Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the landlord: MNDL-S, MNDCL, FFL
For the tenant: MNSDS-DR, FFT

Introduction

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

- an order for the landlord to return the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

This hearing also dealt with the landlords' application pursuant to the *Act* for:

- a monetary order for compensation for damage and loss under the Act, the Regulation or tenancy agreement pursuant to section 67 of the Act;
- authorization to retain the tenants' security deposit under Section 38 of the Act; and
- authorization to recover the filing fee for this application, pursuant to section 72.

Tenant SP (the tenant) and landlord AE (the landlord) attended. The landlord was assisted by lawyer MB. Both parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Service of the Application, Interim Decision and the Evidence (the materials)

I accept the tenant's testimony that the landlords were served with the materials by registered mail on April 02 and April 10, 2020. The landlord affirmed he received the materials. I find the landlords were served the tenants' materials in accordance with section 89 of the Act.

I accept the landlord's testimony that the tenants were served with the landlords' materials by registered mail on May 05, 2020 (the tracking numbers are on the cover page of this decision). The landlord affirmed both packages were mailed to the

forwarding address provided by the tenants on December 23, 2019 which is the same address recorded on the tenants' dispute resolution application.

The tenant affirmed he did not receive any package and that he moved out of his forwarding address in the beginning of May 2020. The tenant affirmed he did not update his mailing address at the Residential Tenancy Branch.

I find the landlord served their materials in accordance with Section 89(1)(c) of the Act.

Section 90 of the Act provides that a document served in accordance with Section 89 of the Act is deemed to be received if given or served by mail, on the 5th day after it is mailed. Given the evidence of registered mail I find the tenants are deemed to have received the landlords' materials on May 10, 2020.

Preliminary issue – Amendment of the Dispute Address

The parties amended the application to change the tenancy address (the updated address is reproduced on the cover of this decision). Section 64(3)(c) of the *Act* allows me to amend the application to update the tenancy address, which I have done.

Issues to be Decided

Are the tenants entitled to:

1. an order for the landlords to return double the security deposit?
2. an authorization to recover the filing fee for this application?

Are the landlords entitled to:

1. retain the security deposit and receive a monetary award for compensation for damages caused by the tenants?
2. an authorization to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submissions and arguments are reproduced here. The relevant and important aspects of the claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is their obligation to present the evidence to substantiate their applications.

Both parties agreed the fixed-term tenancy started on September 01, 2019 and was supposed to end on August 31, 2020. Monthly rent was $1,950.00, due on the first day of the month. At the outset of the tenancy the landlords collected a security deposit of $975.00 and still hold it in trust. The tenant affirmed the tenancy ended on November 28, 2019 and the landlord affirmed the tenancy ended on December 01, 2019. A tenancy agreement was submitted into evidence.

The tenant affirmed he viewed the rental unit in August 2019 and he did not enter the second bedroom (the bedroom) because he was late for another appointment. The rental unit was advertised as a two-bedroom and the tenant assumed the bedroom would have a window.

The landlord affirmed the tenant viewed the rental unit on August 06, 2019 and entered the bedroom. The landlord submitted into evidence an e-mail received form the tenant on August 10, 2019:

> It was a pleasure viewing your place yesterday. I believe we would like to move forward with your suite, though I do have a few more viewings today
> […]
> Please keep me in the loupe (SIC).

On September 10, 2019 the tenant contacted the landlord and informed: “I just wanted to say thank you for renting us your suite, it has been an excellent experience so far.”

The tenant affirmed he only learned the bedroom does not have a window when he moved in. The tenant submitted a written notice for failure to comply with a material term to the landlord on October 31, 2019. It states:

> [tenancy address] was advertised as a two-bedroom secondary suite. One of the two rooms in fails to meet the B.C. building code requirements as the bedroom does not have windows of any sorts. The BC building code 2018 states that every bedroom needs an egress window no smaller than 0.35 meters squared or to have a sprinkler system.

