



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, FFL, MNDCT, MNSD, FFT

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- 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 applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to sections 51 and 67;
- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and
- 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 be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenant confirmed that they were handed the 2 Month Notice by the landlord on March 31, 2018, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*. As the landlord confirmed that they received a copy of the tenant's dispute resolution hearing package and written evidence package sent by the tenant by registered mail on May 29, 2018, I find that the landlord was duly served with

these documents in accordance with sections 88 and 89 of the *Act*. The tenant also confirmed that they had received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on June 13, 2018, I find that the landlord was duly served with this package in accordance with section 89 of the *Act*. As the tenant confirmed having received copies of the landlord's written evidence, I find that the tenant was duly served with the landlord's evidence in accordance with section 88 of the *Act*.

At the commencement of this hearing, the landlord asked for permission to add a monetary claim for loss of rent resulting from the tenant's failure to vacate the premises on the date the tenant stated the tenant would be leaving. The landlord said that this had led to the landlord's loss of income to a subsequent tenant who had anticipated being able to take up residency in the rental unit in May 2018, after the tenant was scheduled to vacate the rental unit. Since the landlord had not amended this additional monetary award to the landlord's application and had only submitted this aspect of the landlord's claim a few days before this hearing, I declined to include the landlord's request to have this additional monetary request added to the amount sought by the landlord at this hearing.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for losses and damage arising out of this tenancy? Is the tenant entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the tenant entitled to a monetary award equivalent to double the value of the security deposit as a result of the landlord's alleged failure to comply with the provisions of section 38 of the *Act*? Are either of the parties entitled to recover their filing fees for this application from one another?

Background and Evidence

While I have turned my mind to all of the relevant documentary evidence, including photographs, invoices, text messages and other miscellaneous documents submitted by the parties, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of these claims and my findings around each are set out below.

This month-to-month tenancy was entered into between the landlord and two tenants on September 1, 2016. The tenants moved into the rental unit as of October 1, 2016.

Monthly rent was set at \$2,200.00, payable in advance by the first of each month. Initially, the tenants were also to pay for 80% of the hydro and gas use at this duplex property with the tenant in the basement suite paying the remainder. The parties agreed that this arrangement was revised during the course of this tenancy such that the tenants were expected to pay 70% of the hydro and gas costs by the time this tenancy ended. The landlord continues to hold the \$1,100.00 security deposit for this tenancy paid on September 1, 2016. The other tenant vacated the rental unit in or about February 2018.

The landlord's 2 Month Notice, entered into written evidence by the parties, identified the following reason for seeking an end to this tenancy by May 31, 2018.

- *The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse...*

The landlord entered written evidence and sworn testimony that a real estate transaction which the landlord had arranged fell through by April 15, 2018. The landlord said that his sale of his existing home was to have taken place by June 1, 2018, and later June 5, 2018. This was timed to coincide with the last possible date when the tenant would be required to vacate the tenant's rental unit, so that the landlord would be able to move into the premises.

The landlord provided undisputed written evidence that they had immediately contacted the tenant by a text message on April 15, 2018 to let the tenant know that the landlord's plans had changed because of the failed real estate transaction and that the tenant could remain in the rental unit if the tenant wanted to stay there. The landlord sent a number of additional text messages to the tenant enquiring as to the tenant's wishes. The tenant said that by April 15, the tenant was already exploring other accommodation options, as she was by then needing to downsize to more affordable accommodations.

On May 4, 2018, the tenant sent the landlord a 10 Day Notice to End Tenancy pursuant to the provisions of paragraph 50(1)(a) of the *Act*, after having received the landlord's 2 Month Notice in accordance with section 49 of the *Act*. The tenant identified May 15, 2018 as the final day of this tenancy. Both parties agreed that the tenant did not surrender keys to the rental unit until May 18, 2018; the landlord testified that true vacant possession of the rental unit was not surrendered by the tenant until May 19, 2018.

