



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, FF (Landlord's Application)
 MNSD, MNDC, O, FF (Tenant's Application)

Introduction

This hearing convened as a result of cross applications. In the Landlord's Application for Dispute Resolution filed November 14, 2016, the Landlord requested monetary compensation for unpaid rent and to recover the filing fee. In the Tenant's Application for Dispute Resolution filed on March 3, 2017 (erroneously stamped 2016) the Tenant sought monetary compensation in the amount of \$6,006.81, including return of double the security deposit paid, compensation pursuant to section 51 of the *Residential Tenancy Act*, compensation for breach of quiet enjoyment, and recovery of the filing fee.

The hearing was conducted by teleconference on May 2, 2017 and continued on June 13, 2017. Both parties called into the hearing on May 2, 2017, although only the Tenant called into the hearing on June 13, 2017.

Rule 7 of the Rules of Procedure provides that:

7.1 Commencement of the dispute resolution hearing

The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.

7.2 Delay in the start of a hearing

In the event of a delay of a start of a conference call hearing, each party must stay available on the line to commence the hearing for 30 minutes after the time scheduled for the start of the hearing.

In the event of a delay of a face-to-face hearing, unless otherwise advised, the parties must remain available to commence the hearing at the hearing location for 30 minutes after the time scheduled for the start of the hearing.

7.3 Consequences of not attending the hearing

If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent.

If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

The Landlord made partial submissions during the May 2, 2017 hearing.

During the May 2, 2017 hearing, and by written Interim Decision rendered that day, I ordered the Landlord to provide to the Tenant and the Branch, confirmation of his name change and proof of sale of the rental property. I confirm the Landlord provided this evidence as required.

Pursuant to *Rule 6.6 of the Residential Tenancy Branch Rules of Procedure*, the onus to prove their case is on the person making the claim. While the Landlord failed to attend the continuation of this hearing, he was able to present evidence in support of his claim at the May 2, 2017 hearing as well as by way of the documentary evidence he submitted following the hearing.

Although the Landlord failed to attend the hearing, which could have resulted in me not accepting his evidence, I considered the evidence he submitted on May 15, 2017 (pursuant to my Interim Order) which indicates the rental unit did in fact sell; I accept this evidence pursuant to section 74 of the *Act* which reads as follows:

74 (1) Subject to the rules of procedure established under section 9 (3) [*director's powers and duties*], the director may conduct a hearing under this Division in the manner he or she considers appropriate.

Further, while it is within my discretion to simply dismiss the Landlord's claim, and decline to consider his evidence, I considered his evidence and his claim as I find this is consistent with Rule 1.1 of the *Residential Tenancy Branch Rules of Procedure* which read as follows:

1.1 Objective

The objective of the Rules of Procedure is to ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants.

The Tenant gave evidence at both hearings and was given a full opportunity to be heard, to present her affirmed testimony, to present her evidence orally and in written and documentary form, and make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to monetary compensation for unpaid rent?
2. Is the Tenant entitled to return of double her security deposit and interest?
3. Is the Tenant entitled to compensation from the Landlord pursuant to sections 51(1) and 51(2) of the *Residential Tenancy Act*, recovery of her moving costs and compensation for breach of quiet enjoyment?
4. Should the Tenant recover the filing fee paid?

Background and Evidence

Introduced in evidence was a copy of the tenancy agreement dated December 15, 2003. The name on the tenancy agreement for the Tenant was J.M.; the Landlord stated that at some point in time the Tenant changed her name to J.H.

The agreement provided that monthly rent was initially payable in the amount of \$795.00 and the Tenant paid a security deposit in the amount of \$400.00.

The tenancy ended July 7, 2016. The Tenant stated that the Landlord failed to perform a move out condition inspection.

The parties agreed that the Tenant did not pay rent for April 2016, May 2016, June 2016 or July 2016. The Landlord submitted that this should preclude the Tenant from claiming compensation pursuant to section 51(1) of the *Act*.

