Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD

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; and
- authorization to obtain a return of all or a portion of his security deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant confirmed that the landlord's daughter handed him a 2 Month Notice to End Tenancy for Landlord's Use (the 2 Month Notice) on an approved Residential Tenancy Branch (RTB) form on November 26, 2014. I find that the tenant was duly served with this 2 Month Notice on November 26, 2014, in accordance with section 88 of the *Act*. The landlord confirmed that on or about March 14, 2015, she received a copy of the tenant's dispute resolution hearing package and written evidence by registered mail. In accordance with section 89(1) of the *Act*, I find that the landlord was duly served with these documents on or about March 14, 2015. As the tenant confirmed that he had received and reviewed copies of the landlord's written and photographic evidence, I find that this evidence was duly served to the tenant by the landlord in accordance with section 88 of the *Act*.

Preliminary Matters
At the hearing, the tenant testified that on the morning of this hearing, he had faxed the RTB copies of additional emails exchanged with the landlord. He said that he only realized that these emails were important after reviewing the landlord's written evidence, which he said contained an incomplete account of their email interactions. The tenant testified that he had not submitted this evidence to the landlord.

The RTB's Rule of Procedure 3.14 establishes that "Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing." In this case, the tenant's application filed on March 12, 2015 did not contain the recent faxed material that the tenant sent the RTB on the morning of this hearing. When an applicant submits evidence that could have been included with the original application or when a party does not provide evidence to the other

party and the RTB within the time frames established under the Rules of Procedure, the Arbitrator has the discretion as to whether or not to consider this evidence. At the hearing, I gave the parties an opportunity to speak to whether this very late faxed evidence, not available to me at the time of this hearing, should be considered. Although I disallowed the tenant's late faxed evidence after hearing his explanation for why he had submitted this evidence well after the time frames allowed under the Rules of Procedure, I did permit the tenant to read the contents of these emails into sworn testimony, which he did in part at the hearing.

At the commencement of the hearing, the tenant stated that he wished to call a witness, a co-tenant who resided in one of the other 1 bedroom-units on his same floor and who ended her tenancy shortly before him. When it came time to call this witness, it became apparent that the issues that this witness planned to speak about were not ones which were related to the tenant's application before me. Both parties in attendance confirmed that the landlord returned $250.00 of the $325.00 security deposit to this former tenant. The tenant also confirmed that the $250.00 cheque returned by the landlord from his security deposit has been cashed and the tenant sought the return of the missing $75.00 from his security deposit. Since this witness knew nothing about the attempts by the landlord to conduct a joint move-out condition inspection and had no other knowledge of the substance of the tenant's application for dispute resolution, there was no need to obtain sworn testimony from this witness.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for losses and damages arising out of this tenancy as a result of the landlord's alleged failure to occupy the rental unit for the purposes stated on the 2 Month Notice? Is the tenant entitled to a monetary award for the return of a portion of his security deposit?

Background and Evidence

This tenancy for one bedroom in a three-unit rental property began on June 2, 2012, when another tenant, who subsequently vacated the rental unit, signed the Residential Tenancy Agreement (the Agreement) with the landlord. Although the Applicant in the current application (the tenant) said that he moved into the rental unit in November 2012, he signed an Addendum to the Agreement on May 8, 2014, signifying that he had taken responsibility as one of the co-tenants to the initial Agreement. Monthly rent for the tenant's one bedroom unit was initially set at $650.00. This rent increased to $664.30 as of November 1, 2014, as per a Notice of Rent Increase served to the tenant. On or about January 24, 2015, the landlord returned $250.00 of the tenant's $325.00 security deposit paid by the tenant. The parties agreed that the landlord continues to retain $75.00 of the tenant's security deposit.

The tenant's application for dispute resolution for a monetary award of $1,403.60 included a Monetary Order Worksheet seeking a monetary award for the following items:

Item	**Amount**
Damages from False Eviction	$1,328.60

Damage Deposit Deduction	75.00
Total Monetary Order Requested	**$1,403.60**

The parties agreed that the landlord sent the tenant an email on October 31, 2014, in which she advised the tenant that she was planning to sell the rental property. In this email, the landlord gave the tenant two months to vacate the rental unit. On November 3, 2014, she sent the tenant another email in which she advised that her plans had changed and that her son, was planning to move into the rental unit.

