Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT, MNSD, MNDCT**

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- a monetary order for $31,200 representing 12 times the amount of monthly rent, pursuant to sections 51(2) and 62 of the Act;
- a monetary order for $2,500 representing two times the amount of the security deposit, pursuant to sections 38 and 62 of the Act;
- a monetary order for $2,600 representing an amount equal to one months' rent pursuant to section 51(1) and 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 2:22 pm in order to enable the landlord to call into this teleconference hearing scheduled for 1:30 pm. The tenants attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the tenants and I were the only ones who had called into this teleconference.

Tenant BH testified that, on August 14, 2020, he served the landlord with the Notice of Dispute Resolution proceeding package and supporting evidence by registered mail to the address for service listed on the tenancy agreement. BH testified that he sent the landlord a supplemental evidence package by registered mail to the same address on October 18, 2020. Canada Post tracking numbers for both mailings are recorded on the cover of this decision. BH testified that he emailed the landlord (at an email address she used to correspond with the tenants during the tenancy) a copy of the supplemental evidence package on October 18, 2020. He submitted a copy of this email into evidence.

BH also submitted a copy of an email dated December 17, 2019, wherein he asked the landlord to confirm that she still resided at address for service listed on the tenancy agreement (he wanted this confirmation for the purpose of serving a notice to end the tenancy early). He did not receive a response to this email. Less than a month prior, the landlord had communicated with BH from that email address, so I am satisfied that she received BH's request for a new mailing address. As she did not respond to this email, and

as a two-month notice to end tenancy issued on December 5, 2019 listed the landlord's address as the one on the tenancy agreement, I find that the landlord resided at the address listed on the tenancy agreement on December 17, 2019. For reason which I explain in more detail below, I am satisfied that the landlord continues to reside at the address for service listed on the tenancy agreement in August 2020.

Based on the testimony of BH, and the documents submitted into evidence, I am satisfied that the landlord has been served with the required documents in accordance with the sections 89 of the Act. As such, I find that the landlord is deemed served with the Notice of Dispute Resolution proceeding package and supporting evidence on August 19, 2020, and the supplementary evidence package on October 23, 2020, five days after the respective registered mailings, per section 90 of the Act.

I was satisfied that the landlord has, or reasonably ought to have, notice of this hearing, and proceeded with the hearing in her absence.

Preliminary Matter – Jurisdiction

The combined amount of the tenants' monetary claim is $36,300.

Section 58(2) of the Act states:

> **Determining disputes**
>
> 58(2) Except as provided in subsection (4), if the director accepts an application under subsection (1), the director must resolve the dispute under this Part unless
>
> (a) the claim is for an amount that is more than the monetary limit for claims under the *Small Claims Act*,

The monetary limit for claims under the *Small Claims Act* is $35,000.

However, Policy Guideline 27 states:

> If the claim is for compensation under section 51(2) or 51.3 of the RTA, or section 44(2) or 44.1 of the MHPTA, the director will accept jurisdiction if the claim is for an amount over the small claims limit. These claims are not claims for damage or loss and the amount claimed is determined by a formula embedded in the statute. Arbitrators have no authority to alter this amount, and mitigation is not a consideration. They are not usually complex.

One part of the tenants' claim (representing $31,200) relies on section 51(2). As such, Policy Guideline 27 applies and I may accept jurisdiction over this dispute, given that it is the section 51(2) claim that causes the tenants' claim to exceed the small claims limit.

Additionally, I note that the other parts of the tenants' claim are not claims seeking compensation for damage or loss suffered as the result of the landlord's breach of Act. Rather, they are claims determined by formulae in the Act (located at sections 38(6) and 51(1)) over which I have no authority to alter the amount. They are claims that operate as a function of the Act and the tenants are not required to prove any damage or loss suffered; they must only prove that the conditions to apply these sections of the Act are met.

As such, I find that the reasoning set out in Policy Guideline 27 relating to claims made pursuant to section 52(2) of the Act holds true for the tenants' other claims made pursuant to sections 38(6) and 51(1) of the Act.

I find that I have jurisdiction to hear the tenants' application.

