Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC O FF

Introduction
This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("the Act") for: a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; any other remedy under the Act; 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. Both parties confirmed receipt of the other's evidentiary submissions for this hearing.

Issue(s) to be Decided
Is the tenant entitled to a monetary order for compensation for moving costs and loss of enjoyment of the rental unit during the course of the tenancy or any other appropriate remedy under the Act? Is the tenant entitled to recover the filing fee from the landlord?

Background and Evidence
This tenancy began on August 1, 2016 as a one year fixed term tenancy scheduled to end July 31, 2017. The rental amount of $1800.00 was payable on the first of each month. The parties entered into a mutual agreement to end tenancy and the tenants vacated the rental unit on April 30, 2017. The landlord continues to hold a $900.00 security deposit paid at the outset of this tenancy. The tenant(s) applied for the return of their security deposit, to recover the rent paid to the landlord in April 2017 as well as to be compensated for their move-out and filing fee for this application in a total amount of $3400.00.

The tenant sought a monetary order for compensation for $3400.00 as follows,

Item	**Amount**
Return of 1 month's Rent (April 2017)	$1800.00
Return of Security Deposit	900.00
Moving Expenses	600.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought by Tenant	**$3400.00**

The tenant and her family lived in the downstairs suite at the rental property. She testified that the second floor tenant had access to the garage as part of his rental agreement. The tenant testified that the second floor tenant used the garage on ground floor, connected to the ground floor unit and therefore his activities in the garage affected the tenant and her family. The tenant testified that the second floor tenant regularly painted in the garage and that her family was regularly subjected to the toxic paint fume filled air.

The landlord testified that, within the first month of her tenancy, the tenant had commented to the landlord on the paint fumes. The landlord provided undisputed testimony that, at that time, the tenant had merely inquired about the smell and asked the landlord not to say anything to the second floor tenant. The tenant testified that she was scared of the second floor tenant. The tenant testified that she made several inquiries and requests of the landlord because he was a large man. She testified that she never addressed the issue directly with the second floor tenant. She confirmed the testimony of the landlord that she asked the landlord not to raise the issue of paint fumes with the second floor tenant.

The tenant testified that, on March 7, 2017, she asked the landlord to talk to the second floor tenant about no longer using the garage. The landlord explained to the tenant that the second floor tenant was entitled to use the garage because he paid for the garage as part of his tenancy agreement. The tenant testified that she was aware use of the garage was part of the second floor tenant's agreement she felt that her family's comfort and health were being compromised by the paint fumes.

The tenant submitted text message correspondence with the landlord. That correspondence included a message dated November 27, 2016 from the tenant to the landlord indicating that there are paint particles in her home and asking the landlord to ensure the garage is ventilated. On April 1, 2017, the tenant wrote a text message to the upstairs tenant stating that she can smell chemicals in the house and asking the second floor to check for paint or an open canister in the garage. She states, "[sorry] to bother you. It is a health issue for us." The tenant also sent messages to the landlord on; April 3, 2017 (2 times) and April 4, 2017 complaining about the fumes and the effect on her family. The tenant also submitted a copy of her son's admission to the hospital emergency unit and medical certificate from a doctor. Both documents verify the tenant and her son's complaints regarding fumes in the residence, and the effects of the fumes including nausea.

The tenant testified that the paint fumes were excessive in April 2017 and toxic paint fumes came from the garage causing her family to suffer symptoms such as headaches, nausea, and stomach cramps. The tenant testified that her family's health deteriorated due to the negligence of the landlord and his disregard for her complaints while the family were living in the unit. The tenant testified that on, April 5 and 6, 2017, her 7 year old and her 11 year old children's symptoms worsened. She testified that she called an ambulance. She submitted photographs of the family at the hospital and her children on hospital beds.

The tenant testified that, despite her complaints to the landlord, he repeatedly told her to be a good neighbour to other tenants and that he would not take any action despite the fact that she had identified a safety and health concern on the premises.

