Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDL-S, MNDCT, MNSD, FFT, FFL

Introduction

A hearing was convened on December 13, 2018 in response to cross applications.

The Landlord filed an Application for Dispute Resolution in which the Landlord applied for a monetary Order for damage, to keep all or part of the security deposit, and to recover the fee for filing an Application for Dispute Resolution.

The Tenants filed an Application for Dispute Resolution in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, for the return of the security deposit, and to recover the fee for filing an Application for Dispute Resolution.

The Landlord stated that on August 21, 2018 the Landlord's Application for Dispute Resolution and the Notice of Hearing were sent to each Tenant, via registered mail. The male Tenant, hereinafter referred to as the Tenant, stated that these documents were received and that he is representing the female Tenant at these proceedings.

The Landlord submitted evidence to the Residential Tenancy Branch on August 13, 2018, November 16, 2018, and November 17, 2018. He stated that all of these documents were mailed to the Tenants on November 24, 2018. The Tenant acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The Landlord submitted evidence to the Residential Tenancy Branch on November 27, 2018. He stated that this evidence was not served to the Tenants. As this evidence was not served to the Tenants, it was not accepted as evidence for these proceedings.

The Tenant stated that on November 20, 2018 the Tenants' Application for Dispute Resolution and the Notice of Hearing were sent to the Landlord, via registered mail. He stated that these documents were returned to the Tenants by Canada Post with an indication that the party had moved. The Landlord stated that he has not moved from his service address and he does not know why those documents were returned to the Tenants.

The Tenants submitted evidence to the Residential Tenancy Branch on November 19, 2018 and November 26, 2018. The Tenant stated that this evidence was served to the Landlord with the Application for Dispute Resolution and was subsequently returned by Canada Post.

The Tenants submitted evidence to the Residential Tenancy Branch on November 21, 2018. He stated that this evidence was mailed to the Landlord, although he cannot recall the date of service. The Landlord stated that this document was not received.

The hearing proceeded on December 13, 2018 to consider the issues in dispute in the Landlord's Application for Dispute Resolution.

As the Landlord had not received the Tenants' Application for Dispute Resolution the hearing on December 13, 2018 was adjourned. Even if the Landlord had received the Tenants' Application for Dispute Resolution, the hearing would have been adjourned as there was insufficient time to consider the issues in dispute in the Tenants' Application for Dispute Resolution.

The hearing was reconvened on February 5, 2019 and was concluded on that date.

At the hearing on February 5, 2019 the Tenant stated that the Application for Dispute Resolution and all the evidence previously served to the Landlord was re-served to the Landlord, via registered mail, on December 21, 2018. He cited a Canada Post tracking number to corroborate this testimony. He stated that this package was not returned to the Tenants by Canada Post.

The Agent for the Landlord stated that he does not know if the Landlord received the documents that the Tenants mailed on December 21, 2018. He stated that these documents were not provided to him by the Landlord.

On the basis of the evidence presented by the Tenants and in the absence of evidence to the contrary, I find that the Tenants' Application for Dispute Resolution and evidence has been served to the Landlord in accordance with section 89 of the *Residential Tenancy Act (Act).* This evidence was accepted as evidence for these proceedings.

On December 24, 2018 the Landlord submitted a copy of an occupancy permit to the Residential Tenancy Branch, which I gave him authority to do in my interim decision. The Agent for the Landlord stated that he does not know if this document was served to the Tenants. The Tenant stated that this document was served to the Tenants by registered mail and it was, therefore, accepted as evidence for these proceedings.

On January 18, 2019 the Landlord submitted 32 pages of evidence to the Residential Tenancy Branch, which I gave him authority to do in my interim decision. The Agent for the Landlord stated that he does not know if this evidence was served to the Tenants. The Tenant stated that this evidence was served to the Tenants by registered mail and it was, therefore, accepted as evidence for these proceedings.

The Tenant stated that the Tenants submitted evidence after December 13, 2018. He was advised that this evidence was not being accepted as evidence for these proceedings, as the Tenants were not given authority to submit additional evidence. The Tenants were advised they could introduce this evidence orally.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. The parties were advised of their legal obligation to speak the truth during these proceedings.

All of the documents accepted as evidence for these proceedings has been reviewed, but is only referenced in this written decision if it is directly relevant to my decision.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit?
Are the Tenants entitled to compensation for various issues with the tenancy?
Should the security deposit be retained by the Landlord or returned to the Tenants?

