Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DPM Rental Management Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL-S, MNDCL-S, MNRL-S, FFL
MNDCT, MNSD, FFT

Introduction

This was a cross application hearing that dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for damages, pursuant to section 67;
- a Monetary Order for damage or compensation under the Act, pursuant to section 67;
- a Monetary Order for unpaid rent, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for the return of the security deposit, pursuant to section 38;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant and the landlord's agent (the "agent") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties agreed that they received the other's application for dispute resolution via registered mail. The tenant testified that he received the landlord's amendment package

via registered mail. I find that all the above packages were served in accordance with section 89 of the *Act.*

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for damages, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation under the Act, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
4. Is the landlord entitled to retain the tenant's security and pet damage deposits, pursuant to section 38 of the *Act*?
5. Is the landlord entitled to recover the filing fee for this application from the tenant, pursuant to section 72 of the *Act*?
6. Is the tenant entitled to a Monetary Order for the return of the security deposit, pursuant to section 38 of the *Act*?
7. Is the tenant entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
8. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and the agent's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on July 15, 2019 and ended on November 21, 2019. This was originally a fixed term tenancy set to end on July 31, 2020. Monthly rent in the amount of $2,500.00 was payable on the first day of each month. A security deposit of $1,250.00 and a pet damage of $1,250.00 were paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that the tenant provided the landlord with his forwarding address via e-mail on November 25, 2019. The agent testified that the landlord received the above email on November 25, 2019. The landlord applied for dispute resolution on December 6, 2019. The tenant applied for dispute resolution on March 27, 2020.

Both parties agree that a joint move in condition inspection and inspection report was completed by both parties on July 18, 2019. Both parties agree that a joint move out condition inspection and report were completed by both parties of November 21, 2019. The move in and move out condition inspection reports were entered into evidence.

The tenant testified that the landlord did not provide him with a copy of the move out condition inspection report until April 6, 2020, after the tenant served the landlord with his application for dispute resolution. The agent testified that the condition inspection reports are carbon copy reports which are given to the tenants immediately after they are completed. The agent testified that the tenant was provided with carbon copy of the move out condition inspection report on November 21, 2019 when the move out condition inspection report was completed.

Both parties agree on the following sequence of events which occurred prior to the tenant ending the tenancy. Emails establishing the below timeline were entered into evidence:

- September 10, 2019: The tenant notified the landlord via email that he heard loud shouting and stomping noises. The tenant identified the sounds as coming from two possible units above him. The tenant stated “Just wanted to inform the agency so there is some record.
- September 10, 2019: An agent of the landlord asked the tenant via email when the loud noises occurred.
- September 11, 2019: The tenant notified the landlord via email that a strong smell of cigarette smoke was coming into his unit from the unit below. The tenant requested the landlord remind other residents of the no smoking policy.
- September 17, 2019: The landlord emailed a notice to all tenants in the building reminding all tenants that the subject rental building is a 100% non smoking building, including balconies. The emails states that “should any tenant be caught smoking in the unit OR on the balcony your tenancy will be placed in jeopardy.”
- October 4, 2019: The landlord sent the tenant a warning email regarding multiple noise complaints made against the tenant on September 27th and 28th, 2019.
- October 4, 2019: The tenant replied to the October 3, 2019 email from the landlord and denied that his unit was responsible for the noise complaints. The email states that the noise emanated from the unit adjacent to the tenant’s. The

tenant notes ongoing breaches to his right of peace and quiet from excess noise from his neighbours, second hand smoke, and barking dogs. The tenant also states that another tenant's dog is aggressive towards himself and his dog and interferes with his ingress and egress from the subject rental building.

- October 4, 2019: The landlord informed the tenant the offending unit will be sent a warning letter.
- October 21, 2019: The tenant emailed the landlord that second hand smoke entered his unit.
- October 21, 2019: The landlord asks the tenant where the smoke is coming from. but the tenant could not determine the source.
- October 24, 2019: The tenant responds to the landlord's October 21, 2019 email stating that he does not know where the smoke was coming from. In this email the tenant also made a noise complaint against a neighbour via email.

The agent testified that after receiving the tenant's October 21, 2019 email about second hand smoke, the landlord sent an email to all tenants at the subject rental building reminding all tenants of the no smoking policy at the subject rental building. This email was not entered into evidence; however, the tenant did not dispute its existence.

