Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNDCL-S, MNDC-S, MNRL-S
FFT, MNDCT, MNSD, RR

Introduction

This hearing convened as a result of cross applications, In the Landlord's Application filed October 16, 2018 she sought monetary compensation from the Tenant in the amount of $19,315.80 for unpaid rent, loss of rent and damage to the rental unit, as well as authority to retain the Tenant's security deposit and recovery of the filing fee. In the Tenant's Application, filed October 17, 2018, the Tenant sought monetary compensation from the Landlord for loss of use of the den, return of double the security deposit paid and recovery of the filing fee.

The hearing of the applications was scheduled for teleconference at 1:30 p.m. on February 12, 2019. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to monetary compensation from the Tenant for unpaid rent, loss of rent and damage to the rental unit?

2. Is the Tenant entitled to monetary compensation from the Landlord?

3. What should happen with the Tenant's security deposit?

4. Should either party recover the filing fee?

Background and Evidence

In support of her claim the Landlord testified as follows. She stated that this one year fixed term tenancy began August 22, 2017. Monthly rent was payable in the amount of $2,150.00 and the Tenant paid a security deposit of $1,075.00. The tenancy ended September 30, 2018.

The Landlord filed in evidence a Monetary Orders Worksheet detailing her claim as follows:

Unpaid rent	$200.00
Key	$5.00
Repairs to drywall and patio flooring	$1,960.00
Hard wood flooring repair/replacement	$8,136.80
Loss of rent	$8,944.00
Shower curtain rings	$70.00.
TOTAL CLAIMED	**$19,315.80**

The Landlord stated that the $200.00 unpaid rent claim related to the September 2018 rent as the Tenant paid $1,950.00 for rent for September despite the fact rent was payable in the amount of $2,150.00.

The Landlord stated that the $5.00 key charge related to a mail room key which was provided to the Tenant at the beginning of the tenancy and was not returned.

The Landlord sought monetary compensation for the cost to repair one large hole in the wall, as well as compensation for repairing the wall where the Tenant hung his television. In support of this claim the Landlord provided photos of the walls which she claimed to have taken prior to the tenancy beginning as well as at the end.

The Landlord also submitted photos of the patio flooring which showed staining which she claimed was permanent. She stated that the Tenant told her that it was where he kept his barbeque.

The Landlord also testified that the hardwood flooring was scratched in three separate areas at the end of the tenancy. She further claimed that the gouges were too deep to be repaired as the hardwood flooring is engineered and therefore only has a very thin top layer. She also stated that the flooring was all glued together such that the scratched areas could not simply be removed, such that the entire floor required replacement.

The Landlord testified that the rental property was built in 2003 or 2004. She also stated that the rental unit was painted and the floors were replaced in 2010.

The Landlord confirmed that rental unit was approximately 630 square feet; of that, the bathroom (which was approximately 60 square feet) and the den (30 square feet) were the only areas that did not need the flooring to be replaced. She confirmed that she went back to the same company who installed the floors in an effort to match the den flooring as she did not want to replace it as well.

The Landlord also sought the sum of $8,944.00 in loss of rental income for four months from October 2018 to the present. She stated that the rental unit is a "high end" rental and she could not rent it out as it was with the damage to the walls and floors. In this respect she claimed $2,336.00 per month as the "intended rent increase" and stated that this is the amount she would have charged the Tenant had he stayed.

The Landlord stated that the Tenant removed the shower curtain rings at the end of the tenancy such that she sought $70.00 for their replacement.

The Landlord confirmed that she did not perform a move in and move out condition report as she did not realize she had to complete the reports.

In response to the Landlord's claims, the Tenant testified as follows.

The Tenant confirmed that he unilaterally reduced his last month's rent by $200.00. He stated that he had been discussing the loss of use of the den "for some time", and the Landlord agreed to reduce his rent at some point, yet she never made the reduction.

The Tenant also confirmed that he lost the mail key; however, he disputed the amounts claimed as there was no evidence submitted by the Landlord as to the actual cost.

In terms of the Landlord's claim for $1,960.00 for the wall repair and the patio flooring the Tenant stated as follows. The Tenant stated that he did not damage the patio flooring as alleged. He confirmed that she did not perform a move in condition inspection report as required by the *Act.* He denied that the photos submitted by the Landlord depicted the condition of the rental unit when the tenancy began; he also noted that the photos submitted by the Landlord were not time or date stamped such that the photos may not have been taken at the time the tenancy began and he stated that in one such photo there is a picture showing orange tape which he never saw.

