Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD, MNDCT, FFT

Introduction:

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenants in which the Tenants applied for a monetary Order for money owed or compensation for damage or loss, for the return of double the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

The Tenants and the Landlord agree that the Dispute Resolution Package and the Amended Application for Dispute Resolution was served to the Landlord by registered mail in April of 2021.

On October 06, 2021 the Landlord submitted evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was personally served to the Advocate for the Tenant, although he does not recall the date of service. The Advocate for the Tenant acknowledged receiving this evidence on October 08, 2021 and it was accepted as evidence for these proceedings.

On January 19, 2022 the Tenant submitted evidence to the Residential Tenancy Branch. The Advocate for the Tenant stated that this evidence was served to the Landlord, via registered mail, on January 19, 2022. The Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On January 30, 2022 the Landlord submitted additional evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was personally served to the Advocate for the Tenant on February 02, 2022. The Advocate for the Tenant acknowledged receiving this evidence on February 03, 2022 and it was accepted as evidence for these proceedings.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant, with the exception of Interpreter, affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

The participants were advised that the Residential Tenancy Branch Rules of Procedure prohibit private recording of these proceedings. Each participant, with the exception of Interpreter, affirmed that they would speak the truth, affirmed they would not record any portion of these proceedings.

The Interpreter was given the opportunity to translate for the Tenant when necessary, although the Tenant was able to understand some parts of the proceeding without the assistance of the Interpreter.

Issue(s) to be Decided:

Are the Tenants entitled to the return of the security deposit?
Are the Tenants entitled to compensation for agreeing to end the tenancy?

Background and Evidence:

The Landlord and Tenants agree that:

- The tenancy began on September 01, 2018;
- A security deposit of $700.00 was paid;
- A condition inspection report was not completed at the start or end of the tenancy;
- At the end of the tenancy the Tenants were required to pay rent of $1,395.00 by the first day of each month;
- The parties signed a Mutual Agreement to End Tenancy, which declared the tenancy would end on June 30, 2021;
- The Landlord agreed to pay the Tenants a $4,000.00 “settlement payment” in compensation for signing the Mutual Agreement to End the Tenancy;
- The rental unit was vacated on March 31, 2021;
- The Landlord did not file an Application for Dispute Resolution claiming against the security deposit;
- On May 12, 2021 the Landlord paid $2,849.58 to the Tenants;
- A document dated May 12, 2021 relating to the payment of $2,849.58 was submitted in evidence;
- On July 28, 2021 the Landlord paid $950.00 to the Tenants;

- An email dated July 28, 2021 in which the Landlord explains why he made the payment of $950.00 was submitted in evidence; and
- On June 29, 2021 the Landlord paid another $31.59 to the Tenants.

The Advocate for the Tenant stated that a forwarding address was mailed to the Landlord on May 04, 2021. The Landlord acknowledged receiving the forwarding address, although he does not recall the date it was received.

The Landlord stated that he withheld $1,395.00 from the settlement payment of $4,000.00. He stated that he withheld this amount because he lost revenue for the month of April of 2021 which he would have received if the Tenants remained in the rental unit in April of 2021.

The Landlord and the Tenants agree that on March 28, 2021 the Tenants informed the Landlord, via email, that they would be vacating the rental unit on March 31, 2021. The Landlord contends that this is improper notice and that the Tenants should be obligated to pay rent for April of 2021 due to the improper notice.

The Tenants submit that the Tenants are not obligated to pay rent for April of 2021 because the Landlord made it clear, in verbal and email communications, that the Tenants could vacate prior to the mutually agreed end date of June 30, 2021 without providing proper notice. The Landlord agrees that he told the Tenants they could vacate prior to June 30, 2021 but he stated that he did not tell them they could end the tenancy without providing the requisite one month notice to end the tenancy.

The Tenants submit that section 45 of the *Act* (the requirement for a tenant to give notice to end a tenancy), does not apply if the parties have entered into a mutual agreement to end the tenancy. The Tenants submit that the Landlord should have informed the Tenants that they were required to provide one month notice to end the tenancy if the Tenants wished to end the tenancy prior to the date on the Mutual Agreement to End Tenancy.

The Tenants submit that if the Landlord intended to charge the Tenants rent if they ended the tenancy prior to the date on the Mutual Agreement to End Tenancy, the Landlord should have specified that in the settlement agreement.

