



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT
MNDCL, FFL

Introduction

This hearing was scheduled in response to the tenants' application pursuant to the *Residential Tenancy Act* (the "Act") for:

- a monetary order for damage or compensation under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

This hearing was also scheduled in response to the landlord's application pursuant to the *Act* for:

- a monetary order for damage or compensation under the *Act*, *Regulation* or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants, the landlord and legal counsel representing the landlord attended the hearing. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The tenants confirmed they had received the landlord's application and evidence. As the tenants did not raise any issues regarding service of the application or evidence, I find that the tenants were duly served with these documents in accordance with sections 88 and 89 of the *Act*.

Preliminary Issue – Service of the Tenants' Application

The tenants testified that on October 7, 2018 they forwarded the tenants' application via registered mail to the landlord. The tenants provided the Canada Post tracking number into oral evidence to verify this method of service; this number is detailed on the front page of this decision. The address used for service was the landlord's service address as provided on the assignment of lease. Section 90 of the *Act* deems a party served with documents five days after mailing even if the recipient does not pick up the mail.

During the hearing, the landlord denied receipt of the hearing package; he testified that he was out of the country. The landlord confirmed the address used by the tenants was indicated on the assignment of lease as his service address. A landlord can rebut the deemed provision with clear evidence that the documents were not received or evidence of the actual date they were received. In this case, the landlord denied receipt of the hearing package but provided no clear evidence.

Based on the testimony of the tenants and in accordance with sections 89 and 90 of the *Act*, I find that the landlord has been deemed served with the hearing package on October 12, 2018, the fifth day after its registered mailing.

Preliminary Issue – Service of the Tenants’ Amendment

The tenants testified that on January 11, 2019 they forwarded the tenants’ amendment via registered mail to the landlord. The tenants provided a Canada Post receipt and tracking number as proof of service. The parties agreed the address used for service was the landlord’s current address as provided by the landlord in October 2018.

The landlord denied receipt of the amendment; again he testified that he was out of the country. In the absence of clear evidence to rebut the deemed provision, I find that the landlord has been deemed served with the amendment on January 16, 2018, the fifth day after its registered mailing

Preliminary Issue – Res Judicata

Legal counsel for the landlord contended that the tenants’ application should be dismissed on the principle of res judicata. During the hearing, the parties agreed that a previous decision in the form of a record of settlement was rendered on July 5, 2018 regarding this tenancy. The file number has been included on the front page of this decision for ease of reference. The previous hearing was scheduled in response to cross applications filed by the parties. The tenants had applied to cancel a two month notice to end tenancy for landlord use (“2 Month Notice”) and an order that the landlord comply with the law or tenancy agreement. The landlord had applied for an order of possession pursuant to the 2 Month Notice and a monetary order for unpaid utilities and municipal taxes. In the record of settlement, the parties agreed to the following:

1. *The tenancy will end on July 31, 2018 and the landlord will have an order of possession for one o’clock p.m. on that date,*
2. *The landlord withdraws any claim for outstanding utilities or taxes and forgoes any claim for July 2018 rent.*
3. *The landlord is to pay the tenants the amount of \$2000.00 on or before July 31, 2018.*
4. *The parties will deal with the tenants’ deposit money in accordance with the provisions of the Residential Tenancy Act at the end of the tenancy.*
5. *Each party will bear the cost of their filing fee.*

[Reproduced as written]

In the hearing before me, held January 31, 2019, different issues were brought forward by the tenants. In this application the tenants sought monetary compensation and the return of their security deposit. On the basis that the issues before me were not raised and settled in the previous hearing, I reject legal counsel’s argument to dismiss the tenants’ application on the principle of res judicata.

Preliminary Issue – Tenants’ Monetary Limit

Pursuant to section 58(2)(a) of the *Act*, I do not have jurisdiction to adjudicate claims greater than that permitted by the *Small Claims Act*. The limit is prescribed in the *Small Claims Court Monetary Limit Regulation* and is currently set at \$35,000.00.