On October 31, 2019 the tenant served the landlord a notice to end tenancy:

> To our landlords,
> I am writing you today with regards to our tenancy and suite. While we have appreciated your kindness and cooperation during our stay, we feel as we must break our lease due to the following reasons:

> The nature of the suite is not up to building code as per the BC building code, please see the attached document. In short, the lack of a window has negatively affected the health of the dweller of the bedroom due to the lack of ventilation. These negative effects include allergy exacerbations and difficulty sleeping. We have put a considerable amount of effort into making the room more ventilated with our own funds through the purchase of air filters and fans but still find the room inhabitable. Furthermore, we feel it to be a safety concern due to having no secondary fire escape. We understand that this will cause you an inconvenience and will be willing to work with you. We intend to move out at the end of November. As the suite was not habitable as a two bedroom, which it was advertised as, we will be requesting our damage deposit back in full. Please do not hesitate to contact us with any questions.

The landlord replied on November 10, 2019:

> To my Tenants,
> I am surprised by your email in the sense where you have visited the suite and expressed your liking of it before you signed the contract.
> In any case, I don't see any problem with it. I am sorry to see you breaking your leave and leaving before December 1st, 2019.
> I will ask you to deliver the suite in the same state that it was given to you in September 2019: clean carpets, walls, blinds, functional furnitures and appliances.
> I also inform you that new potential tenants will be visiting the apartment starting this week. Therefore, I would kindly ask you to let me know what times you will be absent in order to program and conduct
> the visits.

The tenant affirmed it is inappropriate that the bedroom does not have a window and this is not in accordance with the British Columbia Construction Code (the BC Code). The ventilation in the bedroom was very poor. The tenant purchased an air purifier and could only sleep with the bedroom's door opened.

The landlord affirmed the rental unit is in accordance with the BC Code and there are two entries to the rental unit (the main entrance and the fire exit). The bedroom's ventilation is proper, as there is a timed fan that circulates the air. The landlord pays taxes for the rental unit every year. The landlord affirmed the tenant did not give written notice of the issue to allow the landlord to correct it within a reasonable time, in accordance with section 45(3) of the Act.

The landlord affirmed the tenants must be responsible for the consequences of breaking the tenancy agreement. The e-mail sent on November 10, 2019 does not mention the landlord will not ask for the losses related to breaking the tenancy agreement.

The tenant affirmed when he vacated he left a hand-written notice asking for a move-out inspection (submitted into evidence). The landlord was out of town during the entire tenancy and his wife did not communicate with the tenant. The landlord only communicated via e-mail, and he usually replied within one week. The tenant informed the landlord in an e-mail sent on November 26, 2019 that he would like to do a move-out inspection on November 28, 2019. The landlord replied the same day affirming: "The check out inspection will take place after you move out all your stuff and deliver the apartment. So, when do you expect to deliver the suite?".

On November 28, 2019 the tenant wrote to the landlord:

> Like I outlined in this prior email, we will have the place spotless and clean, and back to the way it was before we moved in tonight. We'd like to do a walkthrough with here at 730pm this evening. I hope she is around this evening too accommodate this.

The landlord replied on November 29, 2019:

> As I said in my last email,
> the check out inspection will take place after you move out all your stuff and deliver the apartment.
> So, when you expect to deliver the suite?
> Sincerely
> The Landlord

The tenant did not reply to the above-mentioned email.

The tenant affirmed the rental unit was very clean and the faucet was not broken when he moved-out. Photographs were submitted into evidence.

The tenant submitted a condition inspection report (the form). It indicates a move-in inspection on September 01, 2019 only signed by the tenant. The condition at the beginning of tenancy column is only partially completed, as only four items have comments. All the remaining items listed in the form are blank.

The landlord submitted the same form with the move-out inspection section also completed. The landlord affirmed the condition at the end of the tenancy for most items was dirty and that the faucet was broken. The landlord affirmed the rental unit's carpet was about four years old and the rental unit was eight years old when the tenancy began.

