Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNSD, FFT
MNRL-S, MNDL-S, MNDCL-S, FFL

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (the "*Act*"). The matter was set for a conference call.

The Tenants' Application for Dispute Resolution was made on July 29, 2022. The Tenants applied for the return of their security deposit and the return of their filing fee.

The Landlord's Application for Dispute Resolution was made on October 26, 2022. The Landlord applied for a monetary order for losses due to the tenancy, for a monetary order for the recovery of unpaid rent and utilities, for a monetary order to recover their costs for damages caused during the tenancy, permission to retain the security and pet damage deposits and to recover their filing fee.

Both the Tenants and the Landlord attended the hearing and were each affirmed to be truthful in their testimony. The Tenant and the Landlord were provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Is the Landlord entitled to monetary compensation for damages under the *Act*?
- Is the Landlord entitled to monetary for the recovery of unpaid rent and utilities?
- Is the Landlord entitled to monetary a monetary order to recover their costs for damages caused during the tenancy?

- Is the Landlord entitled to retain the security deposit?
- Is the Tenant entitled to the return of their security deposit?
- Is the Landlord entitled to recover the cost of the filing fee?
- Is the Tenant entitled to recover the cost of the filing fee?

Background and Evidence

While I have considered all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

Both parties agreed that the tenancy began on October 1, 2021, as a one-year fixed term tenancy, that rent in the amount of $2,800.00 was payable on the first day of the month, and that the Tenants had paid a security deposit of $1,400.00 and a pet damage deposit of $1,000.00 (the “deposits”) at the outset of this tenancy. The Landlord submitted a copy of the tenancy agreement into documentary evidence.

The parties agreed that the Tenants moved out of the rental unit early on January 7, 2022. The parties agreed that a written move-in/move-out inspection was not completed for this tenancy.

The Tenants testified that they sent their forwarding address to the Landlord by Canada Post registered mail sent on June 9, 2022, the Tenants submitted a Canada Post registered mail tracking number into documentary evidence as proof of this service. The Tenants submitted that the Landlord did not return their deposits to them after receiving their forwarding address, nor did the Landlord apply to keep the deposits within the required 15 days after receiving their forwarding address; the Tenants are requesting the recovery of two times the value of their security and pet damage deposits.

The Landlord testified that they are claiming $13,500.00, for 270 days worth of late fees due under the tenancy agreement, at the rate of $50.00 per day, due between January to September 2022. The Landlord referenced section one of the tenancy agreement in support of this section of their claim.

The Landlord testified that they are claiming for $23,168.00 in unpaid rent due under the tenancy agreement between January 8 to September 30, 2022. The Landlord testified that they did secure a new renter for the rental unit as of January 15, 2022, who paid $2,032.00 in rent to the Landlord for January 2022. The Landlord testified that they are claiming for all of the rent due under the tenancy agreement for this tenancy.

The Tenants testified that they paid $632.25 for the seven days they occupied the rental unit in January 2022, and that they should not be responsible for the rent under the terms of the tenancy agreement as the Landlord found a new renter to take over the rental unit.

The parties agreed that $255.00 in utility bills were left unpaid at the end of this tenancy, for the period between December 1, 2021, to January 7, 2022. The Tenants agreed that they owe this money to the Landlord.

The Landlord testified that the fireplace required repair work at the end of the tenancy and cost them $437.85 to complete. The Landlord submitted that the repair technician had advised them that the ignitor wire had broken off and that the Tenants must have physically broken it off during their tenancy. The Landlord submit a copy of the fireplace repair bill into documentary evidence.

The Tenants testified that the fireplace was the only source of heat in the rental unit, and they would never intentionally break their only source of heat. The Tenants submitted that they did not damage the fireplace during their tenancy but that the fireplace was old and that it just breakdown due to age through normal wear and tear.

The Landlord testified that the fireplace was installed sometime in the 1980s.

The Landlord testified that they had to have the rental unit cleaned before the new Tenant could move in at a cost of $367.50. The Landlord submit a copy of the cleaning bill into documentary evidence.

