



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

On June 3, 2022, the Tenants made an Application for a Dispute Resolution Proceeding seeking a Monetary Order for compensation pursuant to Section 51 of the *Residential Tenancy Act* (the “*Act*”), seeking a return of the security deposit pursuant to Section 38 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

This matter was set down for a hearing on February 14, 2023, at 1:30 PM. This Application was then subsequently adjourned for reasons set forth in the Interim Decision dated February 15, 2023, and set down for a final, reconvened hearing on October 3, 2023, at 1:30 PM.

Tenant M.S. attended the final, reconvened hearing, and Landlord G.K. attended the hearing as well. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

Service of documents was discussed at the original hearing and there were no issues surrounding service. As such, I have accepted both parties' evidence packages and will consider them when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Are the Tenants entitled to a return of double the security deposit?
- Are the Tenants entitled to a Monetary Order for 1 month's compensation based on the Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice")?
- Are the Tenants entitled to a Monetary Order for 12 months' compensation based on the Notice?
- Are the Tenants entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

At the original hearing, the parties agreed that the tenancy started on September 1, 2020, as a fixed term tenancy for one year ending on November 1, 2021; however, the tenancy ended when the Tenants gave up vacant possession of the rental unit early, on or around October 15, 2021. Rent was established at an amount of \$1,500.00 per month and was due on the first day of each month. A security deposit of \$750.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence for consideration.

G.K. confirmed that neither a move-in inspection report nor a move-out inspection was conducted with the Tenants. As well, M.S. advised that they provided their forwarding address in writing to the Landlords on their Notice to Move Out Early, dated September 29, 2021, and then again by registered mail to the Landlords' address on the Notice, on May 11, 2022. G.K. stated that they never received the Tenants' registered mail package; however, she acknowledged that they received the Tenants' forwarding address on their Notice to Move Out Early shortly after September 29, 2021. She also

confirmed that they are still holding this deposit in trust.

The parties agreed that the Notice was served on July 22, 2021, by being attached to the Tenants' door. The reason the Notice was served was because "The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of the individual's spouse). In addition, the Landlords indicated that it would be "The landlord or the landlord's spouse" that would specifically be moving into the rental unit. The effective end date of the tenancy was noted as October 31, 2021, on the Notice; however, as this was a fixed term tenancy ending on November 1, 2021, this incorrect effective date automatically self-corrects pursuant to Section 53 of the *Act*. Moreover, the Landlords failed to indicate who this Notice was from on the Notice, and G.K. stated that this was simply an oversight. M.S. confirmed that they received the Notice, and that they were aware that this was from the Landlords.

M.S. advised that they were seeking compensation in the amount of **\$1,500.00** because they were served the Notice and are entitled to one month's rent compensation. She testified that they served their 10-day Notice to Move Out Early on or around September 29, 2021, effective for October 10, 2021. She stated that she left the keys with the cleaners and is not sure if she told them to leave the keys in the rental unit. As such, she is unsure when the keys were returned to the Landlords. Regardless, she then stated that it may have been possible that they did not pay any rent for October 2021 anyways, and then confirmed that they withheld October 2021 rent.

G.K. advised that there was no communication with the Tenants, but they left the keys with the cleaners prior to October 14, 2021, and still had furniture in the rental unit after this date. She confirmed that the Tenants did not pay any rent for October 2021.

With respect to the Notice, G.K. advised that Landlord N.K. suffered from health issues, that were aggravated by the Tenants actions and behaviours, so they elected to simplify their lives and originally planned to sell the rental unit. However, their accountant informed them that it would be more prudent to move into the rental unit and sell the property that they were currently living in to avoid having to pay a capital gains tax. She testified that a person asked her if they were selling the rental unit, but she informed them that they were actually selling their own property, and she had a verbal, accepted agreement for this sale.