Background and Evidence

The Landlord stated that this tenancy began on May 01, 2017 and the Tenants stated that it began on April 30, 2017.

The Landlord and the Tenant agree that the Tenants agreed to pay monthly rent of $1,600.00 and that they paid a security deposit of $800.00.

The Landlord stated that nobody was living in the rental unit prior to the start of this tenancy. The Tenant stated that the Landlord was using this portion of the residential complex prior to the start of the tenancy.

The Agent for the Landlord stated that the occupancy permit that was submitted in evidence establishes that nobody lived in the rental unit prior to the start of this tenancy. The Tenant stated that the occupancy permit does not establish that the Landlord was not using the rental unit prior to the start of the tenancy.

The Landlord and the Tenant agree that a condition inspection report was not completed at the start of the tenancy; that the rental unit was not jointly inspected; and that the Landlord did not schedule a time for a joint inspection of the rental unit.

The Landlord and the Tenant agree that they met on July 23, 2018 at which time the Landlord indicated he would like to inspect the rental unit. The Landlord stated that the Tenant refused to inspect the rental unit on July 23, 2018. The Tenant stated that he did not participate in the final inspection, in part, because a, inspection report had not been completed at the start of the tenancy and, in part, because the Landlord was not allowing him to make comments on the report the Landlord wished to complete.

The Tenant stated that he posted a forwarding address on the Landlord's door on June 06, 2018. The Landlord stated that he received this forwarding address, although he cannot recall the date he received it.

The Landlord and the Tenant agree that this tenancy ended on July 31, 2018. The Tenant stated that he vacated the rental unit on June 12, 2018, although he paid rent until the end of July.

The Landlord is seeking compensation for damage to the cabinets and kick plate beneath the cabinets. The Landlord submitted photographs that show the cabinet door and kick plate were damaged by water and another cabinet door was chipped.

The Landlord stated that this damage was not present at the start of the tenancy and the Tenant stated that it was present at the start of the tenancy.

The Landlord is seeking compensation for damage to the walls. The Landlord submitted photographs that show holes from nails and scratches on the walls. The larger nail holes have been filled, but require painting.

The Landlord stated that none of this damage was present at the start of the tenancy and the Tenant stated that most of it was present at the start of the tenancy. The Tenant stated that the walls were scratched in 2 or 3 places during the tenancy; that he made holes in the wall to mount a television, and that he made holes in the wall to install 4 or 5 coat hooks.

The Landlord is seeking compensation for damage to the floor. The Landlord submitted a photograph of a small chip in the kitchen floor.

The Tenant stated that the floor was damaged when the Landlord installed a refrigerator in November of 2017 and that he pointed out the damage to the Landlord when the damage occurred. The Landlord stated that the Tenant did not advise him that the floor had been damaged when the refrigerator was installed and he was not aware that the floor had been damaged at that time.

The Landlord is seeking compensation for a scratch on the refrigerator. The Landlord submitted a photograph of the scratch.

The Tenant stated that the refrigerator was used when it was installed and that it was scratched when it was provided to them. The Landlord agrees the refrigerator was used but he stated that it was not scratched when it was provided to the Tenants.

The Landlord applied for compensation for mailing costs and the cost of submitting photographs.

The Landlord submitted a list of the amounts he estimates it will cost to repair all of the aforementioned damages. No estimates from tradespeople were submitted.

The Tenants are seeking compensation of $489.90 because the Landlord replaced their refrigerator with a smaller one.

The Tenant stated that:

- on October 03, 2017 their refrigerator stopped working;
- the problem was reported to the Landlord on October 03, 2017;
- the refrigerator was replaced on November 06, 2017;

- the Landlord offered to store their perishable items on November 04, 2017 but by that time their perishable items had been discarded;
- the original refrigerator was 25.4 cubic feet;
- the replacement refrigerator was 18 cubic feet;
- the original refrigerator had an ice and water dispenser;
- the replacement refrigerator did not have an ice and water dispenser; and
- the replacement refrigerator was too small for their family of 5.

The Agent for the Landlord stated that he does not know anything about the refrigerator.

In the Landlord's written submission the Landlord acknowledged that it took him three or four days to replace the refrigerator. He does not dispute the Tenants' submission that he replaced the refrigerator with a smaller one.

