



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes Landlord: **MNDCL-S, FFL**
 Tenants: **MNDCT, MNSD, FFT**

Introduction

This hearing dealt with the Landlord's application under the *Residential Tenancy Act* (Act) for:

1. A Monetary Order for compensation for a monetary loss or other money owed – holding security and/or pet damage deposit under sections 38 and 67 of the Act; and,
2. Recovery of the application filing fee under section 72 of the Act.

This hearing also dealt with the Tenants' application under the Act for:

1. An Order for compensation for a monetary loss or other money owed under section 67 of the Act;
2. An Order for the return of part or all of the security deposit and/or pet damage deposit under section 38 of the Act; and,
3. Recovery of the application filing fee under section 72 of the Act.

The hearing was conducted via teleconference. The Landlord, his support, and both Tenants attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (RTB) Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

Both parties acknowledged receipt of:

- the Landlord's Proceeding Package served by registered mail on December 16, 2022, the Tenants confirmed receipt, deemed served on December 21, 2022; and,
- the Tenants' Proceeding package and evidence served by registered mail on June 26, 2023, the Landlord confirmed receipt, deemed served on July 1, 2023;

Pursuant to sections 89 and 90 of the Act, I find that both parties were duly served with all the documents related to the hearing in accordance with the Act.

Issues to be Decided

Landlord:

1. Is the Landlord entitled to a Monetary Order for compensation for a monetary loss or other money owed – holding security and/or pet damage deposit?
2. Is the Landlord entitled to recovery of the application filing fee?

Tenants:

1. Are the Tenants entitled to an Order for compensation for a monetary loss or other money owed?
2. Are the Tenants entitled to an Order for the return of part or all of the security deposit and/or pet damage deposit?
3. Are the Tenants entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions presented to me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on May 1, 2022. The fixed term was to end on April 30, 2023; however, the Tenants provided a notice to end the tenancy on October 25, 2022 stating that they would be leaving on November 1, 2022. The Landlord pressed that if the Tenants vacate on November 1, 2022, then they owe rent to the end of December 2022, but if they moved out on October 31, 2022, then they owe rent to the end of November 2022. On October 26, 2022, the Tenants wrote the Landlord:

I appreciate your support of course and want to make this a smooth transition for everyone involved. We've never had to end a tenancy ourselves and have

always lived long term to the point where landlords have sold their home. As October 31st is Halloween, we want our kids to still enjoy it. Which is why I didn't say that day. But we will move on October 31st if it makes it easier and following the end of the tenancy rules.

The Tenants reported that the tenancy ended on October 31, 2022.

Monthly rent was \$2,400.00 payable on the first day of each month. A security deposit of \$1,200.00 was collected at the start of the tenancy and is still held by the Landlord.

The Tenants lived in the upper unit, and two different tenants each lived in separate basement units in the home.

The Landlord testified that they neither did a move-in condition inspection nor a move-out condition inspection with the Tenants.

The Landlord received the Tenants' forwarding address on November 2, 2022.

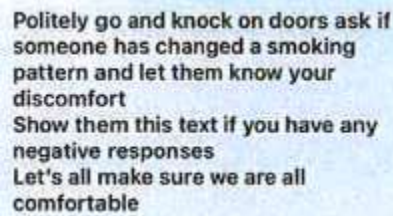
The Landlord stated they do not have an arbitrator's order that they could keep part or all of the Tenants' security deposit. The Landlord confirmed that the Tenants did not agree in writing that the Landlord could keep any of the security deposit.

The Landlord applied to keep some or all of the Tenants' security deposit on December 11, 2022.

The Landlord testified that he secured a new tenant from the lower rental unit in the home starting December 1, 2022, but this person is paying \$400.00 less per month to the Landlord.

The Landlord's notice states they seek \$2,400.00 as they lost one month's rent due to the short notice from the Tenants. The Landlord stated in the hearing that he would be happy to retain the security deposit which would represent his total loss.

The Tenants pointed to a message that was sent to the Landlord on September 29, 2022 informing them about the severity of the smoke issues coming into the Tenants' rental unit. The Landlord replied:



Politely go and knock on doors ask if someone has changed a smoking pattern and let them know your discomfort
Show them this text if you have any negative responses
Let's all make sure we are all comfortable

The Tenants were not happy that it was left with them to deal with the issue. The female Tenant said she was not comfortable talking with tenant who was smoking. The Tenants testified that smoke was coming into their rental unit through the vents in both of their bathrooms. The Tenants documented the days they smelled smoke in their rental unit, and one of those times, they smelled smoke at two or three in the morning. The male Tenant said to him it was worse during the evenings. They were worried that the person smoking possibly could fall asleep with a lit cigarette and there could be a housefire.

The Tenants stated they suffered from headaches, and their children were often coughing. One of their children is a type 1 diabetic, and when they are stressed, this negatively affects their blood sugars. The Tenants felt that the smell of smoke intensified in their rental unit after the downstairs tenants were spoken to. The Tenants stated that their house smelled like an ashtray.

On October 31, 2022, the downstairs tenant who eventually moved into the rental unit messaged the Tenants asking them 'if they had left yet, and that the Landlord asked her to get the key for the rental unit from the Tenants.' The Tenants replied, "Yes, we're gone but should be home soon. The key is in the mail box. He told us to put it there lol"

The Tenants uploaded pictures dated November 27, 2022 from the tenant who moved into their former rental unit. The pictures were taken in the rental unit. The Tenants stated that the tenant moved into their former rental unit before December 1, 2022.

