Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MMDCL, MNDL-S, MNRL, FFL
MNRT, MNSD, FFT

Introduction

This hearing dealt with the adjourned cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (the "*Act*"). The matter was set for a conference call.

The Landlord's Application for Dispute Resolution was made on November 7, 2018. The Landlord applied for a monetary order for compensation for damage caused by the Tenant, a monetary order for compensation for monetary loss or other money owed, a monetary order for unpaid rent, permission to retain the security deposit and to recover their filing fee. The Tenant's Application for Dispute Resolution was made on January 14, 2019. The Tenant applied for a monetary order for the recovery of costs for emergency repairs, for the return of their security deposit and the return of their filing fee.

Both the Landlord and the Tenant attended the hearing and were each affirmed to be truthful in their testimony. The Tenant and the Landlord were provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all evidence and testimony 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

Issues to be Decided

- Is the Landlord entitled to monetary compensation for damages under the *Act*?
- Is the Landlord entitled to monetary order for unpaid rent?
- Is the Landlord entitled to retain the security deposit and pet damage deposit in partial satisfaction of the claim?
- Is the Landlord entitled to recover the cost of the filing fee?
- Is the Tenant entitled to a monetary order to recover the cost of emergency repairs?
- Is the Tenant entitled to the return of her security deposit?
- Is the Tenant entitled to recover the cost of the filing fee?

Background and Evidence

Both parties testified that the tenancy began on July 1, 2017, as a one-year fixed term tenancy that rolled into a month to month after the first year. Rent in the amount of $950.00 was to be paid by the first day of each month and at the Tenant had paid a $475.00 security deposit and a $475.00 pet damage deposit at the outset of the tenancy. The Landlord submitted a copy of the tenancy agreement and five-page addendum to the tenancy agreement into documentary evidence.

The Tenant testified that she gave notice, by fax, to end her tenancy to the Landlord on April 24, 2018, with an effective date of June 1, 2018, and that the notice included her forwarding address. The Tenant testified that the reason she was ending her tenancy was that the rental unit was no longer safe to live in as the Landlord had refused to deal with a carbon monoxide leak in the furnace. The Tenant submitted a copy of her faxed notice to the Landlord into documentary evidence.

The Landlord testified that he did receive the faxed letter from the Tenant dated April 24, 2018.

The Tenant testified that she physically moved out of the rental unit on May 15, 2018. The Tenant testified that she completely cleaned the rental unit and that she had returned the rental in good condition.

Both parties also agreed that the end of tenancy move out inspection had not been completed with the Landlord and the Tenant present for this tenancy.

The Tenant testified that she requested the Landlord attend to conduct the move-out inspection with her, on May 15, 2018, but that the Landlord did not reply to her request. The Tenant testified that she took pictures of the rental unit the day she moved out and had a third party attend the rental unit to conduct a move-out inspection with her as the Landlord would not attend. The Tenant testified that she faxed a copy of her move-out inspection, that she and the third party completed, and that she also mailed a copy of the inspection and the keys to the rental unit to that Landlord on May 15, 2019. The Tenant submitted 17 colour pictures of the rental unit taken the day she move-out, her completed move-out inspection signed by herself and the third party into documentary evidence.

The Landlord testified that he had received the faxed letter from the Tenant dated May 15, 2018, and that he had attended the rental unit and conducted his own move-out inspection of the property, later that same day. The Landlord testified that he made one attempt, by email, to schedule a move-out inspection with the Tenant for this tenancy but that the Tenant had not responded to his email. The Landlord submitted 20 black and white pictures of the rental unit, a copy of the email response he had sent to the Tenant regarding the fax dated May 15, 2018, and his completed move-out inspection signed by the Landlord into documentary evidence.