The Tenants are seeking compensation of $4,200.00 because the Landlord did not build a privacy fence or complete the rear yard in a timely manner.

The Tenant stated that:

- prior to the start of the tenancy the Landlord promised to build a privacy fence between the neighbour and the entry to the rental unit;
- prior to the start of the tenancy the Landlord promised to finish the rear yard and to share that space with the Tenants;
- the Tenant frequently inquired about the completion date of the fence/yard;
- the fence was not built until a week or two before they vacated the unit on June 10, 2018;
- grass was planted in the rear yard in March of 2018;
- the yard was not usable until May of 2018.

The Agent for the Landlord stated that he does not think the Landlord told the Tenants when the fence would be installed or when the yard would be completed.

In the Landlord's written submission that Landlord declared that shortly after the tenancy began the Tenants raised several issues, including completion of the fence and the back yard. He declared that he told them he would complete them "as soon as I can" but he did not promise a completion date.

The Tenants are seeking a rent refund for July of 2018, in the amount of $1,600.00.

The Tenant stated that:

- there were on-going conflicts with the Landlord during the tenancy;
- the Landlord emailed a notice of a rent increase to the Tenants;
- the Tenants did not pay the proposed rent increase because they concluded it was not properly served to them;
- on June 03, 2018 the Landlord telephoned him and asked why the rent increase had not been paid on June 01, 2018;
- during this telephone call the Landlord became “hostile” and told the Tenants they should leave if they were not happy in the rental unit;
- the Tenant told the Landlord to not telephone him again and asked that the Landlord only contact them by mail or email;
- shortly after the telephone call ended the Landlord came to the unit and banged loudly on the door of the rental unit;
- his wife did not want him to answer the door as she was worried the situation would escalate;
- the Tenants did not contact the police as they did not want to upset their children;
- the Landlord exhibited no aggressive behaviour after June 03, 2018;
- on June 08, 2018 the Tenants asked the Landlord if he would mutually agree to end the tenancy;
- the Landlord would not agree to end the tenancy by mutual consent;
- the Tenants vacated the rental unit on June 10, 2018;
- the Tenants vacated the rental unit because they were afraid of the Landlord;
- on June 30, 2018 the Tenants gave the Landlord written notice to end the tenancy, effective July 31, 2018.

The Agent for the Landlord stated that he has no knowledge of the incident on June 03, 2018.

In his written submission the Landlord declared that he never spoke to the Tenants in a derogatory manner and that he did not bang on the door on June 03, 3018. He stated that he knocked on the door and rang the doorbell several times as he wanted to serve the Tenants with a notice of rent increase, in person.

The Tenants are seeking compensation of $1,053.00 for loss of tuition fees. The Tenant stated that:

- their child attended a private school near the rental unit;
- in May of 2018 they paid tuition fees for September of 2018;
- they were unable to find suitable accommodations near the private school, at a price they could afford;

- their new home is not near this school and it was unreasonable for their child to continue to attend that school.

The Agent for the Landlord argued that the Landlord should not be responsible for the tuition fees.

Analysis

Section 23 of the *Residential Tenancy Act (Act*) reads:

> 23 (1) The 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 or on another mutually agreed day.
> (2) The landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day, if
> (a) the landlord permits the tenant to keep a pet on the residential property after the start of a tenancy, and
> (b) a previous inspection was not completed under subsection (1).
> (3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
> (4) The landlord must complete a condition inspection report in accordance with the regulations.
> (5) 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.
> (6) The landlord must make the inspection and complete and sign the report without the tenant if
> (a) the landlord has complied with subsection (3), and
> (b) the tenant does not participate on either occasion.

On the basis of the undisputed evidence, I find that the Landlord failed to comply with section 23(3) of the *Act*, as he did not schedule a time for an inspection of the rental unit at the start of the tenancy.

Section 24 of the *Act* reads:

> 24 (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if

(a) the landlord has complied with section 23 (3) *[2 opportunities for inspection]*, and
(b) the tenant has not participated on either occasion.
(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.

