



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION/ORDER AMENDED PURSUANT
TO SECTION 78(1)(A) OF THE RESIDENTIAL
TENANCY ACT ON March 31, 2018 AT THE
PLACES INDICATED by strikethrough and
bolding.

DECISION

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TO SECTION 78(1)(A) OF
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Dispute Codes MNSD MNDC MNDL-S FF FFL

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* ("the Act"). The landlord applied for: a monetary order for money owed or compensation for damage to the rental unit or other loss under the *Act*, regulation or tenancy agreement pursuant to section 67; authorization to retain all 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 applied for: the return of his security deposit and a monetary order for compensation for the landlord's failure to comply with the Act pursuant to section 38; a monetary order for compensation as a result of loss of use of part of the rental unit pursuant to section 67; as well as 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 make submissions regarding their applications. Both parties acknowledged receipt of the other's documentary materials for this hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for money owed and/or damage to the rental unit? Is the landlord entitled to retain all of the tenant's security deposit or is the tenant entitled to the return of his deposit? Is the tenant entitled to a monetary order as a result of a temporary loss of use of an area of his rental unit? Is either the landlord or the tenant entitled to recover their filing fee for their dispute resolution application?

Background and Evidence

This tenancy began on November 1, 2015 with a monthly rental amount of \$850.00. The current rental amount of \$875.00 is payable on the 1st of each month. The tenant paid a \$425.00 security deposit at the outset of the tenancy which the landlord still holds as of the date of this hearing. The landlord applied to retain the security deposit as a result of his financial loss in repairing damage to the rental unit and cleaning at the end of the tenancy. The tenant vacated the rental unit on October 30, 2017 at the end of the fixed term of the tenancy. The tenant sought the return of his security deposit and an additional amount for loss of use of his kitchen and bathroom during his tenancy. The landlord sought a monetary amount of \$434.00 for cleaning and repairs to the rental unit at the end of the tenancy.

The parties conducted a condition inspection of the rental unit on October 31, 2017. A copy of the condition inspection report was submitted for this hearing. On October 31, 2017, during the condition inspection, the tenant provided the landlord with his forwarding (new) address in writing. The landlord acknowledges receipt of the forwarding address on October 31, 2017.

The tenant testified that he was entitled to rent deductions during the course of the tenancy. Particularly, the tenant testified that he did not have full use of the rental unit bathroom for 85 days. He testified that the majority of the bathroom was non-functional from September 2016 to January 3-5, 2017. He testified that this was the only bathroom within the rental unit and that it was under construction/renovation from September 28, 2016 (undisputed date of the bathroom leak) to January 5, 2017. Both parties agreed that the bathroom was partially out of service for this period of time as a result of a leak.

The tenant testified that he had access to a toilet most days except 2 partial days but that he was without water and a functioning shower throughout the demolition and the renovation of the bathroom.

The tenant testified that he should be compensated for the loss of use of the bathroom, as above, as well as loss of use of his kitchen space in the rental unit. The tenant described a period of approximately 2 days that he was unable to have full use of his kitchen. However, the landlord testified that the kitchen was repaired as a result of a small leak. The landlord provided undisputed sworn testimony that the tenant had access to his refrigerator and oven/stove during the repair. The tenant testified that he was required to clean out an area of the kitchen prior to work done in the rental unit kitchen and that the work concluded on May 2, 2017. The landlord testified that the tenant had to remove a few decorative plates from his counter and that the work done in the unit took approximately a total of less than 10 hours over the course of 2 days. The tenant sought a total monetary award of \$2310.00 as follows;

Item	Amount
Return of Security Deposit	\$425.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	425.00
Compensation for Loss of Use – Kitchen & Bathroom	1460.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought	\$2410.00

With respect to the security deposit, the tenant argues that the landlord is not entitled to retain the tenant's security deposit as he believes the landlord did not apply within the appropriate timeline to do so and that, therefore, he is entitled to recover his security deposit and an amount equivalent to his security deposit as a result of the landlord's failure to follow the requirements of the Act in returning the security deposit.

The landlord acknowledged that the repairs to the bathroom were more extensive and expensive than he had hoped. He testified that the strata company assessed and determined the requirements that the landlord had to meet for the bathroom: essentially, he testified the strata required the bathroom to be "gutted". The landlord testified that the demolition of the bathroom began on October 26, 2016 and that the project was ultimately completed on January 5, 2017.

The landlord testified that the tenant was told in advance that the bathroom would be under construction for an unknown period of time. He testified that he told the tenant he could move out without penalty if he wanted or stay during the construction. He testified that he could not provide the tenant with an end date to the bathroom work. He testified that the tenant declined to move out and instead sought compensation of one months' rent at \$875.00. He provided undisputed testimony that while the tenant had initially agreed to one months' rent as compensation, he eventually reneged, indicating that he would file a dispute resolution application to address the matter of compensation. As for the kitchen repair, the landlord reiterated that the repair was a very minor inconvenience to the tenant for a total of 1.5 days at the most.

The landlord testified that the oven was not cleaned satisfactorily at move-out and that the tenant had agreed to pay \$100.00 towards cleaning. This was noted on the condition inspection report provided as evidence at this hearing. The tenant did not dispute the agreement to pay \$100.00 towards cleaning however he testified that in retrospect, the amount seems high to clean an oven. That agreement is documented in the condition inspection report submitted for this hearing.

The landlord testified that the baseboard heater in the rental unit was broken over the course of the tenancy. On the condition inspection report, the baseboard heater is listed as an item to evaluate at the end of the tenancy but it is not listed on the move-in inspection report. The indication next to "baseboard heater" on the condition inspection report is simply a zero. On the report, the tenant wrote that he was not responsible for the baseboard heater and that he believes it was damaged by one of the many contractors in the rental unit over the course of his tenancy.