The Landlord is claiming for $2,790.00 consisting of the following:

May 2018 rent	$950.00
May rent late free	$25.00
June 2018 rent	$950.00
June rent late fee	$25.00
Cleaning, and repairs	$425.00
Thorough Cleaning	$300.00
Canada Post	$15.00

The Landlord testified that the Tenant did not pay the rent for May 2018 and that there is a late fee provision in the tenancy agreement, of a $4.00 charge per day. The Landlord testified that he understands that the *Act* limits a late fee to $25.00, and that is why he is only asking for $25.00 for the late payment of the May 2018 rent.

The Tenant testified that she agreed, that she had not paid the rent for May 2018, and that she had not paid the May 2018 rent as the Landlord was in breach of the tenancy agreement and owed her compensation, so she withheld the May 2018, rent.

The Landlord testified that the rental unit was returned to him in an uncleaned and damaged state and that it had cost him $725.00 to have the rental unit cleaned and repaired at the end of the tenancy. The Landlord submitted two invoices for the cost of the cleaning and the repairs to the rental unit at the end of tenancy into documentary evidence.

The Landlord also testified that due to the unclean and damaged state of the rental unit at the end of tenancy, he was unable to list the rental unit or conduct showings until the required cleaning and repairs were finished, resulting in the loss of rental income for June 2018. The Landlord testified that the cleaning and repairs were completed at the end of August 2018 and that he secured a new renter to take over the rental unit as of September 1, 2018. The Landlord is requesting the recovery of the lost rental income for June 2018 and a $25.00 late fee for the late payment of the June 2018 rent.

The Tenant testified that she returned the rental unit to the Landlord in a clean and undamaged state. The Tenant testified that the only thing wrong with the rental unit was a malfunctioning furnace that was leaking carbon monoxide and that the Landlord's refusal to repair the furnace did not make her responsible for the June 2018 rent or a late fee.

The Landlords testified that he is also claiming for $15.00 in mailing cost, for sending the Tenant his evidence package and hearing documents through Canada Post. The Tenant disagreed with the Landlord's claim for mailing costs.

The Tenant is claiming for $2,174.04, consisting of the following:

Furnace inspection	$173.25
Smoke and Carbon Monoxide detector	$100.79
Return of double deposits	$1,900.00

The Tenant testified that on April 6, 2018, she had overslept and woke up disoriented, feeling very sick and that she had fallen when she attempted to stand. The Tenant testified that she called the provincial nurse's hotline and had been advised that her symptoms resembled fuel poisoning. The Tenant testified that she turned her furnace, in

her rental unit, off due to this call and arranged for the furnace to be inspected. The Tenant testified that an inspector attended the rental unit on April 10, 2018, and told her that there was a carbon monoxide leak in the furnace system for the rental unit and that the furnace should remain off until it can be repaired. The Tenant submitted a copy of the furnace inspection report into documentary evidence.

The Tenant testified that she sent the furnace inspection report to the Landlord, requesting that the Landlord repair the furnace as she had no heat until it was repaired. The Tenant also testified that she purchased a new smoke/carbon monoxide detector for the rental unit as she believed that the smoke detectors installed by the Landlord were insufficient as they did not detect carbon monoxide. The Tenant is requesting the recovery of her cost for the inspection and purchasing the new smoke/carbon monoxide detector for the rental unit.

The Landlord testified that he did receive the Tenants request for the furnace to be repaired and a copy of the inspection that she had conducted on the furnace in the rental unit. The Landlords testified that he responded immediately to the Tenant's notification that the furnace needed repairs by having the furnace and hot water tank inspected by the BC gas authority. The Landlord testified that the BC gas authority reported to him that there was no carbon monoxide leak in either the furnace or the hot water tank and that they were both in good condition and could be used. The Landlord testified that he reported to the Tenant that everything was fine and to go ahead and turn her heat back on, but that the Tenant would not accept his verbal communication regarding the status of the furnace and had requested to be given written confirmation from the BC gas authority.

The Landlord testified that there was never anything wrong with the furnace and that there was no carbon monoxide leak in the rental unit, and therefore he is not responsible for the cost of the Tenant's inspection. The Landlord also testified that the industry standard is that a landlord installs smoke detectors in all rental units not smoke and carbon monoxide detectors and that he is not responsible for the Tenants purchase of a smoke/carbon monoxide detector for the rental unit, as the smoke detectors he installed worked and were in compliance with the industry standard.