The Tenant confirmed that the Landlord returned \$131.00 of the Tenant's security deposit, retaining \$269.00 for cleaning of the rental unit and the carpet cleaning. She stated that she did not give him consent for retaining any of these funds.

Pursuant to the Tenant's Monetary Orders Worksheet she sought monetary compensation in the amount of \$6,006.81 for the following:

Double security deposit \$400.00 + interest \$14.15 = \$414.15 x 2 = \$828.30 LESS \$131.65 returned	\$696.65
One month's rent pursuant to section 51(1)	\$843.36
Two month's rent pursuant to section 51(2)	\$1,686.72
Moving costs	\$250.00
Three month's rent for breach of quiet enjoyment	\$2,530.08
TOTAL CLAIMED	\$6,006.81

On May 26, 2016 the Landlord issued a 2 Month Notice to End Tenancy for Landlord's Use indicating the rental property had been sold. The Tenant sought monetary compensation pursuant to section 51(1) equivalent to one month's rent. As noted, the Landlord opposed this request.

Initially the Landlord alleged that he had withdrawn the May 26, 2016 2 Month Notice at a previous arbitration. A review of Branch records confirms the Landlord withdrew a 2 Month Notice to End Tenancy issued on *February 28, 2016*.

The Tenant stated that she did not file to dispute the May 26, 2016, 2 Month Notice to End Tenancy; rather, upon receipt of the May 26, 2016 Notice she sent the Landlord a registered letter on May 30, 2016 confirming that she would be vacating the rental unit. A copy of this letter was provided in evidence as well as a copy of the registered mail receipt.

The Tenant testified that on August 5, 2016 she sent her forwarding address to the Landlord by registered mail. She stated that despite several delivery attempts, the letter was returned as undeliverable.

The Tenant confirmed that she sought an additional two month's rent as compensation pursuant to section 51(2) of the *Residential Tenancy Act*. The basis of her claim was that as of June 20, 2016 the rental unit was listed as "active status" in online postings, indicating that it had not sold as indicated on the 2 Month Notice to End Tenancy for

Landlord's Use. The Tenant also stated that she did not know whether the rental unit was eventually sold, but as of June 20, 2016 it appears it was still listed for sale.

The Tenant claimed moving costs in the amount of \$250.00.

The Tenant also sought the sum of \$2,530.08, which is equivalent to three months' rent on the basis that she believes her right to quiet enjoyment was breached by the Landlord. The basis of her claim follows.

The Tenant stated that in January of 2014 the Landlord announced that he wanted the rental unit vacated as he wanted to sell the unit. He did not issue a formal notice to end tenancy at that time, although another renter in the building left due to this informal notice.

The Tenant stated that shortly thereafter the Landlord then began showing the rental unit. The Tenant did not authorize the Landlord to use a lock box, nor did the Landlord request the Tenant's permission to use such a lock box; however from January of 2014 there was a lock box at the rental property.

The Tenant stated that she believed the Landlord used the showings as an "insidious harassment tool" as he had no intentions of selling the property and was merely trying to create a hostile environment so she would move out.

At the beginning of February 2016, and after two years of what the Tenant described as "countless showings", the Landlord informed her that he did not really want to sell the property and that he had received offers and had turned them all down. She stated that she was very upset by this as she had facilitated the showings for two years, including being out of the property from 8:00 a.m. to 6:00 p.m. almost daily. She confirmed this included making her rental unit ready for showings, removing any personal items, and being away from the rental unit such that she could not enjoy the rental property for nearly two years. She further stated that as she was searching for alternate accommodation, the threat of the sale "loomed over her" and this impacted her sleep which exacerbated her pre-existing health issues. She confirmed that at the time of the hearing she is 70 years old, and was therefore in her late 60's at the time she was facilitating the two year sale of the property. The Tenant communicated her concerns to the Landlord by letter dated December 7, 2015 which was also included in the materials.

