# Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

## DECISION

Dispute Codes

File #310079843: MNDCT, MNSD
File #310081918: MNDCT, MNETC

Introduction

The Tenants file two application, the first of which seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order pursuant to s. 38 for the return of the security deposit and/or the pet damage deposit.

By way of amendment to the first application filed on April 3, 2023, the Tenants seek a monetary order pursuant to s. 67 of the *Act* for compensation or other money owed.

The Tenants file a second application in which they seek the following relief under the *Act*:

- a monetary order pursuant to s. 67 for compensation or other money owed; and
- an order pursuant to s. 51(2) for compensation equivalent to 12 times the monthly rent payable under the tenancy agreement.

This matter was heard by another arbitrator on April 24, 2023 but adjourned due to there being insufficient time. It was reset before me following the departure of the other arbitrator. The hearing before me was treated as a new hearing without regard to the previous hearing of April 24, 2023.

J.W.-E. and T.W.-E. appeared as the Tenants. B.B. appeared as the Landlord. The Landlord had the assistance of S.D., who acted as his agent. J.B. was called as a witness by the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

Leaving aside the second application, the parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other's application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Preliminary Issue – The Tenants' Second Application and Amendment of April 3, 2023

Upon review of the matter, the Tenants' amendment of April 3, 2023 appeared to be a replication of the claims made in the second application. The second application was filed on August 14, 2022.

As explained by the Tenants, they had initiated the second application but were uncertain on the process such that they never served it on the Landlord. The Landlord's agent confirmed that only the first application had been served. The agent tells me that she was unaware that a separate application had been filed.

Dealing with the second application, as it was not served, it is dismissed.

With respect to the April 3 amendment, the claim is pled as a claim for monetary compensation under s. 67 of the *Act*. It does not refer to s. 51(2), nor does it explain the amount claimed, simply listing a total claim of $25,170.00. The amendment includes an additional claim in which the Tenants seek an order under s. 62 of the *Act* for an order that the Landlord comply with the *Act*, Regulations, or tenancy agreement, explaining the claim as follows:

> Since vacating, the landlord has failed to have their family member occupy the unit for a six month period. Instead, they preformed (sic) substantial renovations to turn the unit into "separate" suites in order to re-rent at a higher rate ($4250/mo).

There are clearly issues with the way the Tenants' have amended their claim, such that it arguably runs afoul s. 59(2) of the *Act* and is likely improperly pled.

I am cognizant that matters before the Residential Tenancy Branch are intended to be fair, efficient, and consistent, in keeping with the object for the Rules of Procedure set out under Rule 1.1. Provided the parties' right to procedural fairness is ensured, procedural issues should not prevent the consideration of substantive matters in dispute.

I make these comments because the Landlord did not object or raise issue with the procedural problems in the amendment. Indeed, the Landlord was more than prepared to address the Tenant's claim under s. 51(2), which was obliquely pled in the amendment albeit in reference to a claim under s. 62. I accept that the Tenants are self-represented and likely do not know the process or the importance of properly pleading their claims in their application.

Considering the above, I find that taking a flexible approach is appropriate here. I am satisfied that the Landlord had sufficient notice of the Tenants' claims. The Landlord was prepared to respond fully and did not formally object to these procedural issues. To have the matter dealt with, I amend the Tenants' claims such that they seek compensation under s. 51(2) of the *Act* and additional monetary compensation under s. 67. I do so pursuant to Rule 4.2 of the Rules of Procedure as I find that the circumstances for the amendment were reasonably foreseeable.

Issues to be Decided

1) Are the Tenants entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement?
2) Are the Tenants entitled to monetary compensation for other loss?
3) Are the Tenants entitled to the return of their security deposit?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

*General Background*

The parties confirmed the following details with respect to the tenancy:

- The Tenants moved into the rental unit on July 14, 2014.
- The Tenants moved out of the rental unit on July 1, 2022.
- At the end of the tenancy, rent of $1,900.00 was due on the first day of each month.
- A security deposit of $825.00 and a pet damage deposit of $200.00 was paid by the Tenants.