The Tenant testified that she was uncomfortable with just a verbal "all clear" from the Landlords and confirmed that she requested something in writing from the BC gas authority before she would turn the furnace back on. The Tenant testified that she feels

a smoke/carbon monoxide detector is needed for a rental unit but that she did not know the industry standard.

The Landlord testified that he contact the BC Gas authority and request a written report on the furnace and hot water take but that the BC gas authority does not provide a written report when everything is fine, only when there is a problem.

The Tenant testified that when the Landlords refused to provide her with a written report from the BC gas authority, she decided that she would not be comfortable living in the rental unit. The Tenants testified that she gave notice to the Landlord that she would be moving out as soon as possible, but not later than June 1, 2018, and that she move out in accordance with that notice.

The Tenant testified that on October 20, 2018, when she still had not received her security and pet damage deposits back, she faxed the Landlord a second request for the return of her security and pet damage deposits. The Landlord testified that he did receive the faxed letter from the Tenant dated October 20, 2018.

The Landlord testified that he had not noticed the forwarding address on the Tenant's faxed notice dated April 24, 2018, and that he did not file to retain the deposits for this tenancy until after he received the Tenants second request dated October 20, 2018.

Analysis

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

I have reviewed the tenancy agreement, and five-page addendum for this tenancy and I find that the parties to this dispute entered into a one-year fixed term tenancy, starting June 30, 2017, and ending June 30, 2018, and that the parties agreed to a late rent payment fee of $4.00 per day.

I accept the agreed upon testimony of these parties that the Tenant had not paid the Landlord the rent for May 2018.

Rules about payment and non-payment of rent

26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement unless the tenant has a right under this Act to deduct all or a portion of the rent.

I find that the Tenant breached section 26 of the *Act* when she did not pay the rent in accordance with the tenancy agreement. Therefore, I find that the Landlord has established an entitlement to recover the outstanding rent for May 2018. I award the Landlord $950.00 in outstanding rent for May 2018, and $25.00 in late fees, the maximum allowed pursuant to section 7 of the *Residential Tenancy Regulations*.

I acknowledge the Tenant's claim that she did not pay the rent for May 2018 as she believed the Landlord was in breach of their tenancy agreement, the Tenant was advised in the hearing that there are no provisions in the *Act* which would allow a Tenant to unilaterally, decide to withhold their required rent payment.

As for the Landlords claim for compensation for lost rental income for June 2018, in the amount of $950.00 and the $25.00 late fee. I accept the agreed upon testimony of these parties that the Tenant served the Landlord with written notice to end her tenancy early as of June 1, 2018, and that the Tenant moved out of the rental unit as of May 15, 2018.

Section 45(2) of the *Act* states that a tenant cannot end a fixed term tenancy agreement earlier than the date specified in the tenancy agreement as the end of the tenancy.

Tenant's notice

45 *(2)* A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) 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.

As I have already found that this tenancy agreement was for a fixed term ending June 30, 2018, I find that the Tenant was in breach of section 45 of the *Act* when she issued her notice to end the tenancy before the agreed to date in the tenancy agreement.

Awards for compensation due to damage or loss are provided for under sections 7 and 67 of the *Act.* A party that makes an application for monetary compensation against another party has the burden to prove their claim. The Residential Tenancy Policy Guideline #16 Compensation for Damage or Loss provides guidance on how an applicant must prove their claim. The policy guide states the following:

> "The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To determine whether compensation is due, the arbitrator may determine whether:
>
> - A party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - Loss or damage has resulted from this non-compliance;
> - The party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - The party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