The landlord's 2 Month Notice, entered into written evidence by the tenant, identified the following reason for seeking an end to this tenancy by January 31, 2015:

- *The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse...*

After receiving the landlord's 2 Month Notice, the tenant notified the landlord that both he and the other tenant in one of the other bedrooms (i.e., his proposed witness) would vacate the rental unit by the end of December 2015. This changed when the tenant could not vacate his rental unit until January 2, 2015. The parties agreed that the tenant did not pay any rent for January 2015. By not requiring the tenant to pay rent for January 2015, the landlord complied with the provisions of sections 50, 51(1) and (1.1) of the *Act*.

The tenant said that he had moved most of his belongings from the rental unit by January 2, 2015. When he could not make arrangements with the landlord's daughter to complete the joint move-out inspection, the tenant said he returned to the rental unit on January 5, 2015 to retrieve the remainder of his belongings. He said that he found the door unlocked. The landlord said that she did not take formal possession of the rental unit until January 6, 2015.

The landlord's written evidence included photographs, receipts, invoices, medical reports, emails and other miscellaneous documents. The landlord maintained that the rental unit was not properly cleaned at the end of this tenancy, and that the landlord incurred considerable cost in restoring and upgrading the rental unit such that it could be re-rented to a new tenant. She testified that the rent derived from the three units of this rental property before these renovations and upgrades totalled $1,750.00 or $1,800.00, comprised of about $650.00 from the tenant's rental unit, $650.00 from the second rental unit on the same level as his, and $450.00 or $500.00 from the bedroom in the lower level. She testified that her asking rent for the entire rental property after her renovations was $2,300.00, but she accepted $2,100.00 from a family who agreed to rent the entire property as of February 20, 2015.

The landlord provided evidence that she changed her mind on selling this rental property after she spoke with her son shortly before November 3, 2014. In her November 3, 2014 email to the tenant, entered into written evidence by the

landlord, the landlord stated that her son was planning to move to the rental unit from out of town, perhaps with some support individual or caregiver nearby. On or about November 4, 2014, the landlord's son had a very bad accident in which he fractured both of his heels, requiring surgery to one of them. Although the landlord issued the 2 Month Notice on November 26, 2014, she said that it was not until her son visited his doctor on January 5, 2015, that she became aware that her son's surgery would not enable him to climb the 17 steps he would need to reside in the tenant's former rental unit on the second level of this rental home. She said that the doctors' reports entered into written evidence confirmed that her son's mobility would be seriously compromised as a result of his surgery. In a March 18, 2015 email to the tenant, issued a month after she re-rented the rental home to new tenants, the landlord stated the following in part:

> *…In January (S) had his thigh high cast cut off and had a robot boot put on and at this point we found out that he was going to have a very long recovery. His surgeon Dr. B told S he would never have the same gait, he would be having physical therapy for probably 6 months… and it would take at least until April to safely wean him off the morphine. Needless to say S would not be able to tackle the 20 or more stairs in the condo to get to the kitchen and bathroom…*
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> (as in original but for anonymizing names)

Once she realized that her son would not be able to move into the rental unit, the landlord undertook repairs and renovations so as to better position the rental property for sale or for renting to new tenants. Although she said that new flooring was necessary in this rental home, she testified that the floors had not been replaced for at least five or six years. She confirmed that she placed advertisements on a popular website to try to re-rent the premises by mid-February 2015.

The tenant maintained that the landlord had demonstrated bad faith in not using his rental property for the purpose stated in the landlord's 2 Month Notice. The tenant gave undisputed sworn testimony and written evidence that the landlord commenced attempts to re-rent the whole rental property by early February 2015. He entered into written evidence a copy of the landlord's listing of this rental property, including his rental unit on a popular rental website. He testified that the landlord knew that her son had suffered a serious accident requiring major surgery as early as November 5, 2014, well before she issued her first legal 2 Month Notice on November 26, 2014. He maintained that the landlord failed to exercise due caution in issuing the 2 Month Notice when she did not know whether her son would be able to reside in this rental unit which required him to climb stairs to access the apartment.

