Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL OLC MNR MNDC MNSD DRI FF

Introduction

This hearing dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* ("the *Act*"). The landlords applied for: a monetary order for unpaid rent and loss as a result of the tenancy pursuant to section 67; authorization to retain all or a portion of the tenants' 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 tenants pursuant to section 72.

The tenants initially applied pursuant to the Act for: cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use ("2 Month Notice") pursuant to section 49; an order requiring the landlords to comply with the *Act* pursuant to section 62; a monetary order for compensation for loss pursuant to section 67; authorization to obtain a return of their security deposit pursuant to section 38; and authorization to recover their filing fee for from the landlords pursuant to section 72.

Both tenants (Tenant DD and Tenant DS) were present for this hearing and both landlords (Landlord ST and Landlord AT) were present for this hearing. The landlords' son acted ("the landlord") as the landlord's representative. All participants were given a full opportunity to be heard, to present their sworn testimony, and to make submissions.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for unpaid rent, unpaid utilities and loss? Are the landlords entitled to retain the tenants' security deposit in partial satisfaction of the monetary order? Are the landlords entitled to recover the filing fee for this application from the tenants?

Are the tenants entitled to obtain a return of their security deposit? Are the tenants entitled to an amount equivalent to their security deposit for the landlords' contravention of the *Act*? Are the tenants entitled to recover the filing fee for this application from the

landlords?

Preliminary Matters

At the outset of this hearing, the tenants withdrew their application to cancel the landlords' 2 Month Notice as well as their application to have the landlords comply with the Act. Both parties proceeded with their monetary claims.

Background and Evidence

This tenancy began on September 1, 2015 as a month to month tenancy. The rental amount of $1050.00 was payable on the first of each month. Both parties agreed that the landlords continue to hold a $525.00 security deposit paid by the tenants at the outset of the tenancy.

On May 31, 2016, the landlords served the tenants with a 2 Month Notice to End Tenancy. The 2 Month Notice indicated that the landlords would be residing in the rental unit and provided an effective date of July 31, 2016. As a result of this notice, the tenants testified that they began to look for a new rental residence, visiting a variety of different properties and applying to rent several different potential rental units. The tenants submitted that their reliance on this 2 Month Notice means that they should be eligible to receive 1 month's rent ($1050.00) from the landlords in accordance with the requirements when issuing a 2 Month Notice pursuant to the Act.

Both parties submitted copies of text message conversations to illustrate the nature of the discussion between the parties after the issuance of the 2 Month Notice. Some of those messages are reproduced below,

July 8, 2016 *landlord to tenant:* *"If you haven't found a place yet, you can continue to stay here, as our plans have changed."*

July 8, 2016 *tenant to landlord:* *"how long can we stay?"*

July 8, 2016 *landlord to tenant:* *"for good"*

July 10, 2016 *tenant to landlord:* *"I will get back to you at the end of the week"*

Reproduced as written

On **July 15, 2016**, tenant DD advised the landlord that the tenants wanted to stay and asked if a new tenancy agreement needed to be signed. After several days of back and forth text conversation, the landlord wrote, "if you need a new agreement, I will charge the rent by today's market rate which will be $1500/month + utilities". The tenants didn't agree to the proposed new rental amount. On **July 20, 2016**, the landlord writes a text message stating, "If I don't hear by 3pm today, I will assume you are moving out and

plan accordingly". Ultimately, the tenants advise the landlord that they will move out in accordance with the 2 Month Notice. A text from the tenant on **July 26, 2016** confirms the move-out date. Both tenants testified that, ultimately, they were not prepared to pay the increased rental amount.

The tenants testified that they provided the forwarding address in writing to the landlords on August 4, 2016. A copy of the letter with their new address was submitted as evidence for this hearing. The landlords acknowledged receipt of the tenants' forwarding address on August 4, 2016. The landlords filed to retain the tenants' security deposit towards a monetary award on February 27, 2017. The tenants sought to recover double the amount of their $525.00 security deposit, submitting that the landlords did not return their deposit in accordance with section 38 of the Act.

The landlords sought to recover utilities cost totalling $223.06. The landlords submitted electricity bills totalling $157.31 and gas bills totalling $65.75. The tenants both acknowledged that these utility costs were the tenants' responsibility, stating they were waiting for the landlord to provide copies of the bills.

