



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CASCADIA APARTMENT RENTALS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD MNDCT FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- 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.

AR ("landlord") appeared as the primary agent on behalf of the landlord in this hearing, and had full authority to do so. 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 tenants' dispute resolution application ('Application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the Application. The tenants confirmed receipt of the landlord's evidence for this hearing. I find that the tenants were served with the landlord's evidence in accordance with section 88 of the *Act*. The tenants did not submit any written evidence for this hearing.

Issues(s) to be Decided

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

Are the tenants entitled to monetary compensation for the landlord's failure to comply with the *Act*?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This tenancy began on February 1, 2017, with monthly rent set at \$819.00, payable on the first of the month. The landlord had collected a security deposit of \$375.00 and a FOB deposit of \$50.00, and still continues to hold both deposits. The tenants moved out on September 30, 2017 and provided a forwarding address to the landlord on the same date. The landlord filed an application for dispute resolution on October 13, 2017, and a hearing was held on May 16, 2018. On that date the Arbitrator dismissed the landlord's monetary application with leave to reapply.

The tenants are making a monetary claim in the amount of \$2,527.10 as set out in the table below.

Item	Amount
Return of FOB Deposit	\$50.00
Return of Security Deposit	375.00
Compensation for landlord's illegal entry into the rental unit	136.50
Compensation for inability to use balcony	1,965.60
Total Monetary Order Requested	\$2,527.10

The tenants requested the return of both their deposits as they never gave permission for the landlord to retain any portion of their deposits. The tenant testified that they had returned the keys to the landlord by placing the key on a hook on the door as the landlord refused to receive the keys back. The landlord testified that they had already replaced the FOBs and cancelled the old ones as the tenants failed to properly return the FOBs to the landlord.

The tenants are also requesting compensation in the amount of \$136.50 as the tenants testified that the landlord had shown their unit without proper notice to the tenants as required by the *Act*. The tenants testified that the landlord had scheduled over 40 viewings over a period of two days. The tenants testified that the original notice by the landlord was simply slipped under their door for the next day. The landlord testified that they gave a notice to the tenants that they would be showing the unit during a specific time period of 10:00 a.m. to 4:00 p.m. The landlord admitted that originally a notice was slipped under the door, but a new notice was personally served to the tenants. The

landlord testified that they were unable to provide a specific time to the tenants as they were scheduling an open house, and that 40 showings did not occur during that period.

The tenants also applied for \$1,965.60 in compensation, which they calculated as 10 percent of the monthly rent for two years. The tenants testified that due to a windstorm, a tree had damaged the balcony railing, and the landlord has failed to perform repairs to properly fix the balcony railing. The landlord testified that they were unable to perform repairs due to the amount of items on the tenants' balcony. The landlord included warnings to the tenants regarding the clutter in their evidence. The tenants admit that they had furniture, including a freezer, on the balcony, but that their oral requests to the landlord were not addressed.

Analysis

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the tenant must satisfy each component of the following test for loss 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 landlord)* 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 (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss.*

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

Section 29 of the *Act* prohibits the landlord's right to enter the rental suite except with proper notice or the tenants' permission. The landlord's right to enter a rental unit is restricted, and the landlord must not enter unless:

- (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
- (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
 - (i) the purpose for entering, which must be reasonable;
 - (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
- (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
- (d) the landlord has an order of the director authorizing the entry;
- (e) the tenant has abandoned the rental unit;
- (f) an emergency exists and the entry is necessary to protect life or property.

I find that the tenants have not provided sufficient evidence to support that the landlord has failed to comply with section 29(1) of the *Act*. I accept the landlord's testimony that the tenants were served with a notice that meets the specific requirements of section 29(1) of the *Act*, and furthermore I am not satisfied that the tenants had provided

sufficient evidence to support the value of their loss. On this basis, I dismiss this portion of the tenant's monetary claim without leave to reapply.

Section 32(1) and (2) of the *Act* outlines the following obligations of the landlord and the tenant to repair and maintain a rental property:

32 (1) *A landlord must provide and maintain residential property in a state of decoration and repair that*

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

I have considered the testimony of both parties, and while the landlord did not dispute the fact that some repairs to the balcony may be required, the landlord provided a valid explanation about their inability to properly access and repair the balcony. I also find that the tenant did not provide sufficient evidence to support that they had made written requests to the landlord to perform the repairs. On this basis, I dismiss this portion of the tenants' monetary claim without leave to reapply.

Section 38(1) of the *Act* requires that landlords, 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 or pet damage deposit if "at the end of a tenancy, the tenants agree in writing the landlords may retain the amount to pay a liability or obligation of the tenant."

In this case, I find that the landlord did apply for dispute resolution for damages on October 13, 2017, within 15 days of the provision of the forwarding address and the tenants' date of moving out. The Arbitrator dismissed the landlord's application with leave to reapply on May 16, 2018, 14 days before the hearing date for this application.

As the landlord filed an application within the time period required by section 38 of the *Act*, and as the landlord's application was dismissed with leave to reapply, I dismiss the tenant's application for the return of the security deposit and FOB deposit with leave to reapply.

I order that the landlord must, within 15 days of the receipt of this decision to, either return the tenant's security deposit and FOB deposit in full, or file a new application for dispute resolution if that has not already been done. If the landlord fails to comply with section 38 of the *Act*, the tenants may reapply. Liberty to reapply is not an extension of any applicable limitation period

As the tenants were not successful in their application, I find that the tenants are not entitled to the recovery of their filing fee.

Conclusion

The tenants' application for the return of their security and FOB deposits are dismissed with leave to reapply.

The remaining portion of the tenants' application is dismissed without leave to reapply.

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: July 13, 2018

Residential Tenancy Branch