Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: Tenant: MNSD, MNDC, FF
Landlord: MNR, MNDL, FF

Introduction

This hearing was convened in response to cross-applications by the parties. The tenant filed their application on October 31, 2018 pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. An Order for return of security deposit - Section 38
2. A monetary Order for loss – Section 51
3. An Order to recover the filing fee for this application - Section 72.

The landlord filed their application January 20, 2019 for Orders as follows;

1. A monetary Order for unpaid rent – Section 67
2. A monetary Order for damage to the unit (holding deposit) – Section 67
3. An Order to recover the filing fee for this application - Section 72.

Both parties attended the hearing and were given an opportunity to discuss and settle their dispute, to no avail. The parties each respectively acknowledged receiving the other's application and all evidence of the other as provided to this proceeding, albeit provided to this proceeding late. Despite their abundance of evidence only *relevant* evidence was considered in this Decision. The parties were given opportunity to present *relevant* testimony, and make *relevant* submissions of evidence and present witnesses. Prior to concluding the hearing both parties acknowledged they had presented all of the *relevant* evidence that they wished to present.

Preliminary matters – Latest time application for dispute resolution can be made

Pursuant to Section 60 of the Act I find that the tenant having made their application on the last possible day within 2 years of the date that the tenancy ended permits me to

hear the application of the landlord despite the landlord having filed their application after 2 years from the date of the tenancy's end.

Issue(s) to be Decided

Is the tenant entitled to the monetary amounts claimed for loss and return of security deposit?
Is the landlord entitled to the monetary amounts claimed for unpaid rent and damage?

Each party bears the burden of proving their respective claims.

Background and Evidence

The relevant evidence in this matter is as follows. The tenancy started in August 1995 and ended pursuant to a 2 Month Notice to End Tenancy for Landlord's Use with an effective date extended by agreement of the parties to October 31, 2016. The tenant submitted evidence that at the outset of the tenancy in 1995 the landlord of the day collected a security deposit in the amount of $240.00 which the landlord of this matter retains in trust. The payable rent at the end of the tenancy was in the amount of $761.00. The landlord assumed the rental unit tenancy and ownership of the residential property (a house) in June 2003 and also resides in the house.

Neither party provided a copy of a Condition Inspection Report. It is undisputed there was no *move in* condition inspection at the outset of the tenancy in 1995, however the landlord of this matter inspected the unit as part of their purchase in 2003, eight years into the tenant's tenancy, and they determined it to be, "tidy and clean". . The parties argued about the end of tenancy inspection events however agreed there was no *move out* condition inspection conducted together at the end of the tenancy, and nor did the landlord conduct a move out inspection and report on their own. The parties *did not agree* as to the administration of the security deposit at the end of the tenancy. The tenant claims they requested its return and the landlord claims the tenant told them to keep it toward deficiencies. None the less, the parties agreed the landlord was in possession of the tenant's mailing (forwarding) address in writing on the day the tenant vacated, October 31, 2016.

Tenant's application

The tenant seeks the return of their security deposit and compensation pursuant to Section 38(6) of the Act, for double the security deposit amount.

The tenant further seeks compensation pursuant to Section 51(2) of the *Residential Tenancy Act* [pre-May 16, 2018] claiming the landlord failed to accomplish the stated purpose, nor use the rental unit for that stated purpose for ending the tenancy under Section 49(3) of the Act (2 Month Notice to End Tenancy for Landlord's Use), indicating that in good faith the unit was to be occupied by the *landlord or close family member*

In respect to the latter claim the landlord acknowledged that following the 21 year tenancy, they renovated the unit over the next 8 months at their convenience, however then determined it did meet their needs, therefore did not occupy the rental unit as originally intended. The landlord ultimately determined to re-rent the unit for July 2017.

Landlord's application

The landlord seeks unpaid rent for October 2016, the last month of the tenancy, which is known to the landlord was withheld by the tenant as their Section 51(1) compensation for receiving a 2 Month Notice to End. The landlord was apprised of the tenant's entitlement to withhold the last month's rent.