The Tenants testified that they fully cleaned the rental unit at the end of tenancy, and that the additional cleaning the Landlord had done was only required due to the renovations the Landlord had done before the new renter moved in. The Tenants submitted that they should not be financially responsible to clean up after the Landlord’s repair people, as they return the rental unit clean, and the Landlord messed it up after their tenancy had ended.

The Landlord testified that they did have repair/renovation work completed to the rental unit between the time these Tenants left, and the new renter moved in. The Landlord also agreed that this cleaning was required to clean up after the tradespeople had finished their work on the rental unit.

The Landlord testified that they are claiming for $2,800.00 in a new tenant placement fee. The Landlord testified that they called several property management companies in the area and that they all confirmed that it is normal industry practice to charge the equivalent of a month's rent in a “New Tenant Placement Fee.” The Landlord testified that they did not hire a property manager to secure a new renter, nor did they pay a “New Tenant Placement Fee.” The Landlord also testified that they did not have a liquidated damages clause in the tenancy agreement but submitted that they should be entitled to this charge as the Tenants ended their tenancy early.

The Tenants testified that they should not be responsible for a fee such as this as the Landlord did not actually have to pay this amount.

The Landlord testified that they did have costs for their travel to the area to secure a new renter to take over the rental unit and that they are also claiming for the recovery of these costs for their and their wife’s travel from Ontario to British Columbia. Consisting of $2651.00 flights, $2,750.00 lodging, and $619,47 car rental, in addition to the new tenant placement fee they requested above. The Landlord submitted three bills into documentary evidence.

The Tenants submitted that the Landlord should not be entitled to these costs as the Landlord used this trip to the area as a holiday for them and their family and that they spent little to no time, during this two-week stay, doing work on a new tenant placement. The Tenants testified that even though they were still occupying the rental unit the Landlord only visited the rental unit once, for a 30-minute inspection of the rental unit, and that they never saw or heard from them again during the Landlord’s two-week stay in the area. Additionally, the Tenants testified that they assisted the Landlord with the showings of the rental unit to prospective new renters and that the Landlord or the Landlord’s wife never attended any of these showings when they were in the area.

The Tenants also submitted that the Landlord left on January 1, 2022, just 6 days before the end of the tenancy, and that if the Landlord had truly been in the area to deal with the rental unit, they would have planned their stay to include the end of tenancy date of January 7, 2022, so they could facilitate their move-out and the new renters move-in.

The Landlord testified that they attended the rental property several times during their stay in the area between December 17, 2021, to January 1, 2022, but that they agree they only went into the rental unit once for an inspection. However, they still had to deal

with other issues on the rental property, including the other renter who lives in the second unit on the rental property and issues related to the common areas.

The Tenants testified that they should not be held financially responsible for the Landlord and the Landlord's family's vacation to British Columbia.

The Landlord testified that they are only claiming for themselves, and their wife's travel expenses, not their two children, and that their wife's travel should be covered as well as their wife is also a part owner in the rental property. The Landlord submitted that they are claiming for the full recovery of their and their wife's flights, the full lodging costs, and the full car rental costs. The Landlord agreed that their children travelled with them but that the children being there did not add additional costs for logging or the car rental.

The Landlord was asked how much of their time between December 17, 2021, to January 1, 2022, was spent doing work on or for the rental unit; the Landlord stated that 50% of their time was spent working on the rental property but the Landlord did not say how much time was spend on this rental unit specifically.

The Landlord also submitted that this travel took place during the COVID-19 pandemic and that due to concerns about travelling during the pandemic, they were forced to bring their entire family with them for this trip.

Analysis

Based on the evidence before me, the testimony of the Landlords, and on a balance of probabilities that:

I accept the agreed-upon testimony, supported by the documentary evidence, that these parties entered into a one-year fixed term tenancy that started on October 1, 2022, and was to end on September 30, 2022. I also accept the agreed-upon testimony of these parties the Tenants issued notice to the Landlord in November 2022, to end their tenancy early. Section 45 of the *Act* sets how a tenant can end their tenancy, stating the following:

> ***Tenant's notice***
>
> *45 (1) 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.

(2) A tenant may end a fixed term 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,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) 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.

(3) 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.