I am provided with a copy of the tenancy agreement.

I am also provided with a copy of a Two-Month Notice to End Tenancy for Landlord's Use of the Property signed on March 31, 2022 (the "Two-Month Notice"). The Two-Month Notice lists an effective date of May 31, 2022 and that it was issued on the basis that the Landlord's child would occupy the rental unit. As explained to me by the parties, the Landlord extended the effective date of the Two-Month Notice to June 30, 2022 at the Tenants' request.

1) *Are the Tenants entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement?*

Under to s. 51(2) of the Act and provided s. 51(3) does not apply, a tenant may be entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement if they received a notice to end tenancy issued under s. 49 and the landlord or the purchaser who asked the landlord to issue the notice, as applicable under the circumstances, does not establish:

- that the purpose stated within the notice was accomplished in a reasonable time after the effective date of the notice; and
- has been used for the stated purpose for at least 6 months.

Under to s. 52(3) of the *Act*, a landlord may be excused of a compensation claim under s. 51(2) if there are extenuating circumstances which prevent the landlord from carrying out the stated purpose set out under the notice issued under s. 49.

The Landlord's agent advises that Landlord's daughter, J.B., moved into the rental unit in July 2022 and moved out in December 2022. J.B., who provided direct evidence, says that she was on vacation overseas when the Tenants moved out and came back

to Canada on July 9, 2022. She says that when she returned, she visited the rental unit and found that it was unclean and noted some of the flooring needed replacement.

I enquired when J.B. did, in fact, move into the rental unit. J.B. explained that she contracted Covid-19 when she was travelling and underwent 10-days of quarantine at her parents' house. I was told by her that she moved into the rental unit on July 9, 2022.

I was further told by J.B. and the Landlord's agent that the rental unit required some renovations, namely painting and flooring replacement. The Landlord's evidence suggests the flooring and painting was completed in the last week of July 2022. Written statements from J.B. in evidence suggests that Covid-19 isolation and the renovations delayed her moving into the rental unit, though the written statement does not state when she moved in.

Occupancy for the purposes of claims under s. 51(2) is occupancy for residential purposes. In other words, mere storage of belongings is insufficient to meet this threshold. Actual physical occupancy of the individual is required. Simply put, the individual has to reside in the rental unit.

I provide this explanation because it appears more likely than not that J.B. moved into the rental unit in late July 2022 after the cosmetic renovations were completed and she had completed her Covid-19 isolation. I found that both J.B. and the Landlord's agent equivocated on when J.B. moved in, attempting to argue that moving personal items fulfilled the occupancy requirement. To be clear, I did not find that they were necessarily untruthful, simply that they mistook storage of personal items in the rental unit as fulfilling the occupancy requirement. Despite this small issue in the Landlord's evidence, the testimony from J.B. and the Landlord's documentary evidence is clear that J.B. did, in fact, move into the rental unit. I find that she did so in late July 2022, which is when the renovations were completed.

I further find that J.B. did move into the rental unit within a reasonable period of the effective date of the Two-Month Notice, which was extended to June 30, 2022. I accept that the extension for the effective date changed J.B.'s timeframe for moving in, such that she was on vacation when the Tenants moved out and returned on July 9, 2022. I further accept that given her contracting Covid-19, the subsequent quarantine, and the cosmetic renovations all contributed to her moving into the rental unit in late July 2022.

J.B. advises that she moved out of the rental unit on December 26, 2022. J.B. and the Landlord's agent again equivocated somewhat on when she moved-out, suggesting this was in January 2023. Again, occupancy is occupancy for residential purposes. You have to live in the rental unit. Failing to clean out the space or storing items is not sufficient to demonstrate occupancy. I accept that J.B. did move out on December 26, 2022, thus failing to reside within the rental unit for at least 6 months.

