



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Tenant: FFT MNSD
Landlord: FFL MNDCL MNRL

Introduction

This hearing dealt with applications from both the tenant and landlord pursuant to the *Residential Tenancy Act* (the *Act*).

The tenant applied for:

- return of the security deposit pursuant to section 38 of the *Act*; and
- recovery of the filing fee for the application from the landlord pursuant to section 72 of the *Act*.

The landlord applied for:

- a Monetary Order for compensation of damage/loss caused by the tenant, and authorization to retain the tenant's security deposit in satisfaction of this claim pursuant to section 67 of the *Act*; and
- recovery of the filing fee for this application from the tenant pursuant to section 72 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlords M.B. and D.S. (herein referred to as "the landlord") both provided testimony, although landlord M.B. primarily spoke on behalf of the landlord.

As both parties were present, service of documents was confirmed. The parties testified that they were in receipt of each other's application and evidentiary materials. Based on the undisputed testimonies of the parties, I find that both parties were served in accordance with section 89 of the *Act*.

Issue(s) to be Decided

Is the tenant entitled to the return of the security deposit? And if so, is the tenant entitled to any statutory compensation equivalent to the amount of the security deposit for the landlord's failure to comply with the *Act*?

Is the landlord entitled to a monetary award for compensation as a result of loss? If so, is the landlord entitled to retain the security deposit in satisfaction of that claim?

Is either party entitled to recover the cost of the filing fee from the other party?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

A copy of the written tenancy agreement was submitted into documentary evidence. Both parties agreed to the following information pertaining to the tenancy agreement.

- This one-year fixed term tenancy began on November 1, 2016, with a stated end date of October 31, 2017.
- The rental unit consists of a deluxe studio apartment under 400 square feet in size.
- The tenancy ended on the end date of October 31, 2017.
- Monthly rent of \$1,300.00 was due on the first of the month.
- A security deposit of \$650.00 was paid by the tenant at the beginning of the tenancy.
- The landlord returned \$403.25 of the security deposit to the tenant on December 28, 2017 and the landlord continues to retain \$246.75 of the security deposit.

The tenant has claimed that the landlord did not return the full security deposit with 15 days of the end of the tenancy and therefore she is seeking the return of the portion of the security deposit withheld by the landlord, as well as a monetary award equivalent to the amount of the security deposit as compensation for the landlord's failure to comply with the *Act*.

The landlord has claimed for compensation for cleaning costs required at the end of the tenancy and loss of rental revenue for the tenant's failure to provide notice to end the tenancy in accordance with the *Act*.

Both parties confirmed the following undisputed facts related to their claims:

- No written condition inspection reports were provided to the tenant at move-in or at move-out.
- The tenant's written forwarding address was received by the landlord on December 23, 2017.

- The landlord did not file an application for dispute resolution to retain the tenant's security deposit within 15 days of receiving the tenant's forwarding address in writing.
- The tenant did not provide written authorization for the landlord to retain a specific amount of the security deposit to pay for a liability or obligation of the tenant.
- The tenant did not provide the landlord with one month's written notice to end the tenancy.
- On October 2, 2017, the tenant and the landlord discussed via telephone that the amount of rent would be increased if the tenant agreed to stay and sign a new tenancy agreement.
- On October 22, 2017, the tenant contacted the landlord D.S. to request a reference and confirmed that she would be moving out of the rental unit on October 31, 2017.

Both parties provided disputed testimony in relation to the condition of the rental unit at move-out and the renewal of the tenancy agreement, which has been summarized below.

Condition of Rental Unit at Move-Out

The landlord testified that the tenant signed the tenancy agreement and specifically initialled her agreement to Item #5 of the "Addendum to Rental Agreement" which required the tenant to allow deductions from the security deposit, as follows:

Premises (house and ~~yard~~) must be cleaned by Tenants (or professionally cleaned) to the satisfaction of the owner/owners or Landlord at termination of rental period. Tenant's security deposit will be deducted if any house cleaning or repairs are needed upon termination of lease. ~~Yard~~ and house must look the same as when you moved in.