The Tenant confirmed that he put a hole in the wall but stated that he repaired it. In support he provided a photo of the drywall repair. He noted that before the wall repair dried the Landlord put her hand through the hole as shown in her video.

The Tenant admitted that he hung his television on the wall and confirmed that the photos which were provided by the Landlord accurately depicted the way the wall looked when he moved out. The Tenant stated that the Landlord told him that he could mount his television on the wall, but only if he had it professionally installed. He confirmed that he had it professionally installed as requested by the Landlord.

In response to the Landlord's claim for damage to the flooring the Tenant stated that he takes the same position as he does with the patio, denying that he caused the damage. He stated that he did simply did not make those scratches. He also noted that the amount claimed for replacement seems very much outside what is reasonable considering the minor scratches depicted.

In response to the Landlord's claim for loss of rent, the Tenant stated that the Landlord has not provided any compelling reason for why the suite has not been rented since the tenancy ended.

In support of his claim for monetary compensation in the amount of $2,360.71 the Tenant testified as follows.

The Tenant stated that he sought return of double the security deposit paid ($1,075.00 x2) for a total of $2,150.00 on the basis that the Landlord did not make her application within 15 days of the end of the tenancy on September 30, 2018.

The Tenant also sought compensation for the loss of use of the den in the amount of $105.71 as well as $100.00 for his time and labour for removing and returning his items to the den after a flood. He stated that he was not able to use the den for a number of days as a result of the flood and the delay in having the room fixed. He provided photos of the damage to the wall in the den as well as his items in other areas of the rental unit. He also provided text communication with the Landlord showing the number of days this impacted his tenancy.

In reply to the Tenant's submissions, the Landlord stated she was prepared to give him $3.30 for the one day she believed he had to move his items. She also claimed that he was so uncooperative she was not able to repair the floor until he moved out.

The Landlord further stated that the hole in the wall was not properly repaired by the Tenant as he simply used putty and did not reinforce the drywall as required. She noted that three weeks later you could still push it through. She stated that she obtained quotes and was informed that it would cost $500.00 to $1,000.00 to repair the hole; those quotes were not provided in evidence.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, *Regulation*, and *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at**:** **www.gov.bc.ca/landlordtenant**.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;
- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;
- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- 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 the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

Section 37(2) of the *Act* requires a tenant to leave a rental unit undamaged, except for reasonable wear and tear, at the end of the tenancy and reads as follows:

> **37** (1) Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.
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> (2) When a tenant vacates a rental unit, the tenant must
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> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and

(b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

After consideration of the testimony and evidence before me, and on a balance of probabilities I find the following.

The Tenant agreed that he unilaterally reduced his September 2018 rent by $200.00 as compensation for loss of use of the den.
Pursuant to section 26 of the *Residential Tenancy Act,* a Tenant must pay rent when rent is due. The proper course for a tenant who believes they are entitled to a rent reduction due to lack of services or facilities is to make an application before the residential tenancy branch seeking such relief. As such, I find the Landlord is entitled to the **$200.00** owing for the September 2018 rent.

The Landlord claimed the sum of $5.00 for the cost to replace a key. During the hearing the Tenant stated that he disputed this amount on the basis that the Landlord did not provide evidence as to the actual cost to replace the key. In contrast, text communication between the parties (entered in evidence before me) and which occurred in the summer of 2018 confirms the parties discussed the $5.00 charge and the missing key. On balance, I find the Landlord paid to replace the key which was lost by the Tenant and she is therefore entitled to recovery of the **$5.00** from the Tenant.

The Landlord sought the sum of $1,960.00 for repairs to the drywall and the patio flooring.

The photos submitted by the Landlord show a medium sized hole in the wall. The Tenant did not dispute responsibility for this, although he claimed to have repaired it. Photo and video evidence indicates the Tenant attempted to repair this hole, but due to its size the repair was unsuccessful. I find the Tenant is responsible for the cost to repair this hole. Although the Landlord claimed to have received quotes for $500.00-$1,000.00 to repair this hole, I find these amounts to be excessive. I therefore award the Landlord the nominal sum of **$200.00** as compensation for this repair cost.

The Landlord also submitted photos of the wall where the Tenant hung his television. The Tenant testified that he sought the Landlord's permission to hang a television and she agreed provided he had it professional installed; he further testified that he had it professionally installed as requested by the Landlord. The photos submitted by the Landlord show small screw holes where the wall bracket was placed.