The landlords sought to recover the cost of removal of items left behind by the tenants at move-out. The landlords submitted a photograph of iron gates left on the property. The landlords testified that the tenants left these iron gates, as well as a couch and a hutch after they vacated the property. The tenants acknowledged that they left these items behind at the property but argued that the landlords provided no evidence that he paid to have the items removed from the property. The landlord did not submit receipts for the removal of these items but testified that the hutch and couch were removed at a cost of $140.00 and that a quote to remove the iron gates was approximately $300.00.

The landlords also sought to recover "lost rent" in the amount of $1350.00. The landlords submitted that the tenants only notified the landlords that they would vacate the property 5 days prior to July 31, 2016 (the effective date of the 2 Month Notice). The landlords testified that they lost 1 week of rent and that they should be compensated at a monthly rental amount of $1800.00 – the amount that they ultimately re-rented the rental unit for.

The landlords sought a total monetary award as follows,

Item	Amount
Lost Rent	$1350.00
Disposal of Items left on property	440.00
Utilities: gas and electric	223.06
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought by Landlords	**$2113.06**

The tenants sought to recover their security deposit and amount equivalent to the deposit as a result of the landlords' failure to comply with the Act; one month's compensation as a result of the landlords' issuance of a 2 Month Notice to End Tenancy; and to recover their filing fee, for a total as follows,

Item	Amount
Security Deposit	$525.00
Failure to comply with Section 38	525.00
1 month of Rent/Compensation for Issuance of 2 Month Notice	1050.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought by Tenants	**$2200.00**

Analysis: Tenants' claims

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 a tenant's forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution seeking an Order that the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then a landlord may not make a claim against the deposits, and a landlord must return a tenant's security deposit plus applicable interest and must pay their 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 tenants' provision of the forwarding address. In this case, both parties agreed that the landlords were informed of the forwarding address in writing on August 4, 2016. The landlords had 15 days after August 4, 2016 to take one of the actions outlined in the paragraph 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." Both tenants testified that they did not agree to allow the landlord to retain any portion of their security deposit. As there is no evidence that either tenant gave the landlords 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 applied for the return of their security deposit. While the landlords applied to the Residential Tenancy Branch to retain the tenants' deposit, they did not apply within the timeline required by the Act. Therefore, I find that the tenants are entitled to a monetary order including $525.00 for the return of the full amount of their security deposit. No interest is payable for the period the landlords held the tenants' 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 evidence of both parties, I find that the landlords have neither applied for dispute resolution nor returned the tenants' security deposit in full within the required 15 days. The tenants both gave sworn testimony that they had not waived their right to obtain 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 tenants are therefore entitled to a monetary order in an amount equivalent to their $525.00 security deposit.

Subject to section 51 of the Act, “A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* 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” or a tenant may withhold their final month’s rent. As part of their monetary application, the tenants submitted that they are entitled to 1 month’s rent because the landlord issued a 2 Month Notice to End Tenancy for Landlord’s Use pursuant to section 49 of the Act and they acted on that 2 Month Notice. In response, the landlords argued that the tenants should not be entitled to 1 Month’s compensation because the landlords revoked their Notice to End Tenancy.

Section 49, 50 and 51 describe the requirements to meet when issuing a 2 Month Notice to End Tenancy for Landlord’s Use is issued. These sections of the Act include the definitions and types of use permitted under section 49, the compensation to the tenant pursuant to a 2 Month Notice to end tenancy and the timeframe for disputing such a notice. I note that the tenants filed their application for dispute resolution on September 10, 2016 and that, to dispute the Notice to End Tenancy they were required to dispute the notice within 15 days. In these circumstances, the tenants were presumed to have accepted the landlord’s 2 Month Notice and must vacate by the effective date of the notice.

> 49 (8) A tenant may dispute a notice under this section by making an application for dispute resolution within 15 days after the date the tenant receives the notice.
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> (9) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (8), the tenant
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> (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
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> (b) must vacate the rental unit by that date.

I find that the text message conversations submitted by both parties as well as the testimony at this hearing show that there was no agreement by either party to cancel the 2 Month Notice. In certain circumstances, one can cancel a document before it has come into legal effect or been acted upon. As with any provision of a contractual document, the revocation must be clear and unwavering. Based on the tenants’ testimony and documentary evidence that they had been trying to find new accommodations for at least 1 month after receipt of the 2 Month Notice and 1 month before the landlord suggested retracting the Notice to End Tenancy, I find that the tenants acted on the assumption that they would be required to vacate. This is reflected

in the lack of agreement by the parties on a rental amount. Based on all of the testimony at this hearing, I find both parties waivered as to whether the 2 Month Notice would in fact be revoked.

