Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT, RR, PSF, LRE, OLC, FFT**

Introduction

This hearing dealt with an application by the tenants under the *Residential Tenancy Act* (the *Act*) for the following:

- An order to reduce the rent for repairs, services or facilities agreed upon but not provided pursuant to section 65;
- An order requiring the landlord to provide services or facilities required by the tenancy agreement or law pursuant to section 62(3);
- An order to restrict or suspend the landlord's right of entry pursuant to section 70;
- An order requiring the landlord to comply with the Act pursuant to section 62;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

The tenants attended the hearing and were given the opportunity to make submissions as well as present affirmed testimony and written evidence. The hearing process was explained, and an opportunity was given to ask questions about the hearing process.

The landlords did not appear at the hearing.

Both parties are referenced in the singular.

I kept the teleconference line open for 60 minutes to allow the landlord the opportunity to call. The teleconference system indicated only the tenant and I had called into the hearing. I confirmed the correct call-in number and participant code for the landlord had been provided.

Preliminary Issue: Service upon Landlord

The tenant provided affirmed testimony that they served the landlord with the Notice of Hearing and Application for Dispute Resolution as directed in an Order of Substituted Service dated July 15, 2022 as follows:

> I order the tenants to provide proof of service of the e-mail which may include a screenshot of the sent item, a reply message from the landlord, or other documentation to confirm the tenants have served the landlord in accordance with this order.
>
> The tenants are granted an order for substituted service. The tenants may serve the landlord the Notice of Dispute Resolution Proceeding, with supporting documents and written evidence, along with a copy of this substituted service decision, to the landlord through KakaoTalk as set out above. I order that documents served in this manner have been sufficiently served to the landlord for the purposes of the Act, three days after the date that the documents are sent by the tenants to the landlord.

The tenant provided a copy of an email which included attachments sent to each landlord on July 20, 2022 and testified to compliance with the Order.

Further to the tenant's testimony and documents, I find the tenant served the landlord as required under the Act.

Preliminary Issue: Joined Applications

The tenant testified they lived in one apartment, the tenancies started at the same time, and each had a similar 1-page tenancy agreement with the landlord. Both tenancies ended for the same reason, that is, the landlord's construction without notice in the apartment making it unliveable.

The tenant testified they believed they could bring one application with respect to both agreements. They requested their application be joined and heard together.

The Rules of Procedure state as follows:

> 2.10 Joining applications
>
> Applications for Dispute Resolution may be joined and heard at the same hearing so that the dispute resolution process will be fair, efficient and consistent. In considering whether to join applications, the Residential Tenancy Branch will consider the following criteria:
>
> > a) whether the applications pertain to the same residential property or residential properties which appear to be managed as one unit;
> > b) whether all applications name the same landlord;
> > c) whether the remedies sought in each application are similar; or
> > d) whether it appears that the arbitrator will have to consider the same facts and make the same or similar findings of fact or law in resolving each application.

The parties stated that both applications related to the same tenancy agreement between them, concerned the same unit and landlord, dealt with the same issues upon the end of the tenancy including a request for the same compensation, and involved the same considerations of fact and law.

Pursuant to Rule 2.10, upon hearing the submissions and reviewing the evidence, I ordered that the two applications be joined and heard at today's hearing to assure a process that was fair, efficient and consistent. As the landlord

has been served with notice of today's hearing, I determine that no further notice to the landlord is required.

The hearing continued.

Preliminary Issue – Amendment

The tenant requested an amendment to their claim to add a request for a return of the security deposit. The tenant testified at the beginning of the tenancy they provided a security deposit of $500.00 each for a total security deposit of $1,000.00 which the landlord holds; they have not provided any written authorization to the landlord to withhold the security deposit.

The tenant claimed a monetary order under section 67 but overlooked requesting a return of the security deposit under section 38. The tenant testified they believed their application included a request for the return of the security deposit. They referenced their submitted documents which include a request for its return. A copy of these documents in which the tenant requested the return of the security deposit were served on the landlord.

Section 64(3)(c) and Rule 4 of the *Rules of Procedure* allow for the amendment of an application at the hearing in circumstances that can reasonably be anticipated; if sought at the hearing, such an amendment need not be submitted or served.

I reviewed the tenant's evidence and documents which clearly state that one of the tenant's claims is for the return of the security deposit. In consideration of the evidence filed and the testimony of the tenant, further to *Act* and *Rules of Procedure*, I find the landlord could reasonably have anticipated that the tenant would claim a monetary order for the return of the security deposit. I find the correction is not prejudicial to either party. I accordingly allow the tenant to amend the application as sought.

Preliminary Issue – Withdrawal of Claims

The tenant stated they vacated the unit on June 24, 2022. Accordingly, they withdrew their claims for all relief except a Monetary Order under sections 67 and 38 and an order for return of the filing fee.

All other claims are dismissed without leave to reapply.

Issue(s) to be Decided

Is the tenant entitled to a Monetary Order and an Order for return of the security deposit?

Is the tenant entitled to an award for return of the filing fee?

Background and Evidence

The tenant provided uncontradicted evidence as the landlord did not attend the hearing.

The tenant testified as follows.

They entered into an agreement with the landlord to rent an apartment. They each signed a 1-page agreement. The tenancy started June 1, 2022. Rent was $2,000.00 ($1,000.00 each) and each provided a security deposit of $500.00 for a total security deposit of $1,000.00.

The 1-page “Rental Agreement” does not comply with the Act and does not clearly set out the rent or security deposit. Various provisions are noncompliant with the Act.