The Tenant further stated that during the two years of showings, the Landlord often lost track of showings, and at times people would show up at the rental unit unannounced

expecting to view the rental property. One such example was documented in an email sent by the Tenant to the Landlord on February 3, 2016 wherein she writes about an agent with potential purchasers attending the property while she was there. She stated that after this incident there was a time when people came into the rental unit while she was on the toilet and the bathroom door was open. She stated that she felt that these viewings were designed for "maximum harassment" so she would feel compelled to move quickly.

In February 2017 the Landlord then stated that he wanted her to move quickly and he would give her \$3,000.00 if she would move out in two weeks as he wanted to build another property and occupy the rental home during the building process. The Tenant did not move from the rental property as she did not have anywhere to go.

The Tenant stated that she felt this called into question the Landlord's agenda as shortly thereafter, the Landlord issued a 2 Month Notice to End Tenancy on February 28, 2016. The Tenant disputed this Notice which was resolved by agreement during the April 14, 2016 hearing as the Landlord withdrew the Notice.

The Tenant stated that she does not believe the property was actually sold, or feels the Landlord submitted insufficient evidence to prove this. She notes that the Landlord failed to provide proof of the sale when he initially responded to her claim and only did so after being ordered to.

Pursuant to my Interim Order, the Landlord submitted evidence of the contract of purchase and sale for the rental unit.

The Tenant stated, based on the history of the sale, the Landlord issuing and then rescinding informal and formal notices to end tenancy, that she does not trust the landlord sold the property as alleged. Accordingly, she requests the equivalent to two months' rent as compensation pursuant to section 51(2) of the *Residential Tenancy Act*.

The Tenant also stated that in addition to the Landlord's breach of her right to quiet enjoyment as a result of the aforementioned issues, she sought compensation for the distress caused by the Landlord forcibly entering the rental unit on June 18, 2016 to serve a 10 Day Notice to End Tenancy. She stated that the Landlord entered without her consent and when she attempted to lock the door he forcefully entered the rental unit to serve her with the Notice. She said that at this time he also repeatedly stated that he was going to "play hardball" which she found to be threatening. The Tenant was so concerned that she contacted the police at this time (she also provided a copy of the police report in evidence).

The Tenant stated that despite warnings by the police, the Landlord then entered the rental unit again on June 20, 2016 when the Tenant was not in the rental unit and left the 10 Day Notice to End Tenancy issued June 20, 2016 in her rental unit.

The Tenant stated that she had to respond to these two 10 Day Notices, and had previously asked for an Order restricting the Landlord's right to enter the rental unit (which determined to be moot at the hearing as she had moved out). She stated that in all the circumstances she felt harassed by the Landlord.

Analysis

The Tenant conceded that she did not pay rent for April 2016, May 2016, June 2016 or July 2016.

Under section 26 of the *Act*, the Tenant must not withhold rent, even if the Landlord is in breach of the tenancy agreement or the *Act*, unless the Tenant has some authority under the *Act* to not pay rent. In this situation, I find the Tenant was only authorized to withhold one month's rent pursuant to section 51(1) of the *Act* (for reasons which I will address later in my Decision). Accordingly, I grant the Landlord's request for unpaid rent for three months in the amount of **\$2,530.08** (\$843.36 x 3).

I will now deal with the Tenant's claims and first deal with the Tenant's claim for double her security deposit.

Section 38 of the *Residential Tenancy Act* deals with the return of security deposits and provides as follows:

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) 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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows.

I accept the Tenant's evidence that she did not agree to the Landlord retaining any portion of their security deposit.

I accept the Tenant's evidence that on August 5, 2016 she sent her forwarding address to the Landlord by registered mail. Section 90 of the *Act* provides that documents served in this manner are deemed received five days later; accordingly, I find the Landlord was served as of August 10, 2016.

The Landlord failed to apply for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, to retain a portion of the security deposit, as required under section 38(1) of the *Act*.

I also find the Landlord failed to perform the outgoing condition inspection report in accordance with the *Act*, and therefore extinguished his right to claim against the security deposit for damages, pursuant to section 36(2) of the *Act*.