The landlord testified that he responded to all of the tenant's requests and complaints. He testified that the tenant told him that her family was sick before they moved to Canada and that these symptoms were ongoing. He testified, confirmed by the documentary evidence, that he advised the tenant to go to the doctor with her children on several occasions. He also recommended she consult a lawyer.

The landlord also testified that he spoke with the second floor tenant on several occasions. He testified that he told the second floor tenant to cease painting and spraying activities on April 4, 2017. The landlord testified that, despite the fact that the tenant was bound by a fixed term tenancy, he allowed the tenant and her family to vacate with short notice given their complaints and health concerns.

The landlord testified, supported by his documentary evidence that he retained a quality air inspector to test the air in and around the garage. The report from that inspection, dated April 17, 2017, provides figures that indicate the amounts of certain compounds in the air. A "sample integrity receipt" was included with the date. An email from the company who conducted the analysis indicates that the levels of impactful compounds identified were minimal and similar to the effects of car fumes in traffic.

The landlord testified that while he did not make an application to retain a portion of the tenant's $900.00 security deposit, he believed he was authorized to retain a portion to recover the unpaid gas and electricity bills left unpaid by the tenant at the end of the tenancy; and the cost to repair the stove within the rental unit. The landlord provided a copy of a cheque made out to the tenant in the amount of $224.78. This is the portion of the deposit that the landlord returned to the tenant after deducting the cost of utilities and the cost of repairing the stove in the rental unit.

The landlord submitted letters sent to the tenant on April 10, 2017, text correspondence to the tenant on May 2, 2017 as well as copies of the utility bills with the breakdown per unit. At this hearing, the tenant agreed that she was responsible for the outstanding utility bills totalling $340.85 (in four amounts: $110.84; $23.70; $192.76; $13.55).

The landlord submitted a handwritten signed note dated April 30, 2017 that reads, "After inspection, we found one of item of the stove have to be check or repair [*sic*]. Others are ok." Both the landlord and the tenant appear to have signed the bottom of this handwritten note. No amount for this repair was provided to the tenant. The landlord confirmed in his testimony that he did not provide a figure for the repair to the tenant before returning a portion of the tenant's security deposit to her by mail. The tenant testified that she did not agree to pay $334.37 – the

amount that the landlord retained for the repair of the stove and she did not anticipate such a high amount for the repair. She testified that she is not even sure that she damaged the stove.

The tenant submitted a $600.00 handwritten receipt and a moving company's business card in order to support her claim for the landlord to reimburse her for her moving expenses. The landlord submitted that the tenant should not be entitled to moving expenses. He submitted that his agreement to have the tenant vacate the unit early was his agreed compensation or remedy for the tenant's dissatisfaction with the living circumstances. He testified that the tenant would have incurred moving expenses on July 31, 2017 at the end of the fixed term tenancy in any event.

Analysis

Section 67 of the Act establishes that if loss results from a tenancy, an arbitrator may determine the amount of that loss and order one party to pay compensation to the other party. In order to claim for loss under the *Act*, the party claiming the loss (in this case, the tenant) bears the burden of proof. The tenant must prove the existence of the loss, and that the loss stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the landlord.

A tenant might incur loss in a less tangible way than actual loss of property or direct financial loss. The tenant may be entitled to compensation if they do not have access to a part of the property or a service or facility that the landlord has agreed to provide as part of the tenancy agreement. Even if this type of loss is not caused directly by the landlord, the tenant may be eligible for compensation. The tenant relies on the proposition that, as a result of the paint fumes created by the second floor tenant, the quiet enjoyment of their rental property was reduced and therefore they are entitled to compensation by the landlord.

Under section 28 of the Act, a tenant is entitled to quiet enjoyment, including, but not limited to the rights to freedom from disturbance – a substantial and unreasonable interference with the enjoyment of the premises that results from a situation that the landlord was aware of but failed to take steps to correct. Residential Tenancy Policy Guideline No. 6 states that "[temporary] discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. When claiming for loss of quiet enjoyment, a tenant must prove frequent and ongoing interference or disturbance.