Both parties agreed that the tenant did not pay any rent for May 2018, which was apparently the landlord's attempt to comply with the provisions of section 51(1) of the *Act*, which allows a tenant receiving a 2 Month Notice the equivalent of one free month's rent. Both parties agreed that the tenant's subsequent 10 Day Notice was not factored into the allowance provided to the tenant for one full free month's rent to comply with section 51(1) of the *Act*.

The landlord testified that when his sale of his existing home did not happen, he took measures to re-rent the tenant's rental suite to a new tenant once the tenant advised him that she was planning to move. The landlord testified that the new tenant is paying \$2,300.00 in monthly rent and was scheduled to take possession in the latter half of May 2018, which did not happen because the tenant overhired her tenancy.

The landlord's claim for a monetary award of \$1,446.16 included the following items listed in the landlord's Monetary Order Worksheet entered into written evidence by the landlord.

Item	Amount
Landscaping	\$150.00
Unpaid Utilities (Hydro and Gas)	146.16
Broken Blinds	50.00
Tenant's Agreement to let the Landlord Keep the Security Deposit	1,100.00
Total Monetary Order Requested	\$1,446.16

The landlord provided statements from a number of people attesting to the extent of damage caused to the rental unit by the smell of marijuana smoke in this non-smoking rental unit.

Although the tenant provided no formal Monetary Order Worksheet, they described the various components of their application for a monetary award of \$8,800.00 in the following terms at this hearing.

Item	Amount
Return of Double the Security Deposit (2 x \$1,100.00 = \$2,200.00)	\$2,200.00
Compensation for failure to compensate	2,200.00

the tenant for the early notice to end tenancy (2x \$1,100.00 = \$2,200.00)	
Compensation for Landlord's Failure to use the Rental Unit for the purposes stated in the 2 Month Notice (2 x \$2,200.00 = \$4,400.00)	4,400.00
Total Monetary Order Requested	\$8,800.00

The tenant maintained that she had been advised by Residential Tenancy Branch (RTB) staff that each of the items identified above could entitle her to the monetary awards requested. There are doubling provisions regarding the failure to return security deposits in accordance with section 38 of the *Act* and pursuant to section 51(2) of the *Act* for a failure by a landlord to use the property for the purpose stated in a 2 Month Notice. The tenant was unable to identify any similar doubling provision regarding the second of the items listed above. The tenant maintained that the landlord attempted to retract the 2 Month Notice issued to her, but could not do so after it had been provided to her.

The tenant did not contest the landlord's claims for landscaping or the unpaid utilities claimed.

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.

Analysis - Tenants' Application for Compensation Pursuant to Sections 51(1) and (2)

Section 49(3) of the *Act* provides the statutory authority whereby a landlord may end a tenancy for landlord's use of the property under the following circumstances:

(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

The following portions of section 50 and 51 of the Act have a bearing on the tenant's eligibility for compensation after receipt of the 2 Month Notice from the landlord:

50 *(1) If a landlord gives a tenant notice to end a periodic tenancy under section 49 [landlord's use of property]..., the tenant may end the tenancy early by*

(a) giving the landlord at least 10 days' written notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice, and

(b) paying the landlord, on the date the tenant's notice is given, the proportion of the rent due to the effective date of the tenant's notice, unless subsection (2) applies.

(2) If the tenant paid rent before giving a notice under subsection (1), on receiving the tenant's notice, the landlord must refund any rent paid for a period after the effective date of the tenant's notice.

(3) A notice under this section does not affect the tenant's right to compensation under section 51 [tenant's compensation: section 49 notice].

51 *(1) A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or after the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement...*

(2) In addition to the amount payable under subsection (1), if

(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or

(b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,

the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement...

