



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, 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 his security deposit pursuant to section 38 (double the amount); and authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The landlord confirmed receipt of the tenant's Application for Dispute Resolution package sent by registered mail. The tenant submitted the receipt for this registered mailing as additional proof. Both parties confirmed receipt of the other's evidentiary submissions for this hearing.

Issue(s) to be Decided

Is the tenant entitled to a monetary order for compensation for damage or loss? Is the tenant entitled to a monetary award equivalent to double the value of his security deposit as a result of the landlord's 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

According to both parties, this tenancy began on June 1, 2015. The landlord stated that the tenancy was to be a twelve month lease with a rental amount of \$1000.00 payable on the first of each month. On July 11, 2015, the tenant gave written notice that he intended to vacate the rental unit. The tenant testified that he vacated the rental unit on July 23, 2015 because the rental unit was not "liveable". The landlord testified that he believed the tenant returned the keys to the rental unit until August 5, 2015. The landlord testified that he continues to hold the \$500.00 security deposit paid by the tenant on June 1, 2015. The landlord also testified that the tenant had agreed to provide 2 months' notice if he intended to end the tenancy early.

The tenant applied for a monetary order against the landlords in the amount of \$2175.00. The tenant includes the following items in his accounting;

Item	Amount
Return of July Rent paid to Landlord (lack of facilities – privacy/bathing)	\$1000.00
Return of Security Deposit	500.00
Monetary Amt. for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	500.00
Cost of stop payment of cheques for balance of lease (\$12.50 x 10 cheques = \$125.00)	125.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Amount Sought by Tenant	\$2175.00

The tenant claims that, over the course of his approximately one and a half month stay in the rental unit, he was unable to shower for the majority of that time. He testified that the rental unit had a stand-alone shower within the rental unit and the lack of access was an ongoing course of discussion with the landlords. The tenant testified that, on or about June 11, 2015, discovered a substantial leak in the shower and, from that point on, the shower was unusable: he testified that he was not able to use the shower at all over the course of July 2015. The tenant submitted ongoing text communication with the landlord that he requested that the shower be fixed so that it was useable. The tenant testified that the failure to repair the shower was a main reason he decided to end the tenancy early.

The tenant also testified that the residential premises, particularly his rental unit were being renovated over the course of his tenancy. He testified that the renovation work was far more substantial than he anticipated (or had been told about by the landlord) on moving in to the rental unit. He testified that, on several occasions, the landlord did not provide proper notice to alert him that workers intended to enter his rental unit. He testified that he often found out that workers were coming into the unit when they knocked on the door or by a short-notice text message from the landlord's wife. He described and documented some embarrassing, inconvenient and intrusive circumstances where he was not given notice of workers arriving at his rental unit.

The tenant claims that, on July 23, 2015, he vacated the residence after cleaning the rental unit. He submitted photographs to show the condition of the unit at move-out. The photographic evidence shows a clean unit under some ongoing construction. He testified that he provided his forwarding address to the landlord on this date by providing a written "vacate letter" and gave the rental unit keys to the landlord at the same time. The tenant gave undisputed evidence that his security deposit has not been returned by the landlord. The tenant submitted a copy of the

July 23, 2015 “vacate letter” as well as a copy of the letter that originally notified the landlords of his intention to vacate the rental unit.

The tenant claims that he provided the landlord with 12 post-dated cheques at the outset of the tenancy. He testified that the landlord refused to return his post-dated cheques and he was therefore forced to place stop payments on each cheque individually. The tenant testified that he paid a bank fee for each of the remaining 10 rental cheques of \$1.25. The tenant submitted a copy of the September 2015 stop payment request and fee information.

The landlord acknowledged that the tenant had provided post-dated cheques and that they had not been returned to the tenant. The landlord testified that the tenant knew the bathroom shower was not in working order when he moved in. The landlord testified that the tenant said that he could shower at his work-place.

The landlord claims that the tenant has other motives for ending his tenancy. He submitted a letter written by the tenant stating that he intends to go travelling and cannot stay for the length of the lease as originally planned. He testified that he tried to call and text the tenant on receipt of the notice to end tenancy but he was unsuccessful in reaching the tenant before he vacated the rental unit. He testified that the key was returned to the premises by the tenant on August 5, 2015.

The landlord testified that he did not receive a forwarding address from the tenant. He testified that he was unable to re-rent the unit until October 1, 2015.

Analysis

Residential Tenancy Policy Guideline No. 30 provides direction on the definition and terms of a fixed term tenancy:

A fixed term tenancy is a tenancy where the landlord and tenant have agreed that the tenancy agreement will begin on a specified date and continue until a predetermined expiry date...

I find that the testimony and documentary evidence of both parties indicates that this tenancy was intended as a fixed term tenancy for a term of 12 months.

Section 44 of the Act identifies the way in which a tenancy may end. With respect to a fixed term tenancy, section 44(1)(b) of the Act applies. A tenant who wishes to end a tenancy is required to

do so with notice in writing in accordance with the *Act* and, in the case of a fixed term tenancy, must have a compelling reason for doing so.

45 (2) 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.