The Landlord submits that the Tenant was aware that they were required to provide one month notice to end the tenancy if the Tenants wished to end the tenancy prior to the date on the Mutual Agreement to End Tenancy. He refers to the email dated February

10, 2021 in which the Tenant writes, in part, " it is okay to interpret that if I decide to move, I usually notify you a month in advance and the rent for the last month is exempt?".

The Advocate for the Landlord submits that the Landlord should have replied to the email of February 10, 2021 by confirming that one month's notice to end the tenancy was required.

The Landlord submits that it was not necessary to confirm that one month's notice to end the tenancy was required, as it was evident from the email that the Tenant was aware notice was required. He stated that he corrected the Tenant's misunderstanding that the Tenant would get one month's free rent if the rental unit was vacated early.

The Landlord and the Tenants agree that the Tenants were required to pay 50% of the gas and electricity bills incurred during the tenancy.

In the letter of May 12, 2021, the Landlord declared that he was withholding an additional $55.42 for gas for the period up to April 12, 2021 and $400.00 for utilities that will be due up to the end of April of 2021.

The Tenants submit that the Tenants should not be required to pay any utility charges for any period after March 31, 2021, as they were no longer living in the rental unit. The Tenants agree that they owe $35.27 for gas and $40.42 for electricity for the period ending March 31, 2021.

The Landlord submits that they should be required to pay 50% of the charges for April even if they were still living in the rental unit.

Analysis:

On the basis of the undisputed evidence, I find that during the latter portion of this tenancy the Tenants were required to pay monthly rent of $1,395.00 by the first day of each month and that they paid a security deposit of $700.00 at the start of the tenancy.

Section 44(1)(a) of the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act.* The evidence shows that neither party gave proper notice to end this tenancy in accordance with these sections and I therefore find that the

tenancy did not end pursuant to section 44(1)(a) of the *Act.*

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. As there is no evidence that this was a fixed term tenancy, I find that the tenancy did not end pursuant to section 44(1)(b) of the *Act.*

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. On the basis of the undisputed testimony and the Mutual Agreement to End Tenancy that was accepted as evidence for these proceedings, I find that the parties mutually agreed, in writing, to end the tenancy on June 30, 2021. As the rental unit was vacated prior to June 30, 2021, however, I find that this tenancy did not end pursuant to section 44(1)(c) of the *Act.*

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. On the basis of the undisputed evidence, I find that the rental unit was vacated on March 31, 2021 and that this tenancy ended on that date, pursuant to section 44(1)(d) of the *Act*.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. As there is no evidence that this tenancy agreement was frustrated, I find that the tenancy did not end pursuant to section 44(1)(e) of the *Act.*

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act.*

Although the Landlord and the Tenant entered into a mutual agreement to end the tenancy, effective June 30, 2021, I find that either party retained the right to end the tenancy earlier in accordance with the *Act*. For example, the Landlord would have had the right to serve notice to end the tenancy, pursuant to section 46 of the *Act,* if the Tenants had not paid rent when it was due. Conversely, the Tenants had the right to end the tenancy prior to June 30, 2021 by serving notice to end the tenancy in accordance with section 45(1) of the *Act.*

Section 45(1) of the *Act* permits a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month

after the date the landlord receives the notice, and 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.

To end this tenancy on March 31, 2021 in accordance with section 45(1) of the *Act*, the Tenants would have had to provide the Landlord with written notice of their intent to vacate on, or before, February 28, 2021. On the basis of the undisputed evidence, I find that the Tenants did not give the Landlord proper notice to end the tenancy on March 31, 2021, as they did not provide written notice of that intent until March 28, 2021.

On the basis of the undisputed evidence, I find that the Landlord informed the Tenants they could vacate prior to June 30, 2021. I find, however, that there is insufficient evidence to support the Tenants' submission that the Landlord agreed the Tenants could vacate without providing the Landlord with proper notice. In reaching this conclusion I was heavily influenced by the Landlord's testimony that he did not agree to waive the requirement for proper notice if the Tenants wished to the end the tenancy prior to June 30, 2021.

When a tenant asserts that a landlord has waived the requirement to give notice to end the tenancy, the tenant bears the burden of proving this submission. I find that the Tenants have failed to meet this burden.

I have considered the email dated February 10, 2021 in which the Tenant writes, in part, " it is okay to interpret that if I decide to move, I usually notify you a month in advance and the rent for the last month is exempt?". I find that this email establishes that the Tenants understood the Tenants could vacate prior to June 30, 2021 providing they provide the Landlord with one month's notice.