The tenants' monetary order request sets out a total claim of \$39,360.00:

Item	Amount
Twelve Months' Rent	\$29,280.00 (12 x \$2440)
Hydro Costs	\$2,000.00
Security Deposit	\$1,900.00
Yard Maintenance	\$3,600.00 (12 x \$300)
Kitchen Faucet	\$100.00
Alarm System Fee	\$480.00 (12 x \$40)
Moving Expense	\$1,000.00
General Hardship	\$1,000.00
Total Monetary Claim	\$39,360.00

Rule 2.8 of the Residential Tenancy Branch Rules establishes that an applicant with a claim over \$35,000.00 may abandon the portion of the claim that exceeds \$35,000.00. The tenants elected to proceed and limit the tenants' claim to \$35,000.00 against the landlord. The tenants have abandoned \$2,360.00 of the twelve months rent claim and the entire \$2,000.00 hydro cost portion of the monetary claim.

Issue(s) to be Decided

Are the parties entitled to a monetary order for damage or compensation under the *Act, Regulation* or tenancy agreement?

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

Are the parties entitled to recover the filing fee for this application?

Background and Evidence

The landlord entered into an assignment of lease on December 22, 2016, when the landlord purchased the property from the former landlord. The tenancy began with the former landlord on February 11, 2016 on a fixed term until February 28, 2018. Rent in the amount of \$2,440.00 was payable on the first of each month. The tenants remitted a security deposit in the total amount of \$1,200.00 at the start of the tenancy, which the landlord assumed from the former landlord. The tenants vacated the unit July 31, 2018.

The tenants testified that a condition inspection was not conducted at the start of the tenancy or when the landlord assumed this tenancy. The landlord agreed he did not conduct an inspection with the tenants at the time he assumed the tenancy. The parties agreed a move-out inspection was completed on July 31, 2018. The tenants testified that they provided their forwarding address in writing to the landlord by way of regular mail on September 7, 2018. The landlord testified that because he was out of the country, he did not receive the tenants' forwarding address until September 17, 2018.

Tenants' Claim & Landlord's Response

The tenants' applied for a monetary order in the amount of \$39,360.00 and after abandoning portions of their claim, now seek a monetary order in the amount of \$35,000.00 for the following;

Item	Amount
Twelve Months' Rent	\$26,920.00
Yard Maintenance	\$3,600.00 (12 x \$300)
Alarm System Fee	\$480.00 (12 x \$40)
Kitchen Faucet	\$100.00
Moving Expense	\$1,000.00
General Hardship	\$1,000.00
Security Deposit	\$1,900.00
Total Monetary Claim	\$35,000.00

Twelve Months' Rent

It was the tenants' position that the landlord did not issue the 2 Month Notice in good faith, and therefore seek compensation equivalent to twelve months rent. The landlord testified that he issued the 2 Month Notice in good faith, when in the country; he resides in the unit with his girlfriend.

Yard Maintenance & Alarm System Fee

The tenants testified that yard maintenance and alarm service were included in the rent and despite this; the landlord did not maintain the yard or provide alarm service. They seek compensation for the loss of these services. To support this claim, the tenant submitted photographs of the yard. The landlord testified that these services were not reflected on the tenancy agreement as claimed by the tenants. The landlord also testified that at the tenants' request, he hired a landscape company to maintain the yard.

Kitchen Faucet

The tenants explained that at the start of the tenancy they replaced the broken kitchen faucet with their own. They testified that because the current landlord was not prepared to compensate them for the faucet at the end of tenancy, they removed it and installed a standard faucet, which they now seek compensation for. The landlord testified that the "standard" faucet the tenants left was of low quality and leaked.

Moving Expense

The tenants contended that they are entitled to recover moving expenses because the landlord did not use the unit for the stated purpose on the 2 Month Notice. The landlord denied liability for the tenants' moving expense.

General Hardship

During the hearing the tenants explained that their claim for general hardship was due to the loss of full possession of the property. They testified that the landlord placed a storage container on the property prior to the end of tenancy. The landlord testified that because the tenants did not vacate by the effective date of the 2 Month Notice, the landlord's possessions, including his girlfriends, were stored in a container on the property.

Security Deposit

Finally, the tenants seek the return of their security deposit doubled, plus the filing fee less the amount already returned to them on November 14, 2018. During the hearing, the landlord acknowledged he only returned \$600.00 of the deposit because he did not realize the tenants had paid a \$1,200.00 deposit until his legal counsel reviewed the statement of adjustment.