(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

I accept the agreed-upon testimony of these parties that the Tenants ended their tenancy when they moved out of the rental unit on January 7, 2022. I find that the Tenants breached section 45(2) of the *Act*, when they ended their tenancy earlier than the specified date in the Tenancy agreement.

In this case, the Landlord is claiming for $24,567.74 in lost rental income, the full amount of rent due under the tenancy agreement between January 8 to September 30, 2022. Awards for compensation due to losses or damage are provided for under sections 7 and 67 of the *Act.* A party that makes an application for monetary compensation against another party has the burden to prove their claim. The Residential Tenancy Policy Guideline #16 Compensation for Damage or Loss provides guidance on how an applicant must prove their claim. The policy guide states the following:

> “The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To determine whether compensation is due, the arbitrator may determine whether:

- A party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- Loss or damage has resulted from this non-compliance;
- The party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- The party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Under sections 7 and 67 of the *Act*, a party that suffers a loss due to another party's breach of the *Act* must first take action to minimize that loss and then any loss still suffered, after action to minimize, can be claimed for in a hearing.

I accept the Landlord's testimony that they took immediate action to minimize their loss, by starting to look for a new renter to take over the rental unit, and that this action resulted in a new renter moving in on January 15, 2022.

However, In this case, this Landlord has claimed for rental income losses for the full term of this tenancy agreement even though they did not suffer a rental income loss between January 15 to September 30, 2022, as they had a new renter in the rental unit.

I find it reprehensible that this Landlord would seek to recover losses that they openly admit they did not suffer. As this Landlord did not suffer any loss of rental income between January 15 to September 30, 2022, I find that they are not entitled to claim for a loss they did not suffer. Consequently, I dismiss the Landlord's claim for lost rental income between January 15 to September 30, 2022, in its entirety.

However, I do find that the Tenants' breach of section 45 of the *Act* did result in a loss of rental income to the Landlord between January 8 to 14, 2022, a total of seven days. I also find that the Landlord has provided sufficient evidence to prove the value of that loss and that they took reasonable steps to minimize the losses due to the Tenants' breach.

Therefore, I find that the Landlord has established an entitlement to the recovery of their lost rental income between January 8 to 14, 2022, in the amount of $632.24, consisting of seven days of rent at the per diem rate of $90.32. I award the Landlord the recovery of their lost rental income in the amount of **$632.24**, for this tenancy.

The Landlord has also claimed for $13,500.00 in late fees, at the rate of $50.00 per day, between January 8 to September 30, 2022. Section 7 of the *Residential Tenancy*

Regulation (the "*Regulation*") states the following regarding fees charged by a landlord during a tenancy:

> ***Non-refundable fees charged by landlord***
>
> *7 (1) A landlord may charge any of the following non-refundable fees:*
>
> *(a) direct cost of replacing keys or other access devices;*
>
> *(b) direct cost of additional keys or other access devices requested by the tenant;*
>
> *(c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;*
>
> *(d) subject to subsection (2), an administration fee of not more than $25 for the return of a tenant's cheque by a financial institution or for late payment of rent;*
>
> *(e) subject to subsection (2), a fee that does not exceed the greater of $15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;*
>
> *(f) a move-in or move-out fee charged by a strata corporation to the landlord;*
>
> *(g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.*
>
> *(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.*

Pursuant to section 7 of the *Regulation*, I find that a landlord was prohibited from contracting to the requirement of the Tenants to pay a late rent fee charge of $50.00 per day in their tenancy agreement. I find that this Landlord breached section 7 of the *Regulation* by writing a tenancy agreement term that would allow for a $50.00 daily late fee to be charged during this tenancy. Section 5 of the *Act* states the following regarding attempts to contract contrary to the *Act* or the *Regulation*:

> ***This Act cannot be avoided***
>
> *5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.*
>
> *(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.*

I find that the Landlord has attempted to contract for a fee that is not allowable under the *Regulation*. Consequently, I find that the term in this tenancy agreement regarding a

$50.00 daily late fee to be of no effect and I dismiss the Landlord's claim to collect this fee in its entirety.

