Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFL, MNDL-S**

Introduction

This hearing originally convened on August 26, 2021 and was adjourned to December 20, 2021. This Decision should be read in conjunction with the August 26, 2021 Interim Decision. This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for damage, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

Both parties attended both hearings and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord's daughter attended the hearing to assist the landlord and translate when necessary.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this Decision.

Both parties confirmed that they received and were able to view the other's evidence. I find that both parties were sufficiently served for the purposes of this *Act,* with the other's evidence, pursuant to section 71 of the *Act.*

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for damage, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
3. Is the landlord entitled to recover the filing fee from the tenants, 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 tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on July 1, 2011 and ended on March 15, 2021. Monthly rent in the amount of $3,465.00 was payable on the first day of each month. A security deposit of $1,200.00 was paid by the tenants to the landlord. This was a month-to-month tenancy. The landlord applied for authorization to retain the tenants' security deposit on March 29, 2021.

The tenants testified that they believed they provided the landlord with their forwarding address in the third week of March 2021. The landlord testified he received the tenants' written forwarding address in the first week of March 2021.

The landlord testified that he believes he completed a move in condition inspection report at the start of this tenancy. The landlord did not enter into evidence a move in condition inspection report. The tenants testified that the landlord did not ask them to complete a move in condition inspection report at the start of this tenancy and a move in condition inspection report was not completed.

Both parties agree that the tenants asked the landlord to complete a move out condition inspection report and that the landlord refused to complete one. A move out condition inspection report was not completed.

The landlord is seeking the following damages from the tenants:

Item	**Amount**
½ months' rent	$1,732.50
Damage to fireplace	$1,500.00
Five sets of curtain strings	$600.00
Disposal of dismantled shed and lumber	$500.00
Clean stove	$100.00
Clean bathtub	$75.00
Paint kit	$50.00
Filing fee	$100.00
Total	**$4,657.50**

½ Months' rent

Both parties agree that the tenants provided the landlord with written notice to end tenancy on February 26, 2021 in the landlord's mailbox. The notice to end tenancy was entered into evidence and states:

> We are writing to let you know that we are moving out of [the subject rental property].
>
> [Tenant M.S.] has been having some health issues and recently got a test done and found that the mold levels in her body are extremely high. As we have discussed with you many times over the years, there have been issues in the house with water leaking. We have shown you the water damage in both the bedroom and the bathroom downstairs many times throughout the years and the leak has only finally been (hopefully) resolved. Because this issue was not properly taken take care of, we believe the mold levels in the house are very high. Now that [tenant M.S.] has paid to have this test done, we are able to see the true effects of it on our health and it will also be a very large expense to replace items that have been damaged because of the mold. Because of this we do not feel comfortable living in the house any longer than necessary and so we would like to move out on March 15th.

> We have included a copy of the test for you to see, as well as a cheque for rent for the first 2 weeks of March. We have also included a form for you to sign to agree we will be moving out on March 15. We would be happy to come by to pick up the second copy for our records. You can call [tenant B.S.] to confirm that you have received this letter.
>
> Thank you for letting us live in your house for the past 10 years and we will be sad to go.

The tenants testified that prior to giving the landlord their notice to end tenancy they did not provide the landlord with a letter that stated that if the landlord did not correct the mold issues by a certain date, the tenants would end their tenancy. The tenants testified that they made numerous requests for the landlord to correct the mold issues, but the landlord never did so they did not believe that anything would change. The tenants testified that they moved out without providing one month's notice because tenant M.S. received laboratory results showing high levels of ochratoxin A, laboratory results showing same were entered into evidence. The tenants testified that ochratoxin A comes from mold. The tenants testified that the mold in the subject rental property was making them sick.

Both parties agree that the tenants paid ½ of March 2021's rent. The landlord testified that he is seeking ½ month's rent because the tenants provided less than one month's notice to end tenancy.

