



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNR, FF

Introduction

This hearing convened as a result of cross applications.

In the Landlord's Application for Dispute Resolution the Landlord requested monetary compensation from the Tenants, authority to retain the security deposit and to recover the filing fee.

In the Tenant's Application for Dispute Resolution the Tenant requested monetary compensation from the Landlord as well as recovery of the filing fee.

The hearing was conducted by teleconference on January 3, 2018. Only the Tenant, L.J., called into the hearing. She gave affirmed testimony and was provided the opportunity to present the Tenants' evidence orally and in written and documentary form, and to make submissions to me.

The Tenant testified that she served the Landlord with the Notice of Hearing and the Tenants' Application on July 17, 2017 by registered mail. A copy of the registered mail tracking number is provided on the unpublished cover page of this my Decision.

Residential Tenancy Policy Guideline 12—Service Provisions provides that service cannot be avoided by refusing or failing to retrieve registered mail:

Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

Pursuant to section 90 of the *Residential Tenancy Act* documents served this way are deemed served five days later; accordingly, I find the Tenant/Landlord was duly served as of July 22, 2017 and I proceeded with the hearing in their absence.

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 Tenants' 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. Are the Tenants entitled to monetary compensation from the Landlord?
2. Should the Tenant recover the filing fee?

Background and Evidence

The Tenant testified that her tenancy began May 10, 2017. A copy of the tenancy agreement was provided in evidence and which provided that the monthly rent was \$800.00 per month. The Tenant stated that her cousin, H.L., and his wife moved into another room in the rental unit on June 13, 2017 at which time the Landlord requested an additional \$700.00 per month such that monthly rent was payable by both Tenants was \$1,500.00. She confirmed that the Landlord did not enter into a written agreement with J.L.

The Tenant testified that she paid a security deposit in the amount of \$800.00 and H.L. paid a deposit of \$700.00 for a total of \$1,500.00 which the Landlord continues to hold.

The Tenant testified that the Landlord failed to perform a move in or move out condition inspection report.

The Tenant testified that she provided the Landlord with her forwarding address on June 28, 2017.

The Tenant stated that they ended their tenancy early as they were unable to live in the rental unit due to the fact that they did not have hot water. She stated that it was particularly cold during time in question and as a result it was very difficult not to have hot water. She also stated that she was recovering from surgery which complicated matters for the Tenant. Written submissions provided by the Tenant confirm that the

Tenant was burned as a result of a house fire at her previous rental. The Tenant submitted that as a result, it was essential that she have adequate water temperature on the areas of her body where skin was harvested/grafted to ensure proper healing. She further writes that on one evening after having yet another cold shower the donor area turned a "blue purple-red colour" which was very concerning to the Tenant.

The Tenant stated that she and her son lived in the rental unit in a one bedroom and the other Tenant and his wife lived in another room on the main floor. She writes that her cousin's wife also recently underwent surgery and the lack of warm water was also problematic for her healing.

The Tenant stated that she and her cousin informed the Landlord that the living situation was not workable as they were not able to have warm showers. She stated that when she brought this to the Landlord's attention, the Landlord told her to shower in the afternoon. The Tenant submitted that this did not resolve the issue and that they continued to have no access to hot water.

The Tenant stated that because there was no hot water, she have the Landlord written notice that she and her son intended to move out on June 17, 2017. She further stated that her cousin also gave written notice to move out, two days after moving in on June 13, 2017, again because there was no hot water.

The Tenants sought monetary compensation \$3,276.66 for the following:

return of the security deposit paid by L.J.	\$800.00
return of security deposit paid by Tenant H.L.	\$700.00
return of the June 17-30, 2017 rent paid by L.J.	\$346.66
return of break lease fee	\$800.00
return of rent paid by the Tenant, H.L., for the 28 days the Tenant, H.L. was not in occupation of the rental unit	\$630.00
TOTAL CLAIMED	\$3,276.66

Analysis

After consideration of the undisputed evidence before me and on a balance of probabilities I find as follows.