As the Landlord has failed to comply with section 23(3) of the *Act*, I find that he has extinguished his right to claim against the security deposit for damage is extinguished, pursuant to section 24(2)(a) of the *Act.*

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit plus interest or make an application for dispute resolution claiming against the deposits. In circumstances such as these, where the Landlord's right to claim against the security deposit has been extinguished, the Landlord does not have the right to file an Application for Dispute Resolution claiming against the deposit for damage and the only option remaining open to the Landlord is to return the security deposit and/or pet damage deposit within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing. I find that the Landlord did not comply with section 38(1) of the *Act*, as the Landlord has not yet returned the deposits.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the Landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(1) of the *Act*, I find that the Landlord must pay double the security deposit to the Tenant.

I find that it is not necessary for me to determine whether the Tenants extinguished their right to the return of the security deposit because they did not participate in the final inspection of the rental unit at the end of the tenancy. Even if the Tenants did not participate in the final inspection, their right to the return of the security deposit is not extinguished because the Landlord breached his obligation first. In reaching this

conclusion I was influenced by Residential Tenancy Branch guideline #17, with which I concur, which reads, in part:

> In cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even though the tenant may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord's breach occurred first.

When making a claim for damages under a tenancy agreement or the *Act,* the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

The burden of proving the rental unit was damaged during the tenancy rests with the Landlord, as he is claiming compensation for damage.

I find that the Landlord has submitted insufficient evidence to establish that the cabinet and kick plate was damaged during the tenancy. In reaching this conclusion I was heavily influenced by the absence of evidence, such as a condition inspection report, that corroborates the Landlord's testimony that they were not damaged at the start of the tenancy or that refutes the Tenant's testimony that they were damaged at the start of the tenancy. As the Landlord has failed to meet the burden of proof, I dismiss his claim for compensation for the cost of repairing the cabinet and kick plate.

In adjudicating this matter I have placed no weight on the occupancy permit that was submitted in evidence. I find that this permit does not establish that the Landlord was not using the rental unit prior to the start of the tenancy, as I am aware that many homes/spaces are occupied prior to the issuance of an occupancy permit.

On the basis of the Tenant's testimony I find that he damaged the walls during the tenancy by installing coat hooks, by scratching them in a few places, and by mounting a television. I find that the nature of these types of holes exceeds normal wear and tear and that the Tenant was obligated to repair and paint those holes. I therefore find that the Tenants failed to comply with section 37(2) of the *Act* when the Tenants did not repair and paint the damage caused by installing these items.

In addition to establishing that a tenant damaged a rental unit, a landlord must also accurately establish the cost of repairing the damage caused by a tenant, whenever compensation for damages is being claimed. I find that the Landlord failed to establish the true cost of repairing the walls. In reaching this conclusion I was heavily influenced by the absence of any documentary evidence, such as an estimate from a tradesperson, which establishes the true costs of repairing the damage caused by the Tenants. When receipts or estimates are available, or should be available with reasonable diligence, I find that a party seeking compensation for those expenses has a duty to present that evidence. As the Landlord has failed to establish the true cost of repairing the damage caused by the Tenants, I dismiss his claim for repairing the walls.

I find that the Landlord has submitted insufficient evidence to establish that the kitchen floor was not damaged when he installed a refrigerator. In reaching this conclusion I was heavily influenced by the absence of evidence that corroborates the Landlord's testimony that he was not aware the floor was damaged when the refrigerator was installed or that refutes the Tenant's testimony that it was damaged at that time. As the Landlord has failed to meet the burden of proof, I dismiss his claim for compensation for the cost of repairing the floor.

I find that the Landlord has submitted insufficient evidence to establish that the refrigerator was not scratched when it was provided to the Tenants. In reaching this conclusion I was heavily influenced by the absence of evidence that corroborates the Landlord's testimony that it was scratched when it was provided to the Tenants or that refutes the Tenant's testimony that it was not scratched at that time. As the Landlord has failed to meet the burden of proof, I dismiss his claim for compensation for the damaged refrigerator.

The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of *Act*. With the exception of compensation for filing the Application for Dispute Resolution, the *Act* does not allow an Applicant to claim compensation for costs associated with participating in the dispute resolution process. I

therefore dismiss the Landlord's application for mailing costs and the cost of providing photographs for these proceedings.

Section 27(1) of the *Act* stipulates that a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or providing the service or facility is a material term of the tenancy agreement. As a refrigerator was provided with the rental unit which is essential to use of the unit as living accommodations, I find that Landlord was required to replace the refrigerator when it stopped working, pursuant to section 27(1) of the *Act*.

