



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR OPC MNR MNSD MNDC FF

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlord requested:

- an Order of Possession for unpaid rent and cause pursuant to section 55;
- a monetary order for unpaid rent and utilities pursuant to section 67;
- authorization to retain the tenants’ security deposit in partial satisfaction of the monetary order requested, pursuant to section 38;
- authorization to recover the filing fee for this application, pursuant to section 72 .

The tenants requested:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; 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, to make submissions, to call witnesses and to cross-examine one another.

Both parties confirmed receipt of each other’s applications for dispute resolution hearing package (“Applications”) and evidence. In accordance with sections 88 and 89 of the *Act*, I find that both the landlords and tenant were duly served with the Applications and evidence.

The tenants indicated at the beginning of the hearing that this tenancy ended on August 15, 2017. As this tenancy has now ended, the landlord withdrew his application for an Order of Possession.

Issue(s) to be Decided

Are the parties entitled to the monetary orders for which they have applied?

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested?

Are the tenants entitled to the return of their security deposit?

Are both parties entitled to recover the filing fee for their applications?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of both applications and my findings around them are set out below.

This fixed-term tenancy began on November 15, 2016, with monthly rent set at \$4,000.00, payable on the fifteenth day of each month. The landlord collected a security deposit of \$2,000.00, and still holds that deposit.

The tenants testified in the hearing that they had moved out on July 27, 2017 after the hot water was cut off to the home on July 26, 2017. The tenants testified that they had returned the keys to the landlord on August 15, 2017, and provided their forwarding address to the landlord in writing. The tenants testified that they had requested the return of their security deposit, and did not give permission for the landlord to retain any portion of their security deposit.

The tenants testified that the last rent payment was made on June 15, 2017 for the rental period of June 15, 2017 to July 14, 2017. The tenants confirmed in the hearing that they did not pay rent for the period of July 15, 2017 to August 14, 2017. The tenants testified in the hearing that they were never properly served a 10 Day Notice to End Tenancy, or a 1 Month Notice to End Tenancy. The tenants also testified that the landlord did not perform a move in or move out inspection, which the landlord did not dispute.

The tenants are seeking a Monetary Order of \$13,451.00 as outlined in the table below:

Item	Amount
Return of security deposit	\$2,000.00

Compensation for landlord's failure to comply with section 38 of the Act	2,000.00
1 Month's Rent	4,000.00
Landscaping	750.00
Moving Costs	4,601.00
Recovery of Filing Fee	100.00
Total Monetary Order Requested	\$13,451.00

The tenants testified that the landlord had change the mailing address for the utility bills so that the tenants were unable to pay the bill, resulting in a disconnection on July 26, 2017. The tenants testified that on July 20, 2017 the landlord sent them a text message with a photo of the notice of disconnection. The tenants testified that they had also received by text message, on the same date, a 10 Day Notice to End Tenancy for unpaid rent and utilities. As the hydro was disconnected on July 26, 2017 the tenants moved out, and returned the keys to the landlord on August 15, 2017 as they required time to move. The tenants submitted the above monetary claim in order to recover the costs associated with this move, and for the landlord's failure to return their security deposit. The tenants testified that the landlord wanted them to move out, and tried to achieve this by harassing them. The tenants are seeking to recover one months' rent as they had to move out before the end of the fixed-term tenancy.

The tenants testified that the landlord had destroyed their plants by dumping grass trimmings on the plants, and are seeking \$750.00 in compensation for their losses.

The landlord applied for a monetary order of \$4,448.66 as set out in the table below:

Item	Amount
Unpaid Rent	\$4,000.00
Unpaid Utilities	348.66
Filing Fee	100.00
Total Monetary Order Requested	\$4,448.66

The landlord disputes that the hydro was disconnected, and provided sworn testimony that the hydro bill dated July 17, 2017 was paid on July 24, 2017. The landlord testified that the tenants owe \$348.66 in unpaid utilities, which the tenants admitted remains unpaid. The landlord is seeking to recover the unpaid rent for the period of July 15, 2017 to August 14, 2017, which the tenants admit remains unpaid.

Analysis

I find that the landlord had failed to comply with sections 23 and 35 of the *Act*, which requires the landlord to perform both move-in and move-out inspections, and fill out condition inspection reports for both occasions. The consequence of not abiding by these sections of the *Act* is that “the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished”, as noted in sections 24(2) and 36(2) of the *Act*.

Section 38(1) of the *Act* requires that landlord, within 15 days of the end of the tenancy or the date on which the landlord receive the tenants’ forwarding address in writing, to either return the deposit 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 tenants’ security deposit plus applicable interest and must pay the tenants 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. 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 tenants agree in writing the landlord may retain the amount to pay a liability or obligation of the tenants.”

