



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, RR, FF, O

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- authorization to recover her filing fee for this application from the landlord pursuant to section 72; and
- other unspecified remedies (which included consideration of the tenant's request to obtain a return of all of her security deposit and any funds owed to her due to the landlord's failure to comply with section 38 of the *Act* and to comply with section 51(1) of the *Act*).

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another.

The tenant confirmed that she received the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) issued on December 28, 2011 and his subsequent 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) issued on January 17, 2012. The tenant testified that she did not apply for dispute resolution to seek cancellation of either of these Notices. The landlord testified that he received the tenant's January 23, 2012 notice advising the landlord that the tenant would be ending her tenancy and vacating the rental unit by January 31, 2012. The landlord also confirmed that he received both the tenant's original application for a monetary award of \$1,200.00 and her subsequent amended application for a monetary award of \$4,988.39. I am satisfied that all of these documents and the parties' written evidence packages were served to one another.

At the hearing, the tenant asked that she also be allowed a monetary award for rent for February 2012 and a return of the remaining portion of her security deposit. The landlord continues to hold \$105.00 from the tenant's security deposit paid on July 1, 2011. The parties agreed that the landlord has returned \$295.00 of the tenant's security

deposit to the tenant. The landlord agreed to include the return of the remaining portion of the tenant's security deposit in my consideration of the tenant's application, as he was interested in obtaining a final decision regarding any amounts owing as a result of this tenancy during this hearing. For that reason, and with the parties' agreement, I have added consideration of the tenant's request to obtain a return of her security deposit and her requests for one month's rent for February 2012 in my consideration of the tenant's application. I have included these portions of the tenant's application for dispute resolution under the "other" category identified in her application.

Since the tenant ended shortly after the tenant applied for dispute resolution, there is no longer the possibility of my ordering the reduction of future rent payments by the tenant. As such, I have considered the tenant's request for a retroactive reduction in rent payments for repairs, services or facilities agreed upon but not provided during portions of this tenancy in the context of her application for a monetary award for losses arising of this tenancy.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for losses arising out of this tenancy? Is the tenant entitled to a return of any portion of her security deposit in accordance with section 38 of the *Act*? Is the tenant entitled to a monetary award pursuant to section 51(1) of the *Act* as a result of receiving the 2 Month Notice? Is the tenant entitled to recover her filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, including many photographs, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

This periodic tenancy commenced on July 1, 2011. Monthly rent as set out in the written residential tenancy agreement was set at \$800.00, payable in advance on the first of each month. The landlord withheld \$105.00 from the tenant's security deposit to compensate him for damage that he maintained had occurred as a result of the tenant's actions, including a broken gate, a broken strip, and a destroyed garbage can. The landlord confirmed that he had not applied for dispute resolution to seek a retention of any portion of the tenant's security deposit nor had he applied for dispute resolution to seek a monetary claim for damage arising out of this tenancy.

The tenant vacated the rental unit by January 31, 2012, after failing to seek a cancellation of the landlord's 2 Month Notice. She did not return her keys to the

landlord. The landlord testified that he took occupancy of the rental premises by February 1, 2012 and has changed the locks to the rental unit.

The tenant's original application for a monetary award asking for a monetary award of \$1,200.00, requested a reduction in rent of \$200.00 per month for 5-6 months. The tenant identified the following items in the "Details of the Dispute" section of her application for a monetary award:

1. Basement flooded. Sept. 17th, 2011. Still incomplete. Repairs not finished.
2. Deception – Hidden faults with flooring when viewing suite. Informed on move-in day.
3. Required to pay for garbage collection, limited laundry & heat facilities.

The tenant did not provide any breakdown of the amended \$4,988.39 amount of the monetary award identified in her amended application. In her subsequent January 23, 2012 letter to the landlord advising that she would be vacating the rental unit by January 31, 2012, she requested \$800.00 from the landlord for February 2012 rent and a return of her \$400.00 security deposit within 15 days of the end of her tenancy. She provided a forwarding address where the landlord could send these payments.