Issues to be Decided

Are the tenants entitled to:

1) a monetary order of $36,300; and
2) recover their filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the tenants, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting June 1, 2016. At the time the tenancy ended, monthly rent was $2,600 and was payable on the first of each month. The tenants paid the landlord a security deposit of $1,250, which the landlord continues to hold in trust for the tenants. The tenants vacated the rental unit on December 30, 2019.

BH testified that the landlord indicated to him in November 2019 that she intended to sell the rental unit and arranged to have prospective buyers enter the rental unit. On November 29, 2019, she emailed the tenants:

> Thank you for the early payment [tenant JA]! We really appreciate it!
>
> We found a realtor team at Rennie whom will be in contact with you both as soon as the contract is finalized this week.
>
> P.S. They inquired if it would be possible to relocate a few things such as the cacti on the step to the balcony to allow potential buyers access to the outside patio and whether it would be too much trouble to store some of the

> miscellaneous items on the kitchen island and bathroom counter in the drawers prior to viewings. I apologize if this causes any inconvenience.

BH testified that the tenants had paid the December 2019 rent early via an e-transfer on November 29, 2019, and that this payment (proof of which the tenants submitted into evidence) is what precipitated the landlord's email.

On November 30, 2019, the tenants responded to the landlord's email and that they would keep the rental unit tidy, but that some items could not be stored in drawers.

Later that evening, at 11:52 pm, the landlord responded:

> After much thought and planning, we have decided to ask you for possession of our property as we wish to reside in [redacted] to be close to my daughter's friends, activities and future schooling in [redacted].
>
> Apologies if this may cause you any inconvenience. Please let us know if you require any assistance.

The landlord attached a Two Month Notice to End Tenancy for Landlord's Use (the "**First Two Month Notice**") to this email, on which the landlord indicated the rental unit would be occupied by the landlord or the landlord's close family member.

The tenants responded that the landlord incorrectly completed the notice form and demanded that it be corrected and reissued. The landlord issued a second Two Month notice to End Tenancy (on the same grounds as the first), on December 5, 2020, and listed an effective date of February 29, 2020 (the "**Second Two Month Notice**").

BH testified that the tenants were able to locate a new apartment to move to very quickly and give the landlord notice that they would be ending the tenancy on December 31, 2019, pursuant to section 50 of the Act. He testified he emailed the landlord of the tenant's intention to do this on December 18, 2019 and sought to confirm that the landlord's address for service was still the address listed on the tenancy agreement. A copy of this email was entered into evidence. The landlord did not respond.

BH testified that on December 18, 2019, he drove to the landlord's address for service listed on the tenancy agreement and attempted to serve the landlord with the tenants' written notice personally. He testified that no one answered the door, so he taped the written notice to the front door of the landlord's house. He submitted a photograph of the landlord's house, with the notice taped to the front door clearly visible.

The tenants vacated the rental unit on December 31, 2019.

BH argued that the tenants are entitled to an amount equal to one months' rent per section 51(1) of the Act. BH testified that the landlord never provided the tenants with an

amount equal to one month's rent, nor did the tenants withhold any amount owing to the landlord in lieu of receiving this amount.

On February 24, 2020, BH sent the landlord an email seeking the return of their security deposit and provided her with the tenants' forwarding address.

On July 14, 2020, the tenants provided their forwarding address to the landlord using Form RTB-47. BH testified that he sent it to the landlord via registered mail to the landlord's address for service as listed on the tenancy agreement and to the rental unit (as this was where the landlord indicated she was moving to on the Notice and in her November 30, 2019 email). The tenants provided Canada Post tracking numbers for each of these mailings (reproduced on the cover of this decision) which indicate that each of these mailings were delivered. BH testified that the mailing sent to the rental unit was later returned to the tenants by Canada Post. The tenants submitted the envelope into evidence, which is marked "RTS" and has the landlord's name and the address of the rental unit crossed out.

To date, the landlord has not returned the security deposit or applied to the RTB to keep it.

BH testified that after the tenants vacated the rental unit he discovered that the landlord had listed the rental unit for sale. He provided screenshots dated June 5, 2020 of a realtor's website showing the rental unit for sale, as well as an MLS listing showing that the rental unit was listed for sale on March 24, 2020. He provided a screenshot from ForSaleByOwner.ca dated July 1, 2020 which lists the rental unit for sale, with the landlord listed as the seller.

