Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF MND MNDC MNR MNSD RR

Introduction
Pursuant to section 58 of the *Residential Tenancy Act* (the *Act*), I was designated to hear this matter. This hearing dealt applications from both parties:

The landlord applied for:

- a Monetary Order pursuant to section 67 of the *Act*;
- an Order allowing the landlord to retain the tenants' security deposit pursuant to section 38 of the *Act;* and
- a return of the filing fee pursuant to section 72 of the *Act*.

The tenants applied for:

- a Monetary Order pursuant to section 67 of the *Act*;
- a return of their security deposit pursuant to section 72 of the *Act;*
- a reduction in rent for repairs, services or facilities agreed upon by not provided pursuant to section 65 of the *Act*; and
- a return of the filing fee pursuant to section 72 of the *Act*.

Both parties attended the hearing with counsel for the tenants, S.C, acting in advisory capacity. Both parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The landlord explained that he sent copies of the evidentiary packages, along with his application for dispute resolution to the tenants by way of Canada Post Registered Mail on April 6, 2017. Copies of the Canada Post tracking numbers and receipts were provided to the hearing. Pursuant to sections 88 & 89 of the *Act* the tenants are found to have been duly served.

The tenants testified that on April 7, 2017 the landlord was served in person with their application for dispute resolution. While the landlord acknowledged service of the tenants' application for dispute resolution, he explained that he did not receive all of the tenants' evidence. As part of the tenants' evidentiary packages there were affidavits signed by a

process service company. An affidavit submitted at the hearing dated August 21, 2017 and signed by process server M.S., stated that the tenants' evidentiary package was placed in the landlord`s mailbox on August 17, 2017. Pursuant to sections 88 & 90 of the *Act* I find that the landlord was deemed served with the tenants` evidentiary package on August 20, 2017, three days after it was placed in the mailbox.

Following opening remarks, the tenants explained that they wished to amend their monetary application to reflect a miscalculation of the return of their security deposit. Pursuant to section 64(3)(c), the tenants' application is amended to $21,870.00 from $25,000.00. Further to this, the landlord also explained that he wished to amend his application for a monetary order. The landlord stated that he did not have all of the invoices when he applied for dispute resolution and therefore did not have an accurate number. Pursuant to section 64(3)(c) of the *Act*, the landlord's application is amended to reflect an application for a monetary order of $4,667.34 instead of $5,509.38.

Issue(s) to be Decided

Is either party entitled to a monetary order?

Are the tenants entitled to a retroactive reduction in rent for repairs, facilities or services agreed upon but not provided?

Can the landlord retain the tenants' security deposit?

Is either party entitled to a return of the filing fee?

Background and Evidence

Testimony provided by both parties established that this tenancy began originally as a fixed term tenancy for one year, in May 2013. Following the expiry of this first tenancy agreement, the parties entered into a second tenancy agreement on May 15, 2015. Rent was $3,792.50 per month and a security deposit of $1,875.00 collected at the outset of the tenancy continues to be held by the landlord.

The landlord stated that he was seeking a Monetary Order of $4,667.34 plus a return of the filing fee. This figure represented the following:

Amount	**Item**
Millwork	$313.25
Tile Repair	450.00 (+GST)

Electrical work	567.00
Gutters, siding and window repair	2,525.00 (+GST)
Pictures for evidence	62.09
Painting/Drywall	500.00 (+GST)
Outdoor cleaning	250.00
Return of Filing Fee	100.00
Total =	$4,767.34

During the course of the hearing, the landlord testified that following the conclusion of the tenancy the rental unit was left dirty, required extensive cleaning and numerous repairs. Specifically the landlord stated that;

- The cabinets had been chipped;
- The window sill was burned and a transition strip melted;
- Lights were removed and a fixture broken;
- A satellite dish was installed without permission leading to a damaged trellis, siding and downspout;
- Baseboards and drywall were chipped and dirty; and
- Items were left in the backyard including a cabinet, garbage, a saw horse and toys.

The landlord noted that the prior to the tenants' occupation of the unit, it was recently renovated and he would be considered it to be brand new. He said that no incoming, condition inspection was performed at the outset of the tenancy because the premises were newly renovated and the tenants were the only people to occupy the unit since the completion of the work. The landlord said that as a result of the large amount of work that was required in the rental unit following the conclusion of the tenancy, he could not re-rent the home until May 1, 2017. He explained that he was unable to re-rent the home because of cabinets that he had sent off for repair and they had not yet been returned to the premises. Furthermore the landlord stated that the tenants did not provide him with one month written notice, saying they informed him on February 1, 2017 of their intention to move out of the unit at the end of the February. He continued by explaining the tenants in fact remained in the premises until March 21, 2017.