Landlord's Claim & Tenant's Response

The landlord applied for a monetary order in the amount of \$5,016.01 for the following;

Item	Amount
Locks	\$240.58
Dump	\$956.25
Storage of Furniture	\$454.76
Carpet Cleaning	\$140.00
Legal Fees	\$2,985.00
Kitchen Faucet	\$240.00
Total Monetary Claim	\$5,016.59

Upon review of the landlord's claim, I note the above does not equate to \$5,016.01, but rather totals \$5,016.59. In accordance with section 64(3) of the *Act*, I amend the landlord's application to reflect the amount claimed to \$5,016.59.

Locks

The landlord testified that he had to change the locks because the tenants had altered them. He provided a copy of a receipt to support his position. The tenants testified that they did not change the locks and that they returned the keys to the landlord's agent at the move-out inspection.

Dump

The landlord testified that the tenants failed to remove refuse from the unit and property, specifically a barbeque, iron stove, pool equipment and a large quantity of cat litter. The landlord has provided a written statement from his agent who performed the move-out inspection report, videos of the property at the time he assumed the tenancy, miscellaneous photographs and a receipt to support his position. The tenants testified that much of the refuse the landlord has referred to was left by the previous owner or tenant. The tenants' acknowledged having a small kitten and the use of cat litter but denied an abundant amount remained on the property.

Storage of Furniture

The landlord testified that because the tenants' were issued the 2 Month Notice in April with an effective move out date in June, and the tenants refused to vacate at the time, he and his girlfriend incurred storage costs. The landlord submitted a copy of the storage invoice, to support his position. The tenants contended that the landlord's girlfriend was evicted from her prior residence and the storage container was deposited on the property June 18, 2018, prior to the effective date of the notice.

Carpet Cleaning

The landlord testified that the tenants' failed to clean the carpets in the basement; the carpets were soiled by the tenants' cat. The landlord provided a receipt and a written statement from his agent who conducted the move-out inspection. The tenants testified that they cleaned the carpets at the end of tenancy. The tenants argued the receipt is dated for a month after their tenancy ended, by which time the landlord's girlfriend was living in the unit with a pet. It was their position that it was more probable the carpets were soiled by this pet.

Legal Fees

The landlord testified that he is seeking to recover a portion of his legal fees on the basis of clause 21 of the signed tenancy agreement. The tenants disagreed with the landlords' position that they should be held liable for legal fees, they claimed it was unfair.

Kitchen Faucet

The landlord testified that the faucet the tenant installed leaked and had to be repaired. The landlord provided a written statement from his agent who conducted the move-out inspection and a copy of the plumbing invoice. The tenants testified that the replacement faucet was purchased brand new and did not leak.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities.

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 this case, the onus is on each applicant to prove, on a balance of probabilities, the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the respondent in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the applicant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find as follows.

Tenants' Claim

Twelve Months' Rent

Under section 49 of the *Act*, a landlord may end a tenancy if the rental unit will be occupied by the landlord or the landlord's close family member intends in good faith to occupy the rental unit. Section 51(2) of the *Act* requires a landlord to compensate a tenant an amount equivalent to 12 times the monthly rent if the landlord ends the tenancy under section 49 of the *Act* and fails to accomplish the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice.

In this case, I find the tenancy did not end on the basis of the 2 Month Notice issued under section 49 of the *Act*. Rather, I find the tenancy ended by mutual agreement pursuant to the record of settlement dated July 5, 2018. Therefore, I find the tenants waived their right to their entitlement under section 51 of the *Act* by way of settlement. For this reason, I dismiss the tenants' monetary claim in the amount of \$26,920.00, without leave to reapply.

Yard Maintenance & Alarm System Fee

Upon review of the testimony of the parties and documentary evidence, particularly the tenancy agreement; I find the tenants have failed to prove the loss claimed is due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement. The tenancy agreement does not reflect yard maintenance or alarm service is included in rent. For this reason, I dismiss the tenants' monetary claim in the amount of \$4,080.00 (\$3,600.00 + \$480.00), without leave to reapply.

Kitchen Faucet

The tenants did not provide a receipt for the faucet and therefore failed to prove the actual amount required to compensate for the claimed loss. I dismiss the tenants' monetary claim in the amount of \$100.00, without leave to reapply.