BH argued that the landlord issued the Notice in bad faith, as she intended to sell the rental unit rather than live in it, and as such, she is subject to a penalty equal to 12 times the monthly rent.

Analysis

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
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> 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.
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> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

As this is tenants' application, they bear the onus to prove it is more likely than not that the landlord has acted (or failed to act) as they have alleged.

I will address each of the three bases for the tenants' claims in turn.

One Months' Rent Compensation

Section 51(1) of the Act states:

> **Tenant's compensation: section 49 notice**
>
> **51**(1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

The tenants received a notice to end tenancy issued pursuant to section 49. As stated above, they moved out prior to the effective date of the Notice. Section 50 of the Act permits them to do this:

> **Tenant may end tenancy early following notice under certain sections**
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> **50**(1) If a landlord gives a tenant notice to end a periodic tenancy under section 49 *[landlord's use of property]* or 49.1 *[landlord's notice: tenant ceases to qualify]*, the tenant may end the tenancy early by
>
> (a) giving the landlord at least 10 days' written notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice, and
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> (b) paying the landlord, on the date the tenant's notice is given, the proportion of the rent due to the effective date of the tenant's notice, unless subsection (2) applies.
>
> (2) If the tenant paid rent before giving a notice under subsection (1), on receiving the tenant's notice, the landlord must refund any rent paid for a period after the effective date of the tenant's notice.
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> (3) A notice under this section does not affect the tenant's right to compensation under section 51 *[tenant's compensation: section 49 notice]*.

I find that the tenants served this notice on the landlord personally on December 18, 2019. The effective date of this notice was December 31, 2019. Based on the documentary evidence provided, I find that the tenants paid December 2019 rent. As the effective date of the tenant's notice was December 31, 2020, sections 50(1)(a) and (2) do not apply. Section 50(3) explicitly states that the tenants' right to compensation under section 51 is not affected if they end their ending the tenancy on 10 days' notice.

As such, I find that the tenants are entitled to receive an amount equal to one months' rent ($2,600) pursuant to section 51(1) of the Act. The landlord did not provide the tenants with this amount. As such, I order that the landlord pay the tenants $2,600.

Return of Security Deposit

Section 38(1) of the Act states:

> **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.

Based on the testimony of the tenants, I find that the tenancy ended on December 31, 2019 and that the tenants provided their forwarding address in writing to the landlord on either February 24, 2020 (by email) or July 14, 2020 (by registered mail). It is not necessary for me to determine if service by email was sufficient, as, given the facts of this particular case, the exact date of the service is not relevant; it matters only that the tenants gave the landlord their forwarding address (which was done by July 14, 2020 at the latest).

I find that the landlord has not returned the security deposit to the tenants within 15 days of receiving the tenants' forwarding address, or at all.

I find that the landlord has not made an application for dispute resolution claiming against the security deposit within 15 days of receiving the tenants' forwarding address, or at all.

Section 38(6) of the Act sets out what is to occur in the event that a landlord fails to return or claim the security deposit within the specified timeframe:

> (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.

The language of section 38(6)(b) is mandatory. As the landlord has failed to comply with section 38(1), I order that she pay the tenants double the amount of the security deposit ($2,500).

Penalty Equal to Twelve Months' Rent

Sections 51(2) and (3) of the Act provide the basis on which the landlord may be required to pay the tenants an amount equal to 12 times the amount of monthly rent:

> **Tenant's compensation: section 49 notice**
>
> **51**(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
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> (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
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> (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
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> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
>
> (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

I note that, contrary to the tenants' arguments, section 51(2) does not require the tenants to prove that the landlord failed to act in good faith when issuing a Two Month Notice to End Tenancy. Rather, they must prove, on a balance of probabilities, that the landlord either: failed to take steps to move into the rental unit within a reasonable period of time following the effective date of the Second Two Month Notice (February 29, 2020); or that the landlord failed to reside in the rental unit for at least six months following a reasonable period of time after the effective date of the Second Two Month Notice.