In this case, the parties agreed that the tenant's non-payment of rent for May 2018 was intended to address the landlord's responsibility pursuant to section 51(1) of the *Act* to compensate the tenant with the equivalent of one month's rent for the issuance of the 2 Month Notice. When the tenant issued her own 10 Day Notice pursuant to paragraph 50(1)(a) of the *Act*, this was to have had the effect of ending this tenancy on the date that the tenant cited on her 10 Day Notice, May 15, 2018. Instead, I find that the tenant did not end this tenancy until May 19, 2018, when all of her possessions had been removed from the rental unit.

Based on this set of circumstances, I find that the tenant has not received a full one month's equivalency of rent for this rental unit as this tenancy ended on May 19, 2018. I find that in order to meet the requirements of section 51(1) of the *Act*, the tenant is entitled to a further monetary award of 12/31 of the monthly rent paid during this tenancy. This results in a monetary award in the tenant's favour in the amount of \$851.61 ($12/31 \times 42,200.00 = \851.61), pursuant to sections 50 and 51(1) of the *Act*.

Whether or not the tenant issued their own notice to end their tenancy pursuant to section 50 or whether they delayed vacating until the effective date of the 2 Month Notice, their entitlement to compensation pursuant to section 51(1) flows from having "received" the 2 Month Notice from the landlords. The same reasoning applies to a tenant's eligibility for compensation pursuant to section 51(2) of the *Act*. Once the 2 Month Notice was issued and received by the tenant on March 31, 2018, the tenant was fully eligible for compensation pursuant to both sections 51(1) and 51(2) of the *Act*.

There is no dispute that the landlord issued the 2 Month Notice at a time when the landlord fully intended to move into the rental unit after the sale of his home had been completed. While I recognize that the landlord immediately notified the tenant that she need not vacate the premises if she wanted to stay there once he discovered that the sale of his own house was not going to be completed, the decision to remain in the rental unit or move elsewhere was the tenant's to make. The tenant is correct in noting that a landlord cannot effectively revoke a 2 Month Notice once issued. Issuing a 2 Month Notice requires a tenant to relocate for reasons that are not of their own making. As such, landlords need to be very certain that their plans are finalized before a 2 Month Notice is issued and the monetary compensation provided to tenants pursuant to sections 51(1) and 51(2) of the *Act* are engaged. While I am sympathetic to the difficult

position the landlord faced once the sale of his house did not happen, the tenant was also inconvenienced and certainly bore her own moving costs as a result of circumstances beyond her control.

Rather than putting his existing home up for rent and moving into the rental unit as planned and noted on the 1 Month Notice, or trying to sell his home to other potential purchasers at a time that would enable the landlord to move into the rental unit as originally planned within a reasonable period of time, the landlord took rapid action to re-rent the premises at a higher rent than the tenant was paying for a tenancy that was to begin almost immediately after the tenant vacated the rental unit. I find that the landlord's actions do not comply with the requirements of paragraph 51(2)(a) of the *Act*, as the premises were re-rented to someone else very shortly after this tenancy ended and thus precluding any real possibility of the landlord using the premises for the stated purpose in the 2 Month Notice. For these reasons, I allow the tenant's application for a monetary award of \$4,400.00 pursuant to section 51(2) of the *Act* as I conclude that the landlord has not used the rental unit for the reason stated in the 2 Month Notice.

Analysis - Landlord's Application for Damage and Losses

Based on the landlord's undisputed sworn testimony and written evidence, I allow the landlord's application for the recovery of unpaid utilities in the amount of \$146.16 for unpaid hydro and gas bills outstanding at the end of this tenancy.

Similarly, I allow the landlord's application for a monetary award for \$150.00 in landscaping charges, which the tenant again agreed were the tenant's responsibility and did not dispute at this hearing.

At the hearing, the landlord said that he was not concerned about the cost of replacing or repairing the used blinds in this tenancy. Based on the landlord's testimony, I dismiss the landlord's application for a monetary award for this item without leave to reapply.