The Tenants seek \$2,400.00 in compensation for the loss of quiet enjoyment of their rental unit. The Tenants seek the return of their security deposit.

Analysis

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. The onus to prove their case is on the person making the claim.

Landlord's unpaid rent claim:

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.*

...

The Tenants and their children were having difficulties residing in the rental unit due to smoke fumes coming from another unit in the residential premises. On October 25, 2022, the Tenants provided a late notice they were ending their fixed term tenancy on November 1, 2022. There were subsequent conversations about ending the tenancy on October 31 or November 1, and what the expectations would be about rent following that. One of the downstairs tenants told the Tenants that she was to collect the keys for the rental unit, and she was told the keys were left in the mailbox as instructed by the Landlord. I find the Tenants vacated the rental unit on October 31, 2022, and the tenancy ended on this date.

The Tenants' notice lacked some of the required information as specified under section 52 of the Act. Most importantly, the Tenants were required to give the Landlord 30 days written notice. I find the Landlord has proven they are entitled to rent compensation for the month of November which would correspond to the 30 days notice provision in section 45 of Act. I grant the Landlord **\$2,400.00** compensation.

Tenants' breach of quiet enjoyment claim:

Protection of tenant's right to quiet enjoyment

28 *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*

...

(b) freedom from unreasonable disturbance;

...

RTB Policy Guideline #6-Entitlement to Quiet Enjoyment assists parties to understand issues that are likely to be relevant in a breach of quiet enjoyment claim. The basis for a finding of a breach of quiet enjoyment is set out in the guideline as:

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

A landlord can be held responsible for the actions of other tenants if it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

RTB Policy Guideline #16-Compensation for Damage or Loss addresses the criteria for awarding compensation to an affected party. This guideline states, "*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.” This section must be read in conjunction with section 67 of the Act.

Policy Guideline #16-Compensation for Damage or Loss asks me to analyze 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.

It is the Landlord's obligation to protect the Tenants' quiet enjoyment of their rental unit. When the Tenants contacted the Landlord about smoke that was entering their suite and disturbing them, it was the Landlord's job to remedy the situation. I note there was no provision in the tenancy agreement that stated the rental unit, or the residential property was non-smoking. The Tenants' lives were negatively impacted from the smoke coming into their home through the vents in the bathrooms. The Tenants submitted that their home smelled like an ashtray. The Tenants ended their tenancy because them and their family could not live in these circumstances.

I find the Landlord breached section 28 of the Act and did not conduct themselves accordingly to protect the Tenants' quiet enjoyment and their rights to freedom of unreasonable disturbance. The smell of smoke was not a tenable living situation for this family as the disturbance was not temporary and by its nature permeated their home. I find the Tenants are entitled to compensation; however, not as much as they seek as the rental unit was not specified to be non-smoking. I find the Tenants are entitled to compensation totalling **\$400.00**.

Tenants return of security deposit claim:

Section 38 of the Act sets out specific requirements for dealing with a security deposit at the end of a tenancy. Section 38(1) requires a landlord to return the security deposit in full or file a claim with the RTB against it within 15 days of the later of the end of the tenancy or the date the landlord receives the tenant's forwarding address in writing. There are exceptions to this outlined in sections 38(2) to 38(4) of the Act.

I previously found that the tenancy ended on October 31, 2022.

The Tenants' provided their forwarding address to the Landlord in writing and the Landlord received this on November 2, 2022.

November 17, 2022 is the relevant date for the purposes of section 38(1) of the Act. The Landlord had 15 days from November 2, 2022 to repay the security deposit in full or file a claim with the RTB against the security deposit.

The Landlord did not repay the security deposit or file a claim with the RTB against the security deposit within 15 days of November 2, 2022. Therefore, the Landlord failed to comply with section 38(1) of the Act.

Sections 38(2) to 38(4) of the Act state:

Return of security deposit and pet damage deposit

38 ...

- (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...*

The Landlord did not organize move-in or move-out condition inspections and provided no opportunities for the Tenants to participate in these. I find the Tenants did not extinguish their rights in relation to the security deposit. Section 38(2) of the Act does not apply.

The Landlord did not have an outstanding monetary order against the Tenants at the end of the tenancy. Section 38(3) of the Act does not apply.

The Tenants did not agree in writing at the end of the tenancy that the Landlord could keep some or all of the security deposit. Section 38(4) of the Act does not apply.

Given the above, I find the Landlord failed to comply with section 38(1) of the Act in relation to the security deposit and that none of the exceptions outlined in sections 38(2) to 38(4) of the Act apply. Therefore, the Landlord is not permitted to claim against the security deposit and must return double the security deposit, \$2,400.00, to the Tenants pursuant to section 38(6) of the Act.

As both parties were successful in this matter, each party must bear the cost of their own application filing fees paid to start these claims.

The Landlord must pay the Tenants **\$2,400.00** plus **\$16.34** interest as calculated using the RTB Deposit Interest Calculator (Interest is calculated on the original security deposit amount, before any deductions are made, and it is not doubled).

The Tenants' monetary award is calculated as:

Item	Amount
Unpaid rent to Landlord	-\$2,400.00
Compensation for breach of quiet enjoyment to Tenants	\$400.00
Security deposit doubled to Tenants	\$2,400.00
Security deposit interest to Tenants	\$16.34
Total monetary award to Tenants	\$416.34

Conclusion

I grant a Monetary Order to the Tenants in the amount of \$416.34. 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 of British Columbia 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 Act.

Dated: October 4, 2023

Residential Tenancy Branch