I rely on the sworn testimony of both tenants that, although there were some negotiations towards that end of the tenancy, they ultimately did not reach an agreement with the landlords to continue the tenancy and cancel the 2 Month Notice. I find that the landlords, who are responsible for both the creation of the residential tenancy agreement as well as the 2 Month Notice to End Tenancy, must bear the burden of any ambiguity or misunderstanding with respect to those documents.

In the case of a Notice to End Tenancy, the landlords did not provide any formal document or provide any certainty within their text communications that they would not act on the Notice to End Tenancy issued. I find that the tenants relied and acted on that Notice to End Tenancy, ultimately vacating the residence on the effective date of the 2 Month Notice. As I have found that the tenants relied and acted on the 2 Month Notice to End Tenancy, I find that the tenants are entitled to 1 Month's compensation in the amount of $1050.00 from the landlords.

Analysis: Landlord's claims

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for loss under the *Act*, the party claiming loss bears the burden of proof. In this case, the landlords are the claimants and must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the tenants. Once that has been established, the landlords must then provide evidence that can verify the actual monetary amount of the loss.

In this case, the landlords seek compensation from the tenants for the cost of removal of the items left on the property as well as lost rent. With respect to the removal of the items left on the property, the landlords submitted undated photographs of the iron gates on the property and no photographs of the other items claimed. However, as part of their testimony at this hearing, the tenants acknowledged that these items were left behind on the property. The tenants emphasized that the landlords had not submitted any receipts for the removal of the items on the property. I find that the landlords have not provided sufficient evidence to verify the *actual* monetary amount of their loss incurred by removing the items from the property. The tenants however acknowledged

that items were left behind and offered a reasonable payment in the circumstances ("approximately $150.00").

The landlord has sought monetary compensation for damages. The types of damages an arbitrator may award are; out of pocket expenditures if proved at the hearing in accordance with section 67 of the *Act*; aggravated damages; an amount reflecting a general loss where it is not possible to place an actual value on the loss; "nominal damages" where there has been no significant loss *or no significant loss has been proven*, but they are an affirmation that there has been an infraction by a party.
In this case, the tenants have acknowledged their failure to remove three bulky items from the rental property at the end of their tenancy, contrary to their obligations under the Act. I find that the landlords have proven, with the assistance of the candid acknowledgment of the tenants that they are entitled to some compensation for removal of the items. Therefore, I find that the landlord is entitled to a nominal damage award in the amount of $200.00.

With respect to the landlords' claim of lost rent, the landlord argued that, since the tenants moved out without sufficient prior notice, they were unable to re-rent the unit and therefore should be entitled to recover the rental amount they have lost. The landlords' claim that they should recover lost rent calculated based on the new rental amount they are charging for the tenants' unit. The tenants argue that, if they had remained in the unit, the landlords would have received $1050.00 (the tenants' monthly rental amount). The tenants also argued that, if the landlords had taken over the rental unit, in accordance with the End of Tenancy Notice, they would have had no financial claim.

I find that the landlords are not entitled to recover the "rental amount loss" from the tenants. I rely on my earlier finding that the tenants relied and acted on the 2 Month Notice. I also rely on the text message from the landlords to the tenants more than 10 days prior to the Notice's effective date stating, "If I don't hear by 3pm today, I will assume you are moving out and plan accordingly". The landlords have benefitted from the move-out of the tenants in that he has now increased his rental income by more than 50% of the previous rent amount paid.

I find that the landlords are entitled to a total monetary award of $423.06 for the payment of the utilities and a nominal amount for removal of the items on the property. I find the tenants are entitled to a total monetary award of $2100.00 for return of the security agreement in double the original amount as well as one month's rent compensation for the issuance of the 2 Month Notice. The amount awarded to the landlord will offset and therefore reduce the total monetary order issued to the tenants.

As both parties have been partially successful in their applications, I find that each party should bear the cost of their own filing fee.

Conclusion

I issue a monetary order to the tenants as follows,

Item	**Amount**
Return of Security Deposit	$525.00
Landlords' Failure to comply with Section 38	525.00
One month of Rent/Compensation for Issuance of 2 Month Notice	1050.00
Disposal of Items left on property	-200.00
Utilities: gas and electric	-223.06
Total Monetary Order to the Tenants	**$1676.94**

The tenants are provided with this Order in the above terms and the landlords must be served with this Order as soon as possible. Should the landlords 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.

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: March 22, 2017

Residential Tenancy Branch