The agent testified that after receiving the October 24, 2019 noise complaint email, the unit the tenant complained of was sent an official warning letter.

Both parties agree that the tenant emailed the landlord on October 31, 2019 and informed the landlord that he intended on breaking his lease and moving out on December 1, 2019. Attached to the email was an unsigned letter from the tenant which stated that the tenant was breaking the lease for the following reasons:

- Ongoing and unreasonable noise disturbances from neighbouring units;
- Excessive second-hand smoke from neighbouring units; and
- Presence of aggressive animals on the property.

Both parties agree that on November 1, 2019 the landlord emailed the tenant and informed the tenant that the landlord requires a signed notice to end tenancy. Both parties agree that the tenant provided the landlord with a signed notice to end tenancy on November 5, 2019.

The agent testified that the landlord requires a signed notice to end tenancy because they cannot legally enter into a new tenancy agreement with a new tenant unit proper notice to end tenancy has been provided by the outgoing tenant. The agent testified that

the landlord cannot have two signed tenancy agreements for the subject renal property running concurrently.

The agent testified that the subject rental property was remarketed for rent at the same rental rate as that paid by the tenant ($2,500.00), on multiple online platforms on November 5, 2020. The landlord testified that a new tenant was found for January 1, 2020 at a rental rate of $2,250.00. The landlord is seeking lost rental income for the subject rental property for the month of December 2019 in the amount of $2,500.00. The landlord is also seeking the difference in rental income that landlord would have received under the tenant's tenancy agreement and what the landlord will receive under the new tenancy agreement from January 2020 to July 2020. The difference in rental income received is $250.00 per month for seven months, for a total of $1,750.00.

Both parties agree that in the November 5, 2019 email the tenant wrote in part:

> The attached copy has not been revised in content, save the addition of the signature. Please let me know if [the landlord] requires revisions made to the effective date as to accommodate a full months notice.

The tenant testified that in his November 5, 2019 email to the landlord, he offered to stay an extra month at the subject rental property so that the landlord would have a full month's notice of his intention to move out. Since the landlord did not take him up on this offer, the tenant is not responsible for December 2019's rent.

The agent testified that the November 5, 2020 email did not make it clear that the tenant was offering to change the effective date of his notice to end tenancy. The agent testified that in a lease break situation the tenant is in the driver's seat regarding when they intend on moving out and that regardless of the notice period provided, the tenant is responsible for the loss of rental income incurred by the landlord as long as the landlord acted reasonably to mitigate the loss to the tenant.

Both parties agree that the tenant paid the landlord $1,312.50 in liquidated damages. The tenant testified that liquidated damages covers damages for loss of rental income and so his obligation to pay the landlord for loss of rental income from January to July was fulfilled.

Both parties agreed that the subject rental property came fully furnished and that the tenant's dog damaged the couch at the subject rental property. The move in and out condition inspection reports confirm the above testimony. The agent testified that the

couch cost $795.20 to reupholster which the landlord is seeking to recover from the tenant. A receipt for the above was entered into evidence. The tenant testified that since the landlord did not provide him with a copy of the move out condition inspection report, he is not required to pay for the reupholstering of the couch.

Both parties agree that on November 11, 2019 the tenant e-mailed the landlord and informed the landlord that his baseboard heaters smelled when turned on. The landlord testified that at this point in time the subject rental property was already marketed for rent and that during the next showing, which occurred on November 18, 2019, an agent for the landlord turned the baseboard heaters on as high as they would go. The heaters did not omit and odour and produced the appropriate amount of heat. The agent testified that since the heaters were in working order on November 18, 2019 no further action was taken. The agent testified that the new tenant to the subject rental property has not reported any issues with the heater, because there was no issue to begin with. The agent submitted that the tenant was attempting to manufacture issues with the subject rental property to support his claim to break his lease. The tenant disputed the above testimony.

Both parties entered into evidence a series of emails from November 14-20, 2019 regarding theft at the subject rental building; however, neither party presented evidence regarding the contents of those emails or how the emails pertained to their claims.

The tenant testified that since the landlord was unresponsive to his heating issues and he felt that he could not use the heaters safely, he emailed the landlord on November 20, 2019 to inform them that he was moving out the following day, November 21, 2019. This email was entered into evidence. The November 20, 2019 email states in part:

> Due to the ongoing security concerns at the [subject rental building] I am moving out of [the subject rental property] prior to Dec 01.
>
> I would like to schedule the final inspection and to return keys to DPM following tomorrow's 3:00 PM viewing.