The landlord testified that the rental unit was "filthy" at the end of the tenancy and required cleaning for the bedding, floors, blinds, windows, as well as steam-cleaning for the carpets. The landlord has claimed for compensation for cleaning and carpet-cleaning costs in the amount of \$246.75. The landlord submitted into documentary evidence a receipt for these costs, with the following breakdown:

Item	Amount
Cleaning	\$175.00
Steam clean carpets	\$60.00
Tax	\$11.75
Total cleaning costs claimed by landlord	\$246.75

The tenant testified that she vacuumed the carpets and cleaned before moving out. She acknowledged that she did not steam clean the carpets as she stated that there were stains on the carpet when she moved in. The tenant did not submit any evidence or testimony that she alerted the landlord to any concerns regarding the condition of the carpets at move in, or that she requested the carpets to be cleaned.

Renewal of the Tenancy Agreement

The landlord testified that during the October 2, 2017 telephone conversation with the tenant, she agreed to renew the tenancy agreement, with the understanding that the amount of rent would increase.

The tenant disputed the landlord's testimony and stated that during that telephone conversation she did not give much response to the landlord's proposal for the renewal of the tenancy agreement as she testified that she could not stay if the rent cost increased.

The landlord has claimed compensation for four months of lost rental revenue totalling \$5,200.00 [4 months x \$1,300.00/month] as he testified it took several months to find a tenant to re-rent the unit.

The tenant questioned that the landlord did not submit any documentary evidence to support this claim, such as rental advertisements to prove he had tried to find a new tenant.

Analysis

Applications for dispute from both parties were heard at this hearing. First, I have addressed the tenant's application regarding the security deposit, and second, I have addressed the landlord's application for compensation related to cleaning and loss of rental revenue.

Tenant's Application for Return of Security Deposit

The *Act* contains comprehensive provisions on dealing with security deposits. Under section 38 of the *Act*, the landlord is required to handle the security deposit as follows:

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

- (a) the date the tenancy ends, and
- (b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

- (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;
- (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

...

(6) If a landlord does not comply with subsection (1), the landlord

- (a) may not make a claim against the security deposit or any pet damage deposit, and
- (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

In this matter, the landlord retained \$246.75 from the security deposit for cleaning costs, and returned \$403.25 of the security deposit to the tenant. The landlord claimed that the tenant agreed to the deduction from the security deposit because she signed the tenancy agreement and initialled the clause in the addendum to the tenancy agreement with the cleaning cost deduction provision.

Section 38(4)(a) states, in part, as follows:

38(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

- (a) **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

[My emphasis added]

The *Act* very explicitly references that the amount to be retained must be agreed to in writing by the tenant “at the end of the tenancy”.

In this case, I find that the tenant did not agree in writing to an amount that could be retained by the landlord from the security deposit “at the end of the tenancy”. The tenancy agreement and clause were signed and initialled at the beginning of the tenancy. I further note that the clause in the addendum did not specify “an amount”, which is another requirement of section 38(4) of the *Act*. Rather the clause references a deduction from the security deposit but no specific set amount is provided.

Section 6 (3) of the *Act* provides that a term of tenancy agreement is not enforceable if it is inconsistent with the *Act* or the regulations.

I find that the term of the tenancy agreement relied on by the landlord to justify the retention of a portion of the security deposit is inconsistent with the *Act* and therefore it is not enforceable. As such, I find that the landlord was not authorized by the tenant to retain the security deposit or any portion of it.

At no time does the landlord have the ability to simply keep the security deposit because they feel they are entitled to it due to cleaning deficiencies or damages caused by the tenant. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

In this matter, the landlord did not apply for arbitration within 15 days of the end of the tenancy or receipt of the forwarding address of the tenant, to retain a portion of the security deposit, as required under section 38 of the *Act*.