During the hearing, the tenant testified that she was seeking \$1,288.02 in addition to the \$4,988.39 in her amended application for dispute resolution. She also said that she incurred an additional \$1,000.00 in losses arising out of this tenancy which she was not intending to include in her claim for a monetary award. She said that she had receipts for these expenses, but had not submitted them into written evidence. At the hearing, I noted that any claim of \$5,000.00 or more would be subject to an additional filing fee, which she had not paid. As she had not paid this filing fee and the landlord had not been advised that she was seeking a significantly higher monetary award, I have limited the amount of her potential claim for a monetary award to the \$4,988.39 identified in her amended application for dispute resolution.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

The parties submitted considerable written and photographic evidence, some of which was relevant to the issues before me, much of which was not. In both of their final arguments presented in support of their positions, the parties maintained that everything that the other party had said was false. Tensions between the parties escalated after the landlord served the 2 Month Notice and after the tenant served her application for dispute resolution. Police were called several times during the final stages of this tenancy, resulting in the arrest and incarceration of the landlord and his wife.

Despite the animosity between the parties and their allegations that the other party was lying, there was agreement between them on some of the central issues before me in considering the tenant's application for a monetary award. I will first deal with these issues where the facts were not in dispute and will move to the contentious factual issues later in this decision.

Analysis – Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit in its entirety or file an Application for Dispute Resolution for an Order to make a claim to retain the deposit. The landlord testified that he did not apply for dispute resolution to authorize his retention of a portion of the tenant's security deposit. If the landlord fails to comply with section 38(1) of the *Act*, then the landlord may not make a claim against the deposit, and the landlord **must** pay the tenant double the amount of the deposit (section 38(6) of the *Act*) unless he had a written agreement with the tenant enabling him to retain a portion of the security deposit. There was no such agreement in this case.

The following provisions of Policy Guideline 17 of the Residential Tenancy Policy Guidelines would seem to be of relevance to the consideration of this application:

RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH ARBITRATION

3. Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;...*
- *whether or not the landlord may have a valid monetary claim...*

Although the landlord did not comply with the above requirements of the *Act*, I am satisfied that he did return the \$295.00 portion of the security deposit to the tenant

within 15 days of the end of this tenancy. I find that the landlord had no legal basis for withholding the remaining \$105.00 of the tenant's \$400.00 security deposit. The landlord did not file an application for dispute resolution within 15 days of receiving the tenants' forwarding address in writing or the end of this tenancy, nor did he obtain the tenant's written permission to withhold these funds. As noted in Policy Guideline 17, the validity of any monetary claim that the landlord may have against the tenants has no bearing on the landlord's obligation to return the entire security deposit to the tenant in accordance with section 38 of the *Act*.

Under these circumstances, I find that the tenant is entitled to a monetary Order of the \$105.00 not returned to the tenant plus an amount of \$400.00 pursuant to section 38(6) of the *Act* for failing to return the full security deposit within the time limit set out in the *Act*. No interest is payable over this period.

Analysis – Tenant's Entitlement to a Monetary Award Pursuant to Sections 49, 50 and 51 of the Act

Section 49(8) of the *Act* allowed the tenant 15 days to make an application to dispute the 2 Month Notice issued by the landlord on December 28, 2011. As she did not submit an application to dispute the landlord's 2 Month Notice within that time frame, section 49(9) of the *Act* establishes that she "is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice." This required the tenant to vacate the rental unit by the effective date, in this case, February 29, 2012.

Section 50 of the *Act* also allows a tenant given a notice to end a periodic tenancy under section 49 of the *Act* to 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, 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,...*

This provision to end a tenancy early is in addition to any right to compensation that the tenant might receive under section 51 of the *Act*, which 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.*

Under these circumstances, section 53(1) and (2) allow a Dispute Resolution Officer to correct an incorrect effective date stated in a notice to end tenancy when the effective date "is earlier than the earliest date permitted under the applicable section." In this case, section 90 of the *Act* establishes that a 10 Day Notice to End Tenancy issued by the tenant under section 50(1) of the *Act* and posted on the landlord's door on January 23, 2012 was not deemed received by the landlord until January 26, 2012, the third day after its posting. Although the effective date cited by the tenant in her Notice to End Tenancy was January 31, 2012, I find that the earliest that the tenant's January 23, 2012 written notice to end this tenancy could have taken effect was February 5, 2012.

The parties agreed that the tenant did not pay any portion of her February 2012 rent. Had she not given her notice to end this tenancy early in accordance with section 50 of the *Act*, her non-payment of rent for February 2012 would have satisfied the landlord's responsibility under section 51 (1.1) of the *Act*. However, as noted above, the tenant did provide notice that she was ending this tenancy early with a corrected effective date of February 5, 2012.

In accordance with section 51.1 of the *Act*, I find that the tenant is entitled to a monetary award equivalent to one month's rent, a total of \$800.00. However, I also find that the tenant's late notice to the landlord of her intention to end this tenancy early makes her responsible for pro-rated rent of \$137.93 for the first five days of February 2012 ($5/29 \times \$800.00 = \137.93) which she did not pay. I reduce the amount of her monetary award by \$137.93 for her failure to provide adequate notice of her early end to this tenancy.