The landlord testified that the heater was working at the start of the tenancy and broken at the end of the tenancy. Therefore, he submitted the tenant must pay for its replacement in the amount of \$329.00 as contained in the quote he submitted for this hearing.

The parties both stated a desire to resolve this matter but were unable to come to a satisfactory resolution.

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/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 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 in writing (on the condition inspection report) on October 31, 2017. The landlord had 15 days after October 31, 2017 to take one of the actions outlined above, creating a deadline for the landlord to apply of November 15, 2017 for the landlord to apply to retain the tenant's security deposit. The landlord made his application on November-20 **15**, 2017.

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 acknowledged and confirmed the testimony of the landlord that he agreed to pay a \$100.00 cleaning fee. This agreement is reflected in the move-out condition inspection report signed by both parties and the photograph of the dirty oven. Therefore, section 38(4)(a) of the *Act* applies to the agreed \$100.00 of the tenant's security deposit however the rest of the deposit was subject to return or an application to retain the deposit by November 15, 2017.

The tenant seeks the return of his security deposit. With respect to the remaining portion of the tenant's security deposit of \$325.00, the tenant is entitled to its return unless the landlord can prove on a balance of probabilities that the remainder of the deposit should be retained by him for the cost of the repair or replacement of the baseboard heater. I will address the claim for the baseboard heater and the remainder of the tenant's original security deposit below.

As the landlord did not apply within the appropriate time frame of 15 days to retain the tenant's security deposit, I must consider whether he is **the tenant is not** entitled to additional compensation. 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 the tenant's application for an amount equivalent to his security deposit as a result of the landlord's failure to act in the timelines required by the Act. :

~~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:~~

- ~~▪ 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.~~

I find that the landlord did not apply for dispute resolution nor return the tenant's security deposit in full within the required 15 days. While the tenant waived his right to \$100.00 of his security deposit on the final day of the tenancy (at condition inspection), there is no evidence that he waived his 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.

Under the circumstances described above and in accordance with section 38(6) of the Act, I find that the tenant is **not** therefore entitled to a monetary order including an amount equivalent of the value of his security deposit that the landlord was obliged to return, in accordance with the directions of Residential Tenancy Branch Policy Guideline No. 17 regarding security deposits and set offs.

Section 67 of the Act establishes that if loss results from a tenancy, an arbitrator may determine the amount of that loss and an arbitrator may order that a party compensate the other. In order to claim for loss under the Act, the party claiming the loss bears the

burden of proof: they must prove the existence of the loss and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party.

The landlord claims that the tenant damaged his baseboard and he provided one quotation to indicate both that the baseboard needs repair as well as that the tenant is responsible to pay for that repair. I find that the quotation provide by the landlord does not provide sufficient evidence to show that the tenant is responsible for the baseboard. In order to show the extent of the damage to the baseboard, the landlord must provide evidence of the condition of the unit at the outset of the tenancy. The landlord did not provide other evidence of the age or condition of the baseboard heater. Furthermore, I find that the one quote for work to repair/replace the baseboard is insufficient to prove any amount the landlord will be obliged to incur. Without further assessments of the heater, in these circumstances, I am unable to determine the financial amount that the landlord might be entitled to. Finally, the tenant was candid with respect to the cleaning and his responsibility for the cleaning. As the tenant denies responsibility for the malfunction of the baseboard heater and as I find that the landlord has provided insufficient evidence on this matter, I find that the tenant shall not be held responsible for the cost of the repair or replacement of the baseboard heater. I dismiss this portion of the landlord's claim and allow him to retain \$100.00 of the tenant's security deposit as agreed upon by both parties at the end of the tenancy.

The tenant also sought an additional amount of compensation. The tenant sought compensation for his loss of use of the kitchen for a period of 2 days. I accept the largely undisputed testimony of the landlord with regard to the kitchen and find that the work in the kitchen was a minor inconvenience that did not come out of neglect by the landlord and did not result in any measurable loss to the tenant.

With respect to the loss of use of the bathroom, I accept the largely undisputed testimony of the tenant with regard to the loss of use of the bathroom for significant period of time – approximately 3 months. The landlord was candid in his testimony, stating he was surprised by the scope of the work required. I note that the tenant testified that a portion of the bathroom, particularly the toilet was available to him for the majority of the time of the restorations. While the landlord acknowledged that the repairs to the bathroom were substantial, the tenant acknowledged that he was able to continue residing in the rental unit but with great inconvenience.

Pursuant to section 27 of the *Act*, the landlord may be required to compensate a tenant for loss of use of a facility or portion of the rental unit regardless of his own fault in that

loss. In this case, while the landlord was not at fault, a substantial and integral portion of the tenant's home (approximately 20% in my consideration of both the portion of physical unit that was affected as well as in my consideration of the integral part of a bathroom to the tenant's rental unit) was unavailable to him for approximately 3 months (this includes 1.5 days for kitchen repairs). Therefore, I find that the tenant is entitled to a rent reduction of 20% of 3 months of rent at \$875.00 per month for amount totaling \$525.00. The parties are entitled to compensation as follows,

Items awarded to the Tenant	Amount
Return of Partial Security Deposit (\$100.00 deducted for landlord's cleaning as agreed)	\$325.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the Act	325.00
Compensation for Loss of Use – Kitchen & Bath: 1 months' rent	525.00
Total Monetary Order to the Tenant	\$1175.00 \$850.00

As a result of partial success by both parties, both parties are responsible to pay their own filing fees.

Conclusion

I issue a monetary order to the tenant in the amount of **\$850.00**. ~~1175.00.~~

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: January 10, 2018

Residential Tenancy Branch

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