I further note that the landlord extinguished the right to claim against the security deposit by failing to perform a written condition inspection report at the start of the tenancy. This extinguishment is explained in section 24(2) as follows:

- 24** (2) The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord
 - (a) does not comply with section 23 (3) [*2 opportunities for inspection*]

- (b) having complied with section 23 (3), does not participate on either occasion, or
- (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

The landlord may only keep all or a portion of the security deposit through the authority of the *Act*, such as an order from an Arbitrator, or with the written agreement of the tenant. In this matter, I find that the landlord did not have any authority under the *Act* or agreement from the tenant to keep any portion of the security deposit.

Based on the above legislative provisions, the testimony and evidence, and on a balance of probabilities, I find that the landlord failed to address the security deposit in compliance with the *Act*. As such, in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary award equivalent to the value of double the security deposit withheld by the landlord LESS the amount of the security deposit already returned to the tenant. No interest is payable for this period. A breakdown provided below explains this in detail:

Item	Amount Claimed
Security deposit paid by tenant at start of tenancy	\$650.00
Monetary Award to tenant equivalent to amount of security deposit retained by landlord without their written agreement	\$650.00
LESS: Amount of security deposit returned to tenant to by the landlord	(\$403.25)
Total Monetary Award in Favour of the Tenant	= \$896.75

Landlord's Application for Compensation for Cleaning Costs and Lost Rental Revenue

Section 67 of the *Act* provides that, where an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement, an arbitrator may determine the amount of that damage or loss and order compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* by the other party. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to section 7(2) of the *Act*.

In this case, the landlord has claimed for compensation due to damages as a result of cleaning deficiencies and due to loss of rental revenue. I have addressed my findings on each of these claims below.

1) Cleaning and Carpet Cleaning Costs

Section 37(2) of the *Act* sets out the requirements for a tenant to fulfill when vacating the rental unit, as follows, in part:

- 37(2) When a tenant vacates a rental unit, the tenant must
- (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear,...

There was no written condition inspection report submitted into documentary evidence by the landlord as it was never completed. This report would attest to the condition of the rental unit at the beginning and end of the tenancy. Further to this, the landlord did not submit any photographic evidence of the condition of the rental unit to support his testimony that the rental unit was left “filthy” and required cleaning at a cost of \$175.00. The landlord’s testimony was disputed by the tenant. As the onus for proving a claim for damages is on the party seeking compensation, the landlord must prove his claim on a balance of probabilities. When there is only disputed testimony, documentary evidence can add weight to shift the balance of probabilities in favour of the claimant seeking compensation. In this case, I find that landlord failed to provide sufficient evidence to prove his claim for compensation for the cleaning costs of \$175.00.

The tenant acknowledged that she did not steam clean the carpets at move-out. Therefore, the testimony regarding the cleaning of the carpets is not in dispute.

Residential Tenancy Policy Guideline 1. Landlord & Tenant – Responsibility for Residential Premises provides further explanation regarding the responsibility of the tenant for cleaning the rental unit at the end of a tenancy. The section relevant to this matter has been noted below, in part:

CARPETS

...

3. *The tenant is responsible for periodic cleaning of the carpets to maintain reasonable standards of cleanliness. Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets*

after a tenancy of one year. Where the tenant has deliberately or carelessly stained the carpet he or she will be held responsible for cleaning the carpet at the end of the tenancy regardless of the length of tenancy.

As the tenancy lasted one year, and it is a tenant's responsibility to clean the carpets, I find that the landlord is entitled to his claim for carpet cleaning in the amount of \$63.00 [\$60.00 + 5% GST].

2) Loss of Rental Revenue

In this case, the landlord has claimed rental loss for the months of November and December 2017, and January and February 2018 due to the tenant providing late notice to end the tenancy.

Based on the testimony of both parties and the tenancy agreement submitted into documentary evidence, I find that the landlord and tenant had a fixed term tenancy with an end date of October 31, 2017. I find that rent was payable on the first day of each month per the terms of the tenancy agreement.

