



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

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

- authorization to retain a portion of the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38;
- a monetary order for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

This hearing also dealt with the tenants' cross-application pursuant to *Act* for:

- authorization to obtain a return of a portion of the tenants' security deposit, pursuant to section 38;
- a monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, pursuant to section 67; and
- authorization to recover the filing fee for their application from the landlord, pursuant to section 72.

"Tenant DC" and both tenants' lawyer, CT (collectively "tenants") as well as the landlord and her agent SR (collectively "landlord") attended the hearing and were each given a full opportunity to be heard, to present their sworn testimony, to make submissions and to call witnesses. The other tenant named in these applications, tenant BC ("tenant") did not attend this hearing. The tenants provided signed, written documentation stating that the tenants' lawyer had authority to represent both tenants at this hearing. The landlord provided signed, written documentation confirming that her agent had authority to represent her at this hearing.

A “previous hearing” was held at the Residential Tenancy Branch (“RTB”) on February 18, 2015. I was the Arbitrator presiding over the previous hearing and I issued an interim decision, dated February 23, 2015, following the previous hearing. The previous hearing was adjourned pursuant to the landlord’s request, due to medical reasons. At the outset of this hearing, the landlord testified that she was able to fully participate and proceed with this hearing and that she did not require a further adjournment. The tenants’ lawyer confirmed that the tenants were ready to proceed with this hearing.

The tenants’ lawyer confirmed that the tenants received the landlord’s application for dispute resolution hearing package (“Landlord’s Application”). In accordance with sections 89 and 90 of the *Act*, I find that both tenants were duly served with the Landlord’s Application.

The landlord confirmed receipt of the tenants’ application for dispute resolution hearing package (“Tenants’ Application”). In accordance with sections 89 and 90 of the *Act*, I find that the landlord was duly served with the Tenants’ Application.

As per my interim decision, both parties were permitted to serve additional evidence in accordance with the RTB *Rules of Procedure* after the previous hearing. I also directed the landlord to serve the tenants with her written application evidence, which was not served upon the tenants prior to the previous hearing. During the hearing, the landlord’s agent confirmed that the tenants were served with the required evidence and three pages of additional evidence. The tenants’ lawyer confirmed receipt of the required and additional evidence. In accordance with sections 88 and 90 of the *Act*, I find that both tenants were duly served with the landlord’s required and additional evidence.

Issues to be Decided

Is either party entitled to a monetary award for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to retain a portion of the tenants’ security deposit in full satisfaction of the monetary award requested?

Are the tenants entitled to a monetary award for the return of a portion of their security deposit?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

Both parties agreed that this tenancy began on August 15, 2014 for a fixed term ending on June 15, 2015. Monthly rent in the amount of \$1,000.00 was payable on the 15th day of each month. The landlord provided a copy of the written tenancy agreement with her Application. The tenant signed the tenancy agreement on July 7, 2014 and was the only tenant that intended to occupy the rental unit. The tenant's father, tenant DC, was involved in this tenancy as a guarantor, who communicated with the landlord and paid the rent and security deposit on behalf of the tenant. The tenant never occupied the rental unit during the fixed term. The landlord stated that she herself is a tenant in the rental unit and that she pays rent. She indicated that this tenancy was a sublease agreement.

Both parties agreed that a security deposit of \$1,000.00 was paid by the tenants and the landlord continues to retain \$609.95 from this deposit. I note that the amount of the security deposit requested and collected by the landlord is an illegal amount, as section 19 of the *Act* states that the deposit is limited to a half month's rent, which in this case is \$500.00. Both parties agreed that the first month's rent of \$1,000.00 for this rental unit was paid to the landlord and returned to the tenants, along with the remaining \$390.05 from the security deposit and 9 post-dated rent cheques for the remainder of the tenancy.

The landlord confirmed that she received verbal notice on July 11, 2014 and written notice on July 13, 2014, that the tenant did not intend to occupy the rental unit, as he had found an alternative rental unit. Tenant DC confirmed that at the time that the tenancy agreement was signed, the tenant was on a wait list to obtain housing at a university and was advised by the university to find alternate accommodation because there was a low chance of obtaining housing if on the wait list. Tenant DC noted that the tenant was able to secure university housing on July 11, 2014 and the landlord was immediately notified.

The landlord seeks a monetary order of \$609.95 plus the recovery of the \$50.00 filing fee for her Application. The landlord seeks \$500.00 for the loss of a half month's rent, \$90.00 for half a month's utilities, \$12.45 for the registered mailing to return the tenants' remaining security deposit, rent and post-dated cheques, and \$7.50 for the money order purchase for the return of the above items.