Both parties affirmed they tried to schedule a move-out inspection at least twice and a mutual move-out inspection did not happen.

Both parties agreed the tenants' forwarding address was provided on December 23, 2019. The tenants did not authorize the landlords to retain any portion of their security deposit and the landlord applied for dispute resolution on May 02, 2020.

On December 23, 2019 the landlord sent a letter by registered mail to the tenants (submitted into evidence) informing he will retain the security deposit because the tenants caused damage to the rental unit and that the tenants are liable for the loss of rental income the landlord suffered. The tracking number for the two letters are on the cover page of this decision.

The landlord advertised the rental unit since early November on Facebook marketplace and Craigslist. In December the landlord reduced the asking price by $50.00 and was able to re-rent the rental unit for $1,900.00 per month on January 01, 2020.

A monetary order worksheet (RTB form 40) indicating a total amount of $1,950.00 for double the security deposit was submitted by the tenants.

The landlords submitted a monetary order worksheet (RTB form 37) claiming an amount of $2,488.33 after subtracting the security deposit. The landlord is claiming $945.00 for cleaning the rental unit and $168.33 for replacing the broken faucet ($78.75+$89.58). The landlord is also claiming loss of rental income: one month for loss of rent ($1,950.00) and $400.00 because the rental unit was re-rented for $50.00 less and there were eight months left in the fixed-term tenancy.

The landlord submitted into evidence photographs showing uncleaned carpet and wall at the end of the tenancy, the broken faucet, receipts for the cleaning service and the new faucet.

The landlord also affirmed he was out of the country during the tenancy.

Analysis

Sections 7 and 67 of the Act state:

> Liability for not complying with this Act or a tenancy agreement

> 7 (1)If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
> (2)A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.
>
> Director's orders: compensation for damage or loss
> 67 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.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> 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. In order 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.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Return of the Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

Both parties agreed the forwarding address was provided on December 23, 2019 and the landlord only brought an application for dispute resolution on May 02, 2020.

The landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit. This provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit, pursuant to section 38(4)(a) of the Act:

> **38 Return of security deposit and pet damage deposit**
> (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.
> […]
> (4)A landlord may retain an amount from a security deposit or a pet damage deposit if,
> (a)at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
> (b)after the end of the tenancy, the director orders that the landlord may retain the amount.

Residential Tenancy Branch Policy Guideline 17 states:

> Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:
> • if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;

Under these circumstances and in accordance with sections 38(6)(b), I find that the tenants are entitled to a monetary award of $1,950.00 (double the security deposit of $975.00). Over the period of this tenancy, no interest is payable on the landlord's retention of the security deposit.

Cleaning

Section 37(2) of the Act states:

> Leaving the rental unit at the end of a tenancy
> 37(2) When a tenant vacates a rental unit, the tenant must
> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear

Residential Tenancy Branch Policy Guideline 1 states:

> The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set put in the Residential Tenancy Act.

The photographs submitted into evidence by both parties show the rental unit was reasonably clean when the tenancy ended.

Based on the photographs submitted and the landlord's testimony that the carpet was four years old when the tenancy began, I find the tenants returned the rental unit to the landlord in a reasonably clean condition.

As such, I dismiss the landlords' application for a monetary award for cleaning costs.

<u>Broken Faucet</u>
Section 23 of the Act states:

> 23 (1)The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.

Based on the two copies of the form submitted, I find there was no move-in inspection, as the landlord did not sign the move-in inspection form submitted by the tenants.

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. The parties offered conflicting verbal testimony regarding whether or not the faucet was broken when the tenancy ended. I find the landlord failed to prove the faucet's condition at the beginning of the tenancy.

As such, I dismiss the landlords' application for a monetary award for replacing the faucet.

