Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SHANNON MEWS, WALL FINANCIAL CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

Tenant: MNSD
Landlord: MNSD, MNDC, FF

Introduction

This hearing was convened in response to cross-applications by the parties. The landlord filed on April 16, 2017 pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows;

1. A monetary Order for damage / loss – Section 67
2. An Order to retain the security deposit – Section 38
3. An Order to recover the filing fee for this application - Section 72

The tenant filed their application on April 25, 2017 for Orders as follows:

1. An Order for return of double security deposit - Section 38
2. A Monetary Order in compensation for loss – Section 67
3. An Order to recover the filing fee for this application - Section 72

Both parties attended the hearing and were given opportunity to discuss and settle their dispute, to no avail. The parties respectively acknowledged receiving all the evidence of the other. Despite their evidentiary submissions only *relevant* evidence was considered in the Decision. The parties were given opportunity to present testimony, and make submissions of evidence. Prior to concluding the hearing both parties acknowledged they had presented all of the *relevant* evidence that they wished to present.

Issue(s) to be Decided

Is the landlord entitled to the monetary amounts claimed?

Is the tenant entitled to the monetary amounts claimed?

Each party bears the burden of proving their respective claims.

Background and Evidence

The undisputed evidence in this matter is as follows. The tenancy ended March 31, 2017. The tenancy began December 23, 2015 as a written tenancy agreement for a fixed term ending December 31, 2016 of which the hearing had benefit of a copy. At the outset of the tenancy the landlord collected a security deposit and pet damage deposit in the respective amounts of $1062.50.00 and $400.00 which the landlord retains in trust. The payable rent was in the amount of $2125.00 due on the first day of the month. The parties agree there was a *move in* condition inspection at the outset of the tenancy and there was a *move out* condition inspection conducted between the tenant and the landlord. Both parties provided a copy of the requisite Condition Inspection Report (CIR), which the parties agree was ultimately completed March 31, 2017. The parties *did not agree* as to the administration of the security deposit, despite neither party signing the move out portion of the Condition Inspection Report. The parties provided that the tenant supplied the landlord with a written forwarding address on March 31, 2017.

Landlord's application

The landlord originally sought to retain a portion of the tenant's deposits for cleaning and minor damage, which they subsequently reduced to a claim for $110.00. The landlord made their claim against the tenant's deposit on the 15th day, as prescribed by the Act. It was discussed in the hearing that the 15th day was on a statutory holiday weekend and therefore the landlord's application was accepted on April 18, 2017.

The tenant agreed to compensate the landlord their request in the amount of $110.00 in full and final satisfaction of the landlord's claims.

Tenant's application

The tenant seeks the return of their deposit and compensation pursuant to Section 38 of the Act for double the security deposit.

The tenant also seeks compensation for loss off quiet enjoyment in the sum of $13,350.00

The tenant testified that shortly after they occupied the rental unit there began a phase of demolition and construction facing the tenant's fifth floor rental unit which endured to the end of the tenancy and routinely intruded on the tenant's quiet enjoyment of the rental unit, with noise, vibrations and periodically dust. The tenant argued that it was available to the landlord to have informed them of this pending occurrence or possible disruption before entering into a binding agreement, however they did not. The landlord argued there were an abundance of signs about the residential property stating that impending property alterations were to occur but could not confirm the tenant was promised there would not be any disruption. Regardless, the tenant claims they endured the effects of the property changes consisting primarily of continuous noise to the extent they moved out for 4 months for the benefit of their newborn child. The tenant claims they felt "trapped" by the fixed term tenancy agreement and that if they complained it would deteriorate their situation and jeopardize their reputation and the return of their deposits. The tenant stated in their application, *"the only thing we could do was wait until the one year was up and find a new place" – as written.* The tenant determined to vacate 3 months after the end of their fixed term tenancy. The landlord testified that the tenant did not formally complain of their dissatisfaction with their unit vis a vis the construction, and that to their knowledge they did not receive any complaints from other units. The landlord acknowledged that if the tenant had made it known they were unhappy they would have seriously considered waving any early termination fee and ended the tenancy, or sought to otherwise accommodate the tenant's concerns with their rental unit situation. The tenant confirmed that during the tenancy they considered filing for dispute resolution but did not want to disrupt the tenancy relationship. The tenant also confirmed they did not formally complain to the landlord, nor ask the landlord if they could be re-housed in a different unit, or ask the landlord to agree to mutually end the tenancy because of their issues respecting the compromised enjoyment of their rental unit.

Analysis

*A copy of the Residential Tenancy Act, Regulations and other publications are available at **www.gov.bc.ca/landlordtenant**.*

The onus is on the respective parties to prove their claim on balance of probabilities. On preponderance of all evidence submitted, and on balance of probabilities, I find as follows:

Landlord's claim

The parties settled the landlord's claim by mutual agreement in which the landlord will be permitted to retain $110.00 of the tenant's deposits.

Tenant's claim

Section 38(1) of the Act provides as follows **(emphasis mine)**:

> **38**(1) Except as provided in subsection (3) or (4) (a), within 15 days **after the later of**
>
> 38(1)(a) the date the tenancy ends, and
>
> 38(1)(b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord **must** do one of the following:
>
> 38(1)(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;
>
> 38(1)(d) file an application for dispute resolution to make a claim against the security deposit or pet damage deposit.

I find the tenant provided the landlord their forwarding address in writing on March 31, 2017 and the landlord filed their application within the required 15 days to do so in accordance with Section 38(1) of the Act. As a result, the tenant is not entitled to the doubling provisions afforded by **Section 38(6)** of the Act.

Under the *Act*, a party claiming a loss bears the burden of proof. Moreover, the applicant must satisfy each component of the following test established by **Section 7** of the Act, which states;

> ***Liability for not complying with this Act or a tenancy agreement***
>
> ***7*** *(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*
>
> *(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the tenant)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (landlord) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the tenant bears the burden of establishing their claim for loss of quiet enjoyment on the balance of probabilities. The tenant must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the landlord. Once established, the tenant must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenant must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred / claimed.

I find the tenant has not proven their loss resulted from the conduct of the landlord in violation of the Act or tenancy agreement. For a landlord to be liable for a loss of quiet enjoyment the landlord must be first placed on verifiable notice, preferably in writing, that a breach of the tenant's right to quiet enjoyment is occurring or will occur so as to enable the landlord to take remedial action for the situation within a reasonable period. In this same respect I find the tenant did not take reasonable steps of their own to mitigate or minimize the impact to their quiet enjoyment for which the landlord could take responsibility to address any breach, and therefore not meeting the requirements of Section 7(2) of the Act.

As a result of all the above, I find the landlord does not owe the tenant compensation as remedy for a problem of which they were not aware. I find the tenant does not meet the test for loss and therefore I must dismiss this portion of the tenant's claim.

I find the tenant is owed the balance of their deposits held by the landlord.

As both parties were partly successful in their applications they each are entitled to their filing fee from the other party, which mathematically cancel out.

Calculation for Monetary Order:

Tenant's deposits held in trust - sum	$1462.50
Minus landlord's compensation by mutual agreement	***- $110.00***
Monetary Order to tenant	**$1352.50**

Conclusion

The parties' respective applications, in relevant part, have been granted.

I Order the landlord may retain $110.00 from the tenant's security and pet damage deposits and return the balance of $1352.50 to the tenant, forthwith.

To perfect the above Order **I grant** the tenant a **Monetary Order** under Section 67 of the Act in the amount of **$1352.50.** If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

This Decision is final and binding.

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 20, 2017

Residential Tenancy Branch