Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, MNETC

Introduction

This hearing originally convened on October 20, 2022 and was adjourned due to time constraints. This Decision should be read in conjunction with the October 20, 2022 Interim Decision. This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67; and
- a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51.

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 was represented by counsel in the first hearing. The landlord testified in the second hearing that he did not know if his counsel would join this teleconference hearing. The landlord's counsel did not attend the second hearing. The landlord did not request an adjournment.

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.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000."

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

Preliminary Issue- Service

The tenant testified that she served the landlord with this application for dispute resolution and evidence via registered mail at least 14 days before the hearing. The landlord testified that he received the above documents on October 4, 2022 and had a full opportunity to review and respond to the tenant's claims and evidence. The landlord did not object to the hearing continuing on its merits.

Rule 3.1 of the Rules of Procedure states:

> **3.1 Documents that must be served with the Notice of Dispute Resolution Proceeding Package**
>
> The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:
>
> a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;
>
> b) the Respondent Instructions for Dispute Resolution;
>
> c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and
>
> d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

The Notice of Dispute Resolution Proceeding Package was made available to the tenant on March 8, 2022. The tenant's application for dispute resolution was served on the landlord late. Based on the testimony of the landlord, I find that despite the late service, the landlord was informed of the case against him and was provided with a full opportunity to respond to the case and evidence against him. I therefore find that the landlord is not prejudiced by this matter proceeding on its merits. I note that the landlord was represented, and counsel did not object to the application proceeding on October 20, 2022. I find that the landlord was served with the tenant's application for dispute resolution and evidence in accordance with sections 88 and 89 of the *Act.*

At the start of the first hearing the landlord testified that the tenant was served with the landlord's evidence via registered mail on either October 11th or 12th, 2022. The tenant testified that she received the landlord's evidence "last Friday" which consisted of a series of text message exchanges. According to the calendar, the Friday before the first hearing was October 14, 2022. The tenant testified that she had an opportunity to review the landlord's evidence. The tenant did not object to the landlord's text message evidence being considered.

Section 3.15 of the Residential Tenancy Branch Rules of Procedure (the "*Rules"*) states that the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

I find that while the landlord's text message evidence was late, the tenant is not prejudiced by the acceptance of the late evidence because she had an opportunity to review it prior to today's hearing. I also note that the evidence was likely late because the tenant's application for dispute resolution and evidence were served late. I find that the landlord's text message evidence was served on the tenant in accordance with section 88 of the *Act.*

The tenant testified that she did not receive the landlord's other evidence, which was presented in the first hearing by Counsel for the landlord. The other evidence consisted of a series of invoices and photographs of the subject rental property and a tenancy agreement. Later in the first hearing, when the tenant objected to the invoices presented by counsel, the landlord testified that he served the tenant with two separate evidence packages via registered mail, the first on October 11, 2022 and the second on October 12, 2022. The landlord testified that one of the evidence packages was returned to sender. The landlord did not enter into evidence proof of the October 11 and 12, 2022 evidence mailings but provided tracking numbers in the hearing.

Rule 3.5 of the Residential Tenancy Branch Rules of Procedure states:

> **3.5 Proof of service required at the dispute resolution hearing**
> At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.

I find that the landlord has not proved that the tenant was served with two evidence packages because the landlord did not provide proof of service documents into evidence and the tenant disputed receipt of two packages. While the landlord provided tracking numbers, the tracking numbers alone do not prove, on a balance of probabilities, that the tenant was served. I do not have documentary evidence before me that the tracking numbers are valid or that the packages associated with those tracking numbers were sent to the tenant's address for service. I therefore exclude the landlord's invoices and the tenancy agreement from consideration as the landlord has not proved service of same.

Preliminary Issue- Res Judicata

Both parties agree that in a previous arbitration the tenant was awarded double the return of the security deposit. The file number for the previous decision is location on the cover page of this decision.

Res judicata prevents a plaintiff from pursuing a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment. It also precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. Former adjudication is analogous to the criminal law concept of double jeopardy.

As the security deposit was dealt with in a previous decision, I find that the claim for the return of the security deposit is *res judicata,* meaning the matter has already been conclusively decided and cannot be decided again. The tenant's application for the return of the security deposit is therefore dismissed without leave to reapply.

Preliminary Issue- Re-submitted Evidence

In the first hearing I ordered the tenant to upload a more legible copy of the Notice, which the tenant did. I find that the landlord is not prejudiced by the resubmission as the landlord is the author of this document and should have a copy for his records.