Section 45(2) of the *Act* sets out how a tenant may end a fixed term tenancy, as follows:

- 45 (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
- (a) is not earlier than one month after the date the landlord receives the notice,
 - (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
 - (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Residential Tenancy Policy Guideline 30. Fixed Term Tenancies provides further explanation regarding the responsibility of the tenant for providing notice to end a fixed term tenancy. The relevant section, Section C. Ending a Fixed Term Tenancy has been noted below, in part:

*A tenant who wants to end the tenancy at the end of the fixed term, **must give one month's written notice**. For example, if the fixed term expires on June 30th, the tenant must ensure the landlord receives the tenant's notice to end the tenancy by May 31st.*

[My emphasis added]

In this case, the tenant provided her notice to end tenancy on October 22, 2017, by text message, which is not considered “written notice” as it is not a permissible method for serving notice under section 88 of the *Act*.

Therefore, I find that the tenant failed to give notice to end the tenancy in compliance with the *Act*, and as a result the landlord experienced a monetary loss.

Residential Tenancy Policy Guideline 5. Duty to Minimize Loss provides guidance regarding the expectation for a landlord to mitigate a rental income loss due to a tenant providing short notice to end a tenancy, as follows:

*Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect. **Oral notice is not effective to end the tenancy agreement, and the landlord may require written notice before making efforts to re-rent.***

[My emphasis added]

I find it reasonable that the landlord could not undertake efforts to re-rent the unit until being certain that the tenant was not going to continue the tenancy. The landlord accepted that tenant’s text message on October 22, 2017 as confirmation that she was ending the tenancy effective October 31, 2017. Therefore, I find it acceptable that the landlord may have required the remainder of October 2017 and the month of November 2017 to find a new tenant. However, as the tenant was only required to provide one month’s notice, I do not find the landlord can attribute rental loss beyond one month to the tenant. As explained earlier, section 67 requires that:

The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the other party.

The tenant was only required to provide one month’s notice due to the fact that the fixed term tenancy ended on October 31, 2017. Although there had been a discussion between the parties earlier in October 2017 regarding an option to continue the tenancy at a higher rent, no amount of rent had been agreed upon and no documentary

evidence was submitted to confirm any verbal agreement had been made. Further to this, legislation changes to the *Act* came into effect on December 11, 2017 which applied retrospectively to fixed term tenancy agreements. The impact of these legislation changes would have required that the tenancy agreement between the parties be converted to continue as month to month tenancy at the existing rental rate.

Therefore, based on the evidence and testimony provided, I find that the landlord has shown on a balance of probabilities that a loss of one month's rent in the amount of \$1,300.00 was incurred due to the tenant failing to provide notice to end the tenancy in accordance with the *Act*.

In summary, I find that the landlord is entitled to a monetary award as follows:

Item	Amount Claimed
Carpet cleaning costs	\$63.00
Loss of rental revenue (month of November 2017)	\$1,300.00
Total Monetary Award in Favour of the Landlord	= \$1,363.00

Set-off of Claims Pursuant to Section 72 of the *Act*

As both parties applied to recover the filing fee, and both parties were found entitled to monetary awards, the applications offset each other, and as such, each party will bear their own costs for the filing fee.

In accordance with the offsetting provisions of section 72 of the *Act*, I set-off the amount of \$1,363.00 to be paid by the tenant to the landlord, against the amount of \$896.75 to be paid by the landlord to the tenant. As such, I issue a Monetary Order in the landlord's favour for the remaining amount of the monetary award owing of \$466.25.

I issue a Monetary Order in the amount of \$466.25 in favour of the landlord. The breakdown is as follows:

Item	Amount
Monetary award to landlord for compensation (carpet cleaning and one month of rental revenue loss)	\$1,363.00
LESS: Monetary award to tenant for landlord's failure to comply with s. 38 of the <i>Act</i>	\$896.75
Total Monetary Order in Favour of Landlord	\$466.25

Conclusion

I issue a Monetary Order in the amount of \$466.25 in favour of the landlord.

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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: July 23, 2018

Residential Tenancy Branch