Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding STRATA PLAN NW 1961-2
PARKSIDE MANOR
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, RR, FF

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;
- authorization to obtain a return of double her security deposit pursuant to section 38;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

The landlords did not attend this hearing, although the hearing scheduled for 10:30 a.m. lasted until 11:10 a.m. The tenant attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The tenant testified that she sent both landlords shown on her Residential Tenancy Agreement (the Agreement) copies of her dispute resolution hearing package, including a copy of her application for dispute resolution and the Notice of Hearing, by registered mail on September 29, 2014. She also testified that she sent copies of her written and digital evidence to the landlords in the same package. She provided the Canada Post Tracking Number to confirm these registered mailings. She testified that the packages have not been returned to her and she understood that they have been received by the landlords. She testified that the President of the Strata Corporation shown as her landlord on the Agreement contacted her after receiving the hearing package sent to the landlords. Based on the tenant's undisputed sworn testimony and in accordance with sections 89(1) and 90 of the *Act*, I find that the tenant's dispute resolution hearing package was deemed served to the landlords on October 4, 2014, the fifth day after their registered mailing.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for the loss in value of her tenancy? Is the tenant entitled to a monetary award equivalent to double the value of her security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs and videos, miscellaneous letters and e-mails, and the sworn testimony of the tenant, not all details of the tenant's submission (the only evidence received) are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

This one year fixed term tenancy for a two-bedroom rental unit from a strata corporation commenced on September 15, 2013. The rental was scheduled to end on August 31, 2014. Monthly rent was set at $1,200.00, payable on the first of each month, plus heat and hydro. The landlords continue to hold the tenant's $600.00 security deposit paid on September 15, 2013.

The tenant confirmed that she participated in a joint move-in condition inspection with the landlords' representative on September 11, 2013. She entered into written evidence a copy of the landlords' report of that inspection.

On January 10, 2014, the tenant sent the landlords' representative her notice to end this tenancy by email and by personal delivery. She testified that she vacated the rental unit on or about January 13, 2014.

In the tenant's written and digital evidence (including photographs and videos), supported by her sworn testimony at the hearing, the tenant maintained that she ended this tenancy after unsuccessful efforts to obtain necessary repairs to the rental unit. She provided undisputed evidence that serious water damage to the master bedroom occurred on October 31, 2014. This damage resulted in wet carpet, drywall, mould and circumstances that required her to vacate the master bedroom while she awaited the landlords' actions to repair the damage. She provided evidence that the landlords undertook repairs to common areas and other portions of the strata complex that were also subject to water damage that occurred in late October 2014. She provided undisputed evidence that no such action was taken to repair the damage to her bedroom. She maintained that the water damage and mould activated her asthmatic condition causing her health problems. She also alleged that the landlords failed to

remedy a variety of problems, including electrical and heating issues, that she identified shortly after she commenced her tenancy. She claimed that the rental unit was unreasonably cold and she was billed an excessive amount for her use of electricity. She was also dissatisfied that the landlords had not informed her prior to the commencement of her tenancy that the majority of her doors and windows could not be opened because they were for interior use only. The tenant decided to end her tenancy after repeated unsuccessful attempts to convince the landlords to repair the rental unit.

The tenant's January 10, 2014 notice to end her tenancy cited section 45(3) of the *Act* in her assertion that the landlords' alleged breach of a material term of her tenancy agreement enabled her to end her tenancy prior to the scheduled end to her fixed term tenancy.

The tenant's application for a monetary award of $3,390.43 included the following items listed in the Monetary Order Worksheet she submitted as part of her written evidence:

Item	**Amount**
Return of Double her Security Deposit for Landlord's Failure to Abide by s. 38 of the *Act* (2 x $600.00 = $1,200.00)	$1,200.00
Compensation for Loss of Use of Master Bedroom November and December 2013 {(2 x $300.000) - $450.00 for portion of unpaid rent January 2014 = $150.00}	150.00
Recovery of Excessive Electrical and Heating Charges – Sept. 2013 – Jan. 2014	618.37
Stop Payment on Cheques – Feb. 2014 & March 2014 (2 x $10.00 = $20.00)	20.00
2 USB Memory Sticks	11.16
Storage – Feb. 2014 – Sept. 2014 ($1,622.70/3 = $540.90)	540.90
Loss of Quiet Enjoyment and Health (4 months @ $200.00 = $800.00)	800.00
Recovery of Filing Fee for this Application	50.00
Total of Above Items	**$3,390.43**

Analysis

As outlined below, section 45(3) of the *Act* establishes how a tenant may end a fixed term tenancy if a landlord has failed to comply with a material term of the tenancy agreement:

> ***45*** *(3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice...*

The tenant maintained that she ended her fixed term tenancy in accordance with section 45(3) of the *Act* because the landlords failed to comply with a material term of the tenancy agreement. The tenant maintained that the landlords' failure to repair and restore her master bedroom following flooding damage prevented her from using one of the two bedrooms in the rental unit she rented.