Analysis – Tenant's Application for a Retroactive Reduction in Rent for Services and Facilities Committed to but not Provided by the Landlord

The tenant claimed that a flood incident on August 17, 2011 caused damage to the rental premises and reduced the quality of her tenancy for some time. The landlord testified that this flood incident occurred on September 17, 2011, as was noted in documents related to his insurance claim for this flooding incident. The tenant did not dispute the landlord's assertion that the flooding incident occurred on September 17, 2011, that the restoration company was working on the premises that very day, and that repairs were undertaken for a two week period on the shower and vanity in the bathroom.

As the parties agreed that the tenant's shower and vanity were inoperable for a two week period, I allow the tenant a reduction in rent of \$150.00 for that two-week period.

Conflicting evidence was submitted as to the accuracy of the provisions of the residential tenancy agreement and an addendum to that agreement. The landlord

maintained that the tenant had altered the copy of that agreement entered into written evidence by the tenant, including a provision that garbage collection would be included in the services provided as part of this agreement. The tenant testified that the landlord changed the original terms of the their tenancy agreement by adding provisions limiting her access to laundry services on the premises and requiring her to use the landlord's garbage can which seldom had space after the landlord filled it.

The landlord said that the tenant could have and did purchase a seal from the municipality allowing her to use another garbage receptacle on the premises. Although I accept that the unusual provision in this tenancy agreement restricting the tenant's access to garbage collection services was a provision that the tenant should have been provided as a standard term of this agreement, I find that the tenant has not demonstrated entitlement to any significant monetary award for difficulties she may have encountered in removing garbage from her rental unit. The tenant produced no receipts or confirmation that she incurred costs to take her garbage elsewhere during this tenancy. For these reasons, I allow the tenant a nominal monetary award in the tenant's favour in the amount of \$20.00 to compensate the tenant for any loss in service or facility that she may have experienced with respect to the removal of garbage from her rental unit during this tenancy.

The parties entered considerable written evidence with respect to the tenant's claim that she was entitled to a reduction in rent for a wide range of difficulties that she experienced during this tenancy. For example, in her original application for dispute resolution, she requested a rent reduction of \$200.00 for 5 to 6 months. The tenant claimed that the repairs took much longer than they should have taken, that the floors and carpeting were not installed properly, that mould surfaced during the tenancy, and that many features of the rental premises were deficient. Some of her requested rent reduction was to cover her concerns about a lack of heat that she was provided. She testified that she was unaware that the gas fireplace in her suite was not functioning or would not be turned on until October. Later in her tenancy and after she served the landlord with her application for dispute resolution, the landlord removed the thermostat from her bedroom and disconnected the gas fireplace. The landlord confirmed that he took these actions on January 12, 2012, but maintained that he decided at that time to turn his furnace on and heat the entire the home with his furnace.

In considering the tenant's request for a reduction in rent, I find merit in the landlord's observation that there would have been little need for heat in this rental unit during the initial months of this tenancy, as the tenancy commenced on July 1, 2011. The landlord also entered undisputed written evidence of emails from the tenant in which she agreed in October 2011 to pay \$50.00 **more** for her monthly rent commencing on November 1,

2011. While the tenant changed her mind about this offer shortly thereafter, she also stated in an October 26, 2011 email to the landlord that “I dropped the request for a rental reduction and have not asked you for anything.” I find this undisputed evidence from the tenant’s own emails in direct contrast to her claim that she should be entitled to a retroactive rent reduction for services and facilities that she believed she would be receiving when she entered into this tenancy agreement. For these reasons and with the exceptions as noted elsewhere in this decision, I dismiss the tenant’s application for a monetary award for a reduction in rent for many of the services and facilities she believed she should have been receiving as part of her tenancy but which she claimed were reduced or denied by the landlord.

I dismiss the tenant’s claim for a reduction in rent for the landlord’s alleged “deception” in renting her premises that the tenant claimed “disguised” deficiencies in the rental premises. I do so as I find that it was the tenant’s responsibility to check on the condition of the rental premises before she committed to enter into this tenancy. I find that she is not entitled to a retroactive rent reduction for flaws and deficiencies in the premises that she discovered after she had been living in the rental unit for some time. I find that she cannot hold the landlord responsible for her failure to exercise due diligence regarding the state of the premises when she entered into this tenancy agreement. As noted above, her claim that she was entitled to a reduction in rent for services and facilities that she expected to have been provided in her tenancy seems at odds with her own emails indicating that after the repairs to her bathroom were completed following the flooding incident and after she was familiar with the condition of the rental unit, she was prepared to increase her rent.