Damage to fireplace

The landlord testified that at the start of the tenancy the upstairs fireplace had a marble slab below the fireplace and that the tenants removed and destroyed it. The landlord entered into evidence a photograph showing the fireplace and three chunks of marble placed on top of the fireplace tilework. The landlord testified that he found pieces of the marble in the tenants' kitchen.

The tenants testified that the upstairs fireplace never had a marble slab laid over the tiles. The tenants testified that the piece of marble the landlord found had nothing to do with the fireplace. The tenants entered into evidence a photograph of the fireplace which they testified was taken in 2012. No marble can be seen on top of the tile work.

The landlord testified that he estimates the marble will cost $1,500.00 to repair. No receipts or estimates for this work were entered into evidence.

Five sets of curtain strings

The landlord testified that the tenants damaged five sets of curtain strings at the subject rental property, and he estimated it would cost $600.00 to replace the curtain strings. Both parties agree that the curtains and curtain strings were 40 years old at the start of this tenancy and 50 years old at the end of this tenancy. The landlord testified that while the curtain strings were old, they were in top condition at the start of this tenancy. No receipts or estimates were entered into evidence.

The tenants testified that the curtains were old and in poor condition at the start of this tenancy and so they took most of the curtains down for the duration of this tenancy and re-installed them at the end of this tenancy. The tenants testified that they did not damage the curtain stings.

Disposal of dismantled shed and lumber

The landlord testified that the tenants erected a shed at the subject rental property and were supposed to take it down when they left. The landlord testified that the tenants left pieces of wood from the shed at the subject rental property. The landlord testified that he estimates that it will cost $500.00 to remove the wood. No receipts or estimates were entered into evidence. The landlord testified that the wood is still where the tenants left it.

The tenants testified that they removed the shed at the end of the tenancy. The tenants entered into evidence a video of an intact shed being driven away from the subject rental property in the back of a pickup truck. The tenants testified that there was plywood lined up against the bushes at the start of this tenancy and they left it at the end of this tenancy. The tenant testified that it was possible a couple pieces of lumber were left but this would not cost $500.00 to remove. Both parties entered into evidence photographs of plywood leaned up against hedges. No lumber can be seen in the photographs.

Clean stove

The landlord testified that the tenants did not clean the downstairs stove. The tenants testified they cleaned the downstairs stove. No photographs of the stove were entered into evidence. The landlord testified that he is seeking $100.00 for cleaning the stove. The landlord testified that the stove was not cleaned before new tenants moved in.

Clean bathtub

The landlord testified that the tenants did not clean the upstairs bathtub. The tenants testified that they cleaned the upstairs bathtub. The landlord entered into evidence photographs of the bathtub in which black can be seen around the tub where caulking usually goes. The landlord testified that he is seeking $75.00 for cleaning the bathtub. The tenants testified that the landlord's photographs were taken after the grout/caulking was removed. This was disputed by the landlord. The landlord testified that he hired his grandson to clean the bathtub and paid him more than $75.00 because his grandson did more things for him. The landlord did not provide a breakdown of how long his grandson spent cleaning the bathtub or what amount in total his grandson was paid for what work.

Paint kit

Both parties agree that during the tenancy the landlord provided the tenants with a paint kit which included a paint roller, paint brush and paint tray. Both parties agree that at the end of the tenancy the landlord found a paint kit in the garbage covered in dried up paint. The tenants testified that the paint kit found by the landlord was an old one of theirs and that they accidentally took the landlord's paint kit with them. The tenants testified that when they realized their error, they offered to return the paint kit to the landlord, but the landlord refused to accept it. The landlord testified that he did not believe the tenants and that they threw his paint kit away. The landlord testified that he is seeking $50.00 for a new paint kit. No receipts or estimates were entered into evidence.

Analysis

½ Months' rent

Section 45 of the *Act* sets out when and how a tenant may end a tenancy. Section 45(1) of the *Act* states that a tenant may end a periodic 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, and
>
> (b)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(1) of the *Act*, the earliest date the tenants could have legally ended their tenancy was March 31, 2021

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.

