



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes:**

Tenants' application filed September 11, 2013: MNSD; MNDC

Landlords' application filed November 27, 2013: MNDC; MND; FF

### **Introduction**

This Hearing was scheduled to consider cross applications on December 5, 2013. The Tenants seek a monetary award in the equivalent of double the amount of the security deposit and compensation for damage or loss under the Act, regulation or tenancy agreement.

The Landlords seek a monetary award for damages to the rental unit; compensation for damage or loss under the Act, regulation or tenancy agreement and to recover the cost of the filing fee from the Tenants.

The parties gave affirmed testimony at the Hearing.

It was determined that the Tenants mailed the Landlords their Notice of Hearing documents and copies of their documentary evidence on September 11, 2013. The Landlords acknowledged receiving the documents "at the end of September".

The Landlords sent the Tenants their Notice of Hearing documents and copies of their documentary evidence on November 27, 2013. The Tenants acknowledged receiving the package on November 28, 2013.

At the onset of the teleconference, the male Tenant requested an adjournment due to a death in the family. He also stated that he received the Landlord's documentary evidence on November 28, 2013, and therefore he had not had time to submit rebuttal evidence.

The Landlords did not object to an adjournment. Therefore, I adjourned the matters and made the following orders with respect to service of additional documents:

1. The Tenants may file rebuttal evidence and must serve the Landlords, and provide the Residential Tenancy Branch with copies, within 2 days by registered mail.
2. The Landlords must file any reply within 10 days of receipt of the Tenants' rebuttal evidence.

The matters were reconvened on February 4, 2013. The parties served each other, and provided the Residential Tenancy Branch, with additional evidence in accordance with the orders set out above.

### **Issues to be Decided**

- Are the Tenants entitled to a monetary award in the equivalent of double the security deposit pursuant to the provisions of Section 38 of the Act?
- Are the Tenants entitled to compensation under the provisions of Section 51 of the Act?
- Are the Landlords entitled to a monetary award for the cost of cleaning the rental unit, and damages to the rental unit?
- If so, may the Landlords apply the security deposit towards satisfaction of their monetary award?

### **Background and Evidence**

This tenancy began on January 1, 2013, and was a one year lease ending December 31, 2013. Monthly rent was \$1,600.00, due on the first day of each month. The Tenants paid a security deposit in the amount of \$800.00, which is held by the Landlords. On June 24, 2013, the parties signed a mutual agreement to end the tenancy effective July 31, 2013. A copy of the agreement was provided in evidence.

No condition inspection report was completed at the beginning of the tenancy. The Landlord provided a copy of the condition inspection report that was completed on July 31, 2013 with the male Tenant and the Landlord SJ present. The Tenants provided the Landlords with their forwarding address in writing on August 22, 2013.

### **The Tenants gave the following testimony:**

The Tenants testified that the Landlords put great pressure on them to move out of the rental unit because the Landlord AK wanted to move into the rental unit. The Tenants stated that they were unaware that they were entitled to compensation if the Landlord wanted to evict them for Landlord's use. The Tenants testified that the Landlord gave them incorrect information with respect to how the tenancy could end. The female

Tenant testified that she was badgered and bullied into signing the mutual end of tenancy by the Landlords.

The Tenants submitted that after they moved out another occupant paid rent to stay in the rental unit before the Landlord moved in. The Tenants seek compensation in the equivalent of one month's rent pursuant to the provisions of Section 51(1) of the Act and further compensation in the equivalent of two months' rent pursuant to the provisions of Section 51(2) of the Act.

The Tenants also seek double the amount of the security deposit pursuant to the provisions of Section 38(6) of the Act. They testified that they did not receive a copy of the move-out condition inspection report until they were served with the Landlords' documentary evidence.

The Tenants disputed the Landlords' claim in its entirety, stating that the rental unit was reasonably clean and undamaged at the end of the tenancy. They questioned when the photographs that the Landlord submitted in evidence were taken and suggested that they must have been taken from a previous tenancy.

The Landlord SJ gave the following testimony:

SJ stated that the female Tenant asked the Landlord for a form so the Tenants could enter into a new tenancy.

SJ stated that the rental unit was not clean when the Tenants moved in, but that the Tenants wanted to move in and stated that they would clean it. She stated that at the beginning of the tenancy, most of the walls were freshly painted and a new carpet was installed.

SJ testified that the photographs were taken at the end of the Tenants' tenancy. She stated that the rental unit was filthy; the carpets were not professionally shampooed; there were crayon marks all over the walls; the yard was unkempt and full of weeds; a shower caddy had been screwed into the tub surround, ruining it and voiding the warrantee; a custom window covering was damaged and dirty. SJ stated that the rental unit had mould damage around the windows because the Tenants used small electric heaters instead of the oil furnace, and did not ventilate the house when cooking.

SJ denied that the Tenants were coerced into signing the mutual end of tenancy agreement. She stated that the Landlords were not going to sign a new lease with the Tenants at the end of the tenancy, and that they heard another house on the block was available for rent. They thought of the Tenants and told the Tenants they could sign a

mutual agreement to end the tenancy or give notice that they were going to move out at the end of their lease.

The Landlords provided copies of invoices, photographs and estimates in evidence.

The Landlords seek a monetary award, calculated as follows:

Repairing and painting walls	\$2,772.00
Cleaning rental unit	\$600.00
Yard cleanup	\$400.00
Replace tub surround	\$400.00
Replace window covering	<u>\$450.00</u>
TOTAL	\$4,622.00

### **Analysis**

#### **Regarding the Tenants' Application:**

- Are the Tenants entitled to a monetary award in the equivalent of double the security deposit pursuant to the provisions of Section 38 of the Act?