As part of his evidentiary package, the landlord submitted numerous photos displaying the state of the suite both before and after the tenants' occupation.

The tenants strongly denied all allegations leveled by the landlord concerning any damage they may have caused. The tenants maintained that the majority of the items for which the landlord is claiming were subject to normal wear and tear. They explained that in fact, they faced numerous expenses related to the tenancy and took great efforts to ensure that the property was returned to the landlord in a reasonable condition. The tenants themselves are seeking a monetary order of $21,870.00. This amount represents:

Amount	**Item**
Reimbursements for repairs made	$3,540.00
Double the return of security deposit (2 x $1,875.00)	3,750.00
Retroactive reduction in rent	14,580.00
Total =	$21,870.00

As part of their evidentiary package and during the hearing the tenants said that they had made numerous repairs to the unit and spent in excess of $3,000.00 of their own money. In particular the tenants noted that they had replaced a bar fridge that was dented during the tenancy, had the inside walls of the home professionally repainted following the conclusion of their tenancy, twice had the home professionally cleaned after their move-out (March 14 & March 28), arranged for cabinets and blinds to be replaced and repaired, and replaced missing lightbulbs.

The tenants argued that it was unreasonable for the landlord to retain their security deposit, that they did not provide the landlord with written permission to do so and that the landlord had no right to retain the deposit under the *Act*. They reasoned that the landlord's failure to return their deposit should lead to a doubling of its return under the *Act*. The tenants said their last day of occupation was February 28, 2017, on which date movers came to transport their furniture and goods to their new property. The tenants explained that they informed the landlord on February 2, 2017 by text message that their move out was behind schedule and they would be occupation of the unit until the end of February. A copy of this message submitted at the hearing as part of the tenants' evidentiary package shows that the landlord consented to this arrangement. The tenants stated that they had vacated the premises and had to return twice to do additional cleaning in March because the landlord had deemed the property not sufficiently clean. On March 10, 2017 the landlord was provided a copy of the tenants' forwarding address by email.

The final aspect of the tenants' application for a monetary order concerned a retroactive return of rent for September and October 2013 & 2014, and for the loss of the front yard area of their home from May until September 2013, totalling $14,580.00. The tenants explained that the bedroom, bathroom and children's playroom was twice subject to flooding and was inaccessible for two months. For this time period the children were forced to sleep in an upstairs office area.

The second portion of the above described tenants' application for a monetary award concerned significant yard work which was undertaken by the landlord during the tenancy. The tenants argued that they were aware that major landscaping would take place while they were in occupation of the home; however, they argued that this took significantly more time than the landlord had told them it would, and that they continued to pay full rent despite not having the entire use of the property.

The landlord disputed that any money should be owed for this portion of the tenants' application. While acknowledging that flooding in the unit had occurred, the landlord said that significant efforts had been made on his part to immediately deal with the flooding situation. Professional restoration specialists were promptly called to attend to the flooding. Furthermore, the landlord said no compensation should be granted to the tenants for the disruption that occurred as a result of the landscaping on the premises. He argued that the tenants were aware of these repairs when they moved in to the rental home, had specifically asked that artificial grass be installed and that construction set-backs were inevitable when undertaking a project of such magnitude.

Analysis – Landlord's claim

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 damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant 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 other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on both parties to prove their entitlement to a claim for a monetary award.

The landlord is seeking a monetary award of $4,767.34 in reflection of repairs and cleaning that were required in the suite. In addition to this amount the landlord has applied to retain the tenants' security deposit to apply against his monetary claim and is looking to recover unpaid rent for March 2017. I will start by examining the latter part of

the landlord's claim and then conclude by carefully analysing the landlord's claim of repairs and cleaning.

The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection 38(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]*.

While the landlord explained that the rental unit was brand new at the start of the tenancy, he acknowledged that no start of tenancy condition report was performed by the parties and he testified that he did not perform an end of tenancy condition report with the tenants. The landlord`s failure to adhere to the requirements of 38 of the *Act* has therefore led to the landlord forfeiting his right to claim for the deposit.

Section 38 of the *Act* also requires the landlord to either return a tenant's security or pet deposit in full or file for dispute resolution for authorization to retain these deposits 15 days after the *later* of the end of a tenancy, or upon receipt of a tenant's forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained a tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy as per section 38(4)(a). Under section 38(3)(b) a landlord may retain a tenant's security or pet deposit if an order to do so has been issued by an arbitrator.

Based on the testimony and evidence submitted at the hearing, I find that this tenancy ended on February 28, 2017 when a moving company removed the tenants' belongings. The tenants' provided their forwarding address to the landlord via email on March 10, 2017. Email is not a recognized form of service under the *Act* and I can therefore not accept it to determine a date on which it was received by the landlord.