She then testified that when they gained vacant possession of the rental unit, there was substantial damage in the rental unit that prevented them from moving in. She

referenced the documentary evidence to support the extent of the damage. She submitted that due to COVID and a shortage of labour, it was uncertain how long it would take to fix this damage, so they put the sale of their own property on hold. She confirmed that the damage was not fixed until March 24, 2022. She stated that they made an Application to claim against the Tenants' security deposit on March 4, 2023, but then she was not sure of the actual year this was done. She submitted that there was a hearing scheduled for October 20, 2023, but she did not provide a file number for this Application.

She advised that the stress of this situation caused N.K.'s health to deteriorate, and their doctor warned them that a move was not advisable. While she provided testimony regarding the extent of his health conditions, they did not submit any documentary evidence to support this position. She testified that against the advice of their accountant, they listed the rental unit for sale on May 9, 2022, and that it sold in June 2022.

M.S. refuted the claims of the condition of the rental unit at the end of the tenancy, and submitted that the rental unit was in a state of disrepair at the start of the tenancy. However, she acknowledged that there may have been feces left in the toilet as Tenant K.S. suffers from an injury. As well, she confirmed that their movers were negligent for a second crack in the rental unit.

She testified that they were aware that N.K. had health issues, but they were not aware of how his condition progressed. However, she stated that he was fairly active, that he was alert, and that he could communicate clearly in their interactions. She advised that he was around the rental unit frequently. As well, she submitted that the Landlords listed the rental unit for sale prior to service of the Notice.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 23 of the *Act* states that the Landlords and Tenants must inspect the condition of the rental unit together on the day the Tenants are entitled to possession of the rental unit or on another mutually agreed upon day.

Section 35 of the *Act* states that the Landlords and Tenants must inspect the condition of the rental unit together before a new tenant begins to occupy the rental unit, after the day the Tenants cease to occupy the rental unit, or on another mutually agreed upon day. As well, the Landlords must offer at least two opportunities for the Tenants to attend the move-out inspection.

Section 21 of the *Residential Tenancy Regulation* (the “*Regulation*”) outlines that the condition inspection report is evidence of the state of repair and condition of the rental unit on the date of the inspection, unless either the Landlords or the Tenants have a preponderance of evidence to the contrary.

Sections 24(2) and 36(2) of the *Act* state that the right of the Landlords to claim against a security deposit or pet damage deposit is extinguished if the Landlords do not complete the condition inspection reports in accordance with the *Act*.

Section 32 of the *Act* requires that the Landlords provide and maintain a rental unit that complies with the health, housing and safety standards required by law and must make it suitable for occupation. As well, the Tenants must repair any damage to the rental unit that is caused by their negligence.

Section 67 of the *Act* allows a Monetary Order to be awarded for damage or loss when a party does not comply with the *Act*.

With respect to the inspection reports, as neither a move-in inspection report nor a move-out inspection report was conducted with the Tenants, I am satisfied that the Landlords failed to comply with the requirements of the *Act* in completing these reports. As such, I find that the Landlords have extinguished the right to claim against the deposit.

Section 38 of the *Act* outlines how the Landlords must deal with the security deposit and pet damage deposit at the end of the tenancy. Section 38(1) of the *Act* requires the Landlords, within 15 days of the end of the tenancy or the date on which the Landlords receive the Tenants’ forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlords to retain the deposit. If the Landlords fail to comply with Section 38(1), then the Landlords may not make a claim against the deposit, and the Landlords must pay double the deposit to the Tenants, pursuant to Section 38(6) of the *Act*.

Based on the consistent and undisputed evidence before me, the Landlords received

the Tenants' forwarding address in writing on their Notice to Move Out Early, dated September 29, 2021, and the tenancy ended by way of the Notice on the self-corrected effective date of November 1, 2021. Given that the Landlords extinguished the right to claim against the deposit, and given that they did not then return the deposit in full within 15 days of November 1, 2021, I am satisfied that the Landlords failed to comply with this Section of the *Act* and illegally withheld the deposit. As such, I find that the doubling provisions apply to the security deposit in this instance, and that the Tenants are granted a monetary award in the amount of **\$1,500.00**.