Residential Tenancy Policy Guideline 1: Landlord & Tenant – Responsibility for Residential Premises provides as follows:

Nail Holes:

1. Most tenants will put up pictures in their unit. The landlord may set rules as to how this can be done e.g. no adhesive hangers or only picture hook nails may be used. If the tenant follows the landlord's reasonable instructions for hanging and removing pictures/mirrors/wall hangings/ceiling hooks, it is not considered damage and he or she is not responsible for filling the holes or the cost of filling the holes.
2. The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.
3. The tenant is responsible for all deliberate or negligent damage to the walls.

I find that the Tenant followed the Landlord's reasonable instructions with respect to hanging his television and I therefore find the Tenant is not responsible for the repair costs to the wall where his television was installed. I also find the screw holes to be reasonable and not excessive.

The Landlord claimed the Tenant damaged the patio flooring due the presence of his barbeque. The Tenant submitted that the staining on the patio flooring existed when the tenancy began. Although the Landlord provided photos which she claimed to have been taken at the start of the tenancy, the photos were not time or date stamped.

The same argument was advanced by the Tenant with respect to the scratches in the hardwood flooring. Although the Landlord sought related compensation for repair costs, the Tenant submitted that the scratches predated the tenancy.

The evidence confirms that the Landlord did not perform a move in or move out condition inspection report as required by the *Residential Tenancy Act* and the *Residential Tenancy Regulation.*

Pursuant to section 23 and 35 of the *Act,* a landlord is required to complete a move in and move out condition inspection report at the start of a tenancy and when a tenancy ends. Such reports, when properly completed, afford both the landlord and tenant an opportunity to review the condition of the rental unit at the material times, and make notes of any deficiencies.

Section 21 of the *Residential Tenancy Regulation* affords significant evidentiary value to condition inspection reports and reads as follows:

> **21** In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The importance of condition inspection reports is further highlighted by sections 24 and 36 of the *Act* as these sections provide that a party extinguishes their right to claim against the deposit if that party fails to participate in the inspections as required (in the case of the landlord this only relates to claims for damage; a landlord retains the right to claim for unpaid rent.)

Without a move in condition inspection report or compelling evidence as to the condition of the rental at the time the tenancy *began*, I am unable to find that the Tenant caused the damage to the patio flooring or the hardwood flooring as alleged by the Landlord.

As well, based on the photos provided in evidence and the size of the rental unit, I find the amounts claimed for repairing the patio flooring and the hardwood flooring to be excessive. Section 7 of the *Act* requires a claiming party to minimize their losses. In this case, the Landlord stated that she obtained a quote from the company who initially installed the hardwood flooring; she did not provide any other quotes for this work and it does not appear as though she made any attempts to obtain a more reasonable estimate.

For these reasons I dismiss the Landlord's claim for the cost to repair the patio flooring and the $8,136.80 for the cost to replace the hardwood flooring.

The Landlord claimed $8,944.00 in loss of rent, representing four months of rent at $2,336.00 per month. She indicated that this was the amount she would have requested from the Tenant had the tenancy continued. She also claimed that the condition of the rental unit precluded re-renting as it was a high end property.

Residential Tenancy Branch Policy Guideline 3—Claims for Rent and Damages for Loss of Rent provides in part as follows:

> In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.
> …
> Even where a tenancy has been ended by proper notice, if the premises are un-rentable due to damage caused by the tenant, the landlord is entitled to claim damages for loss of rent. The landlord is required to mitigate the loss by completing the repairs in a timely manner.

The Landlord failed to submit any evidence to show that she advertised the rental unit, or made any effort to re-rent it. Further, by insisting on a rent higher than that which was paid during the subject tenancy, I find that she has failed to mitigate her loss. Similarly, she has not made repairs to the rental unit in a timely manner.

I find the Landlord has submitted insufficient evidence to support a finding that the rental unit was not rentable at the end of the tenancy. The photos of the rental unit submitted in evidence do not support this claim. In all cases I find the Landlord has not satisfied her obligation pursuant to section 7 of the *Act* to minimize her losses.

For these reasons **I dismiss her claim for loss of rent in the amount of $8,944.00.**

The Tenant did not dispute the Landlord's claim for **$70.00** for the replacement cost of the shower curtain rings; I therefore award her this sum.