On the basis of the undisputed evidence I find that the Landlord replaced the refrigerator four days after it was reported broken. I find that this was not an unreasonable delay, given that it takes time to locate a replacement appliance and to arrange delivery. I therefore find that the Tenants are not entitled to compensation for the delay in providing a replacement refrigerator.

On the basis of the undisputed evidence I find that the replacement refrigerator provided by the Landlord was smaller than the original refrigerator. I find that the replacement refrigerator, although smaller, was sufficient for the size of this rental unit. I therefore find that the Tenants are not entitled to compensation for the size of the replacement refrigerator.

Section 27(2) of the stipulates that a landlord may terminate or restrict a non-essential service or facility, if the landlord gives 30 days' written notice, in the approved form, of the termination or restriction, and reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

On the basis of the evidence of the Tenants and in the absence of evidence to the contrary, I find that the prior to the start of this tenancy the Tenants were told a privacy fence would be built. On the basis of the evidence of the Tenants and in the absence of evidence to the contrary, I find that the fence was not built until sometime in May of 2018. I find that the absence of the fence reduced the value of the tenancy by $25.00 per month.

As the fence was not built at the start of the tenancy, I find it reasonable for the Tenants to expect that it would be built in two months. I therefore find that the Tenants are entitled to compensation for being without the fence between July 01, 2017 and May 15, 2018, in the amount of $262.50. (10.5 months x $25.00)

On the basis of the evidence of the Tenants and in the absence of evidence to the contrary, I find that the prior to the start of this tenancy the Tenants were told they could share the yard once it was finished. On the basis of the evidence of the Tenants and in the absence of evidence to the contrary, I find that the yard was not completed until sometime in May of 2018. I find that the inability to use the rear yard reduced the value of the tenancy by $50.00 per month.

As the rear yard was not completed at the start of the tenancy, I find it reasonable for the Tenants to expect that it would be completed in two months. I therefore find that the Tenants are entitled to compensation for being without the fence between July 01, 2017 and May 15, 2018, in the amount of $525.00. (10.5 months X $50.00)

Section 45 of the *Act* stipulates that a tenant may end a periodic tenancy by providing the landlord with written notice to end the tenancy on a date that is not earlier than one month after the date the Landlord received the notice and is the day before the date that rent is due.

On the basis of the undisputed evidence I find that the Tenants did not give the Landlord written notice to end the tenancy until June 30, 2018, which notified the Landlord of the Tenants' intent to end the tenancy on July 31, 2018. On the basis of this notice I find that the Tenants retained the right to access the rental unit until July 31, 2018. As the Tenants retained the right to access the unit until July 31, 2018, I find that they were obligated to pay rent for July of 2018. I therefore dismiss the Tenant's application to recover rent paid for July of 2018.

In adjudicating this matter I have placed little weight on the Tenants submission that they left because they were afraid of the Landlord. Even if I accepted the Tenants submission that the Landlord behaved aggressively on June 03, 2018 their description of the interaction does not, in my view, establish a need to vacate the rental unit immediately. In the event the Tenants deemed it necessary to vacate the rental unit immediately, I find they should have given the Landlord notice of their intent to vacate immediately, rather than preventing him from taking possession of the rental unit until July 31, 2018.

Even if I accepted that the Landlord's behaviour caused the Tenants to end this tenancy, I would not conclude that they are entitled to compensation for tuition fees. In reaching this conclusion I find that it is not the Landlord's fault that the Tenants were unable, either by choice or circumstance, to locate suitable accommodation near their child's school. I therefore dismiss the Tenant's application to recover tuition fees.

I find that the Landlord has failed to establish the merit of his Application for Dispute Resolution and I therefore dismiss his application to recover the fee for filing an Application for Dispute Resolution.

I find that the Tenants have established the merit of their Application for Dispute Resolution and I therefore find they are entitled to recover the fee for filing an Application for Dispute Resolution.

Conclusion

The Landlord has failed to establish the merit of his Application for Dispute Resolution and his claims have been dismissed.

The Tenant has established a monetary claim, in the amount of $2,487.50, which includes double the security deposit of $800.00; $262.50 for being without a privacy fence; $525.00 for being without a rear yard; and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution.

Based on these determinations I grant the Tenants a monetary Order for $2,487.50. In the event the Landlord does not voluntarily comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims 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 *Act*.

Dated: February 5, 2019

Residential Tenancy Branch