The landlord further seeks compensation in the sum of $3368.82 for *damage* to the unit. The landlord testified that following the satisfactory 2003 inspection of the rental unit at time of purchase, the landlord did not again inspect the rental unit until 8 years later in 2011 as the requirement for an appraisal. The landlord testified that in 2011, "the "condition of the unit was good" and they had no concerns. Following the satisfactory inspection in 2011 the landlord testified they did not again inspect the rental unit until 5 years later in February 2016, after which they determined the rental unit condition as unsatisfactory and began efforts to evict the tenants for *landlord's use* of the rental unit, and were ultimately successful.

The landlord provided an abundance of photo images and expenditure receipts in support of a total renovation of the 2-room and single bathroom rental unit, including new windows, kitchen countertop and cabinetry, new walls, carpet and bathroom amenities. The landlord claims the tenant, "failed to maintain" the rental unit in adequate repair over the 21 year tenancy, resulting in what they described as irreparable damage and deterioration in all areas of the unit, including mould and other moisture damage to surfaces, which the landlord thinks resulted from use of a humidifier. The landlord acknowledged the tenant was not responsible for normal wear and tear, however determined that the condition of the unit should have been maintained to a better standard of repair by the tenant to the end of the lengthy tenancy.

The landlord's photo images aptly depicted an unclean and run-down living space, with areas of disrepair and some broken features. They acknowledged that some photo images were taken during subsequent renovations but that the majority were taken immediately after the tenant vacated in 2016.

The tenant responded testifying that the rental unit was in general disrepair when first occupied in 1995 and that throughout the 21 year tenancy neither of their landlords made any repairs, renovation or enquiries about the condition of the rental unit. The tenant testified they made few requests or other demands for repairs or renovation to the unit during the tenancy to no avail; at one juncture having to personally replace a refrigerator. Also, that the landlord solely inspected the condition of the unit in 2003 and 2011 and then 5 years later in the beginning of the final year of the tenancy in 2016. The landlord acknowledged that during their ownership since 2003 they did not make any repairs or any renovations to the rental unit.

The tenant testified they did not identify the landlord's photo images as depicting their rental unit and did not recollect the damage portrayed by the landlord's images or accounts. The tenant testified that much of the landlord's claims of damage is simply natural deterioration of materials at the end of their useful life, such as the laminate countertop layer having lifted, kitchen cabinetry and other items falling apart, and other deficiencies that they testified they could not explain as they did not damage the unit and that the photo images did not reflect their experience. The tenant acknowledged that the rental unit was not left in the cleanest condition, with cobwebs strewn about the ceiling, but that they are not responsible for the landlord's depictions of *damage*, which the tenant categorized as normal *wear and tear*

Analysis

A copy of the Residential Tenancy Act, Regulations and other publications are available at ***www.gov.bc.ca/landlordtenant.***

The onus is on the respective parties to prove their claim on balance of probabilities. On preponderance of all evidence submitted, and on balance of probabilities, I find as follows:

Tenant's claim

Section 38(1) of the Act provides as follows **(emphasis mine)**:

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

38(1)(a) the date the tenancy ends, and

38(1)(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord **must do one of the following**:

38(1)(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

38(1)(d) file an application for dispute resolution to make a claim against the security deposit or pet damage deposit.

I find the tenant provided their forwarding address October 31, 2016 and the landlord did not repay the security deposit or file an application within the required 15 days to do either in accordance with **Section 38(1)** of the Act. As a result, the tenant is entitled to the doubling provisions afforded by **Section 38(6)** of the Act. Solely the original amount of the security deposit is doubled, to which I add accrued interest of $43.67, for a sum total to the tenant of **$523.67**. [($240.00 x 2) + $43.67] = $523.67.

In respect to the tenant's claim for compensation under Section 51(2) of the Act [pre-May 16, 2018], I find **Section 51(2)** in part states as follows.

51(2) In addition to the amount payable under subsection 51(1), if

51(2)(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

51(2)(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.

I find that a *reasonable* period following the effective date of the Notice to accommodate the refurbishment and re-occupation of the rental unit is 6 months. I find the evidence in

this matter is that the landlord did not at all accomplish the stated purpose of them, or a close family member, occupying the rental unit after the tenant vacated. But instead the landlord re-rented the rental unit after 8 months after the tenant vacate. As a result, I find the tenant has established an entitlement under Section 51(2) of the Act in the prescribed amount equivalent of double the monthly rent payable under the tenancy agreement of $761.00. Therefore, I grant the tenant double this amount in the aggregate of $1522.00. As the tenant was successful in their claim they are entitled to recover their filing fee of $100.00 for a sum award of **$2145.67**, without leave to reapply.