The tenants testified that they did not give the landlord a letter requesting repair be made by a certain date and if those repairs were not made the tenants would end the tenancy early. I find that the tenants did not provide the landlord with a breach letter

meeting the requriements of Residential Tenancy Policy Guideline 8 and were therefore not permitted to end the tenancy earlier than March 31, 2021.

Residential Tenancy Policy Guideline #5 explains that, where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the *Act*, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect.

Residential Tenancy Policy Guideline # 3 states:

> 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, contrary to section 45 of the *Act,* less than one month's written notice was provided to the landlord to end the tenancy. The earliest date the tenants were permitted to end the tenancy was March 31, 2021. I therefore find that the tenants owe the landlord $1,732.50 in unpaid rent from March 15-31, 2021.

<u>All other damages</u>

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 applicant 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.

Failure to prove one of the above points means the claim fails.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that 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.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

The landlord did not provide any estimates, receipts or other proof of the amount of or value of the alleged damages or losses for the following claims:

- Damage to fireplace,
- Five sets of curtain strings,
- Disposal of dismantled shed and lumber,
- Clean stove,
- Clean bathtub, and
- Paint kit.

Pursuant to Policy Guideline #16, I find that the landlord's above claims fail because the landlord failed to prove the value of the alleged losses. The above claims are therefore dismissed without leave to reapply.

Security Deposit

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenants. When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy.

Section 36(2) of the *Act* states that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not offer the tenant two opportunities to complete the

condition inspection. Pursuant to section 17 of the *Residential Tenancy Act Regulations* (the "Regulations"), the second opportunity must be in writing.

The landlord admitted that he did not ask the tenants to complete a move out condition inspection report and that no move out condition inspection report was completed. Responsibility for completing the move out inspection report rests with the landlord. I find that the landlord did not complete the condition inspection and inspection report in accordance with the Regulations, contrary to sections 35 of the *Act.*

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-out inspection and inspection report, I find that the landlord's eligibility to claim against the security deposit for **damage** arising out of the tenancy is extinguished.

I find that the landlord was sufficiently served, for the purposes of this *Act*, pursuant to section 71 of the *Act,* with the tenants' forwarding address in the first week of March 2021 because the landlord confirmed receipt in that week.

Section 38 of the Act requires the landlord to either return the tenants' security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenants' provision of a forwarding address in writing. If that does not occur, the landlords are required to pay a monetary award, pursuant to section 38(6)(b) of the Act, equivalent to double the value of the security deposit.

Section C(3) of Policy Guideline 17 states that unless the tenants have 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 claimed against the deposit for **damage** to the rental unit and the landlord's right to make such a claim has been extinguished under the Act.

In this case, while the landlord made an application to retain the tenants' security deposit within 15 days of the end of this tenancy, he is not entitled to claim against it for **damage** to the property due to the extinguishment provisions in section 36 of the *Act.* However, the extinguishment provisions only apply to claims for **damage**, not for unpaid rent. I find that the landlord was entitled to hold the tenants' security deposit until the outcome of this decision as part of the landlord's claim is for unpaid rent. The tenants are therefore not entitled receive double their security deposit.

Section 72(2) of the *Act* states that if the director orders a party to a dispute resolution proceeding to pay any amount to the other, the amount may be deducted in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit due to the tenant. This provision applies even though the landlord's right to claim from the security deposit has been extinguished under section 36 of the *Act*. Pursuant to section 72(2) of the *Act*, I find that the landlord is entitled to retain the tenants' security deposit in the amount of $1,200.00.

As the landlord was successful in this application, I find that the landlord is entitled to recover the $100.00 filing fee from the tenants, pursuant to section 72 of the *Act.*

Conclusion

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

Item	**Amount**
Unpaid rent	$1,732.50
Filing fee	$100.00
Less security deposit	-$1,200.00
TOTAL	**$632.50**

The landlord is provided with this Order in the above terms and the tenants 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: December 20, 2021

Residential Tenancy Branch