The landlords did apply for dispute resolution to obtain authorization to retain the tenants’ security deposit on August 2, 2017, within the 15 day time limit for doing so, but as noted above the consequence of the landlord’s failure to comply with sections 23 and 35 of the *Act* extinguishes their right to claim against the deposit. The tenants gave sworn testimony that the landlord had not obtained their written authorization at the end of the tenancy to retain any portion of the tenants’ security deposit. As the landlord failed to return to the tenants’ their security deposit within 15 days of the provision of their forwarding address, and as the landlord’s right to claim against the deposit was extinguished, I find that the tenants are therefore entitled to a monetary order amounting to double the original security deposit for the landlords’ failure to comply with section 38 of the *Act*.

I considered the testimony of both parties, and I find that it was undisputed that the tenants withheld rent and utilities. Section 26(1) of the *Act* states that “a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent.”

In this case, the tenants did not have permission from the landlord nor an Arbitrator to withhold rent or utilities. Accordingly, I find the landlord is entitled to a monetary order for the \$4,348.66 withheld by the tenants.

Section 27(1) of the *Act* outlines the landlord's obligations in relation to restricting services or facilities.

Terminating or restricting services or facilities

27 (1) A landlord must not terminate or restrict a service or facility if

- (a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
- (b) providing the service or facility is a material term of the tenancy agreement.

Section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

I have considered the testimony of both parties, and while the tenants had testified that their hydro was terminated, I find that the tenants failed to provide sufficient evidence to support that the landlord failed to abide by section 27(1) of the *Act* by terminating or restricting this service. The tenants admitted in the hearing that they failed to pay the outstanding rent and utilities, and it is undisputed that the tenants had moved out, returning the keys on August 15, 2017. I note the tenants' concern that the landlord utilized harassment to motivate the tenants to move out, but I am not satisfied that tenants had provided sufficient evidence to support this claim.

Section 44 of the *Residential Tenancy Act* reads in part as follows:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
 - (i) section 45 [*tenant's notice*];
 - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];

- (ii) section 46 [*landlord's notice: non-payment of rent*];
 - (iii) section 47 [*landlord's notice: cause*];
 - (iv) section 48 [*landlord's notice: end of employment*];
 - (v) section 49 [*landlord's notice: landlord's use of property*];
 - (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
 - (vii) section 50 [*tenant may end tenancy early*];
- (b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
 - (c) the landlord and tenant agree in writing to end the tenancy;
 - (d) the tenant vacates or abandons the rental unit;
 - (e) the tenancy agreement is frustrated;
 - (f) the director orders that the tenancy is ended.

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

45 (2) *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

I find that the tenants had moved out prior to the end of this fixed term tenancy, in a manner that does not comply with the *Act*, as stated above. The landlords did not mutually agree to end this tenancy in writing, nor did the tenants obtain an order from

the Residential Tenancy Branch for an early termination of this fixed term tenancy. No applications for dispute resolution have been filed by the tenants in regards to this tenancy prior to them moving out. The tenants moved out three months earlier than the date specified in the tenancy agreement.

The evidence is clear that the tenants did not comply with the *Act* in ending this fixed term tenancy, and I therefore, find that the tenants vacated the rental unit contrary to Sections 44 and 45 of the *Act*. On this basis, I dismiss the tenants' monetary claim for one months' rent and the moving expenses incurred by the tenants.

The tenants testified that the landlords had destroyed their plants, resulting in a monetary loss of \$750.00. 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 or 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 the tenants to prove, on a balance of probabilities, that the landlord caused them a loss of her personal property and the amount of such loss.

I find that the tenants did not provide sufficient supporting evidence to demonstrate that the landlord had destroyed their plants, and furthermore I find that the tenants failed to provide sufficient supporting evidence to demonstrate that they suffered a loss amounting to \$750.00 due to the landlord's actions. On this basis, I dismiss the tenant's monetary claim for \$750.00.

As both parties made an application to recover the filing fee, and as both parties were partially successful in their claims, both the landlord and tenants' applications to recover the filing fee are dismissed.

Conclusion

The landlord withdrew their application for an Order of Possession as this tenancy ended on August 15, 2017.

I issue a \$348.66 Monetary Order in favour of the landlord under the following terms, which takes in consideration the return of the tenants' security deposit and compensation for the landlord's failure to comply with the *Act*, and allows the landlord to recover unpaid rent and utilities.

Item	Amount
Unpaid Rent	\$4,000.00
Unpaid Utilities	348.66
Return of Security Deposit	-2,000.00
Monetary Award for Landlord's Failure to Comply with s. 38 of the <i>Act</i>	-2,000.00
Total Monetary Order	\$348.66

The tenant(s) must be served with this Order as soon as possible. Should the tenant(s) 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

The remainder of the tenants' application is dismissed.

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: November 9, 2017

Residential Tenancy Branch