The tenant testified that he is seeking the following damages arising out of this tenancy:

- Loss of quiet enjoyment- $625.00.
    - The tenant testified that he moved out of the subject rental property approximately one week before his move out date of December 1, 2019 due to the bad smell from his heaters. The tenant is seeking one week's rent in the amount of $625.00 from the landlord.

    - The agent testified that that the landlord investigated the heating issue and determined that the heater was in proper working order. The agent testified that there never was a heating issue and the tenant manufactured the heating issue to bolster his claims to end the tenancy prior to the end of the fixed term.
- Loss of quiet enjoyment- $300.
    - The tenant testified that the landlord is responsible for this tenancy ending prior to the end of the fixed term tenancy which resulted in the tenant having to move out eight months early. The tenant testified that this loss is difficult to quantify but he believes $300.00 is reasonable.
    - The agent testified that the landlord responded to all of the tenant's complaints and sought to address them. The agent testified that the landlord did not cause the tenant to suffer a loss of quiet enjoument.
- Moving Expenses- $300.00.
    - The tenant testified that he is seeking $300.00 to compensate him for his personal time required to move. No receipts were entered into evidence.
    - The landlord testified that the subject rental property was fully furnished so the tenant had no expenses as there was very little to move. The landlord testified that in any event, the landlord responded appropriately to all of the tenant's complaints and the tenant did not have grounds to end the fixed term tenancy early. The agent testified that the tenant did not provide the landlord with a breach letter stating that: (1) there is a problem; (2) the tenant believes the problem is a breach of a material term of the tenancy agreement; (3) the problem bust be fixed by a deadline included in the letter, and that the deadline be reasonable; and (4) if the problem is not fixed by the deadline, the party will end the tenancy.
- Double security and pet damage deposits- $5,000.00
    - The tenant testified that he is entitled to recover double his deposits because the landlord did not provide him with a copy of the move out condition inspection report, contrary to the *Act.*
    - The agent testified that the move out condition inspection report was provided to the tenant and the landlord applied for dispute resolution within the 15 days required under the *Act.*

Analysis

Rule 7.4 of the Residential Tenancy Branch Rules of Procedure states:

> Evidence must be presented by the party who submitted it, or by the party's agent.

Pursuant to the above rule, I decline to consider evidence not presented in the hearing.

Loss of rental income

Section 45 of the *Act* sets out when and how a tenant may end a tenancy. Section 45(2) states that 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.

Pursuant to section 45(2), the earliest date the tenant could end the tenancy was July 31, 2020

Section 45(3) of the *Act* states that if a landlord has failed to comply with a material term of the tenancy 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.

Residential Tenancy Policy Guideline 8 states that to end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I find that the tenant did not inform the landlord in writing that:

- there was a problem;
- the tenant believed the problem was a breach of a material term of the tenancy agreement;
- the problem must be fixed by a set deadline; and
- if the problem was not fixed by the deadline, the tenant would end the tenancy.

Pursuant to my above finding, I find that the tenant was not entitled to end the fixed term tenancy early. I find that the tenant breached section 45 of the *Act.*

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

Policy Guideline 5 states that where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

Policy Guideline 3 states that the damages awarded are an amount sufficient to put the

landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy.

In this case, the tenant ended a one-year fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement. Pursuant to section 7, the tenant is required to compensate the landlord for that loss of rental income. However, the landlord also has a duty to minimize that loss of rental income by re-renting the unit at a reasonably economic rate as soon as possible.

I accept the agent's testimony that the subject rental property was marketed for rent on November 5, 2019, after the tenant provided signed written notice of his intention to end the tenancy. I find that in immediately re-marketing the subject rental property for rent at the same rental rate paid by the tenant, the landlord mitigated the loss. Based on the agent's testimony and the new tenancy agreement entered into evidence, I find that the landlord incurred a loss of rental income in the amount of $2,500.00 for December 2019 and incurred a loss of rental income in the amount of $250.00 per month from January to July 2020 totalling $1,750.00. Total loss of rental income equals $4,250.00.
.
I find that whether or not the tenant provided one full month's notice to end the tenancy is irrelevant as this was a fixed term tenancy, not a month to month tenancy. The tenant breached the fixed term tenancy and is therefore responsible for all losses suffered by the landlord as long as the landlord acted reasonably to mitigate the damages suffered by the tenant.

