



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD MNR FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on August 28, 2018, and a second hearing was held on January 8, 2019. The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage to the unit, for damage or loss under the Act, and for unpaid rent; and,
- 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.

The Landlord was present at the hearing with his agent (referred to as the "Landlord"). The Tenant also attended the hearing. All parties provided testimony. After some initial confusion about where the Tenant was residing, the Landlord was able to locate the Tenant, which is, in part, why it took him so long to file his application and serve his evidence. Although there were initially issues with the Tenant getting a copy of the Landlord's Notice of Hearing and evidence, the Tenant acknowledged getting the Landlord's package and appeared ready to proceed. The Tenant was able to respond to the issues at the hearing and I note she provided an evidence package of her own, complete with responses and submissions, prior to the first hearing.

Ultimately, pursuant to section 71(2) of the Act, I find the Tenant was sufficiently served with the Landlord's Notice of Hearing and evidence. I also note the Tenant had several months to prepare further responses and arguments to the Landlord's evidence in between the first and second hearings. I allowed the Tenant and the Landlord to make further submissions at the second hearing on any of the issues. Further, the Landlord acknowledged receiving the Tenant's evidence package.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Is the Landlord entitled to a monetary order for damage to the unit, for damage or loss under the Act, and for unpaid rent?
- Is the Landlord authorized to retain all or a portion of the Tenant's security and pet deposit in partial satisfaction of the monetary order requested pursuant to section 38.

Background and Evidence

Both parties agree that:

- monthly rent was \$3,600.00 and was due on the first of the month.
- The Landlord holds a security deposit in the amount of \$1,800.00 and a pet deposit in the amount of \$1,800.00.
- The Tenant did not provide her forwarding address in writing.
- The Tenant signed a fixed term tenancy agreement starting April 1, 2016, ending March 31, 2017.
- A move-in inspection was done on March 29, 2016.
- The tenancy ended and a move-out inspection was done on July 31, 2016. Both parties were present for a portion of this, but the Tenant left part way through as she did not agree with what the Landlord's characterization of the rental unit. The Tenant did not sign the move-out inspection report for this reason.

The Landlord is seeking several monetary items as follows:

1. Rent

The Landlord is looking to recover \$3,600.00 for August 2016 rent because the Tenant vacated at the end of July 2016, and was under a fixed term lease. The Landlord stated that he was unable to re-rent the unit until Mid-August 2016, and the new Tenants did not move in until September 1, 2016, at a rate of \$3,200.00. The Landlord is looking to recover the rent he would have obtained from the Tenant for August 2016, had she remained in the rental unit, plus the difference

between the new rental rate (\$3,200.00) versus what the Tenant agreed to in the tenancy agreement (\$3,600.00), for the remainder of her fixed term lease. In other words, the Landlord re-rented the unit at a rate of \$3,200.00 (\$400.00 less than what the Tenant was paying), and he is looking to recover the \$400.00/month over the remaining 7 months of the Tenant's fixed term lease, up until March 31, 2017. The Landlord is looking for \$6,400.00 for these items.

The Landlord stated that he posted the ad soon after he got the Tenant's formal notice on June 30, 2016, that she would be leaving at the end of July 2016. The Landlord was not clear on when this ad was reposted but stated he had several inquiries, but since it is a very high end rental, it is more challenging to find a renter. The Landlord stated that this it is not abnormal for high end rentals to take a little bit more time to re-rent, and this unit was no exception. The Landlord stated that the summer time is difficult to re-rent in his experience, as less people are looking to move over July and August.

The Landlord posted an ad on UsedVictoria and Craigslist "as soon as he got the Notice" from the Tenant. The Landlord provided copies of several emails from interested renters from the beginning of July 2016. The Landlord stated that the unit did not rent, despite some initial interest, so he reduced the rent to \$3,200.00 per month in early August, after a couple of unsuccessful showings, and several failed leads. The Landlord stated that on August 14, 2016, he signed on a new set of tenants for September 1, 2016, at a rate of \$3,200.00.

The Tenant feels the Landlord failed to mitigate his losses on re-renting the unit. The Tenant also feels she should have been more involved in being able to help with finding new tenants, but the Landlord appeared to ignore her attempts.