(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 claims that he ended this tenancy because the landlord failed to comply with a material term of the tenancy agreement, specifically the provision of bathing facilities. The tenant also submits that, while he concedes he initially agreed to give two months' notice to the landlord before vacating the unit, he submits that he gave more than sufficient notice to vacate in compliance with the provisions of the *Act*.

A tenant may end a tenancy for breach of a material term but the standard of proof is high. 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, I must focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach.

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. 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. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the tenancy agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. An arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

I accept the evidence of the tenant that he vacated because he did not have access to bathing facilities (a nonworking shower and no other bath facilities) and that his privacy was regularly interfered with by workers attending his rental unit without sufficient notice. The landlord acknowledged as much in his testimony. On review of the residential tenancy agreement submitted with respect to this tenancy, I note that the tenant submitted documentary evidence to support his testimony that he did not have shower facilities and that he requested that the landlord provide such facilities. The tenant also submitted undisputed evidence, in testimony and in photographs to support his claim that workers came and went without sufficient notice or consideration of his privacy.

I find that the tenant has shown that his privacy, an integral part of one's residence was regularly interfered with. I note that a tenant's right to quiet enjoyment of his residence, including privacy, is carefully protected and highlighted within the *Act* (section 28). I find that the tenant has shown that he attempted to resolve this matter with written notice to the landlord about this interference with his privacy and his home. I find that the tenant has shown that the landlord did not rectify this problem or address it in any significant manner.

I find that the tenant has shown that the provision of bathing facilities are also a material term (and essential facility) of the tenancy. Residential Policy Guideline No. 22 echoes section 27 of the *Residential Tenancy Act*,

A landlord must not:

- *terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or*
- *terminate or restrict a service or facility if providing the service or facility is a material term of the tenancy agreement.*

The Policy Guideline also explains the nature of an essential facility,

An "essential" service or facility is one which is necessary, indispensable, or fundamental. In considering whether a service or facility is "essential" to the tenant's use of the rental unit as living accommodation or use of the manufactured home site as a site for a manufactured home, the arbitrator will hear evidence as to the importance of the service or facility and will determine whether a reasonable person in similar circumstances would find that the loss of the service or facility has made it impossible or impractical for the tenant to use the rental unit as living accommodation. For example, an elevator in a multi-storey apartment building would be considered an essential service.

In the normal course of a tenancy, the remedy for restricting an essential service would be compensation within the rental scheme: reduction of the rent. However, this tenancy has ended and specifically as a result of the lack of facilities. The tenant showed that he provided notice to the landlord in writing regarding the issue of bathing facilities and that he provided a timeline to

have the matter rectified. After the landlord failed to change the situation, the tenant decided to vacate the residence. The tenant provided more notice than required by the *Act* and as much notice to the landlord as possible in the circumstances. Therefore, I find the tenant was entitled to provide notice and vacate the residence as a result of both ongoing infringement on his privacy and lack of any bathing facilities within the residential rental unit.

Under section 27(1) of the *Act*, a landlord may terminate or restrict a service or facility if he also reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility. I find that the use of the shower facility has been restricted. I find the tenant is entitled to a rent reduction that compensates him for this lack of facility that is an integral part of the tenancy. I find that, for all lack of services and/or infringements on right to privacy/quiet enjoyment, the tenant is entitled to a 25% reduction in rent. The tenant is entitled to compensation in the amount of \$250.00. This amount is in acknowledgement of the essential nature of this term within the residential tenancy agreement as well as the aggravating factors relating to workers within the tenant's home without notice and sometimes without permission.

I accept the tenant's evidence that the tenancy effectively ended on July 23, 2015 when he; vacated the residence; returned the key; and provided a forwarding address. With respect to the tenants' application for compensation for the cost of stopping all post-dated rental cheques given to the landlord, the landlord acknowledged the cheques had not been returned. I find that the landlord must pay for the tenant's cost to stop payment however I note that the tenant only provided one invoice for stop payment and therefore is entitled to \$1.25 for that one payment.

With respect to the return of the security and pet damage 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 was informed of the forwarding address in writing on July 23, 2015. The landlord had 15 days after July 23, 2015 to take one of the actions outlined above.

Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security (and/or pet damage) 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." The tenant testified that she did not agree to allow the landlord to retain any portion of her security or pet damage deposit. As there is no evidence that the tenant has given the landlord written authorization at the end of this tenancy to retain any portion of his deposits, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit. The tenant sought return of the \$500.00 security deposit and I find that the tenant is entitled to a monetary order including \$500.00 for the return of the full security deposit.

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;*
- *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 of the tenant before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security in full within the required 15 days. The tenant gave sworn oral testimony that he has not 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 total monetary order amounting to double the value of his security deposit with any interest calculated on the original amount only. No interest is payable for this period.

I find that the tenant is entitled to a monetary order as follows,

Item	Amount
Return of July Rent paid to Landlord (lack of facilities – privacy/bathing)	\$250.00
Return of Security Deposit	500.00
Monetary Amt. for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	500.00
Cost of stop payment of cheques for balance of lease (\$12.50 x 10 cheques = \$125.00)	1.25
Recovery of Filing Fee for this Application	50.00
Total Monetary Amount Sought by Tenant	\$1301.25

Conclusion

I issue a monetary order in favour of the tenant against the landlords in the amount of \$1301.25.

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. 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: January 08, 2016

Residential Tenancy Branch

