Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ASCENT REAL ESTATE MANAGEMENT CORPORATION
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

Tenant: MNSD, MNDC, FF
Landlord: MND, FF

Introduction

This hearing was convened in response to cross-applications by the parties.

The tenant filed their application October 05, 2017 pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. An Order for return of security deposit - Section 38
2. An Order for loss under the Act – Section 51 and 67
3. An Order to recover the filing fee for this application - Section 72

The landlord filed their application May 07, 2018 for Orders as follows;

1. A monetary Order for damage to the unit – Section 67
2. An Order to recover the filing fee for this application - Section 72

Both tenants and the landlord with legal counsel attended the hearing and were given an opportunity to discuss and settle their dispute, to no avail. The parties respectively acknowledged receiving all the evidence of the other. The parties were apprised that despite their abundance of evidence only *relevant* evidence would be considered in the Decision. The parties were given opportunity to present *relevant* testimony, and make *relevant* submissions of evidence. Prior to concluding the hearing both parties acknowledged presenting all of the *relevant* evidence that they wished to present.

Issue(s) to be Decided

Is the tenant entitled to compensation under Section 51 of the Act and return of double the security deposit pursuant to the Act?

Is the tenant entitled to other compensation associated with the tenancies end as claimed?

Is the landlord entitled to the monetary amounts claimed for damage to the unit?

Each party bears the burden of proving their respective claims.

Background and Evidence

The tenancy has ended. The undisputed evidence in this matter is as follows. The tenancy began October 01, 2015 as a written tenancy agreement for a house. The hearing had benefit of the written Tenancy Agreement. At the outset of the tenancy the landlord collected a security deposit in the amount of $1137.50 of which the landlord has returned a portion. At the end of the tenancy the payable monthly rent was in the amount of $2400.00. The parties agree there was a *move in* condition inspection at the outset of the tenancy but that there was not a *move out* condition inspection conducted between the tenant and the landlord. A copy of the requisite *move in* Condition Inspection Report (CIR) was provided into evidence. The handful of inclusions in the CIR states there was damage above the fireplace, some holes in the den/office, the 'spice' kitchen required painting, 2 pieces of baseboards missing in the dining area and nail polish on the bedroom carpeting. The tenant signed the CIR in agreement the report fairly represented the condition of the rental unit at the start of the tenancy. The landlord also signed the CIR.

The tenancy ended earlier than required pursuant to the landlord's 2 Month Notice to End Tenancy for Landlord's Use with an effective date of September 30, 2017. The reason stated by the landlord in the 2 Month Notice was pursuant to Section 49(3) of the Act, that they personally or a qualifying family member would occupy the rental unit. The tenant provided the landlord's representative with notice they were vacating early on August 31, 2017, and on the following day of September 01, 2017 the tenant provided the landlord's representative an e-mail with their forwarding address which the landlord acknowledged. The tenant provided evidence that on September 15, 2017 the landlord created and issued a remittance advice respecting the tenant's compensation pursuant to Section 51(1) of the Act ($2400.00) and stating a refund of the tenant's security deposit in its entirety ($1137.50) was owed to the tenant. However, it is agreed by both parties that the sum of the remittance was short by $978.28 because of a claimed administrative discrepancy between the owner and their agent for which the landlord of this matter acknowledged the tenant was not responsible. The tenant testified they received the landlord's cheque by ordinary mail in the amount of $2784.22 on or about September 21, 2017.

The tenant claims that the landlord did not follow through with the stated purpose on the 2 Month Notice for ending the tenancy. The landlord acknowledged that near or about the time of the effective date of the 2 Month Notice, September 30, 2017, they determined the rental unit would not be occupied by them or a qualifying member of the family. The landlord submitted they have not occupied the rental unit since the tenants vacated. Instead the house was made available for sale following drywall repairs and a total interior repainting, which the landlord claims was required due to the tenant's conduct.

The landlord claims the tenant damaged the rental unit leaving it in a condition of excessive wear and tear with drywall abrasions, nicks, dents, gouges, a broken light switch, carpet staining and a dirty deck. The landlord provided a series of photo images depicting the claimed wall damage and other claims of excessive wear and uncleanliness. The tenant provided that the purported carpet staining was highlighted in the *move in* inspection report as nail polish, and that the same report also mentioned holes in the wall and need for painting. The tenant provided photo images of a damaged wall above the fireplace and images of other small wall deficiencies. The tenant agreed with a fractional portion of the landlord's claim for drywall repairs however denied they are responsible for the landlord's costs to make the rental unit like new.

Tenant's application

The tenant seeks the return of their deposit and compensation pursuant to Section 38 of the Act for double the security deposit and compensation for all their moving related costs inclusive of carpet cleaning equipment, refuse and disposal of items, take-out food and Canada Post mail forwarding service, all in the sum of $631.75. The tenant also seeks compensation pursuant to Section 51(2) of the Act in the amount of $4800.00 ($2400 x 2) for the landlord not following through on their stated purpose, thus necessitating the tenant's moving, associated costs and inconvenience, all in the sum of $10,000.00.