The Tenant further stated that she vacated the rental unit because there were some issues with the rental unit. The Tenant stated that she had numerous conversations with the Landlord about what needed fixing but the Landlord denies that these occurred. The Tenant provided an email from April 11, 2016, which identified a few issues (storage locker not yet built, missing window screens, request for shelving in closet, missing cabinet near fridge, missing carpet on stairs, hot water takes too long to come through, tub drains slowly, parking issues, garbage location, and some privacy/security concerns with respect to an egress staircase, and window curtains). The Tenant also provided a copy of an email she sent on June 30, 2016, where she expressed her dissatisfaction with the rental unit, and laid out why she was breaking her lease.

The Tenant stated that, although some of the issues were fixed, there were disruptions, lots of mess, and many outstanding items.

The Landlord stated that this was a brand new house, and this Tenant was the first one to live in the unit. The Landlord stated that storage was never part of the tenancy agreement and he only ever said he would build a storage locker down the road, as he continued to finish the build/renovation. The Landlord stated that the Tenant agreed to take the unit as it was and was okay with renting it. The Landlord stated that he continued to fix and repair things after the Tenant moved in (installed drapes, carpet on stairs etc). The Landlord stated that the Tenant should have filed an application with the Residential Tenancy Branch for resolution if she wanted things completed or if she was unhappy with the progress, and she didn't have the right to simply cancel the lease for what he considers smaller, trivial items, some of which were not even part of the tenancy agreement.

The Tenant stated that things were promised to her at the outset, but the Landlord largely failed to perform and fulfill his promises. The Landlord denies that he promised her anything and was simply finishing off minor details that were normal, considering this was a brand new unit.

The Tenant also stated that she rented this unit because she was moving from Vancouver, where she had her house listed for sale. The Tenant stated that she received and accepted an offer, on June 6, 2016. The Tenant stated that the new owners took possession of her old house on June 29, 2016. The Tenant stated that she went house shopping on June 19, 2016, and found a house she was interested in. The Tenant stated that she put in an offer, and it was accepted on June 29, 2016. The Tenant stated that she sent the email to her Landlord to end her tenancy on June 30, 2016.

2. Damages/Cleaning

The parties did not agree on the condition of the rental unit at the end of the tenancy, and at the time of the move-out inspection. The Landlord provided a

copy of the condition inspection report but the Tenant failed to sign it because she did not agree with it. The Tenant stated that the Landlord has falsified the condition at end of the tenancy.

Carpet Cleaning – \$204.75

Drape Cleaning - \$217.35

The Landlord stated that the unit was brand new, and the Tenant agreed to clean the carpets and the drapes as part of the Tenancy Agreement, which was provided into evidence. The Landlord stated that this was not done, and was a requirement. The Tenant stated that she acknowledges that this was part of the Tenancy Agreement but stated that her tenancy was only 4 months long, and she cleaned the unit meticulously prior to leaving. The Tenant also stated that as the Landlord was finishing the building while she was living there, there was a lot of dust and debris (caused by him). The Tenant denies that she created any such mess, and she pointed to a lack of photos or other evidence and noted that, as you can see in her photos, there was ongoing construction and debris in and around her unit. The Tenant noted that the Landlord installed carpets, which sent fibres, and dust everywhere, and also did some drywall work. Both of these occurred while she was living there. The Tenant believes that she should not be responsible for the carpets and the drapes cleaning, given the situation.

Suite Cleaning - \$112.50

The Landlord stated that he and his wife cleaned the unit after the Tenant left and it took 4.5 hours. The Landlord is looking to recover \$25.00 per hour. The Landlord stated that there were dust, debris, and scuff marks which took him a long time to clean up. The Tenant stated that she cleaned up thoroughly before she left, and completely disagrees with this charge. The Tenant stated that there is a lack of evidence with respect to how dirty the unit was.

Liquidated Damages - \$480.00

The Landlord stated that since the Tenant signed a contract, and agreed to the liquidated damages clause, she is responsible for paying this fee, which was a genuine pre-estimate of the cost to re-rent. The Landlord pointed to the agreement which specifies that the Tenant is responsible for liquidated damages

in the amount of \$1,000.00. The Landlord stated that, as per the bill from his agent, it only cost him \$480.00 to re-rent the unit, so he has reduced this amount from \$1,000.00 to \$480.00. The Tenant did not deny signing this term on the tenancy agreement, but felt as though she should have been allowed to help more with re-renting and mitigating losses.

Painting - \$472.50

The Landlord stated that the rental unit was painted immediately prior to the Tenant moving in, as it was new. The Landlord stated that it cost him the above amount to repaint several areas where the Tenant left scuff marks and holes in the wall. The Tenant stated that this charge is ridiculous, as she only made two holes in the wall to hang pictures, and she hired a painter (the same painter the Landlord used) to fill the holes and paint over them. The Tenant denies that there were any marks such that painting would have been required.