Security Deposit

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) or if the landlord's right to apply to keep the security deposit has been extinguished, 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 had 15 days after June 1, 2018, the date when the tenant provided their forwarding address to take one of the actions outlined above. The landlord applied to retain the security deposit for this tenancy on June 8, 2018, within the 15 day time limit for doing so. 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."

While the landlord did attempt to conduct a joint move-out condition inspection with the tenant, the Notice of Final Opportunity to Schedule a Condition Inspection provided by the landlord was on a date when other tenants were already living in the rental unit. This would normally have extinguished the landlord's right to claim against the security deposit for this tenancy. However, the landlord has submitted undisputed written evidence in the form of a screenshot of a text message exchange with the tenant on May 15, 2018. In that text message, which the landlord said was the primary way that they communicated with each other during much of this tenancy, the tenant advised that if staying in the rental unit until after her stated date to end this tenancy was not an option that the landlord could keep the security deposit and use it to hire cleaners. At the hearing, the tenant said that they intended this agreement to let the landlord keep the security deposit as conditional upon the landlord forwarding the tenant full compensation for having issued the 2 Month Notice and not requiring the premises for the purposes stated in that Notice. Under these circumstances, I find that the landlord had sufficient grounds to believe that the landlord was entitled to retain the security deposit or was at least entitled to apply for dispute resolution to seek authorization to retain it. As this text message from the landlord pre-dated the end of this tenancy, I find that the landlord's right to apply to keep the security deposit was not extinguished because of the tenant's apparent agreement on May 15 that the landlord could keep that deposit. For this reason, I am not issuing a monetary award against the landlord for failing to adhere to the provisions of section 38 of the *Act*.

Although I find that the tenant's text message of May 15, 2018 created enough uncertainty that I am unwilling to issue a monetary award for double the security deposit to the tenant, whether this text message truly constituted written permission to allow the landlord to keep all of the tenant's security deposit is a separate matter. The tenant's text message does appear to be conditional, although it seems to recognize that

additional cleaning by a cleaning company would be required. This text message also seems to be in recognition that the tenant was overholding the tenancy beyond the May 15, 2018 date when she said she would be vacating. At the hearing, the tenant identified additional conditions when they spoke about this aspect of the communication with the landlord. However, I find that the tenant's conditions appeared to be contingent upon the tenant being reimbursed correctly with respect to the provisions of section 51(1) and (2) of the *Act* for the landlord's responsibilities following the issuance of the 2 Month Notice. As this decision provides the tenant with the compensation the tenant was seeking pursuant to sections 51(1) and (2) of the *Act*, and given that the landlord provided undisputed written and sworn evidence that text messages were the typical and often only means of communication with the tenant, I accept that the tenant has given the landlord authorization to retain the tenant's security deposit. The tenant's agreement to let the landlord keep the security deposit was as a means of compensating the landlord for additional cleaning required and for the overholding of her tenancy. This overholding ultimately resulted in the landlord having to forego rent from the next tenants for the remainder of May 2018, when he could have otherwise been receiving rent from those new tenants. My order allowing the landlord to retain the tenant's security deposit is intended to compensate the landlord for cleaning costs and well as the losses the landlord experienced as a result of the tenant's overholding of the rental unit beyond May 15, 2018. For these reasons, I allow the landlord's application to keep the tenant's security deposit.

As both parties were partially successful in their applications, I make no order with respect to the recovery of their filing fees.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which issues monetary awards to both parties and allows the landlord to retain the tenant's security deposit:

Item	Amount
Monetary Award pursuant to sections 50 and 51(1)	\$851.61
Compensation for Landlord's Failure to use the Rental Unit for the purposes stated in the 2 Month Notice (2 x \$2,200.00 = \$4,400.00)	4,400.00
Less Security Deposit	-1,150.00

Less Unpaid Utilities	-146.16
Less Landscaping Charges	-150.00
Total Monetary Order	\$3,805.45

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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 25, 2018

Residential Tenancy Branch