The security deposit is held in a form of trust by the Landlords for the Tenant, to be applied in accordance with the provisions of the Act.

Section 38(1) of the Act provides that (unless a landlord has the tenant's **written consent** to retain a portion of the security deposit) at the end of the tenancy and after receipt of a tenant's forwarding address in writing, a landlord has **15 days** to either:

1. **repay the security deposit** in full, together with any accrued interest; **or**
2. **make an application** for dispute resolution claiming against the security deposit.  
(emphasis added)

Section 38(6) of the Act provides that if a landlord does not comply with Section 38(1) of the Act, the landlord **must** pay the tenant double the amount of the security deposit.

In other words, a landlord may not keep the security deposit without the tenant's written permission or an Order of the Director allowing the landlord to apply the security deposit towards damages or unpaid rent. In this case, I find that the Tenants gave written consent that the Landlord could retain the security deposit as evidenced by the male Tenant's signature on the move-out condition inspection report. Therefore, the security deposit has been extinguished and this part of the Tenants' claim is dismissed.

- Are the Tenants entitled to compensation under the provisions of Section 51 of the Act?

Section 51 of the Act provides that a tenant who receives a notice to end a tenancy under Section 49 of the Act (Landlord's Use of Property) is entitled to receive compensation in an amount in the equivalent of one month's rent.

It is important to note that the Landlords are under the false impression that the tenancy agreement was a fixed term tenancy that ended at the end of the term. However, the tenancy agreement includes the following clause:

1. RENTAL PERIOD – The tenancy created by this Agreement STARTS ON January 1, 3 and is for a 1 year term ending December 31, 2013. **At the end of this time the tenancy will continue on a month-to-month basis**, or another fixed length of time, unless the tenant gives written notice to end the tenancy at least one clear month before the end of the term.

[reproduced as written, my emphasis added]

In other words, the tenancy would continue as a month to month tenancy unless the parties entered into another term lease or the Tenants gave notice under Section 45 of the Act one month before the end of the term.

If the Tenants did not give due notice to end the tenancy at the end of the term (and unless the tenancy ended for Cause, Unpaid Rent, or Mutual Agreement prior to the end of the term), the Landlords would have had to give the Tenants a Notice to End Tenancy for Landlord's Use if they wished to move back into the rental unit at the end of the term. However, the Landlord SJ e-mailed the Tenants on June 25, 2013, stating:

"[The Landlord AK] has just come from the Residential Tenancy Branch. You have two choices (1) you can go to the end of your lease. You will be issued the mandatory two months' notice and there will be NO free rent. Your lease will be finished and it will not be renewed. Or, 2) you can rent a different house before October and sign the Mutual Agreement to Vacate. There is NO financial compensation."

Section 5 of the Act provides that landlords and tenants **may not avoid or contract out of the Act or regulations** and that any attempt to avoid or contract out of the Act is of no effect.

In this case, I find that the Tenants had no desire to end the tenancy and that the Landlords effectively avoided the Act. I find that the Tenants acted on the Landlords'

wishes to end the tenancy and that they are entitled to compensation equivalent to one month's rent, in the amount of **\$1,600.00**.

I find that the Tenants are not entitled to compensation under the provisions of Section 51(2) of the Act, because the Tenants did not provide sufficient evidence that the Landlord AK did not take steps to move back into the rental unit within a reasonable period after the end of the tenancy, or that she has not been residing in the rental unit for at least six months after the end of the tenancy.

Regarding the Landlords' Application:

This is the Landlords' claim for damage or loss under the Act and therefore the Landlords have the burden of proof to establish their claim on the civil standard, the balance of probabilities.

Section 7(1) of the Act states that if a landlord or tenant does not comply with the Act, regulations or tenancy Agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results from the breach. Section 67 of the Act provides me with authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Section 7(2) of the Act requires the party claiming compensation to do whatever is reasonable to minimize the damage or loss.

To prove a loss and have the Tenants pay for the loss requires the Landlords to satisfy four different elements:

1. Proof that the **damage or loss exists**,
2. Proof that the damage or loss occurred **due to the actions or neglect of the Tenant in violation of the Act**,
3. Proof of the **actual amount required to compensate** for the claimed loss or to repair the damage, and
4. Proof that the Landlord followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Sections 23 and 35 of the Act require landlords to complete a condition inspection report in accordance with the regulations at the beginning and at the end of the tenancy. Section 21 of the regulation states that a condition inspection report completed in accordance with the regulation is evidence of the state of repair and condition of the rental unit on the date of the inspection, unless there is preponderance of evidence to the contrary. In this case, the Tenants denied that they damaged the walls to the

degree that the Landlords allege. They submitted that most of the damage pre-existed the tenancy. The Tenants also denied damaging the tub surround. The Landlords did not complete a condition inspection report at the beginning of the tenancy and I find that they did not provide sufficient documentary evidence of the state of repair of the rental unit at the beginning of the tenancy. Therefore, I find that the Landlords have not met part 2 of the test for damages as set out above.

However, the male Tenant agreed that the Landlords could retain the security deposit at the end of the tenancy for damages to the rental unit. Therefore I find that the Landlords are entitled to a monetary award in the amount of **\$800.00**, which they may deduct from the security deposit, leaving a balance of **NIL**.

I make no order with respect to reimbursement of the filing fee to the Landlords.

### **Conclusion**

The Landlords may retain the **\$800.00** security deposit in compensation for damages to the rental unit.

I hereby provide the Tenants with a Monetary Order in the amount of **\$1,600.00** for service upon the Landlords. This Order may be filed in the Provincial Court of British Columbia (Small Claims) 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: March 03, 2014

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Residential Tenancy Branch

