared to be for structural damage, waterproofing all perimeter acrylic stucco joints, framing removal, and installation of structural support.

The landlord did not claim that the tenants caused the leaks, only that they failed to report them in a timely manner. I find this is speculation on the part of the landlord and not supported by evidence.

I find a tenant cannot be held responsible for what is going on behind a wall in the rental unit. Therefore, I find the landlord submitted insufficient evidence that the tenants were negligent in reporting either of the two different, separate 2021 leaks at the property.

I therefore **dismiss** the landlord's claim for $8,580 for the 2021 Spring leak, **without leave to reapply**.

Move-out repairs

The landlord's evidence on this claim was a short, letter-style statement from the same company providing the earlier repair letter, with no breakdown or scope of work. It is important to note that repairs to the rental unit from another leak were ongoing at the time the tenants vacated and that work, according to the landlord, took several more months, as the contractors slowed down after the tenants vacated.

Additionally, I find a critical component in establishing a claim for damage, and the resulting expenses, is the record of the rental unit at the beginning and end of the tenancy as contained in condition inspection reports.

Under sections 23(4) and 35(4) of the Act, a landlord **must** complete a condition inspection report in accordance with the Residential Tenancy Regulations and both parties must sign the report.

In the case before me, the landlord failed to provide any inspection report or photographs of the rental unit both from the start and end of the tenancy.

I therefore could not assess the condition at the end of the tenancy compared with the beginning of the tenancy. Consequently, I could not determine whether any alleged damage by the tenant was beyond reasonable wear and tear, or if there was any damage or repairs needed at all caused by the tenant. Apart from that, contractors were on scene and in the process of completing repairs to the rental unit at the end of the tenancy.

Due to the above findings, I find the landlord submitted insufficient evidence to support her monetary claim against the tenant for move-out repairs, and as a result, I **dismiss** the landlord's claim for $2,693.25, **without leave to reapply**.

Fortis bills

The written tenancy agreement requires the tenants to pay all utilities in relation to the property, which means the tenants would pay for the lower tenant's utilities.

I find the landlord's expectation that the tenants were responsible to pay for the lower tenant's utilities unreasonable. I also find it unreasonable that the landlord expected the tenants to be held responsible for any increased cost in the utility bill for the multiple months of repairs on the rental unit during 2021. I also find it unreasonable that the landlord claimed for the cost of the Fortis bills for the time they were not residing in the rental unit.

In addition, I find the landlord submitted insufficient evidence that the bills were incurred at the rental unit, as the service address in the billing statements was not the rental unit address.

For the above reasons, I find the landlord's evidence is inconsistent and unclear to establish what, if any, Fortis bills were owed by the tenants for use of their own rental unit during the tenant, not the entire property. It is the landlord's responsibility to assess what all tenants in the residential property owed for utilities for their own use, it is not up to the arbitrator to decide what portion should be deducted from each bill.

Apart from that, I find the landlord delayed for nearly two years to make any claim against the tenants for the Fortis bills, allowing the claim to build and grow, and as a result, I find the landlord waived her rights to seek enforcement of a legal right.

For all these reasons, due to the landlord's insufficient evidence and waiver of their legal rights, I **dismiss** the landlord's claim of $3,022.24, **without leave to reapply**.

As the landlord's application was partially successful, I grant the landlord recovery of her filing fee of $100.

Due to the above, I find the landlord has established a total monetary claim of **$6,000**, comprised of unpaid rent of **$5,900 for December 2021, and the filing fee of $100**.

At the landlord's request, I direct them to retain the tenants' security deposit of $3,000 in partial satisfaction of their monetary award of $6,000. I therefore grant the landlord a monetary order pursuant to section 67 of the Act for the balance due in the amount of $3,000.

Should the tenants fail to pay the landlord this amount without delay after being served the order, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court. The tenants are advised that costs of such enforcement are subject to recovery from the tenants.

Additional information

I note that the tenants' documentary evidence listed a cross application. An application for dispute resolution may not be made through evidence, but must be made separately by going through the application process with the RTB. For this reason, I did not consider the tenants' evidence to be a cross application.

Conclusion

The landlord's application for monetary compensation is partially granted, as noted above granted.

The landlord has been authorized to retain the tenants' security deposit of $3,000 and they have been awarded a monetary order for the balance due, in the amount of $3,000.

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*. Pursuant to section 77(3) of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: March 14, 2023

Residential Tenancy Branch