A tenant may end a tenancy for breach of a material term but the standard of proof is high. As noted in Residential Tenancy Branch (RTB) Policy Guideline 8, "a material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement." It falls to the person relying on the term, in this case the tenant, to present evidence and argument supporting the proposition that the term was a material term. It is necessary to prove that there has been a significant interference with the use of the premises. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach.

In this case, the tenant rented a two bedroom unit from the landlords and expected to have use of these two bedrooms during her tenancy. I find convincing written, oral, photographic and video evidence that the largest of these bedrooms, the master bedroom, was damaged to the extent it could not be used by the tenant some 70 days after water damage rendered it unusable by the tenant. There is no evidence before me to even suggest that the tenant was in any way responsible for this damage. Based on the evidence before me and on a balance of probabilities, I find that the tenant ended her tenancy in accordance with sections 45(3) and (4) of the *Act* as a result of the landlords' demonstrated breach of a material term of the Agreement. As such, I find that this tenancy ended on January 13, 2014.

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 security deposit in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address in writing.

Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security deposit if "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." As there is no evidence that the tenant has given the landlords written authorization at the end of this tenancy to retain any portion of her security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

In this case, the tenant gave undisputed sworn testimony and written evidence that she included her forwarding address in writing to the landlords' representative in the January 10, 2014 letter she handed to him. Thus, the landlords had 15 days after January 13, 2014, the date when the tenant vacated the rental unit to take one of the actions outlined above.

The following provisions of Policy Guideline 17 of the RTB's Policy Guidelines would seem to be of relevance to the consideration of this application:

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;*
- *If the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*

- *whether or not the landlord may have a valid monetary claim.*

Based on the undisputed evidence before me, I find that the landlords have neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. The tenant entered into written evidence a copy of the landlords' January 28, 2014 letter in which the President of the strata advised her that the landlords (the strata) considered the tenant's security (damage) deposit "forfeited." The tenant gave sworn oral testimony that she has not waived her rights to obtain a payment pursuant to section 38 of the *Act* owing as a result of the landlords' failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the value of her security deposit with interest calculated on the original amount only. No interest is payable.

Section 32(1) of the *Act* establishes that a landlord is under obligation to provide and maintain residential property in a state of decoration and repair that

> *(a) complies with the health, safety and housing standards required by law, and*
>
> *(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant...*

Subsections 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past or future rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

In this case, I find that there was an unreasonable delay in the landlords' attendance to required repairs to restore this rental unit to a condition suitable for occupation by the tenant. Based on the undisputed evidence before me, I find that the tenant could not use her master bedroom for a lengthy period of her tenancy. While I can accept that it would take some time to obtain estimates and arrange for restoration work to be completed, I find that the landlords delayed taking action to return the tenant's master bedroom to her use.

Although I have given the tenant's calculations due consideration, I found both her written evidence and her sworn testimony regarding the amount of her claim somewhat confusing. At the hearing, the tenant did not have her written evidence available to her and was somewhat uncertain as to how she arrived at the $150.00 amount requested in

her application for a monetary award for this item. She also testified that she did not pay any rent for January 2014.

As there is no application before me from either party with respect to the payment of rent for January 2014, I have limited my consideration of the tenant's claim for a reduction in the value of her tenancy to November and December 2013, the last two months when she did pay rent to the landlords. I find that by mid-November 2013, the landlords were responsible for having repaired the rental unit to the extent that the tenant could regain access to her master bedroom, a key portion of her tenancy. As this did not occur, I find that the tenant is entitled to a monetary award pursuant to subsection 65(1)(f) of the *Act* for her recovery of past rent she paid during this tenancy. I issue a monetary award in the tenant's favour in the amount of $150.00 for the remainder of November 2013, and $300.00 for the entire month of December 2013, for the loss in value of her tenancy arising out of the landlords' failure to take adequate action pursuant to section 32(1) of the *Act* after having been notified of the flooding of the tenant's rental unit.

I have also given careful consideration to the tenant's evidence with respect to the electrical and heating charges she received during this tenancy, which she maintained were excessive. In this regard, the tenant testified that the estimates for hydro and heat that she received from the landlords' representatives were significantly below her eventual utility costs for these items. She maintained that the landlords attributed these higher costs to the installation of smart meters by BC Hydro. After checking these new smart meters, BC Hydro attributed the costs to features of the strata building itself.

I can appreciate that the tenant was surprised by the heating and hydro costs for this rental unit, especially since she maintained that the rental unit was frequently cold, with other electrical deficiencies. However, as her Agreement specified that she was to be responsible for the costs of heat and hydro, I do not find that the landlords are responsible for any portion of these costs. Heating and hydro costs are frequently much higher during the colder months of the year, and the timing of her commencement of her Agreement in mid-September coincided with these increased costs. I dismiss the tenant's application for the recovery of heating and hydro costs without leave to reapply. I do so as I find that the tenant has not demonstrated to the extent required that the landlords bear any responsibility for these costs, costs assigned to her in the Agreement she signed with the landlords.