Section 32 of the Act provides the landlord and tenant obligations to repair and maintain the rental unit. The landlord's obligations are as follows;

> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
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> > (a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The tenant submits that the enjoyment of their rental unit was decreased as a result of the landlord's failure to stop the paint fumes created by the second floor tenant. Further, the tenant submits that the landlord did not take appropriate steps given the impact on the health of the tenant and her family.

I acknowledge that landlord's air quality inspection results dated April 17, 2017 and submitted as evidence for this hearing. However, I accept that testimony and documentary evidence, including photographs of the impact to this particular family of the paint fumes and continuous complaints to the landlord within the month of April 2017. I find that the evidence submitted by the tenant has provided sufficient evidence, that the rental unit was not fully suitable for occupation in the month of April 2017 in that the paint fumes regularly entered the rental unit and affected the tenant's family. The tenant described and documented the harm to her family's health. However, barring some limited conversation in and around November 2017, I find that the bulk of the exposure to paint fumes and disturbance to the tenancy occurred in April 2017.

I accept the landlord's testimony that, when advised by the tenant of her concerns, he attempted to address them with the second floor neighbour. I further accept the testimony of the landlord that, as a result of the tenant's concerns and complaints, the tenant was permitted to vacate the rental unit early, ending the tenancy prior to the end of the fixed term.

Based on all the evidence provided, the issue of paint fumes emanating from the garage near their rental unit remained unresolved for approximately 1 month prior to the tenant's vacate date. Therefore, I find that the tenant is entitled to an amount that reflects the loss of quiet enjoyment of the rental unit for one month. I find that an amount of 20% of a month's rent (1/5) is appropriate compensation for the disturbance to the tenancy and the impact on the health of the tenant and her family. Fortunately, the impact on the tenant's health was reduced on vacating the rental unit. I find that the tenant is entitled to $360.00 as compensation for the impact on her tenancy of paint fumes during the month of April.

With respect to the tenant's application for the recovery of the moving costs she incurred, I accept the submissions of the landlord that, given the fixed term tenancy ended 3 months after the mutually agreed upon end date, the tenant did not incur significant additional cost as a result of vacating the rental unit early. Furthermore, I find that the receipt submitted as proof of the tenant's costs for moving is insufficient to prove the costs. Therefore, considering all of the circumstances of the tenancy and this application, I find that the tenant is not entitled to recover moving costs.

With respect to the tenant's application for the return of her security deposit, 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 tenant's 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 deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the 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 tenant's provision of the forwarding address. In this case, the landlord was informed of the forwarding address by April 30, 2017 – the date that the tenant and her family vacated the rental unit. The landlord had 15 days after April 30, 2017 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 tenant testified that she did not agree to allow the landlord to retain any portion of her security deposit. The landlord testified that the tenant agreed to reduce her security deposit in an amount to repair the stove in the rental unit. However, at this hearing, the tenant denied that she damaged the stove. As there is no evidence that the tenant has given the landlord **written authorization** at the end of this tenancy to retain any portion of her deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

The tenant seeks return of her security deposit. The landlord did not make an application to retain all or a portion of the tenant's security deposit. Given that the landlord has not taken the required steps to retain the tenant's security deposit, I find that the tenant is entitled to a monetary order including $900.00 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:*
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> - *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 the parties before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. The tenant gave sworn oral testimony that she has not waived her 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*. The landlord has no written documentation to prove the tenant agreed to a deduction to her security deposit. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a total monetary order amounting to double the value of her security deposit with any interest calculated on the original amount only. No interest is payable for this period. Therefore, the tenant is entitled to a total amount of $1800.00 for the return of her security deposit as well as an amount equivalent to her deposit.

The tenant is entitled to a monetary order as follows,

Item	**Amount**
Reduction by 1/5 of 1 month's Rent (April 2017)	$360.00
Return of Security Deposit	900.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the Act	900.00
Less Utility Bill Amounts owed by Tenant	***-340.85***
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought by Tenant	**$1919.15**

Conclusion

I grant a monetary order in favour of the tenant in the amount of $1919.15.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: October 6, 2017

Residential Tenancy Branch