Flooring - \$1,972.95

The Landlord stated that the floors were brand new at the start of the tenancy, and were "ruined" at the end. The Landlord stated that this is what it cost to have a flooring company come in and replace damages flooring pieces, many of which were damaged and marked. The Landlord noted that most of the damage was in the bedroom and the kitchen. The Tenant stated that she has no idea what the Landlord is referring to with this damage and denies that the floors were anything but brand new looking. The Tenant stated that this is one of the items they disagreed on with the move-out inspection, and the Tenant said that the Landlord has falsely documented the condition in the move-out inspection, and pointed out that the Landlord should have taken photos if it was as bad as he says.

Kickboards - \$1,461.60

The Landlord stated that the "kickboards" at the base of the kitchen cabinets were marked and needed to be removed, repainted, and reinstalled. The Landlord stated that it was his company that performed these fixes and he provided a copy of this invoice. The Tenant stated that the only damage to the kickboards was the small water damage that was caused by the Landlord's

improper installation of the dishwasher. The Tenant stated that she immediately notified the Landlord about the leak and there was some minor swelling in the wood as a result, which is not her fault. The Tenant pointed out the lack of evidence to show that there was any damage that she may have caused.

Analysis

The Landlord is seeking monetary compensation for several items, as laid out above. These items will be addressed in the same order for my analysis. A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenant. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

Based on all of the above, the evidence (move in inspection, photos and invoices) and the testimony provided at the hearing, I find as follows:

Condition Inspection Report

Sections 23 and 35 of the *Act* states that a Landlord and Tenant together must inspect the condition of the rental unit on the day the Tenant is entitled to possession of the rental unit, and at the end of the tenancy before a new tenant begins to occupy the rental unit. Both the Landlord and Tenant must sign the condition inspection report and the Landlord must give the Tenant a copy of that report in accordance with the regulations.

In this case, I note the parties completed a move-in inspection report, and signed a copy of this document together. I find this document provides consistent and reliable evidence with respect to the condition of the rental unit at the start of the tenancy. The unit was new, so the condition at the start is largely undisputed. However, the parties disagree completely about the Landlord's characterization of the rental unit at the end of the tenancy. It appears a move-out inspection was completed on July 31, 2016.

However, after a disagreement during this inspection, the Tenant left early, without signing the document. After considering the totality of this situation, I find the move-out portion of the condition inspection report is of limited evidentiary value, since the Landlord completed this part of the report after a contentious meeting with the Tenant. The Tenant alleges that the Landlord has fabricated the damages in order to justify his claim. I note the Landlord has also failed to provide any corroborating photos to substantiate the damages. He only provided testimony and a contentious inspection report. Given the limited evidentiary value of the move-out portion of the condition inspection report, I have given it no weight.

Next, I turn to the Landlord's monetary items, as laid out above. They will be addressed in the same order as above:

1. Rent - \$6,400.00

The Landlord acknowledged that the Tenant paid July 2016 rent, so he is not seeking rent for that month. The \$6,400.00 is comprised of lost rent, after the end of the tenancy. I note the Tenant was under a fixed term tenancy agreement which was from April 1, 2016, until March 31, 2017, at a rate of \$3,600.00 per month.

First I turn to the Tenant's attempt to back out of the lease, given her issues with the rental unit. I note there were some issues, as evidenced by the Tenant's photos (ie- missing closet organizer, missing cabinets, garbage, security, etc). However, I find there is insufficient evidence that any of these items were material to the tenancy. The Tenant raised the materiality of these issues in the hearing, but only broadly, indicating that, summarily, they amounted to a sufficient basis to end the tenancy. It is not sufficiently clear which items were material to the tenancy agreement. Further, and more importantly, I turn to *Policy Guideline #8 Unconscionable and Material Terms* which states the following:

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- *that there is a problem;*
- *that they believe the problem is a breach of a material term of the tenancy agreement;*
- *that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*

- *that if the problem is not fixed by the deadline, the party will end the tenancy.*

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement², and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof.