Issues to be Decided

1. Is the tenant entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
2. Is the tenant entitled to a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51 of the *Act*?
3. Is the tenant entitled to recover the filing fee for this application from the landlord, 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 tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 2, 2019 and ended pursuant to a Four Month Notice to End Tenancy for Renovation (the "Notice"). Monthly rent in the amount of $1,250.00 was payable on the first day of each month. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that the landlord personally served the tenant with the Notice sometime in May 2021. The Notice states that the effective date is August 31, 2021. The tenant testified that the Notice should have stated that the effective date was September 30, 2021.

The Notice states that the landlord is ending the tenancy because the landlord is going to perform renovations or repairs that are so extensive that the rental unit must be vacant. The Notice asks the landlord to indicate how many weeks or months the unit is required to be vacant. The landlord did not so indicate. The landlord indicated on the Notice that no permits and approval are required by law to do this work. The landlord left the section of the Notice blank that asked the landlord to state the planned work and details of that work.

The landlord testified that he served the tenant with the Notice because the tenant told him that she was going to move out at the end of June 2021. The tenant testified that she had no plans on moving out and only moved out because she was served with the Notice.

The tenant testified that the landlord told her that he was evicting her so that he could sell the subject rental property and purchase a home with a bigger backyard.

The tenant testified that in April 2021 the landlord sent her a Mutual Agreement to End Tenancy but she refused to sign it. This was not disputed by the landlord. The landlord entered into evidence a text message dated April 21, 2021 in which he texted the tenant the Mutual Agreement to End Tenancy. The tenant testified that she refused to sign it because she did not agree with ending the tenancy. The landlord entered into evidence a responding text message from the tenant dated April 22, 2021 which states:

> The tenancy branch said for you to call them for information. They said replacing floors and painting do not require us to move. But if we do need to move for your renovations, then you have to give 4 months notice and pay a fee of one month of rent and have any permits required. If someone bought the house and we had to move because they wanted the suite for their use, then it is two months notice and a fee of one month of rent. The tenancy branch said mutual agreement form should only be used if we mutual agree and agree to conditions to move (like duration of notice, compensation fees, when renovations begin etc.) We are looking for a place but the market is really different from two years ago, and I am sure the pandemic makes it worse.

The tenant testified that on June 20, 2021 she told the landlord either verbally or via text message that she might moveout before the effective date of the Notice. The landlord entered into evidence a text message from the tenant dated June 20, 2021 which states:

> …We signed a lease and are moving mid July…

On June 24, 2021 the landlord texted the tenant as follows:

> Hi [tenant], you told me that you will be completely move out by July 15? Am I correct? Because I have to request a time off during that time….

On June 24, 2021 the tenant responded:

> Our new lease behind [sic] July 15

On July 11, 2021 the tenant texted the landlord as follows:

> Hi [landlord] I came back. The last bus on Sunday is before 9. I will complete cleaning by Wednesday and I have some of my things outside and in the suite. I will get them then and we would like to get our deposit back. Thanks.

The Wednesday after July 11, 2021 was July 14, 2021.

The tenant testified that she moved out July 10, 2021 and had to be out by July 15, 2021. The landlord testified that he thought the tenant moved out on July 11, 2021.

Both parties agree that the landlord did not charge the tenant rent for July 1-15, 2021. The tenant testified that she is seeking ½ month's rent for the remainder of compensation owed pursuant to section 51(1) of the *Act.* The tenant testified that prior to this dispute resolution proceeding, when she asked the landlord for the remainder of the compensation under section 51(1) of the *Act,* the landlord refused, stating that she could have stayed until the end of July 2021 for free.

The tenant testified that after moving out, the landlord listed the subject rental property for sale on September 7, 2021 and sold it on September 10, 2021. The tenant testified that the landlord moved out of the subject rental property, pursuant to that sale, in December of 2021 and the new owner took possession in January of 2022. The tenant testified that the new owner listed the subject rental property for rent for $1,600.00 per month. The tenant entered into evidence screenshots of the above online listing. The tenant submitted that the photographs of the suite show that no renovations were completed.

The tenant testified that she is seeking 12 months rent pursuant to section 51(2) of the *Act* because the landlord failed to comply with the reasons to end tenancy set out in the Notice. The tenant testified that she is also seeking the cost of her moving fees in the amount of $692.53. A receipt for same was entered into evidence.

Counsel submitted that the subject rental property was initially listed for sale in March of 2021 and that prior to this, the landlord's intention to sell the subject rental property was made known to the tenant. Counsel submitted that during the showings it became clear that the subject rental property was not showing well due to the condition of the floors.