I have reviewed the Landlord's claim that he was unable to advertise the rental unit as available for June 1, 2018, due to to the damaged and unclean condition of the rental unit at the end of tenancy, and I find this to be an unreasonable claim. When the Landlord received the Tenant's notice to end her tenancy on April 24, 2018, he was given a full 6 weeks to attempt to mitigate his losses by securing a new renter for the rental unit; however, in this case, the Landlord made no attempt to advertise the rental unit between April 24, 2018, to May 31, 2018. Additionally, I find that the Landlord has not provided any evidence to show that he knew, during the notice period between April 24, 2018, and May 31, 2018, that the rental unit would be returned to him in an unrentable condition. I find that the Landlord should have taken immediate steps to mitigate his losses by attempting to re-rent the rental unit as soon as he received the Tenant's written notice to end her tenancy early, on April 24, 2018.

I find that the Landlord was in breach of section 7 of the *Act* when he failed to take any action to minimize his potential loss during the notice period of April 24 to May 31, 2018. Therefore, I dismiss the Landlord's claim for compensation for the lost rental income and a late fee for June 2018.

Regarding the Landlord's claim for $725.00 to recover his cost to have the rental unit cleaned and repaired at the end of the tenancy. During the hearing, the parties to this dispute provided conflicting verbal testimony regarding the condition of the rental unit at the end of this tenancy. In cases where two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

An Arbitrator looks to the move-in/move-out inspection report (the "inspection report") as the official document that represents the condition of the rental unit at the beginning and the end of a tenancy; as it is required that this document is completed in the presence of both parties and seen as a reliable account of the condition of the rental unit. I have reviewed the move-in and move-out inspections, submitted into evidence by the parties to this dispute, and I find that the move-in inspection had been conducted in accordance with the *Act.* However, I find that the move-out inspection had not been conducted in accordance with the *Act*. Section 35 of the Act states the following:

Condition inspection: end of tenancy

> **35** (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
>
> (a) on or after the day the tenant ceases to occupy the rental unit, or
>
> (b) on another mutually agreed day.
>
> (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
>
> (3) The landlord must complete a condition inspection report in accordance with the regulations.
>
> (4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

It is the responsibility of the Landlord to ensure that the Tenant was offered at least two opportunities to conduct the move-out inspection with the Landlord as required. I find

that the Landlord was in breach of section 35 of the *Act* by not make two attempts to schedule the move-out inspection with the Tenant as required. As the move-out inspection was not completed in accordance with the Act, I find the individual move-out inspections completed by the parties to this dispute to be unreliable and I will not consider them in my findings.

In the absence of a reliable move-in/move-out inspection report to represents the condition of the rental unit at the beginning and the end of this tenancy, I must rely on the additional documentary evidence submitted by these parties. I have reviewed the photographic evidence submitted by the Landlord and the Tenant, that each party claims depicts the condition of the rental unit at the end of the tenancy. However, I also find the photographic evidence provided by these parties to be as conflicting as the parties' verbal testimony. As the Landlord has the burden to proof his claim, I find that the Landlord has submitted insufficient evidence to support his claim that there were cleaning and repairs required at the end of this tenancy. Therefore, I dismiss the Landlord's claim to recover $725.00 in cleaning and repair costs.

Concerning the Landlords' claim for the costs associated with mailing hearing document and evidence to the Tenants, the Landlord was advised in the hearing that there are no provisions in the *Act* which provide compensation for this requested cost. As such, I dismiss this portion of the Landlords' claim in its entirety.

As for the Tenants claim for $173.25 for a furnace inspection, I accept the Tenants testimony that she believed that the furnace in the rental unit was malfunctioning. Section 33 of the *Act* considers a malfunctioning furnace to be an emergency repair and states the following:

> **Emergency repairs**
>
> **33** (1) In this section, **"emergency repairs"** means repairs that are
>
> (a) urgent,
>
> (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and
>
> (c) made for the purpose of repairing
>
> (i) major leaks in pipes or the roof,
>
> (ii) damaged or blocked water or sewer pipes or plumbing fixtures,
>
> (iii) the primary heating system,

(iv) damaged or defective locks that give access to a rental unit,

(v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

(a) emergency repairs are needed;