The landlord states that she is entitled to retain the tenants' entire security deposit of \$1,000.00 because the tenants failed to give two months' written notice to end their tenancy. The tenancy agreement indicates that the landlord requires two months' written notice to terminate this fixed term tenancy agreement and failure to provide this

notice would result in a forfeiture of the entire security deposit of \$1,000.00. However, the landlord stated that she is only seeking \$609.95 total from the security deposit, not the \$1,000.00 that she is entitled to. She stated that she rejected the tenant's offer to live in the rental unit for two months after providing written notice to vacate because she accepted the tenant's notice to vacate and the tenant could not revoke this notice after providing it. The landlord also indicated that she had hired a moving truck in order to facilitate her personal move out of town and that she did not want to return later to find a new tenant, as it would inconvenience her move, work and health issues. The landlord testified that she wanted to be personally involved in finding a new tenant because she has numerous health issues and wanted to ensure that the new tenant would be a non-smoker with minimal chemicals and no pets, especially given that her rental unit was being offered as a furnished unit.

The landlord seeks a loss of rent of \$500.00 for a half month period. The landlord indicated that she was unable to re-rent the rental unit until September 15, 2015. The landlord stated that she had to delay her move out of town, in order to find a new tenant. She stated that her agent had to take time off from work and help her with finding a new tenant. She stated that she advertised online on three different websites as well as with written flyers in strategic, busy locations. The landlord stated that she paid advertising costs on two of the websites, but she did not provide receipts for these expenses. She indicated that in these advertisements, she highlighted the benefits of her furnished rental unit and the ideal location, and that she attempted to find a suitable tenant to meet hers and the strata's requirements.

The tenants claim that since the landlord rejected their two months' notice to end this tenancy and then claimed for a loss of rent during this period, she is not entitled to a compensation of \$500.00. Tenant DC stated that written notice was provided to the landlord on July 13, 2015, the tenant offered to stay for two months until September 13, 2015, and the landlord re-rented the unit on September 15, 2015 to a new tenant. Tenant DC indicated that if the landlord suffered any rental loss, which the tenants deny, that it would be limited to the two days from September 13 to 15, 2015.

Both parties provided a copy of an email, dated July 13, 2014, in which the tenants offered the landlord two options for ending this tenancy: 1) the landlord could keep \$500.00 from the tenants' security deposit for her advertising costs and return the remaining \$1,500.00 rent and security deposit amounts already paid or 2) the landlord could retain the \$2,000.00 already paid to account for rent from August 15 to October 15, 2014 and allow the tenant to occupy the rental unit for a two-month period. The landlord stated that she offered to retain \$1,500.00 from the money already paid by the

tenants, to cover advertising and re-rental costs without allowing the tenant to occupy the rental unit. The tenants rejected this offer from the landlord.

The tenants seek the return of a portion of their security deposit of \$609.95 plus the \$50.00 filing fee for their Application. The tenants state that they are entitled to the return of their deposit as per the *Act*, as the landlord has no right to claim any amount from it. The tenants indicated that they properly ended the tenancy in accordance with the landlord's two-month notice provision. Tenant DC noted that the landlord refused to abide by her own provision for ending the tenancy, as she rejected the tenants' offer to occupy the rental unit for two months.

Analysis

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings around each are set out below.

Landlord's Application

Loss of Rent

Section 16 of the *Act* states the following with respect to the rights and obligations of each party under a tenancy agreement:

The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

I find that the landlord and tenant entered into a fixed term tenancy for the period from August 15, 2014 to June 15, 2015. Although the tenant did not occupy the rental unit, he signed a tenancy agreement on July 7, 2014, at which time the rights and obligations of both parties took effect.

Subsection 45(2) of the *Act* sets out how a tenant may end a fixed term tenancy:

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 above provision states that the tenant cannot give notice to end the tenancy before the end of the fixed term. The tenant ended the tenancy before the completion of the fixed term on June 15, 2015.

I find that the landlord's provision in the tenancy agreement, to provide a two-month notice to end the tenancy, is unenforceable. I find that the landlord is attempting to contract out of the *Act* by including a provision that is inconsistent with the *Act*, as per sections 5 and 6. The *Act* states that a tenant may end a tenancy by giving at least one month's written notice. However, in this case, the tenant became responsible for the rental obligations established in this fixed term tenancy. I also find the landlord's provision to automatically retain the security deposit if the tenant fails to give two months' notice, to be unenforceable for the same reasons, as per section 20(e) of the *Act*.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, the *Regulation* or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

The landlord is claiming for a loss of rent of \$500.00. I find that the landlord could have mitigated her losses by allowing the tenant to occupy the rental unit for the two-month period that they proposed, as they were willing to pay rent for this period. Although this portion of the tenancy agreement was unenforceable, the tenants were willing to minimize losses to both the landlord and tenants by staying in the rental unit and paying rent to give the landlord time to find another tenant. The landlord would only have suffered a potential loss of approximately two days, if at all, during this time period, as she was able to re-rent for September 15, 2014. Although the landlord claimed that she did not want to come back in town around that time, as she was planning to move away from the city, she had an agent to represent her. The landlord's agent recommended the new tenant that is currently occupying the rental unit, so the landlord could have avoided or minimized a loss of rent.