Breach of a material term

Residential Tenancy Branch Policy Guideline 8 defines a material term and sets conditions to end a tenancy because of a breach of a material term. It states:

> A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
> **To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.**
> **The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question**. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.
> **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 agreement2, 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.
>
> **(emphasis added)**

Based on the landlord's testimony and e-mails the tenant sent the landlord on August 10 and September 10, 2019, I find the tenants were aware the bedroom does not have a window and decided to start the tenancy nevertheless.

Furthermore, the written notice for failure to comply with a material term, served by the tenants on the landlord on October 31, 2019, does not set a deadline for the landlord to provide a solution.

As such, I find the tenants did not end the tenancy based on breach of a material term pursuant to section 45(3) of the Act.

Loss of Rental Income

Based on the landlord's undisputed testimony, I find that due to the tenants' failure to pay rent until the end of the fixed term tenancy on August 31, 2020, the landlord incurred a loss of rent income for the month of December 2019 ($1,950.00) and $50.00 per month from January 01, 2020 to August 31, 2020, totalling $2,350.00.

Residential Tenancy Branch Policy Guideline 3 sets conditions for loss of rental income claims. It states:

> If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant while the tenant remains in possession of the premises is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.
>
> **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**. **This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.**

> For example, **a tenant has agreed to rent premises for a fixed term of 12 months at rent of $1000.00 per month abandons the premises in the middle of the second month, not paying rent for that month. The landlord is able to re-rent the premises from the first of the next month but only at $50.00 per month less. The landlord would be able to recover the unpaid rent for the month the premises were abandoned and the $50.00 difference over the remaining 10 months of the original term**. In a month to month tenancy, if the tenancy is ended by the landlord for non-payment of rent, the landlord may recover any loss of rent suffered for the next month as a notice given by the tenant during the month would not end the tenancy until the end of the subsequent month. If a month to month tenancy is ended for cause, even for a fundamental breach, there can be no claim for loss of rent for the subsequent month after the notice is effective, because a notice given by the tenant could have ended the tenancy at the same time.

Further to that, Policy Guideline 5 states:

> When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:
> 1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
> 2. re-rent the unit as soon as possible.
>
> For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November. **Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear**.
>
> If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.
>
> **(emphasis added)**

I find the e-mail the landlord sent the tenants on November 10, 2019 stating: “I also inform you that new potential tenants will be visiting the apartment starting this week.” and the letter dated December 23, 2019 are enough notice from the landlord to the tenants that he intended to ask for loss of rental income.

In accordance with section 67 of the Act, I find the tenants are responsible for the loss of income for December’s rent ($1,950.00) and $400.00 because the rental unit was re-

rented for $50.00 less than the original tenancy and there were eight months left in the fixed-term tenancy.

As such, I order the tenants to pay the landlord $2,350.00 for loss of rental income.

Filing fee and Set-off

As both parties were partially successful with their applications, each party will bear their own filing fee.

The tenants are awarded a monetary award of $1,950.00. The landlords are awarded a monetary award of $2,350.00.

Residential Tenancy Branch Policy Guideline 17 sets guidance for a set-off when there are two monetary awards:

> 1. Where a landlord applies for a monetary order and a tenant applies for a monetary order and both matters are heard together, and where the parties are the same in both applications, the arbitrator will set-off the awards and make a single order for the balance owing to one of the parties. The arbitrator will issue one written decision indicating the amount(s) awarded separately to each party on each claim, and then will indicate the amount of set-off which will appear in the order.
> 2. The Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord.

In summary:

Award for the tenants – double security deposit	$1,950.00
Award for the landlords – loss of rental income	$2,350.00
Final award for the landlords	**$400.00**

Conclusion

Pursuant to section 67 of the Act, I grant the landlords a monetary order in the amount of $**400**.**00**

The landlords are provided with this order in the above terms and the tenant must be served with this order as soon as possible. Should the tenants 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: June 04, 2020

Residential Tenancy Branch