Section 49 of the *Act* outlines the Landlords' right to end a tenancy in respect of a rental unit where the Landlords or a close family member of the Landlords, intend in good faith to occupy the rental unit.

Section 52 of the *Act* requires that any notice to end tenancy issued by the Landlords must be signed and dated by the Landlords, give the address of the rental unit, state the effective date of the Notice, state the grounds for ending the tenancy, and be in the approved form. The first issue I must consider is the validity of the Notice. When reviewing this Notice, given that all parties were aware that the Landlords served this Notice despite their name not being on the Notice, I am satisfied that this was a valid Notice.

The second issue I must consider is the Tenants' claim for one month's compensation owed to them when they were served the Notice, I find it important to note that Section 51 of the *Act* reads in part as follows:

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.

I also find it important to note Section 50 of the *Act* below, which pertains to the Tenants' right to end the tenancy early when the Notice is served.

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].

Given that this was a fixed-term tenancy ending on November 1, 2021, the Tenants were not permitted to give 10 days' written notice to vacate early, as this is only permitted in periodic tenancies (ie. month to month tenancies). Regardless, as the consistent and undisputed evidence is that the Tenants did not even pay October 2021 rent, they clearly received the compensation that was entitled to them due to service of the Notice. As such, the Tenants' claim for one month's compensation after being served this Notice is dismissed without leave to reapply.

Finally, the last issue I must consider is the Tenants' claim for twelve-months' compensation owed to them as the Landlords did not use the property for the stated purpose on the Notice. I find it important to note that the Notice was dated July 22, 2021, and Section 51 of the *Act* changed on May 17, 2018, which incorporated the following changes to subsections (2) and (3) as follows:

51 (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*

(a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

(b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

At the time the Notice was served, G.K. advised that the intention was for them to move into the rental unit and that the Notice was served in good faith. Regardless, the good faith requirement ended once the Notice was accepted by the Tenants and after they gave up vacant possession of the rental unit. What I have to consider now is whether the Landlords followed through and complied with the *Act* by using the rental unit for the stated purpose for at least six months after the effective date of the Notice.

Furthermore, the burden for proving this is on the Landlords, as established in *Richardson v. Assn. of Professional Engineers (British Columbia)*, 1989 CanLII 7284 (B.C.S.C.).

With respect to this situation, Policy Guideline # 2A states that “Other definitions of “occupy” such as “to hold and keep for use” (for example, to hold in vacant possession) are inconsistent with the intent of section 49, and in the context of section 51(2) which – except in extenuating circumstances – requires a landlord who has ended a tenancy to occupy a rental unit to use it for that purpose (see Section E).”

As well, Policy Guideline # 50 states the following:

Sections 51(2) and 51.4(4) of the RTA are clear that a landlord must pay compensation to a tenant (except in extenuating circumstances) if they end a tenancy under section 49 or section 49.2 and do not accomplish the stated purpose for ending the tenancy within a reasonable period or use the rental unit for that stated purpose for at least 6 months.

Another purpose cannot be substituted for the purpose set out on the notice to end tenancy (or for obtaining the section 49.2 order) even if this other purpose would also have provided a valid reason for ending the tenancy. For instance, if a landlord gives a notice to end tenancy under section 49, and the stated reason on the notice is to occupy the rental unit or have a close family member occupy the rental unit, the landlord or their close family member must occupy the rental unit for at least 6 months. A landlord cannot convert the rental unit for non-residential use instead. Similarly, if a section 49.2 order is granted for renovations and repairs, a landlord cannot decide to forego doing the renovation and repair work and move into the unit instead.

A landlord cannot end a tenancy for the stated purpose of occupying the rental unit, and then re-rent the rental unit, or a portion of the rental unit (see *Blouin v. Stamp*, 2011 BCSC 411), to a new tenant without occupying the rental unit for at least 6 months.

Finally, Policy Guideline # 50 outlines the following about extenuating circumstances:

The director may excuse a landlord from paying additional compensation if there were extenuating circumstances that prevented the landlord from accomplishing the stated purpose for ending a tenancy within a reasonable period after the tenancy ended, from using the rental unit for the stated purpose for at least 6 months, or from complying with the right of first refusal requirement.