Based on the uncontroverted testimony of BH and on the emails submitted into evidence, I find that prior to issuing the First Two Month Notice, the landlord intended to sell the rental unit. I rely on the email sent November 29, 2019 in which she indicates that she has found a realtor to sell the rental unit.

However, as stated above, this intention is not sufficient to make an award under section 51(2) of the Act. We must look to what occurred after February 29, 2020.

Based on the MLS listing submitted into evidence, I find that the landlord listed the rental unit for sale on March 24, 2020. Based on the ForSaleByOwner.ca screenshot, I find that the landlord continued to list the rental unit for sale until at least July 1, 2020. However, just because the rental unit is listed for sale does not mean that the landlord has failed to use the rental unit for the purpose stated on the Second Two Month Notice (that is, to occupy it). It may be that the landlord moved into the rental unit herself while listing it for sale.

I note that Policy Guideline 2A, citing the BC Supreme Court in *Schuld v Niu*, 2019 BCSC 949, states that "'occupy' means 'to occupy for a residential purpose'", so, in order to be considered to have used the rental unit for the stated purpose on the Second Two Month Notice, the landlord would actually have to move into it and take up residence (that is, she could not keep it vacant, re-rent it, or use it for storage).

However, on the balance of probabilities, I do not find that it likely that the landlord occupied the rental unit.

From the landlord's conduct prior to issuing the First Two Month Notice, it is apparent that the landlord intended to sell the rental unit, not live in it. It is only after the tenant refused to comply with all of the requests the landlord made regarding cleaning the rental unit for showings that the landlord indicated that she intended to move into the rental unit, rather than sell it. I find it is unlikely that she would have changed her mind with regards to the disposition of the rental unit within a 24-hour time period, especially since she had just secured a realtor (as stated in her November 29, 2019 email). I find is more likely that she issued the First Two Month Notice as a pretext to remove the tenants in order to make the rental unit easier to sell (that is, allowing the rental unit to be presented in a pristine condition to sellers).

Again, this conduct is not determinative on the issue of whether the tenants are entitled to compensation under section 51(2) of the Act. Rather, is serves as context through which we can understand what occurred after the effective date of the Second Two Month Notice.

I find that it is more likely than not that the rental unit remained vacant after the tenants' departure. If the landlord moved into the rental unit following the tenants' departure, it would have defeated the most probable purpose of issuing the First Two Month Notice, as the rental unit would have become cluttered with the landlord's possessions, rather than the tenants'.

Additionally, on July 14, 2020, the tenants sent registered mail to the rental unit addressed to the landlord, and it was returned to them with the landlord's name crossed

out and marked RTS (which is a common abbreviation for “Return to Sender”). Such markings on the envelope are common practice when mail is delivered to an address where the addressee does not reside.

I cannot say who marked the envelope RTS. It may have been a new occupant of the rental unit, the landlord’s realtor, or an employee of Canada Post. However, I find that it was most likely not the landlord (as, if she lived at the rental unit, there would have been no reason to mark the letter RTS).

As such, I find that, as of July 19, 2020, the landlord did not reside at the rental unit. This is less than six months after the effective date of the Second Two Month Notice (February 29, 2020). As such, I find that the tenants have satisfied the requirement of section 51(2)(b) of the Act. Accordingly, the landlord must pay the tenants $31,200, an amount equal to 12 times the monthly rent ($2,600 x 12).

I note that there is no basis in the evidentiary record upon which I might have found that extenuating circumstances existed which might excuse the landlord’s failure to occupy the rental unit, per section 51(3) of the Act. The landlord did not attend the hearing, and as such, did not provide any evidence on the matter, and nothing in the tenants’ evidence supports such a finding.

Pursuant to section 72(1) of the Act, as the tenants have been successful in the application, they may recover their filing fee from the landlord.

Conclusion

Pursuant to sections 62 and 72 of the Act, I order that the landlord pay the tenants $36,300, representing the following:

Double the Security Deposit (s. 38(6))	$2,500.00
One Months' Rent (s. 51(1))	$2,600.00
Twelve Months' Rent (s. 51(2))	$31,200.00
Filing Fee (s. 72(1))	$100.00
Total	**$36,400.00**

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: December 11, 2020

Residential Tenancy Branch