Counsel submitted that due to the condition of the floors, the landlord intended on renovating and installing new floors. Counsel submitted that after 23 days on the market, the landlord removed the subject rental house from the market to complete the renovation before re-listing.

Counsel submitted that in April of 2021 the tenant informed the landlord that she might leave because of job opportunities. Counsel submitted that when the landlord learned of the tenant's plans to move out, the landlord decided to wait to complete the renovations until after the tenant moved out. Both parties agree that in April of 2021 the tenant signed a month-to-month Tenancy Agreement with the landlord.

The landlord testified that he served the Notice because the tenant told him in April 2021 that she might move out if she got a job offer. The landlord testified that he believed that if the tenant moved out, he could do some renovations. Counsel submitted that he thinks the landlord was not aware of the legal purpose of the Notice.

The landlord testified that the Notice was not intended to make the tenant move, and that she was permitted to stay until she was ready to leave. This was disputed by the tenant.

Counsel presented text messages between the landlord and the tenant from April 2, 2021 to July 17, 2021 which show that during that time, the relationship between the parties was amicable. Counsel submitted that the cordial relationship shows that the tenant was not forced to move out and that the tenant was co-operating with the landlord.

The tenant testified that she kept the landlord informed of her progress in finding new accomodation but only moved out because she was served with the Notice. The tenant testified that the landlord has not provided any evidence that the tenant chose to move out. The tenant testified that she turned down the Mutual Agreement to End Tenancy offered by the landlord because she did not want to move out.

Counsel for the landlord submitted that invoices entered into evidence by the landlord show the renovations made after the tenant moved out. As stated earlier in this decision, the invoices were excluded from consideration for failure to prove service. The landlord testified that the following renovations were completed at the subject rental property by the second or third week of July 2021:

- flooring replaced,

- kitchen countertops replaced,
- kitchen cabinets replaced, and
- walls painted.

The landlord testified that the subject rental property was sold on September 7, 2021.

The tenant testified that none of the renovations completed by the landlord required vacant possession of the subject rental property. The tenant testified that the landlord told her that he didn't want to do the renovations while she was living at the subject rental property because it would cost more.

Analysis

Section 50 of the *Act* states:

> **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]* or the tenant receives a director's order ending a periodic tenancy under section 49.2 *[director's orders: renovations or repairs]*, 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 or director's order, and
>
> (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.
>
> (3)A notice under this section does not affect the tenant's right to compensation under section 51 *[tenant's compensation: section 49 notice]*.

Based on the text messages entered into evidence and the testimony of both parties, I find that on June 22, 2022 the tenant provided the landlord with written email notice to end the tenancy effective July 15, 2022. Pursuant to section 51(1)(a) of the *Act,* I find that the tenant was permitted to end the tenancy on July 15, 2022, before the effective

date of the Notice. I find that at the time the section 51(1)(a) notice was given, the tenant had already paid June 2022's rent in full.

Ss 51(1), 51(1.1) and 51(1.2) of the *Act* state:

> **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.
>
> (1.1)A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.
>
> (1.2)If a tenant referred to in subsection (1) paid rent before giving a notice under section 50, the landlord must refund the amount paid.

Based on the testimony of both parties, I find that the tenant did not pay any rent for the period of July 1, 2021 to July 15, 2021. Pursuant to section 51(1.1) the tenant was permitted to withhold rent from July 1, 2021 to July 15, 2021. Pursuant to section 51(1.2), since the tenant already paid June 2021's rent in full, the landlord was required to refund the tenant ½ months' rent in the amount of $625.00.

To be clear, pursuant to section 51(1) of the *Act,* the tenant was entitled to receive one free month's rent from the landlord. The tenant was also permitted to end the tenancy before the effective date of the Notice. As the tenant did not pay rent for July 1-July 15, 2021, as permitted under the *Act*, the tenant was still entitled to receive a full one month's compensation from the landlord, meaning the landlord still owes the tenant $625.00 for the compensation owed the tenant under section 51(1) of the *Act.* The tenant's choice to end the tenancy before the effective date of the Notice does not reduce the compensation owed to the tenant under section 51(1) of the *Act.* The tenant is granted a monetary order in the amount of $625.00.

