



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC MNR MNSD FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* ("the Act"). The landlord applied for a monetary order for unpaid rent pursuant to section 67; authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for authorization to obtain a return of all or a portion of her security deposit pursuant to section 38 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 evidentiary submissions for this hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to retain all or a portion of the tenant's security deposit?

Or is the tenant entitled to the return of all or a portion of their security deposit?

Is either party entitled to recover the filing fee for this application from the other party?

Background and Evidence

This tenancy began on March 1, 2015 as a one year fixed term with a monthly rental amount of \$1537.50. The landlord's agent ("the landlord") confirmed that the landlord continues to hold the tenant's \$750.00 security deposit paid at the outset of this tenancy. The tenants sought the return of the deposit while the landlord sought to retain the deposit towards an unpaid rental amount of \$1537.50.

A copy of the residential tenancy agreement was submitted by the tenants for this hearing as well as photographic evidence of the home improvements they made to the rental unit during the tenancy. The photographs show substantial upgrades in fixtures like flooring, window coverings and other clean-up work. The landlord does not deny that these long term tenants made improvements to the residence.

The landlord testified that the owner wanted to move back in to the rental unit/residential premises. The landlord testified that the tenants were notified and ultimately served with a 2 Month Notice to End Tenancy for landlord's Use with an effective date of February 29, 2016. The landlord testified that he indicated verbally to the tenants that they could stay until the end of the tenancy. The landlord testified that the tenants insisted on a 2 Month Notice and that neither he nor the owner knew the obligations attached to serving a 2 Month Notice to End Tenancy.

The tenants testified that they vacated the rental unit on January 31, 2016. The tenants testified that they did not pay any rent for February 2016 because they were entitled to 1 months' rent in compensation for the provision of a 2 Month Notice to End Tenancy. The landlord argues that the tenants took advantage of them and broke the lease early without paying February 2016 rent.

The tenants referred to the photographic evidence submitted to show that the unit was clean and undamaged (and upgraded) at the end of the tenancy and that their security deposit should be returned. They testified that they provided their address in writing on February 2, 2016. The tenants submitted a copy of the correspondence providing their forwarding address. The landlord submits that the tenants' security deposit should be retained and used towards the rent arrears for February 2016.

Analysis

The *Residential Tenancy Act* sections 49, 50 and 51 address an end of a tenancy related to landlord's use. Section 49 of the Act provides the circumstances under which a landlord may end a tenancy for landlord's use of the property. Section 50 provides the rules for tenant notice in these circumstances. Section 51 provides the compensation applicable when a notice to end tenancy is given for landlord's use. I have reproduced the sections and relevant subsections here for the parties' information.

49 (2) Subject to section 51 [*tenant's compensation: section 49 notice*], a landlord may end a tenancy for a purpose referred to in subsection (3), (4), (5) or (6) by giving notice to end the tenancy effective on a date that must be

- (a) not earlier than 2 months after the date the tenant receives the notice,
- (b) 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, and
- (c) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.

(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....

50 (1) If a landlord gives a tenant notice to end a periodic tenancy under section 49 ... the tenant may end the tenancy early by

- (a) giving the landlord at least 10 days' written notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice, and
- (b) paying the landlord, on the date the tenant's notice is given, the proportion of the rent due to the effective date of the tenant's notice, unless subsection (2) applies.

...(3) **A notice under this section does not affect the tenant's right to compensation under section 51 ...**

51 (1) A tenant who receives a notice to end a tenancy under section 49 ... is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

...

I accept the documentary evidence showing that the tenants were served with a 2 Month Notice to End Tenancy. I find that the landlord's evidence that the tenants *forced* the landlord to issue a 2 Month Notice is irrelevant: the landlord issued a 2 Month Notice pursuant to section 49(3) of the Act and the landlord is bound by the obligations created by that notice. In accordance with section 50(1), the tenants notice to end tenancy does not impact their right to compensation equivalent to one months' rent. Therefore, the tenants were entitled to withhold February 2016 rent as it was the last formal month of

their tenancy as indicated by all final communications between the parties in documentary evidence submitted by the tenant. The landlord sought to recover the February 2016 rent. I find that the landlord is not entitled to the February 2016 rent. Therefore, I dismiss the landlord's claim.

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 tenants' 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 deposits, and the landlord must return the tenants' security deposit plus applicable interest and must pay the tenants a monetary award equivalent to the original value of the security and pet damage 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 tenants' provision of the forwarding address. In this case, the landlord was informed of the forwarding address in writing by mail on February 2, 2016. The landlord had 15 days after February 2, 2016 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 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 tenants both testified that they did not agree to allow the landlord to retain any portion of his security deposit. As there is no evidence that the tenants gave the landlord written authorization at the end of this tenancy to retain any portion of their deposit, section 38(4)(a) of the *Act* does not apply to the tenants' security deposit.

The tenants sought return of their security deposit. While the landlord applied to the Residential Tenancy Branch to retain the tenants' deposit, the landlord was unsuccessful in applying for a monetary order and the satisfaction of that monetary order through the retention of the security deposit. Given that the landlord was unsuccessful in the application, I find that the tenants are entitled to a monetary order including \$750.00 for the return of the full amount of her 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 all of the evidence before me, I find that the landlord has neither successfully applied for dispute resolution nor returned the tenants' security deposit in full within the required 15 days. The tenants both gave sworn oral testimony that neither Tenant J nor Tenant G have waived their 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 tenants are therefore entitled to a total monetary order amounting to double the value of their security deposit with any interest calculated on the original amount only. No interest is payable for this period.

Having been successful in this application, I find further that the tenants are entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I dismiss the landlord's application in its entirety.

I issue a monetary Order in favour of the tenants as follows:

Item	Amount
Return of Security Deposit	\$750.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	750.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order	\$1600.00

The tenants are provided with formal Orders in the above terms. Should the landlord(s) fail to comply with these Orders, these Orders may be filed and enforced as Orders of the Provincial Court of British Columbia.

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: September 14, 2016

Residential Tenancy Branch