On the basis of the email of February 10, 2021, I find it was reasonable for the Landlord to conclude that the Tenant understood there was a need to give proper notice to end the tenancy and, as such, there was no need for the Landlord to respond to that particular issue. Had the Landlord agreed that the Tenants could vacate the rental unit without providing the requisite notice, I would expect that the Landlord would have replied to that email by informing the Tenants that proper notice was not. As this response was not provided to the Tenants, I find it unreasonable for the Tenants to conclude that proper notice to end the tenancy had been waived.

I respectfully disagree with the Tenants' submission that the Landlord should have informed the Tenants that they were required to provide one month notice to end the tenancy if the Tenants wished to end the tenancy prior to the date on the Mutual Agreement to End Tenancy. In the absence of evidence that the requirement for proper notice to end the tenancy had been waived, I find that the Tenants should have understood they remained obligated to comply with their obligations under the *Act*. I find that to be particularly true when the Tenants appear to understand a particular obligation, such as the need to provide proper notice to end a tenancy.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or file an Application for Dispute Resolution claiming against the deposits.

On the basis of the testimony of the Advocate for the Tenant, I find that the Tenants' forwarding address was mailed to the Landlord on May 04, 2021. As the Landlord does not recall when the forwarding address was received, I find that it is deemed received on May 09, 2021, pursuant to section 90(a) of the *Act*.

As the tenancy ended on March 31, 2021 and the Landlord is deemed to have received the Tenants' forwarding address on May 09, 2021, I find that the Landlord had until May 24, 2021 to comply with section 38(1) of the *Act.*

I find that the Landlord complied with section 38(1) of the *Act* when the Landlord provided the Advocate for the Tenants with a cheque in the amount of $2,859.58 on May 12, 2021.

In the letter of May 12, 2021 that accompanied the above payment, the Landlord acknowledged that he owes $4,000.00 (which relates to an agreement to end the tenancy) plus $700.00 for the return of the security deposit. He then declares that he is withholding $1,850.42 for rent and utilities owed, leaving a balance owed of $2,849.58.

The relevant issue for me to determine, is whether the Landlord withheld $1,850.42 from the security deposit or from the $4,000.00 he agreed to pay the Tenants in regard to the mutual agreement to end the tenancy. On the basis of the Landlord's declaration in the letter of May 12, 2021 that he is "willing to reimburse the full $700.00 damage deposit", I find that the Landlord makes it clear that he returning the security deposit. I therefore find that the payment of $2,849.58 served as a full return of the security

deposit of $700.00 and a partial payment of the $4,000.00 “settlement payment”.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord complied with section 38(1) of the *Act,* I find that the Landlord is not required to pay double the security deposit.

On the basis of the undisputed evidence, I find that the Landlord agreed to pay the Tenants $4,000.00 in exchange for the Tenants signing a Mutual Agreement to End the Tenancy. As the Tenants signed a Mutual Agreement to End the Tenancy, I find that the Landlord is obligated to pay $4,000.00 to the Tenants. I find that the Landlord paid $2,149.58 ($2,849.58 - $700.00 return of the security deposit) towards the $4,000.00 settlement payment on May 12, 2021, leaving a balance of $1,850.42.

On the basis of the undisputed evidence, I find that on July 28, 2021 the Landlord paid $950.00 to the Tenants. I find that this should be applied towards the balance of the $4,000.00 settlement payment ($1,850.42), leaving a balance of $900.42.

In the email dated July 28, 2021, the Landlord explains that $700.00 of the $950.00 payment is for “double payment of the rental deposit”, by which I presume he means the payment required by section 38(6) of the *Act*. As I have concluded that the Landlord is not required to pay double the security deposit pursuant to section 38(6) of the *Act*, I find it reasonable that this payment be applied to the balance of the $4,000.00 settlement payment.

In the email dated July 28, 2021, the Landlord explains that $250.00 of this payment was for $250.00 that he “recently withheld”. I find that this is a reference to the email dated July 22, 2021, in which the Landlord declared that “At this point I will conservatively charge them $200.00 for damages to the walls and $50.00 for garbage removal”.

As I have concluded that the Landlord returned the Tenants’ security deposit on May 12, 2021, I cannot conclude that the Landlord withheld $250.00 from the security deposit on July 22, 2021 when he declared that he was charging the Tenants $250.00 for damage to the walls and garbage removal. A landlord cannot withhold money from a deposit that has already been returned. I therefore find that the email of July 22, 2021 served as a declaration that the Landlord was holding $250.00 from the $4,000.00

settlement payment.