<u>Analysis – Application for Equivalent of 2 Month's Rent due to Landlord's Failure to Use the Rental Unit for the Purpose Described on the 2 Month Notice</u>

Section 49 (3) of the *Act* reads in part as follows:

> *(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.*

Section 51(2) of the *Act* establishes the provision whereby a tenant is entitled to a monetary award equivalent to double the monthly rent if the landlord does not use the premises for the purposes stated in the 2 Month Notice issued under section 49(3) of the *Act*. Section 51(2) reads in part as follows:

> ***51*** *(2) In addition to the amount payable under subsection (1), if*
>
> > *(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or*
> >
> > *(b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,*
>
> *the landlord, … must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.*

The tenant's claim for compensation relies on his contention that the landlord did not use his rental unit for the purpose stated on the 2 Month Notice. Rather than moving her son into the rental unit, the tenant maintained that the landlord renovated the rental property and re-rented the whole rental home for considerably more than she was receiving from the three tenants who were previously residing in this home.

Residential Tenancy Branch Policy Guideline # 2 provides the following direction on the interpretation of the "good faith" requirement set out in section 49(3) of the *Act*.

> *If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy…*
>
> *If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose....*

In considering this matter, I first note that section 52(e) of the *Act* requires a landlord to provide a notice to end tenancy in writing on an RTB approved form.

I find that the landlord's emailed notice to end tenancy issued in late October 2014, notifying the tenant to move so she could sell the property, and her early November 2014 emailed notice requesting the rental unit for her son were not on the proper RTB approved form. The tenant correctly alerted her that she would need to issue a proper 2 Month Notice on an RTB approved

form. I find that the sole legal 2 Month Notice issued by the landlord was the Notice issued on November 26, 2014.

Within a few days of notifying the tenant by email that she needed to end his tenancy because she wanted to sell this rental property, the landlord changed her mind, requesting that he leave so that her son could live in his rental unit. While this may have been her good faith intention at that time before her son's accident and surgery, she was clearly aware of her son's changed circumstances by the time she issued her first legal notice to end tenancy for landlord's use on November 26, 2014.

Since her son's surgery was in a different community, the landlord may not have been fully aware of the status of her son's recovery from major surgery to his heel on November 5, 2014. At some point between November 5, 2014 and November 26, 2014, I find that the landlord ought to have obtained sufficient information to ascertain whether her son could in fact take up residency in the tenant's rental unit. The landlord has entered into written evidence, a report from her son's doctor of November 16, 2014 confirming the extent of the extensive surgery on a fracture to her son's heel, requiring "multiple plates and screws." A second report from one of her son's doctors of November 20, 2014 noted that her son had been hospitalized for the past 15 days and was going to be non-weightbearing "for at least 4 weeks, and possibly more." He left the hospital in a wheelchair. The doctor's reports of December 2, 2014 and January 5, 2015 entered into written evidence by the landlord continued to demonstrate that while her son was making progress, his mobility would still be limited for some time.

The landlord maintained that she was not aware of the true severity of her son's mobility restrictions until he visited his doctor on January 5, 2015. While I have given the landlord's statements and evidence in this regard careful consideration, I find that the landlord had ample information, or at least had ample information available to her, that her son's injuries were serious enough to jeopardize the plans she had made with him in early November to relocate to another community and move into a rental unit where he would need to climb steps on an ongoing basis. Under these circumstances, a cautious landlord truly interested in ensuring that she needed the tenant's rental unit for the purposes stated on her 2 Month Notice and without any ulterior motives would likely have delayed issuing the formal 2 Month Notice on November 26, 2014. Rather than exercising such caution, the landlord issued the 2 Month Notice on the apparent assumption that her son would be sufficiently recovered to negotiate the 17 steps she knew would be required for him to live in the rental unit.

In considering this matter, I also must take into account the timing of the landlord's decision that her son would not be able to reside in the rental unit, occurring almost immediately after she obtained vacant possession of the rental unit from the tenant. Shortly after the tenant vacated the rental unit, the landlord undertook renovations designed to make this rental home more attractive to future tenants. While a landlord can end a tenancy for landlord's use if major renovations are required in which the tenant could not remain in the tenancy, she did not end this tenancy for this reason. The landlord did not deny the tenant's claim that she posted this entire rental home, containing all three rental units, on Facebook and then Craigslist, available by February 15, 2015 for a combined monthly asking rent of $2,300.00, almost $500.00 more than she was receiving from the three sets of tenants before she issued the 2 Month Notice.