Residential Tenancy Policy Guideline #17 notes, "In cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss." In this case the landlord was the first to breach his obligation when he failed to conduct a proper condition inspection report at the outset of the tenancy and the tenants are not entitled to a doubling of the security deposit. The landlord is therefore directed to return the security deposit to the tenants.

During the hearing the landlord stated that he sought an award for rent for March 2017. He argued that the tenants had violated the *Act* by failing to provide him a full month's written notice, that the tenants were in occupation of the rental unit throughout the month of March 2017 and that the repairs required in the unit were extensive, making it impossible to re-rent the suite.

Residential Tenancy Policy Guideline #3 examines the issue of claims for rent and damages for loss of rent. It states, "In all cases the landlord's claim is subject to the statutory duty to mitigate the loss." This issue is examined in more detail by *Policy Guideline #5* which says, "The duty to minimize the loss generally begins when the persons entitled to claim damages becomes aware that damages are occurring…efforts to minimize the loss must be reasonable in the circumstances…the legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."

As part of his oral testimony presented at the hearing, the landlord acknowledged that no efforts had been made to re-rent the suite until April 2017. He said that he could not have re-rented the suite due to the amount of damage present in the suite. The landlord directed my attention to the photos he submitted as part of his evidentiary package showing the state of the rental unit following the tenants move-out. Furthermore, the landlord testified that the suite did not have cupboard doors, as they had not yet been returned to him from the shop where they were getting repaired.

After having closely examined the photos, I do not find that the damage presented by the landlord would have prevented him from re-renting the home. The items which are pictured as needing repairs are not major appliances; they would not affect the day to day occupation of a tenant; and they show items that would not require substantial renovations. I find the landlord made no reasonable attempt to re-rent the suite, that he concluded on his own that it was un-rentable, and took no steps to advertise it until April 2017. Even if the unit required some touch up cleaning, the fact remains that the landlord was aware that the tenants would be gone by February 28, 2017 and took no steps to re-rent the suite prior to this date.

While the landlord argued that the tenants were in occupation of the suite until the end of March 2017 and did not provide him with proper notice of vacating the suite, I find that the unit was vacated on February 28, 2017 and the tenants took immediate steps and made significant efforts part to return the unit the landlord in an acceptable state. In particular, following the landlord's request, the tenants paid for the unit to be

professionally painted in March 2017, and they had the unit professionally cleaned twice in March 2017. I dismiss this portion of the landlord's claim for a monetary award.

The final aspect of the landlord's claim concerns alleged damage to the rental unit. The tenants maintained that it was reasonable wear and tear while the landlord argued they had done significant damage.

Section 37(2) of the *Act* explains, "When a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear." *Residential Tenancy Policy Guideline #1* expands on this issue of "normal wear and tear" and notes, "The tenant must maintain 'reasonable health, cleanliness and sanitary standards' throughout the rental unit or site. The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that started. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guests."

Guideline #1 continues by stating that, "A tenant is not required to make repairs for reasonable wear and tear" which is defined as being the "natural deterioration that occurs due to ageing and other natural forces, where the tenant has used the premises in a reasonable fashion."

Evidence and testimony presented at the hearing by the tenants' show that professional cleaners twice attended the property following the conclusion of the tenancy. When questions of normal wear and tear are raised by a party, *Residential Tenancy Policy Guideline #40* provides direction for determining the useful life of building elements. It says, "The arbitrator may consider the useful life of a building element and the age of the item…if the arbitrator finds that a landlord makes repairs to a rental unit due to damage caused by the tenant, the arbitrator may consider the age of the item at the time of replacement and the useful life of the item when calculating the tenant's responsibility for the cost or replacement."

Millwork for Cabinets

Testimony and written submissions presented at the hearing show that the tenants agreed to pay $560.00 for the replacement of cabinets that required repairs. The landlord explained that additional repairs were required beyond the work for which the tenants had paid. I find that the tenants have made significant efforts to repair the cabinets and any alleged damage which remained to be reasonable wear and tear of the units.

Window Sill Repair

The tenants explained that they were unaware of the need for a window sill to be repaired, and they could not comment on this. After reviewing the photo submitted to the hearing by the landlord, I note that photo #160 and #167 to show some evidence of the need for a minor repair. I am not convinced that the loss demonstrated in the photos extends beyond normal wear and tear and note that the minor hole in the screen and the cracking around the window to fall within the definition of section 37(2) of the *Act*.

Electrical Work for light fixture

During the course of the hearing the tenants informed that the landlord had instructed them to not handle the lighting. In the midst of the tenancy, an issue had developed with a 5 bulb light fixture. The tenants explained that significant efforts were made to replace the exact fixture; however, this fixture could not be located. The tenants stated that they purchased a replacement fixture which resembled as closely as they could find, to the original fixture. I find that the tenants have made reasonable efforts to rectify the issues identified by the landlord concerning the light fixture and decline to award the landlord compensation for electrical work for the lights.