As set out in this decision, I dismiss most of the tenant’s application for a monetary award for the period preceding her service of her application for dispute resolution to the landlord. Once that occurred, on a balance of probabilities, I find that there is evidence that the landlord’s behaviours, language and actions changed considerably and to an extent that was troubling and worrisome to the tenant. She provided undisputed written evidence of a detailed Tenant Log commencing on January 10, 2012 until January 23, 2012 chronicling her interactions with the landlord and his wife. The police were called by the tenant on a number of occasions, leading to an alleged assault against her guest on January 21, 2012, and the arrest and incarceration of the landlord and his wife. The tenant outlined a series of escalating threats and disturbance by the landlord and his wife leading to a considerable loss of her quiet enjoyment of her rental premises. The landlord confirmed that he removed the thermostat from the tenant’s bedroom and removed her access to the gas fireplace. Although the landlord claimed that his furnace was providing heat to the entire house by that time, I find on a balance of probabilities that the landlord was attempting to obtain an early end to this tenancy by making it as

difficult as possible for the tenant to remain in the rental unit until the effective date of the 2 Month Notice took effect.

I find that the tenant's quiet enjoyment of the premises and access to heat were seriously restricted from the date that the tenant served the landlord with a copy of her dispute resolution hearing package. As of that date, January 10, 2012, I find that the tenant is entitled to a significant reduction in rent for her loss of quiet enjoyment (pursuant to section 28 of the *Act*) and for the landlord's restriction of services and facilities that she should have expected to receive from the landlord during the remainder of her tenancy. For the period from January 10, 2012 until the effective end of her tenancy on February 5, 2012, I allow the tenant a monetary award for a reduction of 75% of her rent over that period. This results in a reduction in rent of \$425.81 (i.e., $\$800 \times 22/31 \times 75\% = \425.81) for the period from January 10, 2012 until January 31, 2012, and of \$ ($\$800 \times 5/29 \times 75\% = \103.45) for the period from February 1, 2012 until February 5, 2012.

I dismiss the tenant's claim for reimbursement for a \$450.00 workshop that she attended at the end of January 2012 when she found it difficult to concentrate because of the circumstances of her tenancy. She testified that she did attend one of the two days of this workshop and I am not satisfied that she has demonstrated sufficient grounds for including this in her claim for a monetary award.

The tenant did stay in a hotel for one of the nights of the renovations and submitted a rather confusing receipt which she said revealed a \$124.50 charge she incurred while her premises were being repaired. The landlord had agreed to pay for her lodging that night, but the hotel accommodations were unsuitable to the tenant and she relocated that same night to another hotel. She said that she cancelled the credit card charge to the landlord for the original hotel accommodations. The landlord confirmed that he was not charged for the hotel accommodations. As the tenant testified that she was not seeking reimbursement for the hotel accommodations in question, I have not made any monetary award with respect to this item.

As the tenant has been partially successful in her application, I allow her to recover her \$50.00 filing fee for this application from the landlord.

Conclusion

I grant a monetary Order in the tenant's favour in the following terms.

Item	Amount
Total Unreturned Portion of Tenants' Security Deposit	\$105.00
Monetary Award pursuant to section 38(6) of the <i>Act</i> for Landlord's Failure to Return all of the Tenant's Security Deposit	400.00
Monetary Award Equivalent to One Month's Rent pursuant to section 51.1 of the <i>Act</i>	800.00
Less Tenant's Responsibility for Rent from February 1, 2012 to February 5, 2012	-137.93
Monetary Award for Tenant's Loss of Shower and Vanity in Bathroom for Two Week Period while Repairs Undertaken	150.00
Monetary Award for Reduced Access to Garbage Collection Services	20.00
Rent Reduction from January 10, 2012 to January 31, 2012 for Loss of Quiet Enjoyment and Reduction in Services and Facilities	425.81
Rent Reduction from February 1, 2012 to February 5, 2012 for Loss of Quiet Enjoyment and Reduction in Services and Facilities	103.35
Filing Fee	50.00
Total Monetary Order	\$1,916.23

The tenant is provided with these Orders in the above terms and the landlord(s) must be served with a copy of these Orders as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I dismiss the remainder of the tenant's claim for a monetary award without leave to reapply.

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: February 17, 2012

Residential Tenancy Branch