These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically because of matters that could not be anticipated or were outside a reasonable owner's control. Some examples are:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before moving in.
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
- A tenant exercised their right of first refusal, but did not notify the landlord of a further change of address after they moved out so they did not receive the notice and new tenancy agreement
- A landlord entered into a fixed term tenancy agreement before section 51.1 and amendments to the Residential Tenancy Regulation came into force and, at the time they entered into the fixed term tenancy agreement, they had only intended to occupy the rental unit for 3 months and they do occupy it for this period of time.

The following are probably not extenuating circumstances:

- A landlord ends a tenancy to occupy a rental unit and they change their mind.
- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for the renovations and cannot complete them because they run out of funds.
- A landlord entered into a fixed term tenancy agreement before section 51.1 came into force and they never intended, in good faith, to occupy the rental unit because they did not believe there would be financial consequences for doing so.

When reviewing the totality of the evidence before me, I am satisfied that the reason on the Notice was for the rental unit to be occupied by "The landlord or the landlord's spouse" only. However, the consistent and undisputed evidence is that the Landlords never moved into the rental unit after the effective date of the Notice. As such, I am satisfied that the rental unit was clearly not occupied by the Landlords, and as a result, the Landlords failed to use the rental unit for the stated purpose. Consequently, the only thing I must consider now are extenuating circumstances.

G.K. advanced two arguments for extenuating circumstances, and the first one pertained to extensive damage to the rental unit. I find it important to note that the Landlords did not conduct a move-in inspection report at the start of the tenancy. Therefore, there is no evidence to confirm the condition of the rental unit that was provided to the Tenants, and it is not possible to ascertain whether some or all of this damage existed already, despite M.S. acknowledging that there were some minor deficiencies that they were responsible for.

Moreover, the Landlords were entitled under the *Act* to conduct monthly inspections, and if there truly was damage to the rental unit caused by the Tenants, the Landlords would have observed this, and could have required the Tenants to rectify these issues during the tenancy. Furthermore, there is no evidence before me that the Landlords filed an Application against the Tenants to recover the costs to remedy this damage. In my view, had the rental unit been so heavily damaged at the end of the tenancy, it makes little sense that the Landlords would not have pursued the Tenants for recovery of this damage. As there is no evidence before me that the Landlords conducted inspections of the rental unit, this purported damage could have been anticipated, and was not outside of the Landlords' control to address. For the above reasons, I do not accept that these submissions regarding damage would constitute extenuating circumstances.

Regarding G.K. submissions about N.K.'s declining health, while I sympathize with these health concerns, there has been no documentary evidence submitted to substantiate these health concerns, or to support the testimony that these issues prevented the Landlords from occupying the rental unit. As such, I do not accept that these submissions regarding a health condition would constitute extenuating circumstances.

Given my assessment above, I do not accept that the Landlords' reasons constituted an extenuating circumstance. As such, I am not satisfied that there were any extenuating circumstances that prevented the Landlords from using the rental unit for the stated purpose for at least six months after the effective date of the Notice. Ultimately, I find that the Tenants are entitled to a monetary award of 12 months' rent pursuant to Section 51 of the *Act*, in the amount of **\$18,000.00**.

As the Tenants were partially successful in these claims, I find that the Tenants are entitled to recover the \$100.00 filing fee paid for this Application.

Pursuant to Sections 38, 51, 67, and 72 of the *Act*, I grant the Tenants a Monetary Order as follows:

Calculation of Monetary Award Payable by the Landlords to the Tenants

Item	Amount
Double security deposit	\$1,500.00
Twelve months' rent compensation	\$18,000.00
Filing fee	\$100.00
Total Monetary Award	\$19,600.00

Conclusion

I provide the Tenants with a Monetary Order in the amount of **\$19,600.00** in the above terms, and the Landlords must be served with **this Order** as soon as possible. Should the Landlords 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: October 25, 2023

Residential Tenancy Branch