Moving Expense

Based on my previous finding that the tenants voluntarily vacated the unit pursuant to the record of settlement dated July 5, 2018 and not as a result of the 2 Month Notice, I find the tenants are not entitled to recover moving expenses. Therefore, if the tenants incurred moving costs, which they likely would in any event when moving to a new place, they must bear these costs. The tenants also failed to provide evidence of the costs charged. I dismiss the tenants' monetary claim in the amount of \$1,000.00, without leave to reapply.

General Hardship

Residential Tenancy Policy Guideline #16 establishes that a party seeking compensation should present compelling evidence of the value of the damage or loss in question. While I acknowledge the placement of the storage container may have inconvenienced the tenants, the tenants did not present compelling evidence of the value of the loss they claim undue hardship. For this reason, I dismiss the tenants' monetary claim in the amount of \$1,000.00, without leave to reapply.

Security Deposit

Section 38 of the *Act* establishes that a landlord has fifteen days from the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to file an arbitration application claiming against the deposit, or return the deposit. Should the landlord fail to do this, the landlord must pay the tenant double the amount of the security deposit.

The landlord failed to provide clear evidence to rebut the deemed provision, therefore I find that the landlord has been deemed served with the tenants' forwarding address on September 12, 2018, the fifth day after its mailing. Within fifteen days of receipt of the forwarding address the landlord did not file an arbitration application to retain the deposit, the landlord did not return the full deposit and the landlord did not receive written authorization to retain any portion of it. Based on this, I find the tenants are entitled to double the value of their security deposit in the amount of \$2,400.00 less the \$600.00 paid late for a total of **\$1,800.00**.

Analysis of Landlord's Claim

Locks

The parties provided conflicting testimony in regards to the locks. 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 the landlord failed to provide sufficient documentary evidence to substantiate his claim. Although the landlord submitted a receipt to "rekey" the locks, I do not find this established the tenants changed the locks or eliminated the possibility the landlord had the locks rekeyed to suit his own purposes. I dismiss the landlord's monetary claim in the amount of \$240.58, without leave to reapply.

Dump

Under Residential Tenancy Policy Guideline #1, tenants are responsible for the removal of garbage at the end of tenancy, unless an agreement exists to the contrary. In the absence of an agreement and upon review of the landlord's documentary evidence I am satisfied the tenants' left garbage at the end of the tenancy that required disposal. Accordingly I award the landlord \$956.25 in dump fees.

Storage of Furniture

I find the landlord failed to establish the cost incurred to store his possessions was the result of the tenants' actions in contravention of the *Act*, *Regulation* or tenancy agreement. The tenants are at liberty to dispute a 2 Month Notice under the *Act*, therefore I find that any storage costs incurred by the landlord are a cost of doing business as a landlord and are not recoverable. I dismiss the landlord's monetary claim in the amount of \$454.76, without leave to reapply.

Carpet Cleaning

Residential Tenancy Policy Guideline #1, establishes that after a year of tenancy, a tenant is responsible for shampooing the carpets. On the basis of the move-out inspection report, written statement from the landlord's agent and in the absence of a receipt from the tenants' indicating they shampooed the carpets, I find the landlord is entitled to \$140.00 for carpet cleaning.

Legal Fees

The *Act* does not allow for compensation to a party for choices they make in pursuing actions or claims against the other party. In this case, the landlord made a business choice to seek legal counsel, therefore I find the clause in the signed tenancy agreement is unenforceable and the landlord's legal fees are not recoverable under the *Act*. I dismiss the landlord's monetary claim in the amount of \$2,985.00, without leave to reapply.

Kitchen Faucet

The plumbing invoice submitted by the landlord could not be reviewed; it appears to be in an unrecognized format. Consequently I could not verify the amount claimed by the landlord and therefore dismiss the landlord's monetary claim in the amount of \$240.00, without leave to reapply. In total, I find the landlord is entitled to an award of **\$1,096.25**.

Set Off of Claims

The landlords have established a damage claim therefore in accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain \$1,096.25 of the outstanding \$1,800.00 security deposit in full satisfaction of the monetary award. The tenants are entitled to the remaining \$703.75 security deposit balance.

As to the filing fees I find both parties were in breach of the *Act*, and therefore I do not award compensation for their filing fees.

Conclusion

I order the landlord to retain \$1,096.25 from the security deposit. The tenants are entitled to the return of the balance of the security deposit. I therefore grant the tenants a monetary order for the balance of the deposit, in the amount of \$703.75.

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: February 4, 2019

Residential Tenancy Branch