In total the Landlord is entitled to monetary compensation in the amount of **$475.00** for the following:

Unpaid rent (September 2018)	$200.00
Key	$5.00
Repairs to drywall (nominal)	$200.00
Shower curtain rings	$70.00
TOTAL AWARDED	**$475.00**

I will now deal with the Tenant's claim for return of his security deposit. Section 38 of the *Residential Tenancy Act* deals with such claims and provides in part as follows:

> **Return of security deposit and pet damage deposit**
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> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
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> (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;
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> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
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> (2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.
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> (3) A landlord may retain from a security deposit or a pet damage deposit an amount that
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> (a) the director has previously ordered the tenant to pay to the landlord, and
>
> (b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that the tenancy ended on September 30, 2018.

Section 25 of the *Interpretation Act* provides as follows with respect to the calculation of time.

Calculation of time or age

25 (1) This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.

(2) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.

(3) If the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.

(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

> (6) If, under this section, the calculation of time ends on a day in a month that has no date corresponding to the first day of the period of time, the time ends on the last day of that month.
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> (7) A specified time of day is a reference to Pacific Standard time, or 8 hours behind Greenwich mean time, unless Daylight Saving time is being used or observed on that day.
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> (8) A person reaches a particular age expressed in years at the start of the relevant anniversary of his or her date of birth.

Section 38(1) of the *Residential Tenancy Act* uses the qualifier "within" such that, pursuant to section 25(4) of the *Interpretation Act,* the first day (the last day of the tenancy): September 30, 2018 is excluded and the last day, October 15, 2018 is included. As such, and pursuant to section 38(1) the Landlord had until October 15, 2018 in which to make her application for dispute resolution. In this case the Landlord applied on October 16, 2018 such that she applied outside the strict 15 day limit imposed by section 38(1).

Pursuant to section 38(6)(b) of the *Residential Tenancy Act* the Tenant is entitled to the sum of return of double the security deposit paid (2 x $1,075.00) for a total of **$2,150.00**. I therefore award the Tenant this sum.

The Tenant seeks monetary compensation for loss of use of the den. In support the Tenant provided photos of the damage to the den, as well as text communication with the Landlord in July of 2018 wherein he attaches a photo of his items moved from the den to the living room. The Tenant also provides a photo of two shelves in the hallway, which were also moved from the den.

Although the den is small (30 square feet according to the Landlord) it was clearly of value to the Tenant in terms of storage. The loss of use of the den impacted the Tenant as the items formerly stored in the den were moved into the living areas thereby limiting their use.

In written submissions provided by the Tenant he calculates the per diem value of the den as $3.41 (based on the overall square footage of 630 square feet). The Tenant submits that the den was not useable for 31 days during the following time periods:

- March 21, 2018 to April 3, 2018 = 14 days
- July 23, 2018 to August 8, 2018 = 17 days

The Tenant therefore seeks the sum of $105.71 representing reimbursement of $3.41 per day for 31 days.

I accept the Tenant's evidence that the den was not usable during this time period. While the den may not have the same value as a bathroom or kitchen in a rental unit, I find the impact on this tenancy warrants a straight square footage calculation. The rental unit is small such that

space is at a premium. The photos submitted by the Tenant show that the rest of the rental unit was impacted by the presence of the items which were formerly stored in the den. Further, the text communication between the parties confirms that the repairs were not completed in an efficient manner and impacted the Tenant as he was required to be present for the repair persons. I therefore award the Tenant the **$105.71** claimed.

I dismiss the Tenant's claim for a further $100.00 for this time and labour moving his items as I find the $105.71 sum to be sufficient to cover his losses in this regard.

As the Tenant has been substantially successful, I find he is entitled to recover the $100.00 filing fee for a total award of **$2,355.71.**

Conclusion

The Landlord is entitled to the sum of **$475.00** for unpaid rent for September 2018, the cost to replace a key and the shower curtain rings and nominal sum for the cost to

repair a hole in the drywall.

The Tenant is entitled to the sum of **$2,355.71** representing return of double the security deposit paid, $105.71 for loss of use of the den and recovery of the $100.00 filing fee.

These sums are offset against the other ($2,355.71 - $475.00 = $1,880.71) such that the Tenant is entitled to a Monetary Order in the amount of **$1,880.71.** This Order must be served on the Landlord and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

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: March 12, 2019

Residential Tenancy Branch