Despite this, the Landlord's agent argued extenuating circumstances prevented J.B. from remaining in the rental unit. J.B. testified that she developed ongoing joint pain following her Covid-19 infection, which resulted in her knees being drained of fluid and injections to manage the pain. J.B. further testified that her physician recommended she avoid stairs, such that it was decided she would move elsewhere. The Landlord's evidence includes a copy of a note from J.B.'s physician dated April 9, 2023, which notes that in December 2022 J.B. reported being unable to climb stairs and was advised by the physician to use caution to prevent falls.

It was argued by the Tenants, which I do not accept, that the Landlord's evidence should not be believed. The highlight the following issues:

- the utility invoices do not show actual usage;
- there are no witness statements from neighbours and the witness statements provided are not from impartial sources, being from family and friends;
- there are no photographs of her making use of the space;
- the Landlord had issued various notices to end tenancy to other properties nearby for landlord's use; and
- the physicians note appears fabricated based on T.W.-E.'s experience working in a medical office for eight years.

The problem with the Tenants' arguments regarding the credibility of J.B. or the reliability of the Landlord's evidence is that they are unsubstantiated. On the whole, unsubstantiated allegations of untruthfulness are insufficient to make an adverse finding on credibility.

I accept that had the Landlord simultaneously issued several notices to end tenancy for landlord's use of the property to different rental units, an adverse finding on credibility could have been made. However, the Tenants provide no evidence of this in the form of separate notices to end tenancy, all signed for the same purpose by the Landlord.

J.B. affirmed to tell the truth in her testimony. Witnesses have been known to lie under oath. However, the are presumed to be truthful barring evidence to the contrary. Again, no evidence has been provided to undermine J.B.'s credibility.

I further note that I did find that J.B. and the Landlord's agent were less direct than they otherwise ought to have been on the question of when J.B. moved into the rental unit and when she moved out. However, I accept that this is because they likely do not know the case authorities with respect to the occupancy requirement and were attempting to argue their case in the best possible light.

Having said all of this, I accept that extenuating circumstances are present explaining why J.B. did not reside within the rental unit for at least 6 months. J.B.'s testimony, as supported by the physician's note, shows she was suffering from severe joint pain and reduced mobility such that moving to accommodation without stairs was preferable. J.B. should not be required to reside within the rental unit for 6 months just to satisfy the requirements set by s. 51(2) of the *Act* particularly as there were risks to her welfare had she continued to do so.

I find that extenuating circumstances excuse the Landlord from liability under s. 51(2) of the *Act*. As such, the Tenants' claim for compensation under s. 51(2) of the *Act* is dismissed without leave to reapply.

On a final note, there was suggestion by the Tenants in their submissions that the Landlord intended to end the tenancy such that he could increase the rent. Further evidence supports that a second kitchen was installed in the rental unit in January 2023 and an advertisement for the rental unit showed rent at $4,250.00.

The Landlord's agent acknowledges she posted the advertisement on Facebook in December 2022 after it was decided that J.B. would be moving out of the rental unit. It was further acknowledged kitchen renovations were completed in January 2023, with the Landlord providing invoices for the work completed.

To be clear, there is nothing preventing a landlord from re-renting a rental unit after the 6-month period imposed by s. 51(2) of the *Act* has ended. Given the extenuating circumstances that are present here, I accept that the Landlord chose to re-rent the space after his daughter could no longer reside there due to her medical issues. Nothing in the *Act* prevented the Landlord from doing so or from undertaking certain renovations in January 2023 to maximize his rental income.

2) *Are the Tenants entitled to monetary compensation for other loss?*

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the 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.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

The Tenants seek compensation for moving from the rental unit after being served with the Two-Month Notice. The issue with the Tenants' claim is that they fail to consider that they must prove that the Landlord breached the *Act*, Regulations, or the tenancy agreement. I have been provided no evidence to support that the Landlord has done so.

The Landlord had the right to issue the Two-Month Notice under s. 49 of the *Act*. The Tenants had the right to dispute that notice. They did not. Instead, they moved out. It is difficult to sustain that the Landlord is responsible for moving expenses when he exercised his rights under the *Act* to issue the notice to end tenancy.