The landlord testified that she rented the whole building to a family as of February 20, 2015, for a total monthly rent of $2,100.00, still almost $300.00 more than she was previously receiving from this property.

The sequence of events that followed the tenant's surrender of vacant possession of the rental unit to the landlord is consistent with the tenant's claim that the landlord had ulterior motives in seeking the end to this tenancy. I find that the tenant's assertions regarding the landlord's intentions and motivations in issuing the 2 Month Notice are supported by the landlord's rapid decision to renovate and re-rent the premises within six weeks of obtaining possession of the entire rental property. The landlord's decision to issue the 2 Month Notice when she knew that her son had suffered a major injury requiring surgery and rehabilitation is also consistent with the tenant's claim that the landlord's true intention was to obtain more rent from this property.

Based on a balance of probabilities and the evidence before me, I find that the landlord has not met the threshold required to demonstrate that she was acting in good faith when she issued the 2 Month Notice on November 26, 2014. Under these circumstances and pursuant to sections 51(2) of the *Act*, I find that the tenant is entitled to a monetary award of $1,328.60, constituting a doubling of his monthly rent.

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 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 this case, the landlord confirmed that she received the tenant's forwarding address on January 6, 2015. Paragraph 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 his security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

The landlord returned $250.00 of the tenant's security deposit to the tenant's forwarding address on January 24, 2015, more than 15 days after she confirmed receipt of the tenant's forwarding address. She retained $75.00 for cleaning, although she had no written authorization from the tenant to do so, and has made no application in this regard.

At the hearing, I heard sworn testimony and received written evidence from the landlord with respect to the landlord's claim that the tenant failed to attend two scheduled joint move-out condition inspections with her daughter on January 5 and January 7, 2015. The tenant denied

that these inspections were truly scheduled and testified that he tried repeatedly by telephone and by text message to contact the landlord's daughter to arrange for a joint move-out condition inspection. The tenant testified that the landlord and/or her daughter acting as her agent failed to provide him with a written Notice of Final Inspection. The landlord did not dispute the tenant's testimony that the landlord's daughter accessed his rental unit without him on January 2, 2015.

In this case, the landlord confirmed that no final written notice was provided to the tenant to arrange for a final inspection of the rental unit. Although the landlord provided emails, which suggested that arrangements had been made between her daughter and the tenant for a move-out condition inspection, the tenant testified that the whole series of emails failed to identify that inspection arrangements were truly confirmed. He said that he was available one day when the landlord's daughter apparently attempted to conduct this inspection but did not ring the doorbell, knocking on the door instead. The landlord did not present her daughter as a witness to the circumstances surrounding her attempts to conduct the move out inspection and did not enter any written statement from her daughter regarding these events.

Under these circumstances, I find that the tenant has raised questions regarding the landlord's claim that the tenant refused to participate in a final inspection of the premises. In the absence of evidence from her daughter to the contrary and in the absence of a written notice to the tenant of a final opportunity to conduct a joint move-out condition inspection, I find that the tenant's right to the return of the security deposit has not been extinguished pursuant to sections 35(2) and 36(1) of the *Act*.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch'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; …*
- *whether or not the landlord may have a valid monetary claim.*

Based on the undisputed evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. There is no evidence that the tenant has waived his right to obtain a payment pursuant to section 38 of the *Act* owing as a result of the landlord's 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 his security deposit less the amount of the security deposit already returned to the tenant. No interest is payable over this period.

Having been successful in this application, I find further that the tenant is entitled to recover the $50.00 filing fee paid for this application.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to obtain a monetary award for losses or damages arising out of this tenancy, to recover his filing fee, and to obtain a return of double his security deposit less the amount already returned by the landlord:

Item	**Amount**
Damages Due as a Result of the Landlord's Failure to Abide by the Reasons Stated on the 2 Month Notice ($664.30 x 2 months = $1,328.60)	$1,328.60
Return of Double Security Deposit as per section 38 of the Act ($325.00 x 2 = $650.00)	650.00
Less Returned Portion of Security Deposit	-250.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$1,778.60**

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order. Should the landlord 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: August 14, 2015

Residential Tenancy Branch