The Landlord has claimed for $357.50 in cleaning costs at the end of tenancy, I accept the agreed-upon testimony of these parties that the Tenants returned the rental unit clean at the end of tenancy and the cleaning completed was required due to renovation completed after the Tenants move out. Section 37(2) of the *Act* states the following regarding a tenant's responsibility for cleaning at the end of a tenancy:

> ***Leaving the rental unit at the end of a tenancy***
>
> *37 (1) Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.*
>
> *(2) When a tenant vacates a rental unit, the tenant must*
>
> *(a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and*
>
> *(b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.*

As it is agreed that the Tenants returned the rental unit clean to the Landlord, I find that the Tenants are not reasonable for the Landlord's requested cleaning costs, and I dismiss this portion of the Landlord claim.

The Landlord had claimed for $437.85 to repair the fireplace at the end of this tenancy. I accept the testimony of the Landlord that the fireplace for the rental unit required repairs at the end of the tenancy. I also accept the Landlord's testimony that the fireplace was installed sometime in the 1980s, making the fireplace in the rental unit at least 43 years old as of the date of these proceedings. The Residential Tenancy policy guideline #1 Landlord & Tenant – Responsibility for Residential Premises states the following:

> "Reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant. An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant."

I have reviewed the Landlord's documentary evidence and find that there is no evidence before me to indicate that the Tenants had damaged or used the fireplace in an unreasonable fashion. Therefore, on a balance of probabilities, I find that the fireplace in the rental unit required repairs at the end of the tenancy due to its age, natural deterioration and normal wear and tear. As Tenants are not responsible to cover the costs of age or normal wear and tear-related repairs, I must dismiss this portion of the Landlord's claim.

The Landlord has also claimed for $8,820.47 in the recovery of their costs to find a new renter for the rental unit, consisting of $2,800.00 in a new tenant placement fee, $2,651.00 in the recovery of their costs for flights to the area, $2,750.00 in logging costs for 15 days, and $619.47 for a car rental. I have several concerns with this portion of the Landlord's claims, which I note is three and a half times the value of the monthly rent for this tenancy.

First, the Landlord is claiming for a new tenant placement fee, which they agreed during these proceedings, they were never charged, as they do not employ a property manager. The Landlord also agreed that they did not contract to a liquidated damages clause in their tenancy agreement, which is normal business practice, and is meant to cover such costs, had they been paid, which they have not. Nor do I have any evidence before me to show what costs the Landlord paid to secure a new renter for this rental unit, except the travel costs, which the Landlord is claiming in addition to this new tenant placement fee. As the Landlord did not actually pay this fee, and they have not demonstrated that they have paid for expenses equalling this amount associated with securing a new renter for the rental unit, I dismiss the Landlord's claim for $2,800.00 in a new tenancy placement fee in its entirety.

As for the travel costs, consisting of flights, lodging and a car rental for the Landlord and the Landlord's wife between December 17, 2021, to January 1, 2022, in this case, the Landlord is seeking the recovery of 100% of their costs to travel and stay in the area.

The Tenants have submitted that the Landlord is trying to use their tenancy ending to fund a family vacation to the local area. I find that I must seriously consider this submission made by the Tenants, especially given the fact that the Landlord themselves testified that they only spent about 50% of their time between December 17, 2021, to January 1, 2022, dealing with the rental property, yet they are seeking to have these Tenants pay 100% of their travel costs during this time.

I am unable to reconcile how I could accurately address what portion of these costs could reasonably be assigned to these Tenant given that the rental property has more than one rental unit, and the Landlord has agreed that they spent some of their time dealing with issues related to the other renter and the common areas on the property, which I find that these Tenant should not have to cover the costs for. Combined with the fact that the Landlord has also admitted that they only spent, at most, half of their time dealing with the rental property, as a whole, during their stay in the area, yet they are asking for the recovery of 100% of their costs.

Also, the Landlord is seeking to recover their wife's travel cost as well, yet there is no evidence before me to show that the Landlord's wife is a "Landlord" as defined by the *Act*. After reviewing the Landlord's documentary evidence; I noted that the Landlord's wife is not listed as a landlord on the tenancy agreement or the Landlord's application for these proceedings.