Gutters & Siding

The landlord argued that the tenants should be directed to pay for repair works to the gutters and siding that were damaged as a result of the satellite dish that was installed without his permission. I find this claim by the landlord to be problematic. A May 12, 2013 email submitted as part of the tenants' application shows that the landlord was aware of the satellite's installation and in fact took steps to assist the tenants find a suitable internet provider. Furthermore, testimony provided at the hearing by the tenants established that renovations on the house were on going, with the landlord constantly hanging ladders from the room and against the side of the house. I find that the landlord has failed under section 67 of the *Act* to show on the balance of probabilities the existence of the damage/loss stemming directly from a violation of the agreement or a contravention of the *Act* on the part of the tenants.

Painting & Drywall

The tenants explained that prior to their move out they had the inside of the home professionally painted. The landlord acknowledged this to be the case but argued that

the worked performed was not to an adequate standard. *Residential Tenancy Policy Guideline #40* notes that interior painting is to be done every 4 years on a rental unit. The tenants were in occupation of the unit for 3 years and 9 months. Following their departure, the tenants paid professional painters to paint the unit. I find this goes far beyond what is expected of a tenant and that the paint in the interior rental unit was only 3 months away from being beyond its useful life. I therefore decline to award an amount for paint and drywall to the landlord.

Analysis – Tenant's Claim

As I have already directed the landlord to return the security deposit to the tenants and have declined to double it, I will focus only on the tenants' application for a retroactive reduction in rent, and for reimbursements for repairs made.

The tenants have applied for a monetary award of $21,870.00 including $14,580.00 in retroactive reduction in rent and reimbursements for repairs of $3,540.00.

Starting with the retroactive reduction in rent, I turn to section 67 of the *Act*. An award under this section can only be made *when a claimant has proved the existence of the damage/loss, stemming directly from a violation of the agreement or a contravention of the Act on the part of the other party*. I do not find that such loss or damage can be attributed from a violation of the tenancy agreement or in contravention of the *Act*. All parties present at the hearing acknowledged that the flooding was the result of an accident and the landlord took immediate steps to rectify the situation. Furthermore, I find it difficult to justify awarding the tenants an award of 50% of their rent for the two, 8-week periods in which they experienced flooding when these issues were not raised by the tenants until 3 and 4 years after these events took place during which no claims for loss of quiet enjoyment was raised by the tenants. I therefore decline to award the tenants an award of retroactive rent for this time period.

The second aspect of the award for a retroactive return of rent concerns the loss of the yard for 4 month period at the start of the tenancy. The tenants argued that while they were aware that repair works were being performed on the yard of the unit, these repairs took much longer than anticipated and prevented them from using the yard, and from fully enjoying the entire property. An email dated September 14, 2013 from tenant D.M. to the landlord outlines their frustrations with these matters. This is followed by an email dated September 15, 2013 from the landlord to the tenant which details the work that had been done by the landlord since the home had been rented. A second email from tenant on September 16, 2013 acknowledges that some work had been done but notes that other work had yet to be completed and that he had been paying rent in full since the outset of the tenancy.

The tenant seeks a monetary order for a loss of the yard, as a result of the landlord's actions.

Residential Tenancy Branch ("RTB") Policy Guideline 16 states the following with respect to types of damages that may be awarded to parties:

> *An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. An arbitrator may also award "nominal damages", which are a minimal award. These damages may be awarded 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 of a legal right.*

I find that some loss has occurred as the tenants paid full rent and were denied access to their yard for the summer months of 2013. The landlord testified that the repair work done was only performed to satisfy the tenants desire to have artificial turf installed. After examining the photos submitted to the hearing, it is apparent that significant repair works were being performed on the front yard, that went beyond the installation of artificial turf. I will therefore award the tenants a monetary award of $1,517.00 representing 10% of the rent they paid ($15,170.00) for the 4 months in which the yard was unusable.

As both parties were partially successful, they must each bear the cost of their own filing fees.

Conclusion

The landlord is ordered to return the entire security deposit to the tenants.

The landlord's claim for a monetary award is dismissed in its entirety.

The tenants' claim for reimbursements for repairs made is dismissed.

Both parties must bear the cost of their own filing fees.

I am making a Monetary Order of $1,517.00 in favour of the tenants as follows:

Item	Amount
Loss of yard	$1,517.00
Total =	$1,517.00

The tenants are provided with formal Orders in the above terms. Should the landlord 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 29, 2017

Residential Tenancy Branch