The security deposit is held in trust for the Tenant by the Landlord. The Landlord may only keep all or a portion of the security deposit through the authority of the *Act*, such as the written agreement of the Tenant an Order from an Arbitrator. Here the Landlord did not have any authority under the *Act* to keep any portion of the security deposit.

Having made the above findings, I must Order, pursuant to sections 38 and 67 of the *Act*, that the Landlord pay the Tenant the sum of **\$696.65**, comprised of double the security deposit (2 x \$414.15) less the \$131.65 paid to the Tenant.

The Tenant sought compensation pursuant to section 51(1) of the *Act* which reads as follows:

Tenant's compensation: section 49 notice

- 51** (1) 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.

The Landlord issued a 2 Month Notice to End Tenancy on May 26, 2016; therefore, the Tenant is entitled to this compensation. As the Tenant failed to pay rent for four months, she is credited a month's rent and is therefore only liable for three month's rent.

The Tenant also sought compensation pursuant to section 51(2) which reads as follows:

Tenant's compensation: section 49 notice

- 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, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

While the circumstances of the two years preceding the sale certainly gave the Tenant reason to doubt the Landlord's intentions, I find the rental unit was used for the stated purpose on the May 26, 2016 Notice and I therefore dismiss the Tenant's claim for two month's compensation pursuant to section 51(2) of the *Act*.

The Tenant was informed during the hearing that her moving costs are not recoverable as they are an inevitable cost of tenancy.

I will now address the Tenant's claim for compensation for breach of her right to quiet enjoyment.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

After careful consideration of the evidence, testimony and submissions before me I find the Tenant is entitled to compensation for breach of her right to quiet enjoyment, and I award her the **\$2,530.08** claimed.

A tenant's right to quiet enjoyment is protected under section 28 of the *Residential Tenancy Act*, which reads as follows:

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6—Right to Quiet Enjoyment provides in part as follows:

“ ...

Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment.

...

In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.

...

I accept the Tenant's evidence that for approximately two years, while the Landlord attempted to sell the property, she was frequently disturbed by the Landlord, realtors, and prospective buyers. I accept that she was not able to be in the rental unit regularly while the property was being shown, and that she was required to prepare her unit for showings. I further accept that at times the rental unit was entered without her knowledge or consent, and that on at least one occasion her privacy was breached in an embarrassing manner.

I also accept the Tenant's evidence that the Landlord forcibly entered the rental unit to serve a 10 Day Notice to End Tenancy and that in doing so, he intimidated and frightened the Tenant.

I find the Tenant's claim for compensation, equivalent to three months' rent, to be a reasonable sum considering the length of time her right to quiet enjoyment was breached as well as the severity of the incident on June 18, 2016. In all the circumstances I find the Tenant is entitled to the **\$2,530.08** claimed.

As the Tenant has been substantially successful, I award her recovery of the **\$100.00** filing fee.

I therefore find that the Tenant is entitled to compensation in the amount of **\$3,3256.73**

Double security deposit \$400.00 + interest \$14.15 = \$414.15 x 2 = \$828.30 LESS \$131.65 returned	\$696.65
Three month's rent for breach of quiet enjoyment	\$2,530.08
Filing fee	\$100.00

TOTAL AWARDED

\$3,325<u>6</u>.73

Conclusion

The Landlord is entitled to compensation for unpaid rent. The Tenant's claim for compensation pursuant to section 51(1) is granted, such that the Landlord's claim for four months' unpaid rent is reduced by one month. The Landlord is therefore entitled to compensation in the amount of **\$2,530.08** for unpaid rent for three months.

The Tenant is entitled to compensation in the amount of **\$3,3256.73** representing double her security deposit, compensation for breach of her right to quiet enjoyment equivalent to three month's rent, and recovery of the filing fee.

These amounts are offset against the other such that the Tenant is entitled to a Monetary Order in the amount of **\$796.65**. The Tenant must serve the Monetary Order on the Landlord and may file and enforce the Order in the B.C. Provincial Court (Small Claims Division).

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 23, 2017

Corrected date: August 25, 2017

Residential Tenancy Branch