I find that the Tenants failed to demonstrate that the Landlord breached the *Act*, Regulation, or the tenancy agreement which would give rise to a claim for monetary compensation. I dismiss their claim under s. 67 of the *Act* without leave to reapply.

3) *Are the Tenants entitled to the return of their security deposit?*

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit.

There is no dispute that the Tenants provided the Landlord with their forwarding address on July 11, 2022. There is further no dispute that the process for the move-in condition inspection report, as set out under s. 23 of the *Act*, was followed. A copy of the move-in condition inspection report was put into evidence by the parties.

No move-out condition inspection report was completed. As explained by the parties, there was some level of hostility during the move-out inspection on July 1, 2022. Text messages provided by the Landlord shows the Tenants notified him on July 1, 2022 at 7:50 PM that they were ready to conduct the inspection after completing the move-out. The Landlord's agent says that the Tenants were eager to leave quickly following the inspection as they were travelling to another community some hours away and wished to make it there that evening.

Section 36(1) of the *Act* extinguishes a tenant's right to the return of the security deposit and pet damage deposit if the Landlord has complied with providing the Tenant at least 2 opportunities to conduct the move-out inspection and the Tenant has not participated on either occasion.

It was argued by the Landlord's agent that the Tenants refused to allow the report to be completed and left abruptly. The Tenants argued that the Landlord did not prepare a written inspection report and did not ask for them to sign. The Tenants further argued that the Landlord did not provide at least two opportunities to conduct the move-out inspection.

Section 35 of the *Act* sets out the process for conducting a move-out inspection. Under s. 35(1) of the *Act*, a landlord and a tenant must conduct the condition inspection together on a date on or after the tenant vacates or another date agreed upon.

In this instance, I accept that the parties agreed to do so on July 1, 2022, which is supported by the text messages put into evidence. The Tenants argue that they were not provided with two opportunities. However, it is non-sensical to offer another inspection date to the Tenants when they were leaving town on July 1, 2022 and the parties agreed to conduct the inspection on July 1, 2022.

This leaves open the question of whether the Tenants participated in the move-out inspection. I find that they did. The Tenants were present. They discussed matters with the Landlord. The Landlord had an obligation to prepare the written condition inspection report under s. 35(3) of the *Act*. He did not do so. Had the Landlord have done so, he

could have explained to the Tenants that they were under no obligation to agree to the report and could have noted any points they disagreed with. That did not occur. Instead, the episode ended in argument.

I find that the Tenants did participate in the condition inspection in compliance with their obligation to do so under s. 35 of the *Act*.

As the Tenants provided their forwarding address on July 11, 2022 and as their right to the deposits has not been extinguished, I find that they are entitled to double the return of their security deposit and pet damage deposit, which in this case is $2,050.00 (($825.00 + $200.00) x 2).

The parties made mention of an agreement that the Landlord could retain a portion of the security deposit for the removal of garbage left behind by the Tenants at the rental unit. However, the Landlord's right to the security deposit was extinguished under s. 36(2) of the *Act*, such that any purported agreement to retain funds from the deposit is irrelevant. The Landlord had an obligation to return it within 15-days of July 11, 2022. He did not do so.

The Landlord failed to complete the written move-out condition inspection report in contravention of his obligation under s. 35(3) of the *Act*. Under s. 38(5) of the *Act*, a landlord who's right to claim against the security deposit has been extinguished cannot obtain a tenant's consent to withhold any funds from the security deposit. In other words, even if there was an agreement, it cannot be used as a basis for withholding the deposit.

Conclusion

I dismiss without leave to reapply the Tenants' claim under s. 51(2) of the *Act* for compensation equivalent to 12 times the monthly rent payable under the tenancy agreement.

I dismiss without leave to reapply the Tenants' claim under s. 67 of the *Act* for monetary compensation.

I order pursuant to s. 38 of the *Act* that the Landlord return double the security deposit and pet damage deposit, which totals **$2,050.00**.

It is the Tenants' obligation to serve the monetary order on the Landlord. If the Landlord does not comply with the monetary order, it may be enforced by the Tenants at the BC Provincial 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: June 15, 2023

Residential Tenancy Branch