The tenancy agreement provided in evidence includes several unenforceable terms; such as, paragraph #2 which prohibit overnight guests; paragraph #7 which provides for

an automatic forfeiture of the security deposit ; and, paragraph #17 which provides for the supremacy of the agreement over the *Residential Tenancy Act*. Each of these clauses is not enforceable for the following reason:

- Paragraph #2 is unenforceable as while a Landlord may issue a 1 Month Notice to End Tenancy for Cause pursuant to section 47(1)(c), in the event a Tenant allows an unreasonable number of occupants, a Landlord may not restrict overnight guests.
- Paragraph #7 is contrary to section 20(e) of the *Act* which reads as follows:

Landlord prohibitions respecting deposits

20 A landlord must not do any of the following:

... (e) require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

- Paragraph #17 offends section 5, which reads as follows:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Accordingly, I find Paragraphs 2, 7 and 17 of the residential tenancy agreement to be of no force and effect.

The Landlord failed to call into the hearing and as such their claim to retain the security deposits is dismissed.

Additionally, I accept the Tenants' evidence that the Landlord failed to perform a move in and move out condition inspection report. In failing to do so, the Landlord has extinguished their right to claim against the deposits pursuant to sections 24(2) and 36(2) of the *Residential Tenancy Act*. As the Landlord had extinguished their right to claim against the deposits, they had only one option pursuant to section 38(1) of the *Act*, and that was to return the funds to the Tenants. In failing to do so, the Landlord must pay the Tenants the sum of \$3,000.00 representing double their \$1,500.00 deposit according to section 38(6) of the *Act*. Accordingly, I find the Tenants are entitled to the sum of **\$3,000.00**.

I accept the Tenants' evidence that the lack of hot water resulted in the Tenants ending their tenancy after less than a month. I further accept the Tenants' evidence that they brought this matter to the Landlord's attention on numerous occasions and the Landlord failed to correct the situation.

I find, based on the Tenants' undisputed evidence that hot water was a material term of this tenancy, particularly given the Tenants' aforementioned medical issues. Section 45(3) of the *Act* permits a Tenant to end a tenancy if a Landlord fails to comply with a material term of the tenancy. In this case I find the Landlord failed to provide hot water as required, and as such find that the Tenants were able to end their tenancy.

I therefore award the Tenants return of the rent paid for days in which they were not in occupation of the rental unit; namely, \$346.66 for L.J. and \$630.00 for H.L.

The Tenants also claim return of the "break lease fee" of \$800.00 which was purportedly payable pursuant to paragraph 7 of the agreement; as noted previously, I have found that paragraph be unenforceable. However, that amount was not in fact paid by the Tenants, as the intention of paragraph 7 was that the amount would be paid from the Tenants' security deposit. As I have awarded the Tenants return of their deposit, I dismiss their claim for recovery of the \$800.00 break lease fee.

The Tenants have been substantially successful in their claims and I therefore award them \$100.00 for recovery of their filing fee.

Conclusion

In total I find the Tenants are entitled to compensation for the following:

return of double the security deposit paid by L.J.	\$1,600.00
return of double the security deposit paid by Tenant H.L.	\$1,400.00
return of the June 17-30, 2017 rent paid by L.J.	\$346.66
return of rent paid by the Tenant, H.L., for the 28 days the Tenant, H.L. was not in occupation of the rental unit	\$630.00
filing fee	\$100.00
TOTAL ENTITLEMENT	\$4,076.66

Rule 2.2 of the *Residential Tenancy Rules of Procedure* provides that a claim is limited to what is stated on the Application for Dispute Resolution. As the Tenants' total

entitlement of the \$4,076.66 exceeds the \$3,276.66 monetary amount set out in the Tenants' Application, I find that the Tenants are only entitled to the sum of **\$3,276.66**.

The Tenants are granted a Monetary Order in the amount of **\$3,276.66**. This Order must be served on the Landlord and may be filed and enforced in the B.C. Provincial Court (Small Claims Division) 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: January 3, 2018

Residential Tenancy Branch