Landlord's claim

I find that the landlord's claim for unpaid rent for the last month of the tenant's occupancy represents the rent withheld by the tenant as their entitlement compensation for receiving the landlord's 2 Month Notice to End Tenancy, all pursuant to **Section 51** of the Act. The landlord is not entitled to the rent for October 2016 and therefore this portion of the landlord's claim is **dismissed** without leave to reapply.

Under the *Act*, a party claiming a loss bears the burden of proof. Moreover, the applicant landlord of this matter must satisfy each component of the following test established by **Section 7** of the Act, which states;

Liability for not complying with this Act or a tenancy agreement

7 *(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the tenant)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (landlord) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the landlord bears the burden of establishing their claim on the balance of probabilities. The landlord must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the tenant. Once established, the landlord must then provide evidence that can verify the actual monetary amount of the loss. Finally, the landlord must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred, including depreciation of materials claimed damaged.

Section 32 of the Act and the corresponding Regulation respecting the landlord and tenant obligations to repair and maintain state that a landlord must *maintain* residential property in a state of decoration and repair, and that a tenant is solely responsible to *repair* damage they or their guests cause and are not responsible to make repairs for reasonable wear and tear.

I find that in the absence of a move in and move out inspection report it cannot be said that any loss claimed by the landlord is *solely* the result of the tenant's conduct in failing to make repairs caused by them or their guests. I find that the landlord's failure to conduct more than one inspection of the rental unit in their 15 years of ownership likely contributed to a lack of routine maintenance on the landlord's part.

Residential Tenancy Policy guideline 40. Useful Life of Building Elements, states,

> This guideline is a general guide for determining the useful life of building elements for considering applications for additional rent increases and determining damages which the director has the authority to determine under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act . Useful life is the expected lifetime, or the acceptable period of use, of an item under normal circumstances, and
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> **Damage(s)**
> When applied to damage(s) caused by a tenant, the tenant's guests or the tenant's pets, the arbitrator may consider the useful life of a building element and the age of the item. Landlords should provide evidence showing the age of the item at the time of replacement and the cost of the replacement building item. That evidence may be in the form of work orders, invoices or other documentary evidence. If the arbitrator finds that a landlord makes repairs to a rental unit due to damage caused by the tenant, the arbitrator may consider the age of the item at the time of replacement and the useful life of the item when calculating the tenant's responsibility for the cost or replacement.
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> *(Guideline table follows)*

I find that, as the tenancy was for 21 years and the house was not new at the start of

the tenancy, that on balance of probabilities all materials within the rental unit were likely approaching 25 years or exceeded 25 years. I am also satisfied by the evidence of both parties that the rental unit did not benefit from refurbishment or ongoing maintenance during the tenancy. I find that even if I were to accept the landlord's assertion that the tenant was wholly responsible for the purported damage, that all the building elements claimed damaged and replaced by the landlord all exceeded their useful life (as identified by Policy Guideline 40) and as a result the mitigated value of the landlord's claims would result in $00.00. Therefore the landlord's claim for their renovations, purported due to damage by the tenant, largely **is dismissed** without leave to reapply.

Section 37 of the Act, in part states: **(emphasis mine)**

Leaving the rental unit at the end of a tenancy

37 (2) When a tenant vacates a rental unit, the tenant must

(a) leave the rental unit **reasonably clean**, and undamaged except for reasonable wear and tear

I find the photo image evidence of the landlord, corroborated by the tenant's testimony of cobwebs left about the ceiling, is that the rental unit was left sufficiently unclean at the end of the tenancy as to not be *reasonably clean*. Therefore, I grant the landlord **$100.00** for cleaning. I find that the landlord has not been sufficiently successful to attract recovery of their filing fee.

Calculation for Monetary Order follows. The security deposit held in trust was previously factored within the tenant's award.

Tenant's award sum	$2145.67
Landlord's award sum	*-$100.00*
Monetary Order to tenant	**$2045.67**

Order

I grant the tenant a **Monetary Order** under Section 67 of the Act in the amount of **$2045.67.** If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

Conclusion

The tenant's application is granted.
The landlord's application has been largely dismissed, without leave to reapply.

This Decision is final and binding.

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 27, 2019

Residential Tenancy Branch