(b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;

(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

(a) claims reimbursement for those amounts from the landlord, and

(b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:

(a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;

(b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);

(c) the amounts represent more than a reasonable cost for the repairs;

(d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

Section 33(3b) of the Act requires a tenant to make two attempts to contact the Landlord regarding a required emergency repair before a tenant can conduct the repair themselves and charge their costs back to the landlord. In this case, I find that the Tenant made no attempts to contact the Landlord regarding her concerns about the furnace before she went ahead had an inspector attend the rental unit at her own cost. Since the Tenants did not comply with section 33(3b) and allow the Landlord the opportunity to make the emergency repair, I find that the Tenant is not entitled to the recovery of her cost for the inspection she had completed.

Regarding the Tenant's claim for the recovery of her cost for the purchase of a smoke/carbon monoxide detector, in the amount of $100.79. During the hearing, the parties to this dispute provided conflicting verbal testimony regarding the requirement of a landlord to install a smoke and carbon monoxide detector in a rental unit. Again, In cases where two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

I have reviewed the documentary evidence submitted by the Tenant, and I find that there is no evidence before me to support the Tenant's claim that the Landlord was required to install a smoke and carbon monoxide detector in the rental unit. Therefore, I dismiss the Tenant's claim to recover $100.79 for the purchase of a smoke and carbon monoxide detector for the rental unit.

As for the security deposit and pet damage deposit (the "deposits") for this tenancy; section 38(1) of the *Act* gives the landlord 15 days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to file an Application for Dispute Resolution claiming against the deposits or repay the security deposit and pet damage deposit to the tenant.

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a)the date the tenancy ends, and

(b)the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c)repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I accept the testimony of these parties, that the Tenant faxed a letter, on April 24, 2018, to the Landlord, giving notice that she would be ending her tenancy and that the Tenant had provided her forwarding address in that letter. I also accept the testimony of these parties that the Tenant moved out of the rental unit on May 15, 2018. I find that this tenancy ended on May 15, 2018, the date the Tenant moved out of the rental unit and that the Landlord had the Tenant's forwarding address as of that date. Accordingly, the Landlord had until May 30, 2018, to comply with section 38(1) of the *Act* by either repaying the deposits in full to the Tenant or submitting an Application for Dispute resolution to claim against the deposits. The Landlords, in this case, did not repay the deposits and did not file his claim against the deposits until November 7, 2018. Therefore, I find that the Landlord breached section 38 (1) of the *Act* by not returning the Tenant's deposits or filing a claim against the deposits within the statutory timeline.

Section 38 (6) of the *Act* goes on to state that if the landlord does not comply with the requirement to return or apply to retain the deposit within the 15 days, the landlord must pay the tenant double the security deposit.

Return of security deposit and pet damage deposit

38 (6) If a landlord does not comply with subsection (1), the landlord

(a)may not make a claim against the security deposit or any pet damage deposit, and

(b)must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Therefore, I find that pursuant to section 38(6) of the *Act* the Tenant has successfully proven that she is entitled to the return of double her deposits, in the amount of $1900.00.

Section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As I have found that both the Landlord and the Tenant for this tenancy have breached the *Act*, I find that neither the Landlord or the Tenant are entitled to the recovery of their filing fee. Therefore, I decline to return the Landlord's or the Tenant's filing fee for their respective applications.

I grant the Tenant a monetary order in the amount of $925.00; consisting of $1,900.00 for the return of double the security and pet damage deposits paid for this tenancy, less $950.00 awarded to the Landlord for May 2018 rent and $25.00 in late fees.

Conclusion

I find for the Tenant pursuant to sections 38 and 65 of the *Act*. I grant the Tenant a **Monetary Order** in the amount of **$925.00**. The Tenant is provided with this Order in the above terms, and the Landlord must be served with this Order as soon as possible. Should the Landlord fail to comply with this Order, this 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: May 3, 2019

Residential Tenancy Branch