The relationship was fraught with difficulties as, among other things, the landlord entered the unit several times without notice.

On June 24, 2022, the landlord started construction in the unit without notice to the tenant. The tenant stated it was impossible to continue living in the unit because of the chaos, noise and dirt. The landlord moved their personal possessions without their permission. The tenant submitted photographs of a wall which fell, the open and unsecured unit, storage in the unit of construction materials, and a hallway blocked with garbage bags and other items. Pictures included the landlord doing repairs.

The tenant submitted copies of translated texts in which the tenant expressed shock at the disruption and demanded an explanation The landlord said they had to do the work, but it is not clear from the submitted texts if the work was caused by an emergency or if the landlord simply decided to carry out repairs at that time without notice. The landlord did not promise a date when the repairs would be finished and did not offer compensation. The landlord expressed no apologies, explanation or regret.

For these reasons, the tenant immediately moved out when the construction started on June 24, 2022. They had nowhere to stay and struggled to find alternate accommodations.

The tenant requested the return of their security deposit by several texts to the landlord copies of which were submitted.

On July 2, 2022, the tenant requested the amount be transferred and provided their email address and telephone number. They sent the landlord a signed document titled “Return of Security/Pet Damage Deposit”, a copy of which was submitted:

> According to section 38 of the *Residential Tenancy Act*, my security deposit and/or pet damage deposit of $500 is to be returned within 15 days after you have received my forwarding address in writing and my tenancy has officially ended. This amount also includes any interest that has accumulated on the initial deposit. I calculated this amount using the Residential Tenancy Branch's (RTB) Deposit Interest Calculator, which can be accessed at gov.bc.ca/landlordtenant.

The landlord told the tenant they would not return the security deposit.

The tenant responded by email as follows on July 3, 2022, a copy of which was submitted, again requesting the male landlord return the security deposit. They enclosed copied information about the landlord's responsibilities:

> I just talked to [female landlord].. She said she won't give my deposit back until the inspection from the City of Burnaby…. Please return my deposit as soon as possible.

The tenant claimed disturbing and frightening threats, harassment and verbal violence from the landlord as they tried to get their security deposit refunded.

The tenant claimed return of the balance of the rent for June 2022.

The tenant clarified their request for monetary compensation as follows:

ITEM	AMOUNT
Double the security deposit (first tenant)	$1,000.00
Double the security deposit (second tenant)	$1,000.00
Return of 7 days rent (first tenant)	$233.33
Return of 7 days rent (second tenant)	$233.33
Reimbursement of filing fee	$100.00
TOTAL	**$2,566.66**

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide enough evidence to establish **all** of the following four points:

1. The existence of the damage or loss;

2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

In this case, the onus is on the tenant to prove entitlement to a claim for a monetary award. 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.

I will consider the issue of the frustration of the contract first.

Frustration

Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event. This event must have drastically changed the circumstances of the tenancy. As a result, the tenancy agreement as planned cannot be carried out.

Residential Tenancy Act Policy Guideline 34: Frustration provides guidance on when contracts are frustrated and the liabilities of each party thereafter. The Guideline states in part as follows:

> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

> A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

I accept the tenant's credible and undisputed testimony supported by photographs and copies of communication with the landlord that the unit became uninhabitable on June 24, 2022 when the landlord started major repairs without notice.

I find that the tenancy agreement was frustrated on June 24, 2022 as the landlord could not provide habitable conditions to the tenant from that date onward. The tenant acted reasonably in moving out that day and considering the tenancy at an end.

I find the tenant has met all four parts of the above test.

Rent

Based on the testimony and evidence before me, on a balance of probabilities, I find that the tenancy agreement between the landlord and the tenant to be frustrated on June 24, 2022, and as such, the parties to the tenancy agreement are discharged from fulfilling their obligations under the tenancy agreement after that date.

I find these events as credibly described by the tenant drastically changed the circumstances of the tenancy. As a result, the tenancy agreement as planned could not be carried out after this day and to unit was, to all intents and purposes, uninhabitable.

As the contract was frustrated, I find the tenant has met the burden of proof on a balance of probabilities that the tenant is entitled to reimbursement of rent paid from June 24, 2022 to June 30, 2022 in the amount claimed of $466.66 ($233.33 x 2).

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.

If that does not occur, 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. However, this provision does not apply if the landlord has obtained the tenants' written permission to keep all or a portion of the security deposit pursuant to Section 38(4)(a).

I find that at no time has the landlord brought an application for dispute resolution claiming against the security deposit for any damage to the rental unit pursuant to section 38(1)(d) of the *Act*.

I accept the tenant's uncontradicted evidence they have not waived their right to obtain a payment pursuant to section 38 of the *Act*. I accept the tenant's evidence that the tenants gave the landlord written notice of their forwarding address July 2, 2022.

Under these circumstances and in accordance with sections 38(6) and 72 of the *Act*, I find that the tenants are entitled to a monetary order of **double the security deposit.**

Filing fee

As the tenant has been successful in this application, I award the tenant reimbursement of the filing fee of $100.00.

Summary of Award

My award is summarized as follows:

ITEM	AMOUNT
Double the security deposit (first tenant)	$1,000.00
Double the security deposit (second tenant)	$1,000.00
Return of 7 days rent (first tenant)	$233.33
Return of 7 days rent (second tenant)	$233.33
Reimbursement of filing fee	$100.00
TOTAL	**$2,566.66**

Conclusion

I grant the tenant a monetary order pursuant to section 38 in the amount of **$2,566.66.**

This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) to be 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: November 25, 2022

Residential Tenancy Branch