Sections 51(2) and 51(3) of the *Act* state:

> (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 the landlord or purchaser, as applicable, does not establish that

(a)the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and

(b)the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(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 applicable, from

(a)accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and

(b)using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Residential Tenancy Branch Policy Guideline 2B states that:

Renovations or repairs that require the rental unit to be vacant could include those that will:

- make it unsafe for the tenants to live in the unit (e.g., the work requires extensive asbestos remediation); or
- result in the prolonged loss of a service or facility that is essential to the unit being habitable (e.g., the electrical service to the rental unit must be severed for several weeks).

Renovations or repairs that result in temporary or intermittent loss of an essential service or facility or disruption of quiet enjoyment do not usually require the rental unit to be vacant….

Cosmetic renovations or repairs that are primarily intended to update the decor or increase the desirability or prestige of a rental unit are rarely extensive enough to require a rental unit to be vacant. Some examples of cosmetic renovations or repairs include:

- replacing light fixtures, switches, receptacles, or baseboard heaters;

- painting walls, replacing doors, or replacing baseboards;
- replacing carpets and flooring;
- replacing taps, faucets, sinks, toilets, or bathtubs;
- replacing backsplashes, cabinets, or vanities.

Pursuant Policy Guideline 2B I find that replacing the flooring, kitchen countertop/cabinets and painting are all cosmetic renovations that are not extensive enough to require the rental unit to be vacant. I find that the landlord did not accomplish the stated purpose for ending the tenancy, that being conducting renovations that required vacant possession of the subject rental property.

Based on the testimony of both parties, I find that the landlord sold the subject rental property in September of 2021. I find that the landlord did not use the subject rental property for the stated purpose of renovations requiring vacant possession. I find that the landlord completed cosmetic renovations to aid in selling the subject rental property. I find that the subject rental property was not used for renovations requiring vacant possession for at least six months duration as the property was sold a couple of months after the tenant was evicted.

Pursuant to my above findings and section 51(2) of the *Act*, I find that the tenant is entitled to 12 months rent in the amount of $15,000.00 unless extenuating circumstances prevented the landlord or the purchaser, as applicable, from

> (a)accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and
>
> (b)using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

I find that failing to understand the legal ramifications for serving the Notice on the tenant is not an extenuating circumstance. Before serving a legal notice to end tenancy on the tenant, the landlord had an obligation to inform himself of the law. I find that ignorance of the law does not excuse the landlord from its application.

Counsel submitted that since the text messages exchanged between the parties were amicable, the tenant was not forced to move out. I find this line of reasoning deeply flawed and unsupported by the text messages entered into evidence. I find that the civility between the parties does not diminish the fact that the landlord served an eviction notice on the tenant and that she moved out in accordance with the Notice. In

any event, the triggering factor for receiving section 51 compensation is the receipt of a section 49 notice to end tenancy. It is undisputed that the landlord served the tenant with the Notice, which is a section 49 notice to end tenancy. The landlord cannot escape the compensation found in section 51 of the *Act* because the tenant was cordial with him.

Based on the tenant's testimony and the text exchange between the parties on April 21-22, 2021, I find that the tenant did not agree with mutually ended the tenancy. I find that the landlord has not proved that the tenant gave the landlord notice to end tenancy before the Notice was served. I find that the end of this tenancy flowed directly from the Notice.

I find that the landlord served the tenant with the Notice, made cosmetic renovations that did not require vacant possession and then sold the subject rental property. I find that the landlord acted contrary to the *Act* and ended the tenancy for reasons not authorized under the *Act.* I find that the landlord has not proved that extenuating circumstances prevented him from complying with the reason to end the tenancy set out in the Notice. I award the tenant $15,000.00 in accordance with section 51(2) of the *Act.*

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 tenant 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.

Under section 67 of the *Act,* there is a requirement that the party claiming compensation must do whatever is reasonable to minimize their loss. One way to minimize their loss is by applying for compensation pursuant to s. 51(2) of the *Act*, not pursuant to both section 51 and section 67 of the *Act.* I find that the above failure to mitigate is fatal to the section 67 claim.

I also note that the 12 months rent payable under section 51 of the *Act* is meant to compensate the tenant for damages arising out of the failure of the landlord to comply with the reason to end the tenancy found in the Notice. I find that to award the tenant the statutory claim in section 51 of the *Act* and damages stemming from the tenant's move, pursuant to section 67 of the *Act*, would amount to double compensation, which is not intended by the *Act.*

Pursuant to my above findings, the tenant's section 67 claim for damages stemming from the tenant's move, is dismissed without leave to reapply.

Conclusion

I issue a Monetary Order to the tenant in the amount of $15,625.00.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: March 2, 2023

Residential Tenancy Branch