Based on the evidence presented, I find that the landlord has failed to fully mitigate her losses under section 7(2) of the *Act*. The landlord posted online rental advertisements

on different websites, one at a time, for 3 to 5 weeks total. The landlord stated that she wanted to see the response from each website before using another website. The landlord did not provide a copy of these advertisements or receipts for the cost of these advertisements. The landlord did not reduce the rental price of the rental unit, as an incentive to try to attract potential tenants. According to the landlord's agent, no shorter fixed term lease or month-to-month tenancy was offered to potential tenants, which likely restricting the number of potential tenants. However, the landlord testified that she did offer a shorter term lease to potential tenants by way of her advertisements. The landlord turned down potential tenants if there was more than one tenant that wanted to occupy the rental unit. The landlord indicated that it was the strata's preference to have a single occupancy for this rental unit. However, the landlord failed to provide documentary evidence of this fact. The landlord indicated that out of approximately 12 potential tenants, approximately 6 people were willing to move in, but were rejected for various reasons.

For the reasons stated above and on a balance of probabilities, I find that while the landlord may have suffered a loss of rent due to the tenants ending the tenancy prior to the fixed term date, the landlord failed to mitigate the tenants' exposure to her losses. I find that the landlord could have avoided the loss altogether by allowing the tenants to stay in the rental unit for two months and pay rent for this period. Although the tenants offered settlement options to the landlord, they made this offer to attempt to settle the matter at that time. They stated that the offer was no longer relevant for the purposes of this hearing. Accordingly, I dismiss the landlord's application for a monetary order for a loss of rent in the amount of \$500.00, without leave to reapply.

Other Relief

The landlord claims a loss of utilities in the amount of \$90.00, based on an estimated cost of \$180.00 for one month. The tenants dispute that the landlord is entitled to a loss of utilities for the rental unit because the tenant did not reside in the rental unit and did not use the utilities. The tenants indicated that the landlord's tenancy agreement is very specific about utilities, as this information is contained in a separate section. This section sets out specific details about how and when utilities are to be paid and the fact that utility bills are to be presented to the tenant before payment is made. The landlord did not provide a bill for her utility expenses or any documentary evidence to indicate that she paid any amount for utilities on behalf of the tenant. The tenants dispute that the landlord is entitled to this claim. I find that the landlord did not provide sufficient evidence to show that she is entitled to a loss of utilities of \$90.00 and I dismiss her claim without leave to reapply.

The landlord claims for a loss of \$12.45 for the registered mailing to return the tenants' remaining security deposit, rent and post-dated cheques, and \$7.50 for the money order purchase for the return of the above items. I find that the landlord was not entitled to hold the tenants' rent and security deposit and that it should have been returned to the tenants in any event. Accordingly, I dismiss the landlord's claim of \$19.95 for the above expenses, without leave to reapply, as the only fee the landlord is eligible to recover under section 72 of the *Act*, is for the filing fee for her application.

As the landlord was unsuccessful in her Application, she is not entitled to recover the \$50.00 filing fee from the tenants.

Tenant's Application

The tenants are not entitled to the return of double their security deposit. The tenants did not provide their forwarding address in writing following the termination of this tenancy. The only address provided by the tenants was in the tenancy agreement at the start of this tenancy. Section 38 of the *Act* only allows recovery of double the security deposit at the end of the tenancy AND the provision of a forwarding address in writing. The tenants have not met this requirement. Subsequently, the landlord filed her Application to retain the security deposit on August 1, 2014.

I have dismissed the Landlord's Application and found that the landlord did not have authority to retain any portion of the tenants' security deposit. Accordingly, I find that the tenants are entitled to the return of the remaining portion of their security deposit being held by the landlord in the amount of \$609.95.

As the tenants were successful in their Application, they are entitled to recover the \$50.00 filing fee from the landlord.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$659.95 against the landlord as follows:

Item	Amount
Return of Security Deposit Portion	\$609.95
Recovery of Filing Fee for Tenants' Application	50.00
Total Monetary Award	\$659.95

The tenants are provided with a monetary order in the amount of \$659.95 in the above terms and 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 and enforced as an Order of that Court.

The Landlord's entire Application is dismissed 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: June 15, 2015

Residential Tenancy Branch