I note the Tenant put some of her concerns in writing on April 11, 2016, and sent it to the Landlord. However, her communication is absent a clear warning that she would end the tenancy if the issues were not addressed. There are numerous items in the Tenant's list, some of which I find to be somewhat minor, so it is not clear which she considers to be a breach of a material term. It does not appear this matter was effectively communicated to the Landlord. In this case, if the Tenant was unhappy with the progress or there were issues she wanted remedied, that weren't being completed, she should have filed an application with the Residential Tenancy Branch, rather than arbitrarily deciding that she had sufficient basis to end the tenancy. In summary, I find the Tenant did not have sufficient cause to end the tenancy early, despite the deficiencies, and I find she is bound by the fixed term tenancy agreement she signed and entered into.

With respect to rent for August 2016, I note the Landlord posted the ad in two locations, and fielded several inquiries in July with respect to re-renting the unit. I note this is a high end rental, and although vacancy rates are low, it can take more time to re-rent a unit of this nature. The Tenant alleges that the Landlord failed to adequately mitigate his lost rent. However, I find the Landlord took sufficient steps to re-rent the unit. When the Landlord was unable to re-rent the unit, he reduced rent to \$3,200.00 at the beginning of August in order to mitigate his loss. Since the Landlord was unable to re-rent the unit for August, I find the Tenant is liable for the amount of rent she would have normally paid (\$3,600.00), given she was under a fixed term tenancy agreement, and was not in a position to end the tenancy early. I award the Landlord compensation for this item.

Next, I note the Landlord re-rented the unit at a rate of \$3,200.00 (\$400.00 less than what the Tenant was paying), and he is looking to recover the \$400.00/month over the remaining 7 months of the Tenant's fixed term lease, up until March 31, 2017. I find the Landlord is entitled to this amount, since he had to reduce the rent, in order to attract a tenant. I find the rent reduction is reasonable, and the Landlord is entitled to be compensated such that he would

be in the same position, had the Tenant not breached the lease agreement. I find the Landlord is entitled to compensation at a rate of \$400.00 per month for 7 months, up until the end of her fixed term agreement. The Landlord is awarded \$2,800.00 for this item.

2. Damages/Cleaning

The common issue with most of the items listed in this section is a significant lack of evidence from the Landlord. The Landlord has failed to provide any photos of any of the items he noted. The Tenant directly refutes the Landlord's characterizations. I find the move-out portion of the condition inspection report is of limited value.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

Carpet Cleaning – \$204.75

Drape Cleaning - \$217.35

Suite Cleaning - \$112.50

With respect to the above items, I acknowledge that the Tenant agreed in the Tenancy Agreement to clean the drapes and the carpets at the end of the tenancy. I also acknowledge that the Tenant is required to return the rental unit to the Landlord in a reasonably clean manner. However, I find it important to note the Landlord had several different trades (drywall, flooring) in and out of the rental unit, performing dirty and dusty jobs. I find this would have contributed to any potential dust or debris. I also note the tenancy was only 4 months in duration. I decline to award the Landlord any money for these items, as I find it likely that some of the work he completed during the tenancy contributed to the issues. I also note the Landlord has provided no photos to substantiate the mess.

Liquidated Damages - \$480.00

I note the tenancy agreement clearly specifies that the Tenant is responsible for liquidated damages in the amount of \$1,000.00. I note the Landlord stated that, as per the bill from his agent, it only cost him \$480.00 to re-rent the unit, so he has reduced this amount from \$1,000.00 to \$480.00. I find the Landlord is

entitled to this amount, as it was clearly laid out in the contract, and is a reasonable amount for re-rental costs.

Painting - \$472.50

Flooring - \$1,972.95

Kickboards - \$1,461.60

As stated above, I find there is insufficient evidence that there was damage to the walls, such that they needed repainting. Further, I find there is insufficient evidence that the Tenant caused damage to the flooring or the kickboards. I note there are no photos to show any of these damages. Ultimately, the Landlord has not met the burden of proof to prove his claim on these above 3 items. As such, I decline to award these items.

Further, section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlord was partially successful with his application, I order the Tenant to repay the \$100.00 fee that the Landlord paid to make application for dispute resolution.

Also, pursuant to sections 72 of the Act, I authorize that the security and pet deposit, currently held by the Landlord, be kept and used to offset the amount owed by the Tenant. In summary, I grant the monetary order based on the following:

Claim	Amount
Rent losses	\$6,400.00
Liquidated damages	\$480.00
Filing fee	\$100.00

Less: Security and pet Deposit currently held by Landlord	(\$3,600.00)
TOTAL:	\$3,380.00

Conclusion

The Landlord is granted a monetary order in the amount of **\$3,380.00**, as specified above. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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, 2019

Residential Tenancy Branch