Landlord's application

The landlord seeks compensation for entirely refurbishing the interior walls and the associated cleaning in the amount of $8242.50 for drywall and repainting costs.

Analysis

A copy of the Residential Tenancy Act, Regulations and other publications are available at **www.gov.bc.ca/landlordtenant.**

The onus is on the respective parties to prove their claim on balance of probabilities. On preponderance of all evidence submitted, and on balance of probabilities, I find as follows:

Tenant's claim

Section 38(1) of the Act provides as follows.

> **38**(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> 38(1)(a) the date the tenancy ends, and
>
> 38(1)(b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord must do one of the following:
>
> 38(1)(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> 38(1)(d) file an application for dispute resolution to make a claim against the security deposit or pet damage deposit.

I find the landlord did neither of (c) or (d) above. In this matter, as the landlord acknowledged receipt of the tenant's forwarding address by e-mail, I find that pursuant to Section 71(2)(b) the tenant provided their forwarding address September 01, 2017. I find that the landlord was obligated to repay the tenant their security deposit by September 16, 2017 by employing one of the methods stated in Section 38 of the Act, including personally. I find the evidence of both parties reasonably establishes that the landlord may well have caused a cheque to be mailed as early as September 15, 2017. I find it is not likely the landlord's cheque reached, by regular mail, reached the tenant the following day. Therefore on balance of probabilities I accept the tenant's testimony that they received a payment from the landlord on or about September 21, 2017. But moreover, the evidence of both parties is that the amount owed the tenant fell far short of the refund the landlord determined that the tenant was to be repaid. As a result, I find

that the tenant is entitled to the doubling provisions of the original security deposit afforded by **Section 38(6)** of the Act for which I grant the tenant the resulting amount of

$2275.00, and from which I will deduct the amount already received by them of $159.22.

I am satisfied by the evidence that the tenant has already received compensation required by Section 51(1) of the Act ($2400.00) for them initially receiving the 2 Month Notice to End.

I find the agreed evidence in this matter is that the rental unit was not used for the stated purpose for ending the tenancy after the effective date of the Notice to End for landlord's use. As a result, I find the tenant has established an entitlement under **Section 51(2)(b)** of the Act in the prescribed amount of compensation equivalent to double the monthly rent payable under the tenancy agreement of $2400.00. Therefore, I grant the tenant double this amount in the sum of **$4800.00.**

I find that the stated compensation(s) prescribed by **Section 51** in the Act is,

> 1). [**51(1)**] compensation to offset costs and inconvenience for the landlord's right to end a tenancy and repossess the rental unit under the prescribed conditions set out in Section 49.
>
> If the landlord effectively fails to exercise their right and successfully accomplish the purpose for ending the tenancy, then the tenant is afforded,
>
> 2). [**51(2)**] compensation to offset the inconvenience and ancillary expenses they otherwise could have avoided.

As a result, I find the tenant has already been compensated by their award pursuant to **Section 51(2)(b)** above for such items as moving costs and other arbitrary expenses identified by the tenant in their application. Therefore, the balance of the tenant's application is dismissed without leave to reapply.

Landlord's claim

Under the *Act*, a party claiming a loss bears the burden of proof. Moreover, an applicant must satisfy each component of the following test established by **Section 7** of the Act, which states;

Liability for not complying with this Act or a tenancy agreement

> ***7*** *(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

> *(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the tenant)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (landlord) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the landlord bears the burden of establishing their claim on the balance of probabilities. The landlord 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. Once established, the landlord must then provide evidence that can verify the actual monetary amount of the loss. Finally, the landlord must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

I find that at the outset of the tenancy the tenant and landlord agreed to multiple deficiencies present in the rental unit. I find that in the absence of a *move out* inspection as prescribed by the Act, in which the parties would have had opportunity to agree as to the condition of the unit at the end of the tenancy, and in the presence of the tenant's denial they caused the damage claimed, the landlord has provided photo images of the condition of the rental unit at the end of the tenancy. I find that portions of the landlord's photo images appear to depict conditions of reasonable wear and tear. I find that other images appear to depict conditions requiring repair to a more reasonable level of decoration and function. I find I have not been presented with sufficient evidence to establish what damage was solely caused by the tenant during the tenancy or what steps the landlord took to mitigate or minimize their claim, other than their effort to restore the interior of the rental unit to new condition. None the less, I find the tenant has acknowledged responsibility for some wall damage and for a deck left uncleaned. As a result, I grant the landlord compensation for wall remediation and cleaning in the set amount of **$500.00** and the remainder of their application is dismissed, without leave to reapply.

As the tenant and landlord have been partially successful in their applications they are equally entitled to recover their filing fees from the other, which effectively cancel out.

Calculation for Monetary Order:

Tenant's total award ($2275.00 + $4800.00)	$7075.00
minus security deposit repaid by landlord	*-$159.22*
tenant's net award	**$6915.78**
Minus landlord's award	-$500.00
monetary Order to tenant	**$6415.78**

Conclusion

The parties' respective applications in part have been granted.

I grant the tenant a **Monetary Order** under Section 67 of the Act in the amount of **$6415.78.** If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

This Decision is final and binding.

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: May 29, 2018

Residential Tenancy Branch