



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD CNL MNDC OLC ERP FF O

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:

- authorization to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72;
- cancellation of the landlord’s 2 Month Notice to End Tenancy for Landlord’s Use of Property (“2 Month Notice”), pursuant to section 49;
- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33; and
- a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67.

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.

The landlord confirmed receipt of the tenant's application for dispute resolution ('Application') and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the landlord was duly served with the tenant's Application. The landlord did not submit any written evidence in response to the tenant's application.

The tenant indicated at the beginning of the hearing that this tenancy ended on June 30, 2017. Accordingly the tenant's application for the cancellation of the landlord's 2 Month Notice, and for emergency repairs was cancelled.

Preliminary Issue - Service of the Landlord's Application for Dispute Resolution

The tenant indicated in the hearing that she had never received the landlord's Application for Dispute Resolution Package. The landlord's agent, WW, testified during the hearing that the tenant was served the application package on December 22, 2017 by way of registered mail. The tenant, however, indicated in the hearing that she had never provided the landlord with her forwarding address in writing.

Section 38(1) of the *Act* requires that a landlord, within 15 days of the end of the tenancy or the date on which the landlord receive the tenant's 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 tenant's 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 tenant's provision of the forwarding address.

As the tenant admitted in the hearing that she did not provide the landlord with her forwarding address, the tenant's forwarding address was confirmed during the hearing. I informed the landlord that they had 15 days from the date of the hearing, until January 17, 2018 to either return the security deposit to the tenant in full, obtain written consent to deduct a portion or keep the deposit, or make an Application to retain a portion or all of it. Accordingly the landlord's application for the return of the security deposit, and the tenant's application for the return of the security deposit are dismissed with leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As I was not required to make a decision on the merits of the landlord's case, I find that the landlord

is not entitled to recover the \$100.00 filing fee paid for this application. The landlord must bear the cost of this filing fee.

Issues(s) to be Decided

Is the tenant entitled to monetary compensation for loss, emergency repairs, or other money owed under the *Act*, regulation or tenancy agreement?

Is the tenant entitled to an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This tenancy began in November 2013, with monthly rent set at \$1,240.00. The landlord had collected a security deposit of \$600.00 from the tenant, and this security deposit remains in the possession of the landlord.

The tenant testified that on June 9, 2017 they had submitted a work order to the landlord's son as the basement was flooding and the toilet was leaking. Soon after the tenant noticed mould was forming. The tenant gave authorization to the landlord to enter the unit for repairs, but received no response until June 16, 2017 when the landlord confirmed receipt of the work order. The tenant testified that the landlord's son had placed the work order on the landlord's desk. The tenant was served a 2 Month Notice to End Tenancy for Landlord's Use on June 16, 2017, with an effective date of August 31, 2017, and the tenant responded with a written "10 Day Notice to End Tenancy" by way of a letter dated June 20, 2017 that she would be moving on June 30, 2017.

On June 22, 2017, the landlord and the landlord's son attended the residence to assess the mould, and the tenant moved out on June 30, 2017 after not being able to reach the landlord. The tenant testified that she left the keys in the mail box.

The landlord testified that he received the work order on June 9, 2017 and dispatched a plumber who attended the residence on the same date. The tenant disputes this stating no plumber had ever attended. The landlord testified that the plumber confirmed that the toilet was not leaking, but that both issues were due to the flooding from the nearby lake, which affected hundreds of homes in the area. The landlord testified that the home was only 1 block away from the lake, and that the tenants were not present from June 10 through to June 15, 2017 as they were out of town. The tenant disputes this stating that they had cancelled their vacation plans. The landlord testified that he was not

aware that the tenants had moved out until he received the tenant's application for dispute resolution, which was filed on June 30, 2017, the day the tenants moved out. The landlord testified that the tenants had abandoned their belongings. LT, agent for the landlord testified that on June 16, 2017, she tenant stated that "I just got back".

The tenant testified that she suffered a significant loss due to flooding, and is requesting monetary compensation in the amount of \$4,627.93. The tenant provided the following list in support of their monetary claim:

Item	Amount
Filing Fee	\$100.00
Childcare costs	1,260.00
Moving Truck and Labour	340.00
Self-Storage	218.40
Vehicle Storage	62.45
Food	822.89
Gas for vehicle	394.30
Mould Control Supplies	19.63
Mail Forwarding	56.96
June Rent	1,240.00
Packing Supplies	20.37
Oil Change & Maintenance for Vehicle	92.93
Total Monetary Order Requested	\$4,627.93

The tenant testified that the above claims were the associated losses she incurred due to the flooding and move. The tenant testified that the children had to be put in childcare as she was moving, and that the house contained too much mould which was hazardous to their health. The tenant submitted receipts and invoices for the moving, childcare, storage, food, gas, supplies, and forwarding of her mail. The tenant testified that she was residing at a friend's house after she moved out in a difference city, but that the new place did not have parking for her vehicle, or room to store her belongings. She testified that she could not cook, shower, or do dishes as she was concerned the hot water would contribute to the growing mould. The tenant attempted to treat the mould, and submitted receipts for those items. The tenant requested the reimbursement of the June 2017 rent in addition to these losses.

The tenant testified that she was unsure the reason for the flooding, but admitted in the hearing that this had occurred at the same time as the local flooding.

Analysis

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

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.” The tenant applied for reimbursement of the cost of oil that was not used during this tenancy.

Residential Tenancy Policy Guideline 34 states the following about a Frustrated Tenancy:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the

contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

In consideration of the evidence and testimony before me, I find that this tenancy came frustrated on June 16, 2017. It was undisputed by both parties that the nearby lake had flooded many nearby homes, and that the tenant's home may have been one of these homes. I find that although the tenant submitted a work order to the landlord, the situation was unforeseen by both parties, and not a result of the negligent or deliberate act of either party. I find that the flooding and resulting mould prevented the landlord from fulfilling his obligations under this contract, and therefore the tenancy ended on June 16, 2017, even though the tenant moved out on June 30, 2017.

On that basis I find that the tenant is entitled to the return of her rent for the period of June 17, 2017 through to June 30, 2017. As the monthly rent was set at \$1,240.00, I find that the tenant is entitled to return in of the pro-rated amount of \$578.67 for that period.

The tenant submitted a monetary claim for the costs associated with her move due to end of this tenancy. I find the tenant failed to provide sufficient evidence to support how these losses was due to the deliberate or negligent act or omission of the landlord. I find that this tenancy ended on the basis of a frustrated tenancy on June 16, 2017, as the landlord was no longer able to provide services or facilities as agreed on for this tenancy, and not due to the landlord's failure to comply with the *Act*. On this basis, the tenant's application for monetary compensation associated with the move is dismissed.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the tenant was partially successful in her application, I find that the tenant is entitled to half of her filing fee.

Conclusion

Both parties' applications pertaining to the tenant's security deposit are dismissed with leave to reapply. The landlord's application for recovery of his filing fee is dismissed.

I issue a Monetary Order in the amount of \$628.67 in the tenant's favour for the return of her rent for the period of June 17, 2017 through to June 30, 2017, plus half of the filing fee for this application.

The tenant is provided with this Order in the above terms and the landlord(s) must be served with a copy of this Order as soon as possible. Should the landlord(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 remaining portion of the tenant's monetary application is dismissed without leave to reapply. The tenant withdrew her application for repairs and for cancellation of the 2 Month Notice as she had already vacated the rental suite.

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: February 5, 2018

Residential Tenancy Branch