As I am unable to accurately determine what percentage of time between December 17, 2021, to January 1, 2022, this Landlord spent dealing with issues related to this tenancy, I am left with deciding whether or not this Landlord and their wife are entitled to their requested amount of the recovery of 100% of their travel costs.

Overall, I find it would be unreasonable to require these Tenants to cover any of the costs associated with the Landlord dealing with the other renter living on the rental property, the Landlord dealing with issues related to the common areas on the rental property, or the travel costs associated to the Landlord's family and their free time spent in the local area. As the true costs associated with the new tenancy placement for this tenancy cannot be reasonably determined with the submission made by the Landlord, I must dismiss the Landlord's claims for the recovery of their travel costs in their entirety.

I find that the parties to this dispute did agree that the Tenants owe the Landlord $255.21 in unpaid utilities for this tenancy. Therefore, I award the Landlord their requested amount of $255.21, for unpaid utilities between December 1, 2021, to January 7, 2022, for this tenancy.

I grant permission to the Landlord to retain $887.45 from the security deposit they are holding for this tenancy in full satisfaction of the awarded amounts detailed above.

As for the Tenants' claim for the return of the doubled amount of their deposits for this tenancy. Section 38 of the *Act* sets the requirements on how a security deposit is handled at the end of a tenancy, stating the following:

Return of security deposit and pet damage deposit

38 *(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of*

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) [landlord failure to meet start of tenancy condition report requirements] or 36 (2) [landlord failure to meet end of tenancy condition report requirements].

The *Act* sets a time limit of 15-days from the date the tenancy ends or the date the landlord receives the tenant's forwarding address, whichever is later, for the Landlord to act, by either returning the security and pet damage deposits in full or filing an

application with the Residential Tenancy Branch requesting to keep the deposits. As stated above, it has already been determined that this tenancy ended on January 7, 2022, the date the Tenants moved out and returned possession of the rental unit to the Landlord. I accept the testimony of the Tenants' supported by their documentary evidence, that they provided their forwarding address to the Landlord on June 9, 2022, by Canada Post registered mail. Pursuant to section 90 of the *Act*, I find that the Landlord was deemed to have been in receipt of this mailing five days later on June 14, 2022. Accordingly, the Landlord had until June 29, 2022, to comply with section 38(1) and either file their claim against the security deposit or return the deposits to the Tenants.

However, in this case, the Landlord failed to file their claim against the deposits until October 26, 2022, well after the required 15-day requirement had expired.

Section 38(6) of the *Act* goes on to state that if the landlord does not comply with the requirement to return the deposit within 15 days, the landlord must pay the tenant double the security deposit.

> ***Return of security deposit and pet damage deposit***
>
> ***38*** *(6) If a landlord does not comply with subsection (1), the landlord*
>
> *(a) may not make a claim against the security deposit or any pet damage deposit, and*
>
> *(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.*

Therefore, I find that pursuant to section 38(6) of the *Act* the Tenants have successfully proven they are entitled to double the value of their deposit. Consequently, I find that the value of the security and pet damage deposits for this tenancy has doubled in value to the amount of $4,800.00, due to the Landlord's breach of section 38 of the *Act*.

Finally, section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Tenants have been the more successful party in these proceedings, I find that the Tenants are entitled to recover the $100.00 filing fee paid for their application.

I find that the Landlord is not entitled to the recovery of their filing fee for their application.

I order the Landlord to return the remaining value of the security and pet damage deposits to the Tenants, less the amount they were awarded above.

In order to enforce this decision, I grant the Tenants a monetary order in the amount of $4,012.55, consisting of $4,800.00 in the recovery of the doubled value of their security deposit for this tenancy, $100.00 in the recovery of the filing fee for this hearing, less the $887.45 awarded to the Landlord in this decision.

Conclusion

I grant permission to the Landlord to retain $887.45 from the deposits they are holding for this tenancy in full satisfaction of the amounts awarded in this decision.

I grant the Tenants a Monetary Order in the amount of $4,012.55. The Tenants are 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: May 11, 2023

Residential Tenancy Branch