The tenancy agreement states:

> In the event that the Tenant vacates the premises, or the Tenancy Agreement is terminated for cause, prior to the termination of the tenancy agreement period herein, it is agreed that the Tenant will pay the Landlords costs incurred thereby as liquidated damages and not as a penalty, including, but limited to, a re-rental fee of ($1,250.00) and the cost of advertising and credit check. Liquidated damages covers the Landlords costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit.

I find that the liquidated damages paid by the tenant to the landlord were for the costs of re-renting the subject rental property, not for loss of rental income incurred by the landlord.

Based on my above findings, I find that the tenant is required to reimburse the landlord for the loss of rental income suffered from December 2019 to July 2019 in the amount of $4,250.00.

Sofa Damage

Section 67 of the *Act* states:

> Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To be successful in a monetary claim, the tenant must establish all four of the following points:

1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

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

Based on the testimony of both parties and the move in and out condition inspection reports, I find that the tenant's dog damaged the sofa at the subject rental property, contrary to section 37(2)(a) of the *Act.* I find that the landlord suffered a loss from the tenant's breach and has proved the amount of that loss. I find that the landlord mitigated its losses by repairing rather than replacing the sofa. Pursuant to section 67 of the *Act*¸ I find that the landlord is entitled to recover the cost of reupholstering the sofa from the tenant in the amount of $795.20.

The tenant is responsible for damages he or his dog caused at the subject rental property whether or not the move out condition inspection report was provided to him on move out.

Loss of Quiet Enjoyment

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

> (a)reasonable privacy;
>
> (b)freedom from unreasonable disturbance;
>
> (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.

Residential Policy Guideline 6 states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

Based on the emails presented by the parties and the landlord's undisputed testimony, I find that the landlord took reasonable steps to address all the tenant's complaints. I find that the landlord emailed all the tenants of the subject rental building on two occasions to remind all tenants about the no smoking policy, as requested by the tenant in his September 11, 2019 and October 21, 2019 emails. I find that the landlord issued warning letters to the offending tenants after the tenant complained via email on October 4, 2019 and October 24, 2019. I find that the landlord inspected the heaters after the tenant's November 11, 2019 email. Based on the above, I find that the landlord did not breach section 28 of the *Act.* I therefore dismiss the following tenant's claims for loss of quiet enjoyment:

- loss of use of the subject rental property for the last week of November 2019 in the amount of $625.00; and
- loss of quiet enjoyment of the common areas in the amount of $200.00.

I also note that the tenant testified that he moved out of the subject rental property on November 21, 2019 instead of December 1, 2019 because the landlord did not address his heating concerns; however, the tenant's email dated November 20, 2019 states that the tenant left early because of security concerns in the building. I find that the tenant's testimony and the written evidence submitted is incongruous and not credible.

I find that it was the tenant's decision to end the tenancy early. I find that it was the tenant's decision to move out before the effective date of the notice provided. I find that the tenant has not proved, on a balance of probabilities, that a heating issue existed. Based on the above, I dismiss the following of the tenant's claims:

- forced early end to tenancy in the amount of $300.00; and
- moving expenses in the amount of $300.00.

Security Deposit

Section 38 of the *Act* states that 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 find that the landlord made an application for dispute resolution claiming against the security and pet damage deposits pursuant to section 38(a) and 38(b) of the *Act.*

Section 36(2)(c) of the *Act* states unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

The extinguishment provision in section 36(2)(c) of the *Act* applies to claims for damage to the subject rental property, not to claims for damage and loss of rental income. Since

the landlord is claiming loss of rental income in addition to damage to the subject rental property, the extinguishment provision does not apply.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenant's security and pet damage deposits totalling $2,500.00.

Filing fee

As the landlord was successful in its application for dispute resolution, I find that it is entitled to recover the $100.00 filing fee from the tenant, pursuant to section 72 of the *Act.*

As the tenant was not successful in his application for dispute resolution, I find that he is not entitled to recover the $100.00 filing fee from the landlord, pursuant to section 72 of the *Act.*

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	**Amount**
December 2019 loss of rental income	$2,500.00
January to July 2020 loss of rental income	$1,750.00
Sofa reupholster	$795.20
Filing Fee	$100.00
Less security and pet damage deposits	-$2,500.00
TOTAL	**$2,645.20**

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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 09, 2020

Residential Tenancy Branch