The tenant entered into written evidence copies of stop payment charges imposed by her bank because the landlords failed to return the post-dated cheques she had supplied to them for February and March 2014. I find that the tenant is entitled to

recover $10.00 for each of these charges from the landlords as I am satisfied that these were costs that she incurred as a result of the landlords' failure to return these cheques to her at the end of this tenancy.

While I allow the tenant's application to recover her $50.00 filing fee, this is the only hearing related cost that she is eligible to recover under the *Act*. For this reason, I dismiss the tenant's application to recover the costs of her purchase of two USB memory sticks without leave to reapply.

The tenant has applied for a recovery of 1/3 of the storage costs she incurred when she ended her tenancy. She explained that she had to secure rented storage for her belongings because she could not afford to pay for a security deposit for new accommodations when the landlords refused to return her security deposit to her.

While I have given the tenant's claim for the recovery of a portion of her storage costs due consideration, I find that the landlords can only be held responsible for a relatively short portion of the period identified in her claim. Had the landlords returned her security deposit within 15 days of the end of her tenancy, she would have had access to her $600.00 security deposit by the final days of January 2014. If she were relying on the security deposit held by the landlords to enable her to pay a new security deposit to another landlord, it would have been unlikely that she would have been able to obtain accommodations by February 1, 2014. She testified that she stayed with a series of friends and colleagues until she eventually left her job in British Columbia and returned to another province where she continued to retain a residence.

I find that it was reasonable of the tenant to have incurred storage costs for January 2014 and February 2014, as the precipitous end to her tenancy could not have been anticipated by her, nor could she likely have found alternate accommodation, given the landlords' refusal to return her security deposit. However, I also note that the tenant testified that she did not pay the landlords any rent for January 2014, an expense that she could have diverted to a security deposit on a new tenancy. By March 2014, I find that the tenant was not taking actions to mitigate the landlords' exposure to her storage expenses, a requirement of section 7(2) of the *Act* that the tenant failed to meet as of that date. By then, it would appear that the tenant was making decisions to keep her personal belongings in storage as opposed to seeking and securing her own new rental accommodations.

For the reasons outlined above, I find that the tenant is only allowed to recover her storage costs for 1 ½ months of the total of 8 ½ months when she kept her belongings in storage. This equates to a monetary award equivalent to 17.6% of her overall

storage costs (i.e., 1.5/8.5 = 17.6%). This results in a monetary award in the tenant's favour in the amount of $286.36 for storage costs.

I have also considered the tenant's application for a monetary award for her loss of quiet enjoyment and her quality of life. In her written evidence, the tenant provided the following description of her application for a monetary award of $800.00 for her "loss of enjoyment of the apartment" and her "quality of life":

> *...froze in the apartment – used on one lamp b/c couldn't afford the electricity heating bill as it was and lived in the smaller spare bedroom b/c unable to use master bedroom. Air quality affected my asthma – needed stronger inhaler. Went from Ventolin to Advair Diskus inhaler plus my Ventolin inhaler b/c Dr. Said it was now uncontrolled...*

Section 28 of the *Act* establishes the following protections to tenants regarding their quiet enjoyment of the rental premises:

> ***28*** *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
>
> *(a) reasonable privacy;*
>
> *(b) freedom from unreasonable disturbance;...*
>
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference...*

While the tenant no doubt found her experience with the landlords upsetting, I find that the tenant has not demonstrated that the types of losses outlined above occurred during the course of the last 2 ½ months of her tenancy. I dismiss the tenant's application for a loss of quiet enjoyment of the rental unit without leave to reapply.

Earlier in this decision, I issued a monetary award in the tenant's favour for her loss of use of her master bedroom from mid-November 2013 until December 31, 2013, the final portion of her tenancy when she paid rent to the landlords. In addition to this loss in value of her tenancy, I also allow the tenant a somewhat nominal monetary award in the amount of $60.00 per month (representing 5% of her monthly rent) for the undisputed problems she maintained occurred during the course of her tenancy. I issue this monetary award for the loss in value of her tenancy from October 1, 2013 until December 31, 2013, as I allow the landlords a few weeks at the beginning of her tenancy to rectify problems related to such matters as the electrical wiring, the heat, and

various other issues identified in the tenant's written evidence. I issue this monetary award in accordance with section 65(1)(f) of the *Act*.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to recover double her security deposit, her filing fee and the recovery of various losses incurred during this tenancy.

Item	**Amount**
Return of Double her Security Deposit for Landlord's Failure to Abide by s. 38 of the *Act* (2 x $600.00 = $1,200.00)	$1,200.00
Compensation for Loss of Use of Master Bedroom November and December 2013 ($150.00 + $300.00 = $450.00)	450.00
Stop Payment on Cheques – Feb. 2014 & March 2014 (2 x $10.00 = $20.00)	20.00
Storage – January 13, 2014 - Feb. 2014 – $1,622.70 x 17.6% = $286.36)	286.36
Loss in Value of Tenancy for Other Items Unrelated to Master Bedroom Flooding (3 months @ $60.00 = $180.00)	180.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$2,186.36**

The tenant is provided with these Orders in the above terms and the landlord(s) must be served with this Order 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.

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: November 18, 2014

Residential Tenancy Branch