Whether the Landlord is entitled to compensation of $250.00 for damage to the walls and for garbage removal is not an issue to be determined at these proceedings, as that claim is not before me.

I note that in the email of July 28, 2021 the Landlord advises the Advocate for the Tenant that he understands she interpreted the withholding of the $250.00 to be a withholding of $250.00 from the security deposit. By paying double the security deposit, it appears that the Landlord accepted that interpretation. Regardless of the interpretation of the parties, I find that double the security deposit is not required.

I find that it would be reasonable for the Landlord to withhold the remaining $900.42 due from the $4,000.00 settlement payment if rent was outstanding. It would be nonsensical to conclude that the Landlord must comply with his obligation to pay the full settlement if the Tenants neglected their obligation to pay all the rent that is due. I must, therefore, determine if rent was outstanding at the end of the tenancy.

As has been previously stated, I find that this tenancy ended on March 31, 2021 pursuant to section 44(1)(d) of the *Act*. As the tenancy had ended on March 31, 2021 and rent for April was not due until April 01, 2021, I find that the Tenants were not obligated to pay rent pursuant to section 26 of the *Act*. As rent was not due for April of 2021, I cannot conclude that it was reasonable for the Landlord to withhold the remaining $900.42 due from the $4,000.00 settlement payment.

I respectfully disagree with the Tenants' submission that if the Landlord intended to charge the Tenants rent if they ended the tenancy prior to the date on the Mutual Agreement to End Tenancy, the Landlord should have specified that in the settlement agreement. The agreement was clearly that the Landlord would pay the Tenants $4,000.00 in exchange for the Tenants signing a Mutual Agreement to End the Tenancy, which the Tenants did.

In the event the Landlord and/or Tenant agreed to waive any of the other rights and obligations provided to the parties by the legislation, I would expect that to be clearly outlined in a settlement agreement. In the absence of such waivers, I find that both parties should have understood there were obligated to comply with the legislation and the terms of the tenancy agreement, including the obligation to pay rent when it was due.

Paying rent when it is due is, in my view, significantly different that compensation for lost revenue that may arise when a tenant does not give proper notice to end a tenancy. It appears to me that the Landlord actually withheld part of the settlement payment because he believed he was entitled to lost revenue for April of 2021.

Although the Landlord may be entitled to lost revenue because of improper notice to end the tenancy, that is not an issue before me and it is, therefore, not something I can determine at these proceedings. In the event the Landlord believes he is entitled to compensation for lost revenue for April of 2021, the Landlord has the right to file an Application for Dispute Resolution seeking such compensation.

Whether a Landlord has the right to compensation for lost revenue is something that must be decided by a Residential Tenancy Branch Arbitrator. As that is an issue to be decided by an Arbitrator, I cannot conclude that the Landlord had the right to withhold the remaining $900.42 due from the $4,000.00 settlement payment in compensation for lost revenue.

In the event the Landlord files an Application for Dispute Resolution and is awarded compensation for lost revenue, any monetary Order granted to the Landlord as a result of those proceedings would likely be offset against any monetary Order granted to the Tenants as a result of these proceedings. That would be determined when, and if, those Orders are enforced by the Province of British Columbia Small Claims Court.

On the basis of the undisputed evidence, I find that the Tenants agreed to pay for 50% of the gas and electric bills incurred during the tenancy.

As the Tenants agree that they owe $35.27 for gas and $40.42 for electricity for the period ending March 31, 2021, I find it reasonable that these amounts should be withheld from the remaining $900.42 due from the $4,000.00 settlement payment, leaving a balance due of $824.73.

Although the Landlord may be entitled to compensation for utility charges accrued after March 31, 2021, that is not an issue before me and it is, therefore, not something I can determine at these proceedings. In the event the Landlord believes he is entitled to compensation for any additional utility charges, the Landlord has the right to file an Application for Dispute Resolution seeking such compensation.

As the Tenants agree that the Landlord paid $31.59 toward the $4,000.00 settlement payment on June 29, 2021, I find that the Landlord still owes the Tenants $793.14.

I find that the Tenants' Application for Dispute Resolution has merit and that the Tenants are entitled to recover the fee paid to file this Application.

Conclusion:

The Tenants have established a monetary claim of $893.14, which includes $793.14 towards the settlement payment of $4,000.00 and $100.00 as compensation for the cost of filing this Application for Dispute Resolution, and I am issuing a monetary Order in that amount. In the event the Landlord does not voluntarily comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims 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: February 10, 2022

Residential Tenancy Branch